# R4 UK Aff vs Houston CL Disclosure

**1AC**

**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. Absent our internal link, they’ll obviate the role of financial institutions and 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---military threats alone are not sufficient.**

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

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

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

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

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

**Israel would preempt before the nukes come online. Sparks a wider regional conflict that draws in all the 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.

**Saudi will follow them across the nuclear threshold---nuclear war.**

**Robb et. al 12** (Senator Charles S. – Virginia, General Charles Wald – Former Deputy Commander of U.S. European Command, Dr. Daniel Ahn – Senior Economist and Head of Portfolio Strategy for CitiBank New York, John Hannah – Former Assistant for National Security Affairs to the Vice President, Stephen Rademaker – Former Assistant Secretary of State for Arms Control and Nonproliferation, Christopher Carney – former U.S. Representative from Pennsylvania, Ed Husain – Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations, Ambassador Dennis Ross – Counselor for the Washington Institute for Near East Policy, Ambassador Eric Edelman – Former Under Secretary of Defense for Policy, Reuben Jeffrey III – Former U. S. Under Secretary of State for Economic, Business, and Agricultural Affairs, John Tanner – Former U.S. Representative from Tennessee, Secretary Dan Glickman – Senior Fellow at the Bipartisan Policy Center, Admiral Gregory Johnson – Former Commander of U.S. Naval Forces, Europe, Mortimer Zuckerman – CEO and Chairman of the Board of Directors for Boston Properties, Inc., Larry Goldsetin – Founder of Energy Policy Research Foundation, Inc., and General Ron Keys – Former Commander of the Air Combat Command, The Price of Inaction: Analysis of Energy and Economic Effects of a Nuclear Iran, Bipartisan Policy Center, p. 24)

Saudi Arabia would be **very likely** to try to **follow Iran** across the nuclear threshold. Should it do so, the world would face the possibility of an **Iran-Saudi nuclear exchange**—a catastrophic humanitarian event that would threaten the entirety of Gulf oil exports for an extended period of time. In early 2008, the Senate Foreign Relations Committee concluded: “If Iran obtains a nuclear weapon, it will place **tremendous pressure** on Saudi Arabia to follow suit.”19 By 2012, some experts believe it has already begun to do so. Two main factors could drive Saudi Arabia to pursue a nuclear weapon: (1) a decades-long **Saudi-Iran cold war** waged along sectarian, religious, ethnic, and geopolitical lines and (2) a **deep-seated competition** over the energy policies that form the lifeblood of both regimes. The Sunni Saudi monarchy and Shiite Iranian theocracy each claim leadership of the Islamic world. This sectarian competition for primacy is reinforced by ethnic differences: Saudi Arabia is the largest and most populous Arab country astride the Gulf, but it is dwarfed by Iran’s much larger Persian-majority population. These competing claims have pitted the two countries in an enduring cold war and proxy conflict spanning from Lebanon to Iraq and the Arabian Peninsula. Iran—under both the Shah and the ayatollahs—has routinely sought to use its conventional military capabilities, large population, geostrategic position, expansive resources, and ties to armed groups to shift the balance of power in the Persian Gulf in its favor and at the expense of its Sunni Arab neighbors.20 As a result, Saudi Arabia has made it clear it views a nuclear-capable Iran as an **existential threat**. In 2008, King Abdullah urged the United States to “cut off the head of the snake,” one instance of his “frequent exhortations [to] the United States to attack Iran to put an end to its nuclear weapons program,” according to U.S. diplomatic cables revealed by Wikileaks.21 With uncertain prospects for a halt to Iran’s nuclear program—peaceful or otherwise—in 2009, the King informed a senior American official, “If [Iran] gets nuclear weapons, we will get nuclear weapons.” This year, senior Saudi officials reiterated that “it would be completely unacceptable to have Iran with a nuclear capability and not the kingdom [of Saudi Arabia].”22 Rather than lose time developing an indigenous nuclear program, it is likely the Saudi kingdom would seek to obtain a **nuclear warhead** from Pakistan ready to mount on its CSS-2 ballistic missiles. Close Saudi-Pakistani security ties date back to shared Cold War–era interests, and it is widely believed that Riyadh bankrolled Islamabad’s nuclear weapons program with the stipulation that Pakistan would **sell nuclear devices** to Saudi Arabia in an emergency; in the words of a senior Saudi official, “**within weeks**.”23 Pakistan would benefit by receiving **much-needed cash** and could demand in return **dual-key authority** over missile launches, both to control Saudi policy and to bolster its own secondstrike capability against India. At best, this would create a nuclear-armed standoff between the two most powerful and mutually antagonistic countries in the Persian Gulf. At worst, it could **devolve into atomic warfare**. Iran’s and Saudi Arabia’s **small arsenals**, **lack of durable communication channels**, **poor civilian oversight** of command-and-control systems, **erratic intelligence**, **proximity** to each other, **religious ardor**, and **sectarian divide** would all **distinguish** this scenario from the Cold War balance between the United States and the Soviet Union. Any such conflict would likely be **extremely devastating**. Each country would have natural incentives to cripple its opponent’s oil facilities in any nuclear conflict. Crudeoil exports are both regimes’ political and economic lifeblood, and thus the basis for their military power. Also, each country’s oil infrastructure and export terminals are concentrated along the Gulf, within range of the other’s nuclear-weapons delivery vehicles. Moreover, a nuclear war in this region would likely not only destroy a large portion of the Gulf’s oil infrastructure but also render the entire Gulf **unavailable** to shipping for some period of time. This could come directly through radioactive fallout, atmospheric pollution, and environmental destruction, or indirectly through prohibitively high insurance rates and other risk factors for tankers transiting the region.24 Therefore, even if a nuclear exchange did not spread into a region-wide war, the transit of Hormuz-bound oil exports would be halted by such a conflict.

**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 prohibit platform conduct that fails under rule of reason without imposing heightened burdens on plaintiffs.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Plaintiffs Already Bear the Burden on Balancing

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

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

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

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

**1AC---Conduct**

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.**

**Prospect of big tech acquisition dampens innovation**

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

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

E. Whither Innovation?

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

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

CONCLUSION: “ANTITRUST IS GREEDY”

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

**SCENARIO ONE IS AI:**

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

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

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

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

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

TECH GIANTS LEAD IN AI ACQUISITIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NEW TECHNOLOGIES, OLD PROBLEMS

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

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

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

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

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

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

THE MILITARIES OF TOMORROW

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

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

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

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

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

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

A LOSING GAME

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

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

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

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

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

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

**SCENARIO TWO IS CYBER:**

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

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

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

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

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

How Data-opolies Harm

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

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

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

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

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

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

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

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

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

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

**Goes nuclear.**

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

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

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

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

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up **committing** a president to a nuclear attack

if **deterrence fails**. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

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

# 2AC

## Adv 1

#### Makes nuclear-armed Iran inevitable---guarantees a prolif cascade and Middle East war

Geoff Wilson 3-28, 2015, special assistant to the president at Ploughshares Fund, a global peace and security foundation, MA in political science from American University, “Bombing Iran Is a Terrible Idea,” Medium, https://medium.com/war-is-boring/bombing-iran-is-a-terrible-idea-42452cb5cca0

