## 1AC---Texas v2

**1AC---Platforms**

Advantage 1 is Platforms---

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

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

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

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

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

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

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

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

B. Private Sector Institutional Dynamics

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

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

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

Ii. The Competition Shortcomings

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

A. Entry Barriers

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

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

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

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

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

C. International Competitiveness

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

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

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

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

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

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

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

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

Maintaining U.S. Leverage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Not too bad,” he said.

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

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

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

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

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

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

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

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

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

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

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

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

Solutions for Sanctions Risks

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

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

**Strong sanctions prevent Iranian nuclear acquisition**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**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**.

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

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

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

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

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

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

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

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

**1AC---Conduct**

Advantage 2 is Conduct---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Whither Innovation?

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

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

CONCLUSION: “ANTITRUST IS GREEDY”

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

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

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

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

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

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

How Data-opolies Harm

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

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

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

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

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

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

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

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

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

**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.

**1AC---Search**

Advantage 3 is Search---

**Google’s self-preferencing flagrantly violates the Sherman Act---annihilates small firms and forecloses competition.**

**Hanley 7/8** --- Senior Legal Analyst with the Open Markets Institute. His research focuses on the relationship between technology platforms and antitrust. Before joining Open Markets, Daniel honed his legal experience by working for several organizations including the Connecticut Department of Consumer protection by being award a Janet D. Steiger Fellowship in 2017 from the American Bar Association and as a legal intern with the Honorable Vanessa Lynne Bryant of the U.S. District Court for the District of Connecticut.

Daniel, 7/8/21, “How Self-Preferencing Can Violate Section 2 of the Sherman Act,” Competition Policy International, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3868896

With this framing, Google’s conduct exemplifies how a dominant firm can use **self-preferencing to monopolize a market and violate Section 2** of the Sherman Act. Numerous government reports and anecdotal accounts detail the exclusionary effects Google’s conduct has on market participants and consumers.23

Google’s market share in search far exceeds required thresholds for monopoly power under the Sherman Act.24 Multiple comprehensive investigations into the company’s operations found that Google’s market share in search is almost 90 percent.25 Other evidence also shows that Google is an “indispensable medium” and essential for a firm’s success.26 For example, Google is the top referral site for internet traffic; thus, **if a site is not on Google, it is close to not existing at all** on the internet for most consumers.27 Multiple accounts show that the corporation also has monopoly power in several other markets.28

Google has also engaged in “willful acquisition or maintenance of its monopoly” that harms the competitive process. In multiple instances, comprehensive reports show that Google obtained its dominant position by engaging in a surfeit of exclusionary conduct that includes the use of self-preferencing, making hundreds of acquisitions, and imposing many restrictive contracts on third parties rather than as a consequence of a “superior product, business acumen, or historic accident.”29 Specifically, concerning Google’s use of self-preferencing, two cases are particularly illustrative.

In 2011, the Federal Trade Commission investigated Google for self-preferencing its comparison shopping and local shopping sites.30 Google decided to explicitly demote the search rankings of rival sites like Yelp to promote and advantage its own digital properties, such as Google Maps and Google Shopping.31 Google effectively used its **horizontal monopoly** in general search (i.e. Google.com) to extend its market power into **vertical search services** (i.e. restaurant ratings and reviews).

In another instance, starting around 2015, Google wanted to maintain its dominant position in digital images. To do this, Google **changed its search ranking algorithm** and entered into agreements with Shutterstock and Getty Images to supply it with high-quality stock photos. Google’s changes and agreements significantly demoted the search ranking of Dreamstime, a rival stock photo provider. Since Google relegated Dreamstime’s site to the **back pages of its search results**, it effectively made Dreamstime’s site and other similarly situated sites that do not have an agreement with Google **invisible to consumers** and **depriving consumers of an alternative service**.32 Dreamstime even tried to increase their spending by millions of dollars on Google’s advertising platform, hired advertising and search consultants, and implemented a series of changes recommended by Google to improve their search ranking, all to no avail.

Both of these instances provide an adequate basis for a **violation of Section 2 of the Sherman Act**. In both examples, Google used self preferencing derived from its “dominant economic power” to “**foreclose competition**, to gain a competitive advantage, or to destroy a competitor” and harm the competitive process, — as opposed to succeeding on account of “superior service, lower costs, and improved efficiency.”34 Since Google is indispensable to third parties,35 an artificially lower search ranking from self-preferencing can be devastating for a firm’s competitive position. As such, self-preferencing not only leads to substantial foreclosure of a rival site, but it also can raise the costs to dependent firms because a firm may have to either enter into a special deal with Google or pay for advertising on Google’s search platform to ensure they are at a higher search position.36 All of this has the effect of raising a rival’s costs or forcing a dependent firm to operate in a significantly weaker bargaining position as a direct result of the firm’s market power and self-preferencing.

**Google’s actions are similar to those in a previous Supreme Court case** that affirmed a finding of monopolization and a violation of Section 2 of the Sherman Act in 1973.38 Like Google, Otter Tail Power Company was a vertically integrated corporation (in this case, an electrical utility) that had monopoly power in its relevant market.39 Like Google’s search engine, Otter Tail’s electrical generation and distribution infrastructure were not easily replicable by rivals.40 Like Google’s actions toward Dreamstime, Yelp, and others, Otter Tail used its “strategic dominance” and control of its infrastructure to disadvantage and foreclose municipal rivals by refusing to transmit power over its own power lines from generators to municipal utilities to protect its distribution monopoly.

The primary rationale for the Supreme Court’s decision that Otter Tail violated Section 2 of the Sherman Act is because the company “[used its] monopoly power to destroy threatened competition[.]”42 Importantly, the **Court also distinguished Otter Tail’s conduct from fair competition principles** in which firms, including monopolists, succeed through “superior service, lower costs, and improved efficiency” rather than the use of unfair or exclusionary tactics.