There is hardly a nation in the world that wants a nuclear Iran. But the United States should only consider a war with Iran to be a last resort. “**If you think the war in Iraq was hard, an attack on Iran would**, in my opinion, be a catastrophe,” former Defense Secretary Robert Gates said in 2012. Furthermore, he added that such a quixotic attack would only “**make a** nuclear-armed Iran inevitable**, [as] they would just bury the program deeper** and make it more covert.” Yet the reality of this no-win scenario has done little to deter hawks, both in and out of Congress, from continued attempts to undermine negotiations. Arkansas Sen. Tom Cotton’s letter, signed by 46 of his Republican colleagues, is only the most recent example of their continued campaign of political brinkmanship. Even more worrisome though, is the cavalier attitude toward the use of U.S. military force that underlies this approach. In his recent op-ed for The New York Times, former Bush administration official John Bolton backed up the idea of using U.S. military force against Iran. “The inconvenient truth is that only military action like Israel’s 1981 attack on Saddam Hussein’s Osirak reactor in Iraq or its 2007 destruction of a Syrian reactor, designed and built by North Korea, can accomplish what is required,” he wrote. “Time is terribly short, but a strike can still succeed,” Bolton added. “Such action should be combined with vigorous American support for Iran’s opposition, aimed at regime change in Tehran.” These comments echo Cotton’s statements from earlier this month. “Israel struck Iraq’s nuclear program in 1981 and they didn’t reconstitute it,” Cotton said.“Rogue regimes have a way of getting the picture when there is a credible threat of military force on the table.” Both Bolton and Cotton’s accounts of the strikes on Iraq in 1981 **are completely wrong**. Those **strikes** actually **drove the program underground, where it expanded**. This is just what Gates warns would happen with Iran. As Deputy National Security Advisor Colin Kahl wrote in 2012, “new evidence suggests that Hussein had not decided to launch a full-fledged weapons program prior to the Israeli strike.” “By demonstrating Iraq’s vulnerability, **the attack on Osirak actually increased Hussein’s determination to develop a nuclear deterrent** and provided Iraq’s scientists an opportunity to better organize the program. The Iraqi leader devoted significantly more resources toward pursuing nuclear weapons after the Israeli assault. As [political scientist Dan] Reiter notes, ‘the Iraqi nuclear program increased from a program of 400 scientists and $400 million to one of 7,000 scientists and $10 billion.’” More importantly, these sentiments are reminiscent of the Bush administration’s failed policy toward Iran in the early 2000s. When approached with deals that would have seen all of Iran’s enriched uranium converted into fuel rods — and would have capped the program with some 100 odd centrifuges — the Bush administration balked. Vice President Dick Cheney even once said, “We don’t negotiate with evil; we defeat it.” The results? **Negotiations collapsed and Iran went from** only **a few** installed **centrifuges** at the beginning of the Bush administration **to** about **6,000 by the end**. While many conservatives are quick to spurn negotiations with Iran, they seem to have done very little in the way of analyzing what a war with Iran would actually look like. Maybe they need a reminder. **It would neither be quick nor painless**. As former Brookings Institution fellow Noah Shachtman described in 2012, it would be a major major military action, **with little chance of lasting success**. “Setting back Iran’s nuclear efforts will need to be an all-out effort, with squadrons of bombers and fighter jets, teams of commandos, rings of interceptor missiles and whole Navy carrier strike groups — plus enough drones, surveillance gear, tanker aircraft and logistical support to make such a massive mission go. And all of it, at best, would buy the U.S. and Israel another decade of a nuke-free Iran.” Even a limited strike by U.S. air and naval forces would be massive, according to Anthony Cordesman of the Center for Strategic and International Studies. “It it is not a simple mission of bombers flying in and out of Iran, this is a complicated Offensive Air Strike that will involve many aircraft, each with its own role, such as Combat Aircarft [sic] whose role is to suppress enemy air defenses along the way, aircraft that fly fighter escort with the bombers, aircraft that carry specialized electronic warfare equipment to jam enemy radars and communications., plus probably air‐to‐air refueling along the way in and out of Iran.” Even then, Cordesman added, “depending on the forces allocated and duration of air strikes, **it is unlikely that an air campaign alone could alone terminate Iran’s program**. The possibility of dispersed facilities complicates any assessment of a potential mission success, **making it unclear what the ultimate effect of a strike** would be on Iran’s nuclear facilities.” Further complicating matters, U.S. military forces would not be able to simply focus on striking Iranian nuclear targets. They would also have to safeguard the Strait of Hormuz — a narrow waterway connecting the Gulf of Oman to the Persian Gulf — through which some 20 percent of the world’s oil passes, as well as countless other U.S. and allied strategic assets in the area. Indeed, even a temporary closure of the strait through Iranian deployment of mines, mini-subs, shore-to-ship missile batteries and patrol boats **could have a serious effect upon the** world economy. The Federation of American Scientists estimates that the “the rough effects of U.S. [military] action against Iran on the global economy — measured only in the first three months of actualization — [could] range from total losses of approximately $60 billion on one end of the scale to more than $2 trillion to the world economy on the other end.” All in all, a U.S. or coalition attack against Iran now would be like setting off a bomb in a gunpowder factory. As Cordesman noted, **any “military strike [against Iran] could be** destabilizing for the **entire** Middle East region and potentially generate a nuclear weapons race **in that part of the world**.” War with Iran is no joke. Critics of a deal with Iran should not treat it like one. A breakdown in negotiations will have serious repercussions for the Middle East and U.S. foreign policy. That being the case, lawmakers should be more careful when threatening to use U.S. military force. The enormous costs involved in engaging U.S. forces against Iran, both human and materiel, should not be bandied about lightly. As Levin wrote, “We owe it to our friends and allies in the region, and to our men and women in uniform who might have to risk their lives if diplomacy fails, to give negotiations every chance to succeed.” We should listen to his advice.

#### Wrecks US credibility and doesn’t take out Iran’s program

Robert Farley 3-24, 2015, assistant professor at the Patterson School of Diplomacy and International Commerce, “Exposed: America Can't Blow Up Iran's Nukes,” The National Interest, http://nationalinterest.org/feature/exposed-america-cant-blow-irans-nukes-12466?page=2

Trimming the grass

Almost no one believes that airstrikes can either permanently destroy the nuclear capacity of the Islamic Republic, or bring the Tehran regime down. Arguments in favor of a strike sometimes touch on the possibility of undermining the government, but **these amount to flourishes**, beats that an author has to hit on his or her way to making the core argument. And the core argument is this: the United States should regard itself on more or less permanent war footing with the Islamic Republic, and should expect to regularly use air and sea power in order to curtail Tehran’s ambitions.

If the United States launches a major strike on Iran, it can expect to launch another strike in a few years, and another strike a few years later. **Each time, Iran will improve** the **security** of its nuclear facilities, **and** each time, it will **build sympathy within the international community**. Washington will earn a reputation for bellicosity **that will make Beijing and Moscow look like rank amateurs**.

## Adv 2

#### There is no right option in the context of AI – the only certainty we have is Russian and Chinese control of AI would be far worse

Lowther and McGiffin 19 – Dr. Adam Lowther is Director of Research and Education at the Louisiana Tech Research Institute (LTRI) where he teaches deterrence strategy, NC3 History, and Integrated Tactical Warning and Attack Assessment in several nuclear command, control, and communication courses for the U.S. Air Force. Curtis McGiffin is Associate Dean, School of Strategic Force Studies, at the Air Force Institute of Technology.

Adam Lowther and Curtis McGiffin, August 16 2019, “AMERICA NEEDS A “DEAD HAND”,” War on the Rocks, https://warontherocks.com/2019/08/america-needs-a-dead-hand/

However, artificial intelligence is no panacea. Its [failures are numerous](https://medium.com/syncedreview/2018-in-review-10-ai-failures-c18faadf5983). And the fact that there is profound concern by well-respected experts in the field that science fiction may become reality, because artificial intelligence designers cannot control their creation, should not be dismissed. For the United States, every option presents significant risk and uncertainty. Reality, however, is progressing to a point where the United States must address the challenge we outlined above. Russia and China are not constrained by the same moral dilemmas that keep Americans awake at night. Rather, they are focused on creating strategic advantage for their countries.

#### 0 scenario for pre-delegated launch authority

Boulanin 19 – senior researcher at SIPRI, where his work focuses on the challenges posed by the advances of autonomy in weapon systems and the military applications of AI more broadly.

Vincent Boulanin, May 2019, “THE IMPACT OF ARTIFICIAL INTELLIGENCE ON STRATEGIC STABILITY AND NUCLEAR RISK,” SIPRI, https://www.sipri.org/sites/default/files/2019-05/sipri1905-ai-strategic-stability-nuclear-risk.pdf

For the near future, it is hard to see a situation in which humans explicitly delegate decisions to launch nuclear forces to machines—although the Soviet experience in the 1980s indicates that the possibility of movement in that direction should not be discounted. For all of the extended capabilities that AI-enabled systems may offer nuclear early warning and command and control, nuclear policymakers and operators need to keep at the forefront of their minds the question of what this helping hand could take away in the process if it is not implemented well and under meaningful human control.51

#### AI can increase stability in the nuclear realm by executing routine tasks far more accurately

Horowitz, Scharre and Velez-Green 19 – Michael C. Horowitz is Professor of Political Science and Associate Director of Perry World House at the University of Pennsylvania. Paul Scharre is Senior Fellow and Director, Technology and National Security Program at the Center for a New American Security. Alexander Velez-Green is a defense analyst based in Washington, DC.

Michael C. Horowitz, Paul Scharre, and Alexander Velez-Green, December 2019, “A Stable Nuclear Future? The Impact of Autonomous Systems and Artificial Intelligence,” https://arxiv.org/ftp/arxiv/papers/1912/1912.05291.pdf

In spite of these risks, automation overall has tremendous potential advantages for improving safety and reliability in a variety of applications, including nuclear operations. Automated systems can execute routine tasks more precisely and reliably than humans and are not subject to fatigue or distraction. This is why automation is undoubtedly a major factor in improvements in airline safety.141 Self-driving cars likewise have tremendous potential to reduce automobile accidents, which kill over 30,000 people annually in the United States alone.14

#### Lowers chances of escalation by enhancing decision time.

Spindel 20 – Assistant Professor of Political Science, University of New Hampshir

Jeniffer Spindel, August 17 2020, “Artificial intelligence and nuclear weapons: Bringer of hope or harbinger of doom?” European Leadership Network, https://www.europeanleadershipnetwork.org/commentary/bringer-of-hope-or-harbinger-of-doom-artificial-intelligence-and-nuclear-weapons/

Artificial intelligence could be a boon for drudgery type tasks such as data analysis. AI could monitor and interpret [geospatial](http://news.aag.org/2019/03/ai-and-gis-finally-delivering-on-the-promise/) or [sensor](https://www.c4isrnet.com/thought-leadership/2020/02/14/6-ways-ai-can-make-sense-of-sensor-data-in-2020/) data, and flag changes or anomalies for human review. Applied to the nuclear realm, this use of AI could be used to track reactors, inventories, and nuclear materials movement, among other things. Human experts would thus be free to spend more of their time investigating change, rather than looking at data of the status quo.

Incorporating artificial intelligence into early warning systems could create time efficiencies in nuclear crises. Similar to the boon for data analysis, AI could improve the speed and quality of information processing, giving decision-makers more time to react. Time is the commodity in a nuclear crisis, since nuclear-armed missiles can often reach their target in as little as [eight](https://www.nytimes.com/1983/05/29/us/nuclear-missiles-warning-system-and-the-question-of-when-to-fire.html) [minutes](https://warontherocks.com/2019/04/a-different-use-for-artificial-intelligence-in-nuclear-weapons-command-and-control/). Widening the window of decision could be key in deescalating a nuclear crisis.

## OFF

### 2AC---T-Across Board

#### C/I: “Expand the scope of its core antitrust laws” requires modifying the applicability of the antitrust laws by a part of the private sector

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

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

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

#### C/I: The core antitrust laws just means sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act.

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### The term “prohibition” includes indirect coercion and penalties.

Whyte 19 – Former Chief Legal Counsel, Montana Department of Revenue

Daniel J. Whyte, Brief of Respondents, Espinoza v. Montana Department of Revenue, 2019 U.S. Supreme Court Briefs Lexis 6391, Supreme Court of the United States, November 2019, LexisNexis

I.A The Free Exercise Clause bars laws "prohibiting the free exercise" of "religion." This Court has held that the term "prohibition" covers not only direct bans on religious practice, but also "indirect coercion or penalties on the free exercise of religion." Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (internal quotation marks omitted). Thus, in Trinity Lutheran, this Court held that when a church was barred from receiving a generally available benefit, it was penalized for being a church, in violation of the Free Exercise Clause.

#### 6. “The” is a specifying term.

Random House 6 (Unabridged Dictionary, http://dictionary.reference.com/browse/the)

The (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article *a* or *an*): the book you gave me; Come into the house.

### 2AC---T-Courts

#### “Expand the scope of its core antitrust laws” requires modifying the applicability of the antitrust laws such that they are applicable to conduct that would otherwise not violate.

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

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

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

#### Courts do that---it’s their sole role, expressly established by Congress.

**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---T-Prohibitions

#### We meet—changing plaintiff’s burden increases “scope”

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

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

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

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

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

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

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

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

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

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

### 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.

### 2AC---Con-Con

#### Uncertainty. It introduces a new, unpredictable process over antitrust out of the blue. Best studies prove it wrecks R&D investment.

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Yuchen, Daxin Dong, Jiaxin Wang, “The Negative Impact of Uncertainty on R&D Investment: International Evidence,” International Evidence, Sustainability 2021, 13, 2746. https://doi.org/10.3390/ su13052746

In summary, in this study, we reported a significantly negative impact of uncertainty on R&D investment at the country level. The analyses were based on a sample covering 109 countries from 1996 to 2018. It was also found that uncertainty reduced the number of annual new patent applications. The adverse impact of uncertainty on R&D was not only significant statistically, but also economically. According to the estimation results, if the uncertainty index rises by one unit (one standard deviation), the scale of R&D investment and the number of patent applications will decline by 15.6% (2.1372%) and 22.7% (3.1099%), respectively. Further analyses demonstrated that the effect of uncertainty was not uniform across all countries. In some country groups, the effect was strong and statistically significant. However, in several country groups, the effect was moderate and insignificant. However, we always observed a negative effect. Overall, Hypothesis 1 in our study is verified, and Hypothesis 2 is contradicted.

The study results provided strong support to some previous studies which reported a negative impact of uncertainty on R&D investment, including Arif Khan et al. [5], Cho and Lee [11], Czarnitzki and Toole [8], Goel and Ram [12], Ivus and Wajda [1], Jung and Kwak [15], Nan and Han [17], Wang et al. [4], and Xu [20]. The results did not support several studies that reported a positive effect of uncertainty, such as Atanassov et al. [3], Gu et al. [13], Han et al. [14], Jiang and Liu [6], Meng and Shi [16], Ross et al. [9], Stein and Stone [18], Tajaddini and Gholipour [7], and Vo and Le [19]. Our study utilized a wide sample of more than 100 countries and examined the country-level aggregate R&D investment. This feature enabled our study to better depict the overall situation in the world, compared to most of the extant studies, which have only focused on the R&D of business corporations within one country.

The findings in this study have important policy implications. First, in order to keep abreast of the R&D investment dynamics, governments and economic agents should pay attention to the degree of uncertainty in the economy. The negative impact of uncertainty on R&D is a phenomenon that widely exists in different countries over the world, as shown by our analyses on the full sample, as well as various subsamples. If governments can effectively monitor the variations in uncertainty and evaluate the relevant market responses, they will be able to understand the current situation and forecast future tendency of aggregate R&D investment in a better way. Being more informed will facilitate governments to make proper public policies if necessary. After understanding the link between uncertainty and R&D, firms can reasonably expect that other enterprises in the industry will adjust investment accordingly when uncertainty changes. During the procedure of making their own R&D investment plans, firms should not neglect the potential responses of the competitors and partners to varying uncertainty.

Second, given the importance of innovation and technological advancement for sustainable economic and social development, it is necessary to reduce the degree of macro uncertainty. Governments should avoid frequent variations of economic policies and the abrupt implementation of substantial reforms. The communication and information sharing among governments and private sectors should be reinforced to reduce noises, mitigate misunderstanding, and enhance trust and confidence. Countries should also improve their institutional and economic infrastructure—for example, by reducing frictions in financial markets and strengthening governmental effectiveness—in order to increase the resistibility of economic system to unexpected shocks. In the case that the major origins of the uncertainty can be identified—such as the coronavirus pandemic in the current period—urgent actions should be carried out to deal with the problems

### 2AC---Court Clog

#### Courts clogged now – reopening from COVID isn’t happening fast enough

Smith 6/14 – Criminal justice reporter for WBEZ. His reporting has won awards from the Associated Press, the Chicago Headline Club, the Radio Television Digital News Association, the Chicago Bar Association and others.

Patrick Smith, “As The Nation’s Courthouses Reopen, They Face Massive Backlogs In Criminal Cases,” *NPR*, 14 July 2021, https://www.npr.org/2021/07/13/1015526430/the-nations-courthouses-confront-massive-backlogs-in-criminal-cases.

Criminal courthouses across the United States are confronting massive case backlogs as they begin slowly reopening after long pandemic shutdowns. It has some prosecutors preparing to drop so-called "low-level cases" because they will not be able to handle the expected crush of speedy trial demands.

Prosecutors in Chicago, for example, are preparing to drop a large number of criminal cases when the courts fully reopen later this year.

Thousands of criminal cases have built up in Cook County over the past 15 months, as the county's massive court system has been all-but shut down because of the COVID-19 pandemic. That means thousands of people locked up in jail, on electronic monitoring or out on bond have essentially had their cases on hold. But the waiting caused by the pandemic could mean many people accused of nonviolent crimes will get off scot-free.

"I think we should be prepared for a system that is going to be overwhelmed," Cook County State's Attorney Kim Foxx said.

Foxx said that will likely mean dropping a large number of lower-level cases in order to prioritize cases involving violent crime.

"We cannot allow for violent cases to fall through the cracks," Foxx said. "And so using that calculus, [we have to make] sure that those cases that could be dealt with outside of the system are in fact purged from the system so we can focus our attention on violence."

Courthouses are likely to see a steep increase in speedy trial requests

The Illinois Supreme Court announced June 30 that courthouses will return to normal in October, and defendants will once again be able to assert their Constitutional right to a speedy trial, a right the Illinois Supreme Court suspended in March 2020 amid COVID-19.

Chicago-based defense attorney Adam Sheppard said he expects to see "a flood of speedy trial demands" across the system.

"It is gonna be overwhelming," Sheppard said.

Foxx said there is no way her prosecutors — or the court system overall — will be able to deal with that coming crush.

"In a scenario where everyone demands [a trial], potentially 30,000-plus cases needing to go to trial within the span of several months, and the reality is our court system, I don't think there's any court system in the world that would be prepared to have that many trials just logistically, staff wise, all of it, it would overwhelm the system," Foxx said.

That pattern could be repeated in jurisdictions across the country, as courthouses try to return to normal with thousands of people who have been waiting months or more for their day in court.

Dropping cases sends the message that "you don't matter"

Meg Garvin, executive director of the National Crime Victim Law Institute at Lewis and Clark Law School, said she's heard of other jurisdictions that are also considering dropping a large number of cases because of backlogs. She's concerned about the message that could send to victims.

**Checks prevent floodgates**

**Levy 13**

Martin K. Levy, Associate Professor of Law, Duke University School of Law. JD 2007, Yale Law School, The University of Chicago Law Review, 2013, “Judging the Flood of Litigation”, 80:1007

Now, it is important to recognize that counseling Courts against considering caseload volume in this kind of decision making does not mean that there is no recourse when it comes to docket concerns. Our system provides **several ways to relieve caseload pressure** short of the courts not recognizing causes of action or deciding not to hear particular sets of cases. Specifically, our constitutional system gives Congress the authority to adjust laws so as to stem that flow.305 [Footnote 305 begins here] 305 Furthermore, Congress, of course, has the power to create additional judgeships, **which would** serve to **reduce the burden** on any single judge. [Footnote 305 ends here] And Congress has indeed exercised that power. As noted earlier, Congress passed the Supreme Court Case Selections Act306 **to alleviate the Court’s** then “unmanageable **workload**” by eliminating most of the Court’s mandatory jurisdiction.307 With respect to the rest of the federal court docket, Congress has repeatedly enacted targeted legislation to **reduce frivolous filings.** For example, Congress passed the PLRA precisely as a way of “addressing a flood of prisoner litigation in the federal courts.”308 Similarly, part of the purpose of the Private Securities Litigation Reform Act of 1995 309 was to limit frivolous securities claims.310 This is not to suggest that Congress could not do more in this vein; rather the point is simply that there is still a branch of government that has the clear authority to take the courts’ caseload into account in substantive decision making and has done so **repeatedly in the past.**

This does not leave the courts defenseless against the rising tide, however; they **have many tools besides substantive law** with which **to keep themselves afloat.** Perhaps most prominently, both the district courts and the courts of appeals can avail themselves of various procedural rules **to** help cope with, and indeed **limit, their dockets.** Most plainly, the Federal Rules of Civil Procedure employ what have been called three **basic** pretrial “**discouragement mechanisms.**”311 The first mechanism is the pleading stage itself, with the possibility for a motion to dismiss. Although pleadings obviously have several purposes, scholars have come to identify a significant one as “allowing a court to screen cases for merit.”312 At this juncture, courts can siphon off some of the frivolous cases that come before them. The second mechanism is summary judgment. The main goal of Rule 56 has been said to be “filtering out cases not worthy of trial,”313 and that rule is now regarded as a “powerful tool for judges to control dockets.”314 A third mechanism is the possibility of Rule 11 sanctions, which were developed to “punish lawyers for advancing meritless contentions that wasted the courts’ attention”315 and to deter such litigation from coming into court in the first place.316 [Footnote 316 begins here] 316 FRCP 11, Advisory Committee Notes to the 1983 Amendments (“Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should **discourage** dilatory or **abusive tactics and** help to **streamline the litigation process by lessening frivolous claims** or defenses.”). [Footnote 316 ends here] In short, the district courts have at their disposal **several critical procedural rules** that have been **fashioned**, at least in part, **so that** district **courts can** more **quickly dispose of frivolous filings** and streamline the litigation process more generally.