In addition to Google’s monopoly power and exclusionary tactics, other aggravating factors increase the likelihood that the corporation is seeking to maintain its monopoly in violation of the Sherman Act. First, similar to other exclusionary monopolization offenses (like exclusive dealing or tying), self-preferencing does not need to be used against every possible competitor or cause full foreclosure of a rival or dependent firm to obtain the desired adverse effect.44 For example, Google does not need to demote the search rankings of every rival vertical search engine or even remove a rival firm like Yelp or Dreamstime from their site entirely. Detailed analysis shows that **less than 1 percent of users clicked on a link on the second page of a Google search result**, and most user clicks are confined to the first few search results.45 Thus, getting demoted even slightly would effectively relegate a site to digital jail. Similar effects exist across other sites like Amazon.46 In fact, selective manipulation, exclusion, or demotion of a site like Yelp or Dreamstime may actually be just as, if not more of, an effective indicator to determine whether a firm is intending to exclude a rival to leverage into a market or attempting to succeed in the marketplace by providing “superior service, lower costs, and improved efficiency.”47 Additionally, excluding individual firms by self-preferencing may also prove to be an easier path to maintain a firm’s dominance.48 As the Supreme Court stated in 1959, violations of the Sherman Act are “not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such **small businessmen**, one at a time, as it can by **driving them out in large groups**.

Along similar lines, since self-preferencing needs to be only applied selectively to obtain significant exclusion of a rival or dependent firm, consumers would generally be unable to know or discover that such actions are taking place.50 The founders of Google admitted this and were acutely aware that self-preferencing would also be “very difficult to detect” and have “a **significant effect on the market**.

Second, many technology industries, like internet search, have high barriers to entry and the GAFA corporations have durable and persistent monopoly power.52 In Google’s case, no competitor has meaningfully challenged its dominant position in almost two decades. Such a situation increases the presumption that **antitrust action is warranted**.

Third, self-preferencing facilitates other kinds of predatory and exclusionary behavior condemned by the antitrust laws, including tying.54 Self-preferencing can operate as a form of tying since a company like Google, by preferencing its own services (or the services of other companies) and demoting rivals, encourages users to adopt its products and services together, potentially **locking them in**. Thus, self-preferencing can raise barriers to entry such that a rival service is unfairly inhibited from obtaining a sufficient number of users to be a viable market participant.

Lastly, while benign forms of self-preferencing exist, such as a non-dominant grocery store changing the shelving placement of food items to favor its own in-store brands,56 there are critical differences that distinguish that conduct from Google’s and similarly situated digital giants.57 Unlike an individual grocery store, Google has monopoly power.

Also, as opposed to the physical world, in the digital realm, users confine their searches to the first set of results they are shown. In the digital realm, searching for a particular website or product is a nearly endless process. There will always be more results than a user can review. Thus, in part, there is a “paradox of choice” that exists, and consumers feel that it is not worth their time to endlessly explore options they are presented with.58 As such, users, across multiple technology platforms, confine their search to the first page they are presented with rather than engage in a more scrupulous search as they likely would for a product if they were at a physical retail outlet.59 Thus, self-preferencing in the digital realm can have significant foreclosure effects that are not analogous to physical retailers. All these aggravating factors can **just as easily apply to the conduct or industries of the other digital giants.**

**Erodes local businesses---ending anti-competitive self-preferencing is necessary and sufficient to solve**

Pat **Garofalo 20**, 8-30-2020, "Close to Home: How the Power of Facebook and Google Affects Local Communities," American Economic Liberties Project, https://www.economicliberties.us/our-work/close-to-home-how-the-power-of-facebook-and-google-affects-local-communities/#

**Google Undermines Local Businesses**:

For a local business to operate and be successful, local residents must be able to find it. There’s a long history of enabling such matchmaking between customers and businesses through newspapers, radio, TV, directories, and local advertising channels. Today, one of the **key mechanisms** filling this critical function is local search. **Local search is the single largest category of search** on Google, the world’s dominant search engine. In 2018, Google said local search grew by 50 percent over the year before, outpacing the overall search market.[18] More than 80 percent of cell phone users report searching for businesses “near me.”[19]

And yet, Google’s search properties, either general search or via its Maps subsidiary, often hurt local businesses and residents by allowing scammers to infiltrate its listings. For instance, Florida locksmith Rafael Martorell explained that the name of his business, A-Atlantic Lock and Key, was stolen by scammers on Google who pretended to be him and would charge customers five or six times what he normally charged. “One of the scammers put the name of my company, and the address that he put was my own house,” he said, alleging that such practices are an epidemic in the locksmith industry.[20]

“90 percent of our advertising, most of that for years was the Yellow Pages,” Martorell said. “Then suddenly Google came, without us noticing. And then we figured it out, we knew we had to go to Google and that is when the issues began. Because the local listings, most of them are fraudulent. Completely phony, fraudulent.”[21] The Wall Street Journal noted several other sectors in which similar scams have occurred.[22]

Since Google is so dominant in search, merchants have little alternative to battling the corporation endlessly, trying to buy ads for which they can’t ascertain the true value – and where a substantial amount of clicks can be fraudulent[23] – or simply vanishing from the vast majority of internet searches when they are either not listed or when their listing has incorrect information. (Facebook can create similar issues for small businesses via fraud, driving up costs for businesses running ads and opaque algorithm changes that limit small businesses ability to ensure their customers actually see their content.)[24][25]

Google’s size and scale leads to neglect of local needs. The corporation has eight products with more than a billion users, so the ability of a top executive to focus on any one town, or even a major city, is virtually nil. Google is slow to correct misinformation and has allowed whole neighborhoods to be renamed thanks to user mistakes. In other instances, Google has decided that an entire sector of the economy, such as third-party tech repair shops, is simply too difficult to validate, so it excludes them from search results entirely.[26]

Google’s power is immense, and in some ways, more significant than that of the government. As one businessperson told the Wall Street Journal, “if Google suspends my listings, I’m out of a job. Google could make me homeless.”[27]

Poor-quality results can even be profitable for Google. Legitimate businesses often pay for ads on Google in order to rise back above fraudulent listings. Martorell, for instance, spent $115,000 on Google ads between 2008 and 2015, before giving up on the platform and relying on local referrals.[28]

Local search is not an inherently concentrated business. There are competitors, such as Yelp, TripAdvisor, and other specialized vertical search engines that can compete over quality. And yet Google is a virtual monopoly. That’s because dominance didn’t occur naturally or through differentiating based on quality. It happened through the exercise of power and capital.