Many of the mechanisms that exist at the district court level have analogues at the courts of appeals. Through the Federal Rules of Appellate Procedure, the circuit courts have several key ways to manage their dockets and reduce the time taken by frivolous filings. Rule 34 permits appeals courts to decide cases without oral argument317—a powerful time-saving mechanism.318 Additionally, courts of appeals can rely on staff attorneys to help draft summary dispositions.319 Finally, per Rule 38, if a court of appeals determines that a particular filing was frivolous, **the court can award damages and costs to the appellee.**320

Moreover, these mechanisms of the federal courts are not static—**if they are insufficient to curb the flow of frivolous cases, they can be altered, and** indeed **have been** so altered **in the past.** Rule 34, for example, was amended in 1979 to authorize the resolution of an appeal without oral argument whenever a panel agrees that argument is unnecessary because, inter alia, an appeal is frivolous.321 Similarly, Federal Rule of Civil Procedure 11 was amended in 1983 precisely to reduce the number of frivolous filings.322

And although this has been more controversial, the Supreme Court itself has shifted the meaning of various procedural rules in its own opinions.323 In 1986, the Court in a trilogy of cases324 solidified Rule 56 as “a powerful tool for the early resolutio of litigation.”325 And of course, more recently, the Court altered pleadings with its decisions in Bell Atlantic Corp v Twombly326 and Ashcroft v Iqbal.327 There can be disagreement about the propriety of the way these rules have shifted over time, but the point remains that the federal courts have an extensive set of procedures to manage their dockets, and these procedures can be ratcheted up if they prove insufficient.

#### No risk of court clog

Harris 08

Shubha Harris is a litigator at Stinson Leonard Street LLP, JD from William Mitchell College of Law, May 5, 2008, American Bar Association, May 5, 2008, “Establishing a Constitutional Right to Environmental Quality”, http://apps.americanbar.org/environ/committees/lawstudents/writingcompetition/2008/WillMitSoL/ShubhaHarris.pdf

The “floodgates of litigation” argument previously mentioned107 is often cited as a reason not to encourage policies that might lead to increased litigation. This concern is neither well-founded nor persuasive. In order to have standing to sue in federal court, a plaintiff must allege injury, causation, and redressability. While the standing criteria previously were given broad interpretation, in a recent case involving environmental harm, the Supreme Court reviewed the standing doctrine and tightened the requirements necessary for a plaintiff to challenge government action thereby limiting the potential cases that may be brought by litigants contesting environmentally harmful causes.108 Furthermore, the argument regarding whether a specific policy should be adopted to lessen the Court’s burden has been advanced by a notable defendant and summarily dismissed by the Court.109 “Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant. See Fed. Rules Civ. Proc. 12, 56. Moreover, the availability of sanctions provides a significant deterrent to litigation[.]”110 Undoubtedly, a right that guarantees individuals that the government will refrain from action which causes environmental harm may be difficult for courts to interpret and define. Yet courts have faced similar struggles with respect to other fundamental rights and, over time, have developed a body of jurisprudence on which we can rely. The same may be true for an environmental right.

### 2AC---Neolib K

#### Turn—prefer our tailored defense of competition policy—it is compatible with broader anti-neoliberalism—their k conflates sources of structural equality and devolves into totalitarianism

Coniglio, antitrust attorney in the Washington, DC office of Sidley Austin LLP, ‘20

(Joseph V., “Economizing the Totalitarian Temptation: A Risk-Averse Liberal

Realism for Political Economy and Competition Policy in a Post-Neoliberal Society,” 59

Santa Clara L. Rev. 703)

The implication of the foregoing is that the most pressing task for competition policymakers may not involve a rethinking of first principles. The principles of neoliberal competition policy may have ultimately been proven justified by an unprecedented period of economic growth, technological progress and reductions in poverty, and should presumably remain operative as long as they remain the best framework for bringing about these ends. Neither, as we have suggested, must the capitalist entrepreneur be lost in the process. The totalitarian temptation to submit to general state control of the economy-whether it be in the form of communism from below or fascism from above should be resisted so as to preserve and build upon the great prosperity Western Civilization has managed to achieve.

This statement will no doubt be highly unsatisfactory to many critics of neoliberalism who seek more fundamental and revolutionary changes. Surely, they suggest, there must be some principled basis for critiquing the neoliberal status quo with which so many are frustrated. Indeed, there very well may be, and none of the arguments in this article should be understood to the contrary. The goal of this article has been limited to a tailored defense of neoliberal principles only as they relate to competition policy, broadly understood. It does not suggest that neoliberal monetary, trade, and fiscal policies are also sound-let alone a neoliberal social order, where all the core institutions within society are organized according to the neoliberal principles of wealthmaximization, empiricism, and the rest.129 This is to say that even if neoliberalism is a sound theory as applied to the area of competition policy, neoliberal monetary policy, for example, may be problematic and a just target for contemporary critics. Similarly, claiming that competition policy should be enforced using a consumer welfare standard does not mean that all the organs of law and civil society should be oriented to maximize wealth or consumer welfare, even if this economic inquiry is nonetheless informative. 30 It is well known that several prominent neoliberals have expanded the neoliberal policy apparatus beyond the regulation of market capitalism with which antitrust is concerned to domains typically understood to be beyond a purely utilitarian purview.' 3 ' However, whatever the merits of these broader neoliberal policy programs, the competition policy baby, so to speak, should not be thrown out with the bathwater.

Consider the charge that neoliberal policies have increased wealth inequality in the United States. Some commentators attempt to link this increased inequality with a decline in competition'3 2 and, by implication, consumer welfare competition policy. Notwithstanding the interest such theories appeared to have garnered from highly distinguished economists and policymakers, such as Nobel Laureate Joe Stiglitz,133 one might alternatively consider whether increasing wealth inequality and the resultant social strife are far more a result of policies in other areas, such as monetary policy. 134 At the same time as Chicago School antitrust policy took root, the American economy began to undergo sustained expansions in the money supply and reductions in interest rates that, at least in theory, disproportionately reward the owners of financial assets, who are more likely to be wealthy. 135

Indeed, after the financial crisis, monetary policy engaged in a truly unprecedented expansion, with the Federal Reserve lowering interest rates to zero and increasing its balance sheet from approximately $900 billion before the crisis to $4.5 trillion after, most of which constituted either troublesome mortgage-backed securities or treasury bonds. 36 The share of wealth of the world's richest people roughly doubled. 37 At the same time, however, one would seem to look in vain for any shift toward an increased laissez faire competition policy during the Obama administration. Indeed, antitrust enforcement under the Obama administration arguably increased relative to the George W. Bush administration, even if only at the margins and not in the area of monopolization. 3

#### Capitalism is key to massive improvements in living standards, poverty, and environmental sustainability – any other system shuts that down and worsens environmental and social problems

Budolfson 21 – Assistant Professor in the Department of Environmental and Occupational Health and Justice at the Rutgers School for Public Health.

Mark Budolfson, “Arguments for Well-Regulated Capitalism, and Implications for Global Ethics, Food, Environment, Climate Change, and Beyond,” *Ethics and International Affairs*, vol. 35, no. 1, 2021, pp. 86-88, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/96F422D04E171EECDEF77312266AE9DD/S0892679421000083a.pdf/arguments-for-well-regulated-capitalism-and-implications-for-global-ethics-food-environment-climate-change-and-beyond.pdf.

Premise 1. Development and the past. Over the course of recorded human history, the majority of historical increases in health, wellbeing, and justice have occurred in the last two centuries, largely as a result of societies adopting or moving toward capitalism. Capitalism is a relevant cause of these improvements, in the sense that they could not have happened to such a degree if it were not for capitalism and would not have happened to the same degree under any alternative noncapitalist approach to structuring society. The argument in support of this premise relies on observed relationships across societies and centuries between indicators of degree of capitalism, wealth, investments in public goods, and outcomes for health, wellbeing, and justice, together with econometric analysis in support of the conclusion that the best explanation of these correlations and the underlying mechanism is that large increases in health, wellbeing, and justice are largely driven by increasing investments in public goods. The scale of increased wealth necessary to maximize these investments requires capitalism. Thus, as capitalist societies have become dramatically wealthier over the past hundred years (and wealthier than societies with alternative systems), this has allowed larger investments in public goods, which simply has not been possible in a sustained way in societies without the greater wealth that capitalism makes possible. Important investments in public goods include investments in basic medical knowledge, in health and nutrition programs, and in the institutional capacity and know-how to regulate society and capitalism itself. As a result, capitalism is a primary driver of positive outcomes in health and wellbeing (such as increased life expectancy, lowered child and maternal mortality, adequate calories per day, minimized infectious disease rates, a lower percentage and number of people in poverty, and more reported happiness);5 and in justice (such as reduced deaths from war and homicide; higher rankings in human rights indices; the reduced prevalence of racist, sexist, homophobic opinions in surveys; and higher literacy rates).6 These quantifiable positive consequences of global capitalism dramatically outweigh the negative consequences (such as deaths from pollution in the course of development), with the result that the net benefits from capitalism in terms of health, wellbeing, and justice have been greater than they would have been under any known noncapitalist approach to structuring society.7

Premise 2. Economics, ethics, and policy. Although capitalism has often been ill-regulated and therefore failed to maximize net benefits for health, wellbeing, and justice, it can become well-regulated so that it maximizes these societal goals, by including mechanisms identified by economists and other policy experts that do the following:

• optimally8 regulate negative effects such as pollution and monopoly power, and invest in public goods such as education, basic healthcare, and fundamental research including biomedical knowledge (more generally, policies that correct the failures of free markets that economists have long recognized will arise from “externalities” in the absence of regulation);9

• ensure equity and distributive justice (for example, via wealth redistribution);10

• ensure basic rights, justice, and the rule of law independent of the market (for example, by an independent judiciary, bill of rights, property rights, and redistribution and other legislation to correct historical injustices due to colonialism, racism, and correct current and historical distortions that have prevented markets from being fair);11 and

• ensure that there is no alternative way of structuring society that is more efficient or better promotes the equity, justice, and fairness goals outlined above (by allowing free exchange given the regulations mentioned).12

To summarize the implication of the first two premises, well-regulated capitalism is essential to best achieving our ethical goals—which is true even though capitalism has certainly not always been well regulated historically. Society can still do much better and remove the large deficits in terms of health, wellbeing, and justice that exist under the current inferior and imperfect versions of capitalism.

Premise 3. Development and the future. If the global spread of capitalism is allowed to continue, desperate poverty can be essentially eliminated in our lifetimes. Furthermore, this can be accomplished faster and in a more just way via well-regulated global capitalism than by any alternatives. If we instead opt for less capitalism, less growth, and less globalization, then desperate poverty will continue to exist for a significant portion of the world’s population into the further future, and the world will be a worse and less equitable place than it would have been with more capitalism. For example, in a world with less capitalism, there would be more overpopulation, food insecurity, air pollution, ill health, injustice, and other problems. In part, this is because of the factors identified by premise 1, which connect a turn away from capitalism with a turn away from continuing improvements in health, wellbeing, and justice, especially for the developing world. In addition, fertility declines are also a consequence of increased wealth, and the size of the population is a primary determinant of food demand and other environmental stressors.13 Finally, as discussed at length in the next section of the essay, capitalism can be naturally combined with optimal environmental regulations.14 Even bracketing anything like optimal regulation, it remains true that sufficiently wealthy nations reduce environmental degradation as they become wealthier, whereas developing nations that are nearing peak degradation will remain stuck at the worst levels of degradation if we stall growth, rather than allowing them to transition to less and less degradation in the future via capitalism and economic growth.15 In contrast, well-regulated capitalism is a key part of the best way of coping with these problems, as well as a key part of dealing with climate change, global food production, and other specific challenges, as argued at length in the next section. Here it is important to stress that we should favor wellregulated capitalism that includes correct investments in public goods over other capitalist systems such as the neoliberalism of the recent past that promoted inadequately regulated capitalism with inadequate concern for externalities, equity, and background distortions and injustices.16

#### Alt fails—it’s vague and undefined—can’t generate coherent way to contest neoliberal concentration

Hovenkamp, James G. Dinan University Professor, University of Pennsylvania Law School and the Wharton School, ‘18

(Herbert, “Whatever Did Happen to the Antitrust Movement?” Faculty Scholarship at

Penn Law. 1964)

As a movement, antitrust often succeeds at capturing political attention and engaging at least some voters, but it fails at making effective or even coherent policy. The result is goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output, and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.17

Nevertheless, mantras such as “industrial concentration” or “big business” have great political force. These terms provide almost nothing in the way of administrable rules while yet evoking an image of something big, bad, and powerful that government must bring under control. For example, here is the plank of the 2016 Democratic Party’s platform on antitrust:

Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction.

We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama’s recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.18

The antitrust plank never references low consumer prices, or anything having to do with product quality. That is not because Democrats are not interested in low consumer prices.19 Rather, they apparently believe that antitrust has little to do with it. The references to prices occur in other sections of the platform, devoted to such subjects as health and safety and the high price of pharmaceutical drugs. Those sections make no reference to antitrust law.20 The only references to “consumers” occur in planks pertaining to unionization, affordable housing, Wall Street, banks and Dodd-Frank, and clean energy.21 So according to the platform, while legal policy generally is concerned with high consumer prices, antitrust policy apparently is not. By contrast, the 2016 Republican platform never references antitrust, although it does contain a plank promoting a “competitive America,” but focused entirely on lowering tax rates.22

The antitrust plank in the 2016 Democrat platform is actually one of the most detailed to appear in any platform by a major political party.23 The catchphrases that it uses, however—“corporate concentration,” “unfairly limiting competition,” or “abusive behavior by dominant companies”—can mean practically anything depending on assumptions. The platform is peppered with references to “fair” or “fairness,” including the antitrust plank, but with no reference point indicating how fairness should be assessed. Is it “fair” that consumers be asked to pay high prices in order to accommodate the shortcomings of some businesses; or conversely, is it “fair” that small businesses suffer simply because they are not able to compete with larger firms on price or quality; or is it “fair” that firms heavily invested in old brick-andmortar distribution lose out to more technologically entrepreneurial firms? “Fairness” as an antitrust concern means nothing without a reference point or set of measurement tools.

As for specific practices, the antitrust plank in the Democrat platform singles out “tying arrangements, price fixing, and exclusionary conduct,” saying nothing about mergers, other vertical restraints, or anticompetitive patent practices. In fact, the platform never mentions patents, although it makes frequent references to innovation, largely in the context of proposed government intervention to stimulate production24 or to finance research and development and educate people for more technically demanding jobs.25 Of the three anticompetitive practices that it singles out, “price fixing” is completely uncontroversial and has always been a central focus of nearly every articulation of antitrust policy, left, center, and right—including in Bork’s The Antitrust Paradox. 26 The term “exclusionary conduct” is so vague that it is meaningless. Both socially harmful and socially beneficial conduct can be “exclusionary.” The inclusion of “tying arrangements” is mystifying. Tying is ubiquitous in modern economies and is an essential characteristic of networks and technology.27 Further, the vast majority of it is procompetitive because it increases output without excluding anyone. Finally, the number of antitrust tying cases is small in comparison with merger cases, which make up a large portion of antitrust enforcement activity. A major party platform that identifies “tying arrangements” but not “mergers” as a fundamental concern requires an explanation. Most importantly, it seems to miss the whole point of competitive markets, which is to produce a high output of quality, competitively priced goods.

At least in part, the Democratic Party platform reflects the reappearance of movement antitrust. While it is hardly the only expression, and certainly not the most extreme, it represents a troublesome development—namely, the idea that America needs higher prices in order to give smaller firms a fair chance. The platform also gives a reader the strong impression that its slogans were selected in order to achieve maximum political traction with the illiterati, and perhaps that is all that can be expected of a political platform. In the process, however, it does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined. Its supporters generally disparage the use of economics, sometimes suggesting that antitrust policy should be governed by political theory instead.28 Exactly how political theory gets one to specific antitrust rules is not completely clear, but it involves excluding the opinions of antitrust experts concerning the public’s interest.29

Movement antitrust argues variously for abandoning the measurement of competition by reference to output and price,30 or even abandoning consumer welfare as an antitrust proscription altogether.31 It accuses retailers such as Amazon of engaging in “predatory pricing” without providing a coherent definition of the practice.32 It never explains how a nonmanufacturing retailer such as Amazon could ever recover its investment in belowcost pricing by later raising prices, and even disputes that raising prices to higher levels ever needs to be a part of the strategy, thus indicating that it is confusing predation with investment.33 Charging low but profitable prices indefinitely is not unlawful “predatory pricing”‘ nor is forcing suppliers to price competitively.

### 2AC---FTC DA

**4---Aff solves financial fraud better**

**Mauri 17** – General Manager, z Systems, responsible for all facets of IBM's mainframe business including strategy, architecture, operations, development and overall financial performance

Ross Mauri, "Blockchain for fraud prevention: Industry use cases," Blockchain Pulse: IBM Blockchain Blog, 7-12-2017, https://www.ibm.com/blogs/blockchain/2017/07/blockchain-for-fraud-prevention-industry-use-cases/

Fraud — and the **lack of transparency** that enables it — is a **growing problem** for businesses around the world. In a list published on Risk.net, fraud ranked as one of the top 10 operational risks of 2017. But a cutting-edge technology called blockchain could provide the **fraud prevention capabilities** these businesses are **looking for**.