For example, Google pays to be the default search option on Safari on the iPhone. Google also provides its Android operating system and its app store Google Play to cell phone makers for free so that they make Google search the default on Android phones.[29]

This search dominance also allows Google to **preference its own products** providing local information **over those of its competitors**, even when its own organic search results indicate that Google content is of worse quality.[30]

Google’s search results have evolved over time. While the company once simply provided a list of hyperlinks to other websites, saying that it’s goal was to get consumers into Google and then out to their preferred web destination as quickly as possible, it now provides answers to specific queries and makes suggestions for content that can be accessed through Google directly, through its use of information boxes.

These include answers to factual questions, like offering that Thomas Jefferson was the third president without having to send the user to an online encyclopedia. But these boxes also allow Google to make a judgment call to preference its own content and products in harmful ways.

For example, a search for a local Thai restaurant will provide links to restaurant websites, but above the hyperlinked search results Google provides direct links to restaurants on Google Maps and Google’s restaurant reviews, as shown below:

Placement on a Google results page is critical because **more than a quarter of users** click the **very first result of a search**, while just 2.5 percent click on the tenth. **Barely any users venture onto the second page of results**.[31] As of 2019, less than half of Google searches result in a user clicking away from Google.[32]

Google’s ability to exclude competitors leads to the quality degradation in results, and so users end up more susceptible to fraudulent listings than they would otherwise, undermining the **relationship between local businesses and local customers.**

As one study on Google’s self-preferencing noted, “The easy and widely disseminated argument that Google’s universal search always serves users and merchants is demonstrably false.”[33] The European Union in 2017 fined Google €2.4 billion euros for similar self-preferencing of its Google comparison shopping products, which it placed above those of other third-party sales platforms or direct vendors.[34]

According to at least two studies, users prefer the content that Google’s algorithm would naturally show them to that shown when Google circumvents its algorithm to preference its own content. In 2015, Michael Luca, Tim Wu, Sebastian Couvidat, and Daniel Frank found that users are 40 percent more likely to engage with local search content produced by Google’s organic algorithm than they are with the content Google instead preferences in local search. (Yelp, a Google competitor, provided funding for the study.)

“Google is degrading its own search results by excluding its competitors at the expense of its users,” they wrote. “In the largest category of search (local intent-based), Google appears to be strategically deploying universal search in a way that degrades the product so as to **slow and exclude challengers** to its dominant search paradigm.”[35]

In a 2018 paper, Luca and Hyunjin Kim also found that users preferred organic search results to Google’s preferenced results. Furthermore, they found that other, more specialized search engines saw a fall in traffic as a result of Google’s actions tying its reviews product to its search engine.[36] “Our findings suggest early evidence that dominant platforms may, at times, be degrading products for strategic purposes, such as excluding competitors in adjacent markets that they are looking to enter or grow in,” they wrote.

The Federal Trade Commission in 2013 concluded that such behavior was anti-competitive, though it closed the investigation without action. According to documents from that investigation that were accidentally leaked to the Wall Street Journal, Google engaged in this conduct because it feared competition from specific search verticals such as Yelp and TripAdvisor. One executive in an email explicitly pointed to the threat such specific verticals posed to Google’s traffic, and therefore revenue.[37]

An **inability for customers and local businesses to find each other**, whether because there are too many scam listings to wade through or because Google is pushing an inferior product, **hurts local economies** – first, by potentially driving legitimate businesses under via depriving them of customers, and second by exposing customers to fraudulent businesses charging excessive rates. **Changing Google’s business model** so that it doesn’t have **incentives to self-deal** or tolerate scam artists **will begin to rectify these problems.**

**SMEs key to economic strength and quick recovery from decline.**

**Longley 21** --- U.S. government and history expert with over 30 years of experience in municipal government and urban planning.

Robert, 7-26-2021, "How Small Business Drives U.S. Economy," ThoughtCo, https://www.thoughtco.com/how-small-business-drives-economy-3321945

What really drives the U.S. economy? No, it is not war. In fact, it is **small business** -- firms with fewer than 500 employees -- that drives the U.S. economy by **providing jobs for over half of the nation's private workforce**.In 2010, there were 27.9 million small businesses in the United States, compared to 18,500 larger firms with 500 employees or more, according to the U.S. Census Bureau. These and other statistics outlining small business' contribution to the economy are contained in the Small Business Profiles for the States and Territories, 2005 Edition from the Office of Advocacy of the U.S. Small Business Administration (SBA). The SBA Office of Advocacy, the "small business watchdog" of the government, examines the role and status of small business in the economy and independently represents the views of small business to federal government agencies, Congress, and the President of the United States. It is the source for small business statistics presented in user-friendly formats and it funds research into small business issues. "Small business drives the American economy," said Dr. Chad Moutray, Chief Economist for the Office of Advocacy in a press release. "Main Street provides the jobs and spurs our economic growth. American entrepreneurs are creative and productive, and these numbers prove it." Small Businesses Are Job Creators SBA Office of Advocacy-funded data and research shows that small businesses create more than half of the new private non-farm gross domestic product, and they create 60 to 80 percent of the net new jobs. Census Bureau data shows that in 2010, American small businesses accounted for: 99.7% of U.S. employer firms; 64% of net new private-sector jobs; 49.2% of private-sector employment; and 42.9% of private-sector payroll Leading the Way Out of the Recession Small businesses accounted for 64% of the net new jobs created between 1993 and 2011 (or 11.8 million of the 18.5 million net new jobs). **During the recovery** from the great recession, from mid-2009 to 2011, small firms -- led by the larger ones with 20-499 employees -- accounted for **67% of the net new jobs** created nationwide. Do the Unemployed Become Self-Employed? During periods of high unemployment, like the U.S. suffered during the great recession, starting a small business can be just as hard, if not harder than finding a job. However, in March 2011, about 5.5% -- or nearly 1 million self-employed people – had been unemployed the previous year. This figure was up from March 2006 and March 2001, when it was 3.6% and 3.1%, respectively, according to the SBA. Small Businesses Are the Real Innovators Innovation – new ideas and product improvements – is generally measured by the number of patents issued to a firm. Among firms considered “high patenting” firms – those being granted 15 or more patents in a four-year period -- small businesses produce 16 times more patents per employee than large patenting firms, according to the SBA. In addition, SBA research also shows that increasing the number of employees correlates with increased innovation while increasing sales does not.