Blockchain is a shared ledger that is decentralized and resistant to tampering. It allows verified contributors to store, view and share digital information in a security-rich environment, which helps to foster trust, accountability and transparency in business relationships. Seeking to capitalize on these benefits, companies have been exploring ways to use blockchain technology to prevent fraud in industries such as finance, identity management and supply chain.

Preventing fraud in finance

There are many factors that complicate financial transactions: need for collateral, time required for settlements, differences in currency denominations, third-party mediation and more. Multi-step processes, especially ones that require human interaction, are **prime targets** for fraudsters. With blockchain, information can be shared in **real time**, and the ledger can **only be updated** when all parties **agree**. This can reduce time, costs and opportunities to **commit fraud**. And with lessened time to completion, it is less likely a party won’t be paid.

Chile’s Santiago Exchange plans to introduce blockchain technology across the country’s financial sector. The Latin American stock market will use blockchain to help reduce errors, possible fraud and transaction processing times in its short selling system for securities lending.

**Bank-to-bank** financial transactions are also **vulnerable to fraudulent attacks** from bank cards and mobile payments. According to Constantin von Altrock, Director of Counter Fraud Management at IBM, payment fraud is a $20 billion-a-year problem. Watch the demo below to see how immediate payments can be made with a financial transaction manager built on blockchain.

Preventing identity fraud

Last year, identity theft and fraud cost consumers $16 billion. The threat of online fraud has spurred many credit card companies and financial institutions to alert consumers when potentially fraudulent transactions are made. However, **that hasn’t stopped criminals** from stealing identifying information and using it without permission. In fact, of the banks polled in an IBM Institute for Business global study, **only 16 percent** said they can **detect fraud** as it is attempted.

What if a person’s digital identity could be secured in a way that **prevented it** from being **tampered with** or used in an **unsanctioned way**? Blockchain could make this **possible**. If identifying information is placed on a permissioned blockchain framework, authorized parties will have access to **one version** of the truth, and only known participants can **verify transactions and ensure records** are valid.

#### 5---No means or motive for nuclear terror – their authors are hacks.

Weiss 2015 Leonard, visiting scholar at the Center for International Security and Cooperation at Stanford University, USA, and a member of the National Advisory Board of the Center for Arms Control and Non-Proliferation, On fear and nuclear terrorism, Bulletin of the Atomic Scientists 2015, Vol. 71(2) 75–87

There is clearly some risk of nuclear terrorism via theft of weapons, but the risk is low, and a successful theft of a nuclear weapon would likely require a team of insiders working within an otherwise highly secure environment. There is also some risk that a nuclear-armed country might use a terrorist group to launch a nuclear attack on an adversary. This possibility is also of low probability, because the sponsor country would almost inevitably risk nuclear annihilation itself. Finally, a terrorist group might try to design and build its own weapon, possibly with the help of disaffected persons from a weapon state who might provide them with nuclear know-how and/or materials. Given all the steps needed to achieve a weapon that is workable with high probability without being discovered and without suffering an accident this scenario is also fraught with risk for the terrorists. As a result, terrorists are much more likely to try to achieve their aims using conventional weapons,

which are cheaper, safer, and technically more reliable. Thus, while no one can discount completely the acquisition by a terrorist group of a nuclear explosive weapon, such an event appears to be of very low probability over the next decade at least, and can be made still lower using techniques or policies that do not require constitutionally problematic steps by the federal government or an optional war whose death rate could match or exceed what the terrorists are capable of. There is a tendency on the part of security policy advocates to hype security threats to obtain support for their desired policy outcomes. They are free to do so in a democratic society, and most come by their advocacy through genuine conviction that a real security threat is receiving insufficient attention. But there is now enough evidence of how such advocacy has been distorted for the purpose of overcoming political opposition to policies stemming from ideology that careful public exposure and examination of data on claimed threats should be part of any such debate. Until this happens, the most appropriate attitude toward claimed threats of nuclear terrorism, especially when accompanied by advocacy of policies intruding on individual freedom, should be one of skepticism. Interestingly, while all this attention to nuclear terrorism goes on, the United States and other nuclear nations have no problem promoting the use of nuclear power and national nuclear programs (only for friends, of course) that end up creating more nuclear materials that can be used for weapons. The use of civilian nuclear programs to disguise national weapon ambitions has been a hallmark of proliferation history ever since the Atoms for Peace program (Sokolski, 2001), suggesting that the real nuclear threat resides where it always has resided in national nuclear programs; but placing the threat where it properly belongs does not carry the public-relations frisson currently attached to the word Òterrorism.Ó

### 2AC---Politics

#### Anti-monopoly action is bipartisan

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

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

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

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

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

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

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

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

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

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

#### Courts shield.

Keith E. **Whittington 5**, Cromwell Professor of Politics – Princeton University, ““Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court”, American Political Science Review, 99(4), November, p. 585, 591-592

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president’s putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of “activist” judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the **congenial reception** of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments. Although it might sometimes be the case that judges and elected officials **act in** more-or-less **explicit** **concert** to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are **willing** and able **to accommodate**. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101– 14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render **controversial decisions** and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.¶ [CONTINUES]¶ There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to **circumvent a paralyzed legislature** and **avoid the political fallout** that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician’s own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, **shifting blame** for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

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

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

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

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

#### Medicare fights thump – huge poison pill at heart of the bill

Ollstein 10/1/2021 – reporter at POLITICO

Alice Miranda Ollstein, “Limiting Medicare benefits deepens rift among Hill Democrats” POLITICO, <https://www.politico.com/news/2021/10/01/medicare-benefits-hill-democrats-514946>

Means-testing Medicare, a long-running controversy in health policy debates, is re-emerging as a major source of tension for Democrats seeking a path forward on their stalled social spending package.

Centrist lawmakers are demanding that an expansion of the program to cover dental, vision and hearing care be limited to the poorest Americans, to pare the projected cost by as much as half.

But progressive lawmakers and powerful outside groups like AARP are pushing back, saying the move would fundamentally alter the social insurance program and jeopardize Democrats’ slim margins in the House and Senate by alienating wealthy senior citizens.

“People won’t feel that there is any buy-in for them. You create real divisions,” said House Appropriations Chair Rosa DeLauro (D-Conn.).

The idea of means-testing resurfaced this week in a set of demands Sen. Joe Manchin made to Senate Majority Leader Chuck Schumer, in which he outlined his criteria for a $1.5 trillion package. While many Democrats reject the idea, health industry groups like the American Dental Association argue that limiting the scope of the coverage expansion frees up funds for the party's other health priorities.

“If you have scarce federal dollars, this is where you want to put your money,” said Michael Graham, the dental group’s senior vice president of government affairs, who is pushing Congress to offer the new dental benefit only to people with incomes below 300 percent of the federal poverty line — or around $39,000 a year.

Because traditional Medicare would pay dentists far less for services than private insurance, the group’s members would lose money if Democrats make tens of millions of seniors eligible for a government-sponsored plan.

Medicare premiums already are tied to incomes, with wealthier seniors paying more for Part B and Part D coverage. But critics of Manchin’s approach argue that imposing more income thresholds adds burdens for the middle class and affects more beneficiaries each year. Lawmakers are weighing other cost controls, like funding the new benefits for only a few years or phasing in their rollout.

Loren Adler, associate director of the USC-Brookings Initiative for Health Policy, said while there are valid arguments for not subsidizing wealthier people, means-testing could wind up limiting the new benefit to older, sicker patients — worsening the risk pool and creating new financial stresses on the program. There’s also the added administrative burden of verifying the incomes of seniors each year to determine their eligibility, and the likelihood that some lower-income people may not be aware or able to prove that they’re eligible.

“There’s a simplicity element to just offering the benefit to everyone,” he said. “In retirement your income fluctuates even more than when you’re working, and distributions from retirement accounts can be one-time windfalls. If you kick people out of the program and then allow them to reapply the next year, the amount of money you save could be so low that it wouldn’t outweigh the added complexity.”

The means-testing debate is playing out as Democrats struggle to squeeze a bevy of health care priorities into the social spending bill, H.R. 5376 (117). With the overall cost likely to drop as low as $1.5 trillion over a decade, the centrists' arguments are getting louder.

“Let’s have a targeted program for those who really need it,” said Rep. Kurt Schrader (D-Ore.), one of several House lawmakers allied with Manchin. “We can’t afford to, and it’s not sensible to, give money to people earning $400,000 or $500,000 bucks a year.”

A means test for Medicare was considered several times during fiscal clashes between former President Barack Obama and GOP congressional leaders, but ultimately rejected. Indeed, no one in the program's 56 years has ever been excluded from any benefits based on wealth.

Senate Finance Chair Ron Wyden (D-Ore.) confirmed, in the wake of Manchin's demands, that there's an active debate among Democrats in the upper chamber who have yet to finalize their own version of the package.

“We’ve got colleagues offering a variety of opinions on when [the dental, vision and hearing benefits] should start, who is covered and the extent of it,” he said.

The American Dental Association is aiming to have a leading role influencing the outcome, buying digital ads, sending tens of thousands of emails to Capitol Hill and holding Zoom meetings with lawmakers and staff.

“We understand where the progressives are, and we’re not likely to move them,” Graham said. “We also understand where the Republicans are: they’re going to vote against [the social spending bill] no matter what. So our focus is the moderate Democrats. They’re telling us our plan makes sense, but they’re also waiting to see what the Senate does.”

Adler compared the dentists’ current fight to the American Medical Association’s failed attempts to block the creation of Medicare more than half a century ago.

“Once a program exists long-term, it becomes part of the status quo,” he said. “This is the same basic premise. If this becomes a popular product for seniors, it will become difficult for dentists to not take Medicare patients.”

Progressive lawmakers who've already scaled back their ambitions for the spending bill argue that means testing Medicare would be worse than some of the other cost-cutting ideas under consideration, including phasing in the benefit over several years and requiring seniors to pay a higher percentage of the cost of major dental procedures.

#### Doesn’t solve climate – Manchin will water it down

Sobcyz 10/1/2021 – reporter at E&E News

Nick Sobcyz, “Dem divisions, Manchin demands highlight climate Struggles” <https://www.eenews.net/articles/dem-divisions-manchin-demands-highlight-climate-struggles/>

Democratic infighting on Capitol Hill this week underscores how difficult it will be to get the biggest climate bill in U.S. history across the finish line.

Climate policy has emerged as one of the toughest challenges in striking a deal on Democrats’ reconciliation package, with a chasm between Energy and Natural Resources Chair Joe Manchin (D-W.Va.) and much of the rest of the party.

That divide crystallized yesterday after POLITICO reported a July 28 memo signed by Manchin and Senate Majority Leader Chuck Schumer (D-N.Y.) specifying a $1.5 trillion top line for reconciliation — much lower than House Democrats’ $3.5trillion package — and the inclusion of natural gas, coal and carbon capture in clean energy tax policies (Greenwire, Sept. 30).

Manchin’s stance is threatening to derail the proposed Clean Electricity Performance Program (CEPP) that would likely be central to meeting President Biden’s emissions goals, frustrating Democrats who see reconciliation as one of the last chances to address climate change before it’s too late.

“It's not anything that you can really negotiate away,” Select Committee on the Climate Crisis Chair Kathy Castor (D-Fla.) said in an interview yesterday. “We either follow the science, or we condemn ourselves to higher costs and more catastrophes.”

The leaked document, which Manchin confirmed to reporters yesterday, inserted another twist into the ongoing fight in the House over the bipartisan infrastructure bill. It was initially scheduled for a vote yesterday, but progressives planned to sink it without a deal with Manchin and fellow moderate Sen. Kyrsten Sinema (D-Ariz.) on reconciliation. The vote was delayed after talks that dragged into yesterday evening.

The document includes several climate-related stipulations, namely that Manchin’s committee be charged with writing any clean energy standard and that if clean energy tax breaks are extended, fossil fuel tax benefits should be preserved.

Climate spending, it says, should be “fuel neutral,” and carbon capture and storage should allow natural gas and coal to “feasibly qualify” for energy tax policies. Manchin is also doubling down on his concerns with the CEPP, which he laid out in detail this week during an Energy and Natural Resources hearing (Greenwire, Sept. 28).

“I am just not for giving public companies, who have shareholders, public dollars for free when I know they’re going to be very profitable at the end whatever we do,” Manchin told reporters outside the Capitol yesterday.

“I'd love to have carbon capture, but we don't have the technology because we really haven't gotten to that point,” Manchin added. “And it's so darn expensive that it makes it almost impossible.”

But House Democrats scoffed at the idea that coal and natural gas would get a place in a climate policy, even if some acknowledged a potential role for carbon capture.

“To those of us in the real world, coal and natural gas are not clean. They're just not,” Rep. Jared Huffman (D-Calif.) told reporters. “So let's stop pretending, and let's get real.”

Castor similarly said, “That’s not clean energy,” when asked about the role of natural gas and coal. “You could include carbon capture with guard rails that you're still meeting the clean energy goals, that you're reducing carbon pollution and greenhouse gas pollution,” she added.

The House reconciliation bill, as currently written, includes $150 billion for the CEPP, essentially a clean energy standard redesigned to fit the budget process, and billions more for electric vehicles, the grid and a federal green bank.

The CEPP would offer grants to power providers that increase their share of clean generation by 4 percent each year and fine those that do not. The emissions threshold for what qualifies as clean power would be 0.1 metric ton of carbon dioxide equivalent per megawatt-hour, ruling out natural gas and coal without carbon capture.

That structure could change as negotiations with Manchin continue, Rep. Paul Tonko (D-N.Y.), who chairs the House Energy and Commerce Subcommittee on Environment and Climate Change, said this week. "But I want to keep it as strong as possible," Tonko said.

Sen. Tina Smith (D-Minn.), one of the program’s architects, and other Democratic senators have been lobbying Manchin on the CEPP for weeks. Smith said she and Manchin “continue to have conversations” about the CEPP, but she also warned that negotiations would ultimately have to please all 50 members of the Senate Democratic caucus.

“I just keep reinforcing to everybody that we have to come up with an agreement that 50 senators can agree with, not just one or two,” Smith said yesterday. “I'm looking for strong climate provisions across the board,” she added.

Another key negotiator with Manchin is Finance Chair Ron Wyden (D-Ore.), who is pushing a broad clean energy tax plan that includes a repeal of fossil fuel subsidies. Wyden said yesterday that he and the West Virginia Democrat are “having a number of conversations with respect to energy issues.”

For House progressives, the CEPP and other climate provisions will likely be key to their support for whatever agreement leadership can strike with Manchin and Sinema, but it remains unclear where, exactly, they would draw a line.

For the most part, they’ve left the door open to changes in overall spending, means testing for electric vehicle tax credits and even potentially shortening the duration of funding for some programs to bring down the top line.

“I've got to get the things that are critical for clean energy and climate, and there can't be funny business,” Huffman said.

In the Senate, Manchin’s colleagues have refrained from chiding him publicly as negotiations continue. That’s not to mention Sinema, who has been more publicly opaque about her negotiating position and who issued a statement yesterday saying she would “not support a bill costing $3.5 trillion.”

But Sen. Martin Heinrich (D-N.M.), a member of ENR who has been pushing for the CEPP, quoted a 2009 op-ed by the late West Virginia Democratic Sen. Robert Byrd in a tweet yesterday.

"To be part of any solution, one must first acknowledge a problem. To deny the mounting science of climate change is to stick our heads in the sand and say deal me out,” Byrd wrote as lawmakers debated the Waxman-Markey cap-and-trade bill.

“West Virginia would be much smarter to stay at the table."

Byrd, Heinrich said, “was onto something.”

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**Finishing the 2AC card.**

different countries over the world, as shown by our analyses on the full sample, as well as various subsamples. If governments can effectively monitor the variations in uncertainty and evaluate the relevant market responses, they will be able to understand the current situation and forecast future tendency of aggregate R&D investment in a better way. Being more informed will facilitate governments to make proper public policies if necessary. After understanding the link between uncertainty and R&D, firms can reasonably expect that other enterprises in the industry will **adjust investment** accordingly when **uncertainty changes**. During the procedure of making their own R&D investment plans, firms should not neglect the potential responses of the competitors and partners to varying uncertainty.

Second, given the **importance of innovation** and **technological advancement** for sustainable economic and social development, it is necessary to reduce the degree of macro uncertainty. Governments should avoid frequent variations of economic policies and the **abrupt implementation of substantial reforms**. The communication and information sharing among governments and private sectors should be reinforced to reduce noises, mitigate misunderstanding, and enhance trust and confidence. Countries should also improve their institutional and economic infrastructure—for example, by reducing frictions in financial markets and strengthening governmental effectiveness—in order to increase the resistibility of economic system to unexpected shocks. In the case that the major origins of the uncertainty can be identified—such as the coronavirus pandemic in the current period—urgent actions should be carried out to deal with the problems

**Kills startups---VC investments are key to every facet of their innovative success.**

**Alvarez-Garrido 20** --- Assistant Professor at the Department of International Business at the University of South Carolina, Darla Moore School of Business.

Elisa, 03-2020, “The impact of VC firms on startup innovation,” Mack Institute, https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2020/03/Alvarez-Garrido-Elisa\_Uncovering-the-Impact-of-Venture-Capital-Firms-on-Startup-Innovation.pdf

Investors may be able to help startups overcome some of the **obstacles** that arise in the innovation process, hence increasing their **chances of success**. Venture capital **(VC) firms** are of particular interest because they have a **significant impact** on economic growth through the financing of **innovative startups** (Gornall and Strebulaev, 2015; Samila and Sorenson, 2011; Timmons and Bygrave, 1986), and their contribution to startups goes well beyond merely financing (e.g., Gorman and Sahlman, 1989; Hellmann and Puri, 2002; Hsu, 2006). Kortum and Lerner (2000) provided the first empirical proof that VC investment was associated with **higher levels of patenting**, after accounting for the entrepreneurial opportunities and technological advancements in each industry. The effect is economically **very significant**: with 3 percent of R&D investment, VC investments amount to 8 percent of patents in the U.S. (Kortum and Lerner, 2000). Samila and Sorenson (2011) further support the impact of VC on innovation. They show that the supply of VC in a region fosters startup patenting not only directly, but also indirectly by **enhancing** the effect of **research grants**. These studies jointly provide empirical proof that VC firms, on average, **foster startup innovation** at an early stage above and **beyond selection**.