**Decline cascades---nuclear war**

Dr. Mathew **Maavak 21**, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard **global social instability** as the **greatest threat** facing this decade. The catalyst has been postulated to be a **Second Great Depression** which, in turn, will have **profound implications** for **global security** and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and **intertwined**; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. **Tight couplings** in our **global systems** have also enabled risks accrued in **one area** to **snowball** into a **full-blown crisis** **elsewhere**. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, **health**care and retail sectors etc. are increasingly **entwined**. Risks accrued in **one system** may **cascade** into an **unforeseen crisis** within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of **intersecting systems** is determined by **complex** and largely **invisible interactions** at the **substratum** (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a **trickle-down meltdown**, impacting **all areas** of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a **Second Great Depression**. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce **radical geopolitical realignments**. Bullions now carry more weight than NATO’s **security guarantees** in **Eastern Europe**. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this **erosion** in **regional trust** was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the **U**nited **S**tates and China – set on a **collision course** with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the **seismic ripples** will be felt **far**, **wide** and for a **considerable period**.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the **environment** when our **economies implode**? Think of a **debt-laden** workforce at sensitive **nuclear** and **chemical plants**, along with a concomitant **surge** in **industrial accidents**? **Economic stressors**, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the **biggest threats** to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a **taxonomical silo**. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the **cascading potential** of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial **overcompensation**. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be **hijacked** by nationalist sentiments. The **environmental fallouts** of critical infrastructure (CI) breakdowns loom like a **Sword of Damocles** over this decade.

GEOPOLITICAL

The **primary catalyst** behind **WWII** was the **Great Depression**. Since history often **repeats itself**, expect **familiar bogeymen** to **reappear** in societies roiling with **impoverishment** and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly **forc**ing Israel to undertake **reprisal operations** inside allied nations. If that happens, how will **affected nations** react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? **Balloon effects** like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible **Iran-Israel war**; **US-China military confrontation** over **Taiwan** or the **S**outh **C**hina **S**ea; **North Korean proliferation** of **nuclear** and **missile technologies**; an **India-Pakistan nuclear war**; an **Iranian closure** of the Straits of **Hormuz**; **fundamentalist-driven implosion in the Islamic world**; or a **nuclear confrontation** between **NATO** and **Russia**. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

## 2AC

### Adv 1

#### Amex’s increased burden makes it effectively impossible to sue

Gupta, JD, founder, Gupta Wessler LLP, appellate and Supreme Court Advocate, lecturer at Harvard Law School, former CFPB Senior Litigation Counsel, ‘17

(Deepak, Brief of Open Markets Institute as Amicus Curiae in Support of Petitioners, *Ohio v. American Express*, <https://www.supremecourt.gov/DocketPDF/16/16-1454/23961/20171214162630698_16-1454%20Open%20Markets%20Amicus%20Brief.pdf>)

By introducing a special rule for “two-sided” markets, the Second Circuit needlessly departed from a longstanding approach to antitrust law. Its new rule greatly raises the burden that a plaintiff in the “twosided” market context must carry at the very earliest stage of litigation. Not only is the new rule unjustified, it is pegged to a concept that is contested and ill-defined. Defendant companies ranging from airlines to chicken processors could reasonably claim that they meet the definition of “two-sided,” winning themselves more favorable judicial review.

Basing a fundamental and often decisive inquiry on a slippery definition is a mistake. Troublingly, the Second Circuit’s approach also risks exempting from effective antitrust scrutiny the dominant tech platforms, including Amazon, Google, and Facebook. These firms enjoy dominant positions in key markets that provide ample opportunity for anticompetitive conduct, underscoring the need for robust antitrust enforcement. Yet if the Second Circuit’s rule is upheld, a wide range of anticompetitive activity would become virtually beyond reach, given the far higher burden that plaintiffs would have to meet to establish even a prima facie case. In practice, this approach would risk immunizing dominant platforms from effective antitrust review.

### 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---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---States CP

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

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

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

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

State Levels of Adherence

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

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

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

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

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

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

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

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

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

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

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

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

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

State Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

Workarounds

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

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

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

### 2AC---Adv CP

#### Governments investments backfire.

Thierer 8/18 – Adam Thierer is a Senior Research Fellow at the Mercatus Center at George Mason University. He specializes in innovation, entrepreneurialism, Internet, and free-speech issues, with a particular focus on the public policy concerns surrounding emerging technologies.  
Adam Thierer, August 18 2021, “Government Planning and Spending Won’t Replicate Silicon Valley,” Discourse, https://www.discoursemagazine.com/economics/2021/08/18/government-planning-and-spending-wont-replicate-silicon-valley/

Politicians used to promise a chicken in every pot. Today, it’s a Silicon Valley in every state.

The computing and internet revolutions gave rise to prominent tech clusters in Silicon Valley, Seattle, Boston, Austin and elsewhere. This has left many pundits and policymakers wondering how America might [spread the wealth](https://itif.org/publications/2019/12/09/case-growth-centers-how-spread-tech-innovation-across-america), so to speak, by reproducing these successes in other parts of the country.

A major effort is afoot to do just that. While promoting “innovation hubs” and “science parks” has been a long-standing priority for many state and local officials, a more concerted effort is now underway that marries traditional state and local economic development efforts with a renewed bipartisan interest in [comprehensive industrial policy planning](https://www.researchgate.net/publication/352259022_Does_the_US_Need_a_More_Targeted_Industrial_Policy_for_AI_High-Tech) at the federal level.

Earlier this summer, the Senate passed a 2,300-page industrial policy bill, the “[United States Innovation and Competition Act of 2021](https://www.congress.gov/bill/117th-congress/senate-bill/1260/text),” that included almost $10 billion over four years for a Department of Commerce-led effort to fund 20 new regional technology hubs, “in a manner that ensures geographic diversity and representation from communities of differing populations.” A similar proposal that is moving in the House, the “[Regional Innovation Act of 2021](https://www.congress.gov/bill/117th-congress/house-bill/4588/text),” proposes almost $7 billion over five years for 10 regional tech hubs.

Meanwhile, the Biden administration also is pitching ideas for new high-tech hubs. In late July, the Commerce Department’s Economic Development Administration [announced plans](https://www.aip.org/fyi/2021/commerce-department-dedicating-1-billion-spur-%E2%80%98regional-industry-clusters%E2%80%99) to allocate $1 billion in pandemic recovery funds to create or expand “regional industry clusters” as part of the administration’s new [Build Back Better Regional Challenge](https://eda.gov/arpa/build-back-better/). Among the possible ideas the agency said might win funding are an “artificial intelligence corridor,” an “agriculture-technology cluster” in rural coal counties, a “blue economy cluster” in coastal regions, and a “climate-friendly electric vehicle cluster.”

Efforts to geographically diversify tech clusters are rooted in an understandable desire to extend the benefits of technological innovation beyond major cities. It is hard to fault state and local policymakers for wanting government to do more to attract new investment, firms and jobs to their communities.

Unfortunately, the “if you build it, they will come” mentality surrounding tech clusters and regional innovation hubs doesn’t take into account many economic, political, cultural and geographic challenges. Indeed, the history of previous efforts proves that these things cannot simply be willed into existence through top-down industrial policies, big bureaucracies and a lot of new spending programs. Clusters tend to grow more organically, and efforts by the government to force them are unlikely to meet with any more success than past experiments.

Wishful Thinking About Economic Development Subsidies

“Economic theory offers little reason to think that targeted economic development subsidies benefit the broader communities that ultimately pay for them,” concluded a recent Mercatus Center study on “[The Economics of a Targeted Economic Development Subsidy](https://www.mercatus.org/publications/government-spending/economics-targeted-economic-development-subsidy).” The authors highlighted the extensive economic literature that finds that “the net effect of targeted economic development subsidies is likely to be negative” because “the taxes funding the subsidies will discourage more economic activity than will be encouraged by the subsidies themselves.”

That points to the first problem with governments trying to pick winners: There is no free lunch. Economic development and industrial policy efforts always sound great in theory, but in the end they rely on government-granted privileges—discriminatory tax or regulatory relief, cash subsidies, loans and loan guarantees, in-kind donations and the provision of other valuable goods and services. The costs of these targeted privileges are passed along to those firms and economic sectors without the political clout to get the favors, or just borne by taxpayers more generally.

The second problem with policymakers trying to pick winners is that they’re just not very good at it. Forecasting future market trends and the evolution of technology has always been notoriously difficult, even in the private sector. Lacking a profit motive and business acumen, governments have a much worse track record than investors, regularly picking more losers than winners. This problem has grown more acute today due to “[the pacing problem](https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation),” which refers to the inability of government policies and programs to keep up with the ever-quickening pace of modern technological innovation.

These realities have not stopped policymakers from repeatedly trying to use both direct and indirect subsidies to attract high-tech sectors and talent to specific destinations. But there is no precise recipe for growing tech clusters. And as economists [William R. Kerr](https://www.hbs.edu/competitiveness/faculty/Pages/faculty-profile-details.aspx?profile=wkerr) and [Frédéric Robert-Nicoud](https://www.unige.ch/gsem/en/research/faculty/all/frederic-robert-nicoud/) [note](https://www.aeaweb.org/articles?id=10.1257/jep.34.3.50), “developing even a semi-formal definition is tricky.” Typically, however, a tech cluster includes “an important overall scale of local activity, complemented by spatial density and linkages amongst local firms.”

This is not easily replicated. Indeed, in the U.S. a huge amount of the nation’s high-tech startup activity and venture capital funding is concentrated only in Silicon Valley and eight other big-city areas: New York City, Boston, Los Angeles, Seattle, Washington, D.C., San Diego, Austin and Chicago. Of course, large cities have long possessed many advantages for attracting skilled labor and investors, and they often tend to have a high concentration of universities and research labs, making it far easier for tech clusters to develop in these large urban centers than in rural areas. Fine. But much of the nation is dotted with other large cities. Why can’t they become thriving tech clusters?

This kind of thinking is driving the latest push to create the next great innovation hub. “With federal support, the U.S. can recreate Silicon Valley success nationwide,” [says Steve Case](https://thehill.com/opinion/technology/550262-with-federal-support-the-us-can-recreate-silicon-valley-success-nationwide?rl=1), former head of America Online. [Others argue](https://www.brookings.edu/events/leveraging-regional-tech-hubs-to-advance-racial-equity/) regional tech hubs can help advance economic inclusion and racial equity.

### 2AC---Agency Tradeoff

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

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

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

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

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

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

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

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

#### No internal link—agency resources ineffective b/c they drive away the best talent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Lots of thumpers

Zakrzewski 8-19 (Cat Zakrzewski, technology policy reporter at The Washington Post, covers antitrust, privacy and the debate over regulating social media companies, former reporter for Wall Street Journal Pro Venture Capital, BS Journalism, Northwestern University; **internally citing competition policy director at the consumer group Public Knowledge Charlotte Slaiman, and George Washington University professor and former FTC chair William Kovacic**; “Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly,” The Washington Post, 8-19-2021, https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/)

“There’s multiple signals that FTC is serious about doing their job of investigations and bringing these cases and fighting them hard,” said Charlotte Slaiman, competition policy director at the consumer group Public Knowledge.

Though the most significant, the Facebook case is but one of a wide range of issues on Khan’s plate. A month after she assumed office, the Biden administration issued a sweeping competition executive order, which called for her agency to take a tougher line on concentration throughout the economy.

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way.

But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said.

And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court.

“The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic said.