**Ptx DA**

**Zero politicians perceive antitrust court decisions.**

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

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

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

**Their ev---blue**

HEATHER DIGBY **PARTON OCTOBER 1**, 2021, “Manchin and Sinema finally feel the pressure from Democrats. Is it too late to save Biden's agenda?” SALON, <https://www.salon.com/2021/10/01/manchin-and-sinema-finally-feel-the-pressure-from-democrats-is-it-too-late-to-save-bidens-agenda/>

It would be easy to mock Manchin standing there addressing his people from on high, considering that he and his partner in obstruction Sen. Kyrsten Sinema, a Democrat from Arizona, are both behaving like a couple of theatrical divas. In the last few days especially, both of them have been all over the place, ostentatiously declaring their independence and generally driving everyone nuts with their vague and inconsistent objections combined with constant, tiresome grandstanding. But if you can get past the bizarre spectacle and listen to what Manchin said, it's clear that all is not lost. Yes, Manchin balked at expanding Medicare benefits with a bogus claim that the federal program is going broke. (It is not.) But, importantly, he did say that he believed in taxing the rich and that we should be negotiating for lower drug prices. That's a more concrete promise than we've seen from him in quite some time. That little interaction came on the heels of the release earlier in the day of a memo from last summer, co-signed by Majority Leader Chuck Schumer (who added that he would try to talk Manchin out of it), that outlined Manchin's "topline" number for the bill: 1.5 trillion. If Manchin is negotiating in good faith, then that number cannot be written in stone, leaving at least some room for compromise. The publicizing of this proposal was obviously in response to a growing chorus of Democratic frustration that Manchin and Sinema were throwing their weight around and preening for the press without laying out their own counter-offers. After weeks of op-eds and press gaggles in which Manchin was saying that he wanted a "strategic pause" and appeared not to be interested in passing a bill at all, the release of this memo at least ended that charade. Manchin may still blow up the president's agenda, but he is apparently now **negotiating specifics, which is hopeful**. There have been a gazillion pixels deployed on the question of what Kyrsten Sinema really wants and it's quite difficult to fathom. My personal opinion is that she is simply carving out a brand as an Arizona Maverick and believes that drawing attention to herself as someone who bucks the party will stand her in good stead back home. **It's hard to imagine that destroying the Democratic agenda** and ushering in another era of GOP dominance, likely led by Donald Trump, will endear her to her base voters but that seems to be her motivation. It certainly isn't any adherence to ideology or principle. But it turns out that she too felt the pressure of the criticism coming from the party and so released a statement on Thursday insisting that she is negotiating with all the parties and has offered specifics, although she didn't say what those were. What this all means is that **the two bills — and thus Biden's agenda — still have a chance for passage**. On Thursday night, the House worked with the White House and members of the Senate into the wee hours but were unable to come to an agreement on the reconciliation bill. So they missed the vote on the bipartisan infrastructure bill by the deadline agreed to by House Speaker Nancy Pelosi to appease a small handful of recalcitrant House "moderates." It was an arbitrary date, so missing it is insignificant in itself. They plan to continue to negotiate today and beyond if that's what it takes. This is monumentally important legislation and it makes no sense to cobble together a deal at 2 AM for no good reason. Notably, the House progressives are holding together in their demand that the infrastructure bill will not pass unless the Senate also passes the rest of the Biden agenda in the larger reconciliation package. From the gasps in the media as Thursday night wore on, it seems that few believed they would do it. In fact, they apparently thought that they had done something catastrophic when, in reality, they were just being smart negotiators. That headline is just wrong. The progressives were not alone in this and **it isn't a big setback**. The leadership didn't whip for votes on Thursday night and for good reason: The entire Democratic caucus minus a small handful in the House and two Senators are on board with this legislation. Even more importantly, the President of the United States is with the progressives as well. Politico reported on Thursday that **the White House** is happy with the progressive strategy to hold fast to their terms in the hopes that it would **put pressure on Manchin and Sinema to get with the program**. It quotes Press Secretary Jen Psaki being downright complimentary in the press briefing this week, saying "[M]embers of the Progressive Caucus want to have an understanding of the path forward on the reconciliation package. They have stated that publicly. You know why? Because they think it's a historic progressive package that will make bold changes into addressing our climate crisis, into lowering costs for the American people, bringing more women back into the workplace." In press appearances, progressives have likewise been on message, making very clear that they want to vote for the Biden agenda and it's the small rump of so-called moderates who are standing in the way. Politico characterized the relationship this way: Ultimately, the White House wants to see the infrastructure bill passed when it is brought up. But the idea that it would be comfortable with an effort by a portion of its own party to delay and put into question one of the president's most important initiatives would have been unheard of in previous administrations. These, however, are not normal times. And this is hardly a normal legislative calendar. And it is not your grandfather's Progressive Caucus either. They are a savvy group, leveraging their numbers to pass an ambitious agenda that's been proposed by a mainstream Democratic president. They are a force to be reckoned with. I don't know what will happen today. Pelosi says there will be a vote. It sounds as though **Manchin and Sinema have moved off their high horses**, at least for now, and are seriously engaged in the details. But there's nothing wrong with taking the time to hash this out and get an agreement and if it takes some more time it's worth it. What they all must recognize is that this is their shot to do something historically important and if they don't succeed they may not get another chance. The future of the country — and the planet — depend on it.

**Manchin ruins any climate provisions – 0 chance they can solve their impact**

**Goodell 10/1** – Jeff Goodell is an American author and contributing editor to Rolling Stone magazine. Goodell's writings are known for a focus on energy and environmental issues.

Jeff Goodell, October 1 2021, “Joe Manchin Just Cooked the Planet,” The Rolling Stone, https://www.rollingstone.com/politics/political-commentary/joe-manchin-reconcilation-bill-big-coal-1235597/

West Virginia Sen. [Joe Manchin](https://www.rollingstone.com/t/joe-manchin/) just cooked the planet. I don’t mean that in a metaphorical sense. I mean that literally. Unless Manchin changes his negotiating position dramatically in the near future, he will be remembered as the man who, when the moment of decision came, chose to condemn virtually every living creature on Earth to a hellish future of suffering, hardship, and death.

Quite a legacy. But he has earned it.

Last night, during the insane and at times comical negotiations over President Biden’s [infrastructure](https://www.rollingstone.com/t/infrastructure/) bill and his $3.5 trillion Build Back Better agenda (aka the reconciliation bill), **Manchin let it be known that he was not going to vote for any measure above $1.5 trillion**. And because Democrats can’t afford to lose a single vote in the Senate, if Manchin won’t vote for it, the reconciliation bill won’t pass.

The $3.5 trillion reconciliation bill includes a long list of programs and tax reforms that will help reduce poverty and improve the social safety net, such as universal child tax credit, universal pre-K, free community college, and an expansion of Medicare. But it is also the primary vehicle for President Biden’s ambitious climate action agenda, including cuts in subsidies for the fossil fuel industry, and, most importantly, the Clean Energy Performance Package (CEPP), which is a clean energy standard that incentivizes power companies to shift away from fossil fuels.

From a climate point of view, the importance of these climate policy measures is impossible to overstate. In order to have a decent chance at maintaining a habitable planet, scientists agree that the world needs to zero out carbon pollution by 2050. And to have any shot at that, we have to start moving now. Every year, every month, every hour of delay makes that goal more difficult to achieve, and increases the risks of accelerated climate chaos that will make this past summer of hellish wildfires, storms, and droughts look like the good old days.

The zero carbon by 2050 goal is not a political slogan or environmentalist’s dream. It is what the best scientists in the world are telling us we need to do to avert climate catastrophe. It is also the basis for Biden’s goal of a 100 percent clean energy grid by 2035, and a 50 percent reduction in CO2 pollution by 2030. For Biden, taking strong action on climate is not just important in itself. It is also key to giving the U.S. climate negotiators something to bring to the table at the upcoming Glasgow climate talks, which begin on October 31st. After President Trump pulled the U.S. out of the Paris climate deal, the rest of the world has looked at the U.S. with distrust. Passage of strong climate measures in Congress before the Glasgow meeting would not only rehabilitate America’s standing as a nation that takes its contribution to solving the [climate crisis](https://www.rollingstone.com/t/climate-crisis/) seriously, but give U.S. negotiators leverage to push other nations to take action.

For Biden, and for the world, it all rests on the ability to get the reconciliation bill through Congress. With Republicans not willing to do anything, this was the only chance they had to get climate policy through. It was a gamble, but it was a gamble they had to take.

But **Manchin is fucking it all up**. To him, climate is a tomorrow problem. As **he**[**said**](https://slate.com/news-and-politics/2021/09/manchin-trillion-spending-plan-sanders.html) recently on CNN’s State of the Union: “**What’s the urgency?”**

Manchin is one of a small group of centrist Democrats who pretend to be motivated by fiscal restraint. They have pitched themselves as the sober adults in the room full of crazy Socialist progressives who are spending like drunken sailors on government programs. Manchin says he can only support $1.5 trillion, that is the number that he believes is responsible, and he won’t go beyond that. “I’m at $1.5 trillion — I think $1.5 trillion does exactly the necessary things we need to do,” he [said](https://www.nytimes.com/2021/09/30/us/politics/manchin-biden-agenda.html).

Yes, $1.5 trillion is a big number. And yeah, this is politics, you take the best deal you can get and move on. Half a loaf is better than no loaf.

But the problem is, **it’s not close to what we need on climate**. The policy specifics of the reconciliation bill are not yet clear, but what is clear is that Manchin won’t go along with anything that hurts the coal industry, including a reduction of the massive fossil fuel subsidies lavished on Big Oil and Big Coal. **And if the clean energy standard is included** (which is not at all clear at this point), **Manchin will be sure it is weakened to the point of being ineffectual.**

**FTC DA**

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

Ben **Brody**, Bloomberg, U.S. Google Monopoly Case Could Hit Supreme Court AmEx Hurdle, August 28, 20**20**, <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.

**It’s non unique.**

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, 20**20**, 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.