### 2AC---Court Legitimacy DA

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

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

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

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

#### 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.

#### Public announcement delayed.

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

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

#### Court capital resilient.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Future controversy thumps.

AP 19 – Associated Press

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

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

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

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

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

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

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

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

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

#### Demographics check overpopulation—their authors ignore science

Berezow 13 (Alex B. Berezow is the editor of RealClearScience and co-author of Science Left Behind., 3/5/2013, "Humanity is not a plague on earth: Column", www.usatoday.com/story/opinion/2013/03/05/humanity-is-not-a-plague-on-earth-column/1965485/)

The world population is not exploding out of control. In fact, it is slowing down. In January, David Attenborough, an internationally renowned host of nature documentaries, revealed how disconnected he is from nature. Mankind, he recently warned, is a "plague on the earth." He said, "Either we limit our population growth or the natural world will do it for us." Nobody told him that world population growth is already slowing in nearly every part of the world. In many countries, demographers worry more about a shrinking population than an exploding one. Americans haven't gotten the memo, either. A Center for Biological Diversity poll released last week reports that a majority of Americans worry about population growth sparking global warming, killing off endangered species or causing other environmental mayhem. And, they say, we have a "moral responsibility" to do something about it. Nevertheless, the notion that humanity is a blight upon the planet is a long discredited idea, long nurtured by a vocal cadre of fearful prophets. Fearful history Thomas Malthus predicted more than 200 years ago that world population growth would outpace food production, triggering mass starvations and disease. In 1977, Paul and Anne Ehrlich, along with Obama administration "science czar" John Holdren, authored a textbook that discussed population control, including the unsavory possibility of compulsory abortions. As recently as 2011, Anne Ehrlich compared humans to cancer cells. Yet, science says otherwise. Indeed, what Attenborough, the Ehrlichs and Holdren all have in common is an ignorance of demographic trends. Anyone who believes that humans will overrun the earth like ants at a picnic is ignoring the data. Wealth plays role According to the World Bank, the world's fertility rate is 2.45, slightly above the replacement rate of 2.1. Some demographers believe that by 2020, global fertility will drop below the replacement rate for the first time in history. Why? Because the world is getting richer. As people become wealthier, they have fewer kids. When times are good, instead of reproducing exponentially (like rabbits), people prefer to spend resources nurturing fewer children, for instance by investing in education and saving money for the future. This trend toward smaller families has been observed throughout the developed world, from the United States to Europe to Asia. The poorest parts of the world, most notably sub-Saharan Africa, still have sky-high fertility rates, but they are declining. The solution is just what it has been elsewhere: more education, easier access to contraception and economic growth. Catastrophe avoided. Consequently, no serious demographer believes that human population growth resembles cancer or the plague. On the contrary, the United Nations projects a global population of 9.3 billion by 2050 and 10.1 billion by 2100. In other words, it will take about 40 years to add 2 billion people, but 50 years to add 1 billion after that. After world population peaks, it is quite possible that it will stop growing altogether and might even decline. Despite all indications to the contrary, global population cataclysm isn't at hand and never will be unless the well-established and widely researched trends reverse themselves. That's not likely.

### 2AC---Innovation Turn

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Since these concerns largely dissipate in these markets, the need to place a thumb on the scale in favor of defendants—that is, the need for the inquiry to end as soon as the defendant makes any plau sible claim of a procompetitive benefit—dissipates as well. And in the formula expressed above, a defendant-friendly approach lowers R by reducing the risk of antitrust liability for engaging in exclusionary, design-related conduct. Absent the usual check of market forces, such an approach even further incentivizes such conduct. Firms can and almost certainly do engage in anticompetitive design in these markets; witness Microsoft’s commingling of code,270 the FTC’s theory in In re Intel, 271 or Apple’s allegedly exclusionary software updates.272 While courts are rightly reluctant to review antitrust challenges to physical product design changes, code-based product markets exhibit unique features that obviate the need for an overly defendant friendly analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Begin fn82]

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

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

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

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

[End fn82]

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

#### Turn—Amex is so absurd it makes broad legislation *more likely*

Hovenkamp, James B. Dinan University Professor, Penn Law and the Wharton

School, University of Pennsylvania, ‘19

(Herbert, “Platforms and the Rule of Reason: The American Express Case,” Faculty

Scholarship at Penn Law. 2058)

But the theory never lived up to anything remotely resembling its expectations, although it did provide some valuable lessons. Even in the airline industry, thought to be a prime target for contestability, competition among incumbent carriers remains an important determinant of price and output. The theory of platform markets will pursue much the same course. After a brief period of exaggeration, industrial organization theory will be enriched, but will remain fundamentally the same. The *Amex* majority opinion serves to highlight what happens when a Court abandons fundamental economics in its haste to encounter something new. The decision that seems to come closest to Amex as an economic “misfire” is the Supreme Court’s 1992 ruling in Eastman Kodak Co. v. Image Technical Services, in which the Court held that sufficient power to condemn a tie of parts and service by a nondominant firm could be inferred from consumer “lock in.”230 Kodak was a six to three decision, but the reaction to Kodak was so strongly critical that subsequent lower court decisions went to great lengths to limit it.231 It has had little impact on antitrust outcomes even though lock-in is more prevalent today in our modern networked world than it was in 1992.

Other consequences could be on the horizon. This decision will encourage more legislation and regulation as more decision makers lose confidence in judge-made antitrust rules to promote competition. As Justice Breyer noted in his dissent, several jurisdictions around the world have acted against high interchange fees and antisteering rules, mostly by statute or agency rule.232 The United States legal system has historically relied less on regulation and more on antitrust law, which can be much less intrusive. But what this decision describes as “steering” is actually among the most ordinary and essential of competitive functions: encouraging people to acquire information and giving them the option to choose. This process protects the competitive process, both improving product quality and driving prices to the competitive level. For example, a common concern about healthcare costs is that they are so high because patients are indifferent to prices. First, medical bills are paid indirectly by insurers. Second, most patients do not even pay the insurance premium; rather, it is paid by either an employer or a government agency. As a result, the patient bears only a small portion of the cost and is inclined to spend too much. The antisteering rule operates in much the same way: it makes the cardholder indifferent to merchant costs and thus diminishes the consumer incentive to reduce them.

## 1AR

### Adv CP

**Consensus of academic studies disprove their solvency mechanism.**

**Thierer 8/18** – Adam Thierer is a Senior Research Fellow at the Mercatus Center at George Mason University. He specializes in innovation, entrepreneurialism, Internet, and free-speech issues, with a particular focus on the public policy concerns surrounding emerging technologies.  
Adam Thierer, August 18 2021, “Government Planning and Spending Won’t Replicate Silicon Valley,” Discourse, https://www.discoursemagazine.com/economics/2021/08/18/government-planning-and-spending-wont-replicate-silicon-valley/

Good Intentions Only Get You So Far

While these are noble goals, similar reasoning motivated earlier efforts to spawn innovation hubs, research parks and the like. Setting good intentions aside, however, the government’s past track record has been disappointing. “Despite several attempts, **Silicon Valley has not been successfully copied elsewhere**,” notes Mark Zachary Taylor, author of “[The Politics of Innovation: Why Some Countries Are Better Than Others at Science and Technology](https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780190464127.001.0001/acprof-9780190464127).” Judge Glock, a senior policy adviser with the Cicero Institute, offers a more [blistering assessment](https://www.city-journal.org/manufacturing-needs-fewer-regulations) of such efforts: “Almost every American state has tried to fund the creation of biotech clusters, projects that almost inevitably end with weeds growing through the parking-lot pavement and a trail of corrupt bargains.”

Glock’s assessment is backed by economic studies of efforts to incubate various types of high-tech hubs or science parks that stretch back over several decades. Twenty years ago, for instance, economist Scott Wallsten [surveyed](https://www.researchgate.net/publication/313726958_The_Role_of_Government_in_Regional_Technology_Development_The_Effects_of_Public_Venture_Capital_and_Science_Parks) government programs through 1997 aimed at promoting regional science and technology parks. He also [reviewed](https://www.researchgate.net/publication/24049109) the effectiveness of [Small Business Innovation Research (SBIR) program](https://www.sbir.gov/) efforts to boost capital investment in this regard. Wallsten found that “neither SBIR funds nor research parks have significant impacts on regional technology indicators. Indeed, the results seem to suggest that SBIR funds chase success, rather than vice versa, while research parks chase failure (regions experiencing reduced economic growth) and do not generally reverse it.”

A decade later, Harvard Business School economist Josh Lerner evaluated dozens of similar targeted development efforts from around the globe in his 2009 book “[Boulevard of Broken Dreams: Why Public Efforts to Boost Entrepreneurship and Venture Capital Have Failed—and What to Do About It](https://press.princeton.edu/books/paperback/9780691154534/boulevard-of-broken-dreams).” He concluded that “**for each effective government intervention, there have been dozens, even hundreds, of failures, where substantial public expenditures bore no fruit.”**

A major culprit for these failures, **Lerner argues, is “outright distortions by special interests” and a vocal “subsidy lobby**,” including trade associations and other groups and lobbyists who “are benefiting far more from the subsidies than the entrepreneurs the programs are designed to help.” For example, he found that the Small Business Investment Companies (SBICs)—federally backed risk capital programs sponsored by the Small Business Administration that started in the late 1950s—have included “hundreds of funds whose managers were incompetent or crooked.” Another study he highlights showed that “nine out of ten SBICs violated federal regulations in some way.”

Another [major survey](https://www.journals.uchicago.edu/doi/10.1086/674023) of efforts to create tech clusters was conducted by Aaron Chatterji, Edward Glaeser and William Kerr in 2014. They collected all the research conducted on the topic and concluded that existing evidence “suggests that the regional foundation for growth-enabling innovation is complex and that we should be cautious of single policy solutions that claim to fit all needs.” Furthermore, “even if clusters of entrepreneurship are good for local growth, it is less clear that cities or states have the ability to generate those clusters.” **The more targeted the efforts, the more likely failures become, they concluded.**

National Efforts Have Not Fared Much Better

These studies focused primarily on state and local governments’ attempts to incentivize the formation of clusters or hubs. There have also been many federal efforts to promote the geographic spread of high-tech sectors and jobs since 2000. In 2008, the Brookings Institution reviewed federal initiatives aimed at stimulating regional innovation and entrepreneurialism [and found that](https://www.brookings.edu/research/clusters-and-competitiveness-a-new-federal-role-for-stimulating-regional-economies/) during fiscal year 2006, the government had spent almost $77 billion across 14 different federal agencies and departments on 250 separate programs. The authors noted that with so many different efforts in play, “a lack of coordination is understandable” and that the programs “have evolved in a wildly ad hoc, idiosyncratic, and uncoordinated fashion.”

But that did not stop such programs from proliferating. In 2012, the [Obama administration launched](https://www.eda.gov/archives/2016/challenges/jobsaccelerator/index.htm) the multiagency Rural Jobs and Innovation Accelerator Challenge and Advanced Manufacturing Jobs and Innovation Accelerator Challenge. This occurred at roughly the same time President Obama was launching his [Startup America initiative](https://obamawhitehouse.archives.gov/economy/business/startup-america). He also signed the JOBS Act (Jump-start Our Business Startups) in 2012. All these efforts included various measures to support the spread of advanced manufacturing and high-tech startups across the U.S. **But none of these efforts have borne much fruit so far**.

**Companies don’t trust government contracts.**

**Grabowski et al. 15** – professor of economics at Duke University, director of economic analysis at the Tufts Center for the Study of Drug Development, senior advisor at the Analysis Group

Henry G. Grabowski, Joseph A. DiMasi, Genia Long, “The Roles Of Patents And Research And Development Incentives In Biopharmaceutical Innovation,” Health Affairs, February 2015

Prizes have the advantage of rewarding outputs instead of funding inputs (they only pay for success), and in some instances they may attract a wider set of options and market participants, compared to current market incumbents. However, **there would be several challenges** if they were mandatory replacements for patents.

First, **prizes** generally **require clear**, **prespecified** performance **criteria**, which might not always be possible to define. Second, given that the biopharmaceutical R&D process is particularly long and costly, **prizes could be subject to “hold-up” problems**. As a result, **innovators might fear that**, having made substantial nonrecoverable investments over many years, **they could see their prizes reduced by legislatures or** government **agencies** because of budget constraints or cost reduction efforts. **Early-stage venture-supported research and development would be particularly vulnerable**. Third, biomedical progress often occurs incrementally, as successive “best-in-class” drugs are introduced. It is also clinically desirable that a variety of agents be available, given sometimes idiosyncratic patient response. Unless an ongoing series of prizes were offered to simulate the effects of such dynamic competition, the benefits of therapeutic on-patent competition would be lost in a “winner-take-all” competition.

**OR they’ll rent seek---causes DESTRUCTIVE innovation.**

**Karlson et al. 20** --- Ratio Institute, Linköping University, Stockholm, Sweden.

Nils, Christian Sandström, & Karl Wennberg, 2020, “Bureaucrats or Markets in Innovation Policy? – a critique of the entrepreneurial state,” The Review of Austrian Economics, vol. 34, pg. 81–95.

Further, it appears that the **support schemes** can **distort firm behavior**. Due to the prevalence of public support systems for innovation within countries where different authorities distribute various types of support – often with no or little coordination between the authorities – firms may systematically seek and obtain several grants for related purposes. Not only do this makes evaluations of various policies challenging (Zúñiga-Vicente et al. [2014](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR65)) but it also creates a potential market for **rent-seeking** activities. Firms that are good at securing public grants may in theory be drawn from any tail in the productivity distribution but in practice authorities seek to foster ‘high-potential firms’ where they seem potential for growth and productivity improvement, meaning that below-average productive firms may easily be **lured** into a habit of applying for grants and public support rather than seeking to improve their productivity and gain market shares. Such firms in a sense becoming “**subsidy entrepreneurs**” with lingering **low long-term productivity** but still being able to hire skilled workers and pay them well, at least for the intermediate time horizon (Gustafsson et al. [2019](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR32)). If grants designed to stimulate innovation instead led to some firms simply **specializing in getting grants** this may in time create an increasing market for unproductive or even **destructive** entrepreneurship that compete **unfairly** with non-subsidies firms (Baumol [1990](https://link.springer.com/article/10.1007/s11138-020-00508-7#ref-CR9)).

**Uncertainty over the process will ruin the benefits.**

**Burstein & Murray 16** --- \*Associate Professor of Law at Cardozo School of Law. \*\*Associate Dean for Innovation and William Porter Professor of Entrepreneurship at MIT Sloan School of Management.

Michael & Fiona, “Innovation Prizes in Practice and Theory,” 29 HARV. J. L. & TECH. 401 (2016).

Uncertainty **Innovation is an inherently uncertain activity**. 2 04 Most basically, an innovator experiences uncertainty when she cannot determine ahead of time whether - or how - her innovative activities will succeed in solving a particular problem. "Producers have to make a decision on inputs at the present moment, but the outputs are not completely predictable from the inputs."205 From the perspective of a social planner, the uncertainties associated with innovation proliferate. As Richard Nelson writes, "It is very easy to make choices which, expost, turn out to be the wrong ones." 206 **At the outset** of a project, **it is easy enough to state a goal**: curing cancer, say, or landing a man on the moon. But from an ex-ante perspective, the technological **path that will accomplish that goal is uncertain**. So too is the **time it will take** and, of course, **the cost**.207 No one hearing President Kennedy's 1961 speech setting a national goal of landing a man on the moon could have predicted the mix of technologies that would ultimately achieve that goal - the Saturn V rocket, the Apollo spacecraft, and so forth. 208 Instead, those technologies emerged from a process of development; the ultimate outcome was entirely path dependent.

Uncertainty plagued the Auto X Prize from the very start. Recall that the prize organizers knew they wanted to create a prize that would lead to the development of cars that could achieve much greater fuel efficiency than presently available. 209 But because it was impossible to predict ex ante the course of technological development they were incentivizing, they could not set a target through **anything other than guesswork**. 210 The rules they settled on as an initial matter - the 100 MPGe target as well as a large number of safety and performance specifications - were based only on **unquantifiable extrapolations** from the state of technology at the time the decisions were made.

**Innovation DA**

**Type 1 errors are structurally limited**

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

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

Supporters of AmEx III's two-sided netting requirement presume that this burden shifting framework is inarguably better equipped to avoid judicial errors. 19 1 But, more accurately, it would produce a tradeoff in errors. It reduces the likelihood of type one errors (mistaken finding of liability), **while increasing the likelihood of type two errors** (mistaken denial of liability). While one may reasonably posit that it is preferable to err on the side of non-intervention, **the two error types are not equally likely**. A defendant is much better informed about the broader function of its restraint and its comparative effects across the two sides. That would suggest a defendant can **more capably demonstrate a plausible crossplatform efficiency** than a plaintiff can refute one. As such, in cases that turn on considerations of procompetitive justifications (stage two), **type one errors will be substantially less likely to arise,** given that the defendant need not quantify the relevant efficiencies.

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

**Bridgeline**, The “New” Antitrust, and Why Law Firms and Corporations Should Pay Attention, 20**21**, <https://bridgelinesolutions.com/the-new-antitrust-and-why-law-firms-and-corporations-should-pay-attention/>

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

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

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

**We control uniqueness---tech innovation has been hurt by a/c platforms**

**Bond et al. ’20** – Chief Counsel for the House Judiciary Committee [Slade; Chief Counsel for the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law; Lina Khan; counsel, current chairperson of the Federal Trade Commission; Amanda Lewis; FTC Attorney on Detail to the House Judiciary Antitrust Subcommittee; Phillip Berenbroick; Counsel; Anna Lenhart; Counsel; Joseph Ehrenkrantz; Counsel; Catherine Larsen; Counsel; Joseph Van Wye; Counsel; 2020; "Investigation of Competition in Digital Markets"; Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary; https://judiciary.house.gov/uploadedfiles/competition\_in\_digital\_markets.pdf; accessed 8-12-2021]

In line with this trend, there is **mounting evidence** that the dominance of online platforms has materially **weakened innovation** and **entrepreneurship** in the U.S. economy.179 Some venture capitalists, for example, report that they **avoid funding** entrepreneurs and other companies that **compete directly** with dominant firms in the digital economy.180

Often referred to as an innovation “**kill zone**,” this trend may **insulate** powerful incumbent firms from competitive pressure simply because venture capitalists do not view new entrants as **good investments**.181 Albert Wenger, the managing partner of Union Square Ventures, commented that the “**scale** of these companies and their impact on what can be funded, and what can succeed, is **massive**.” 182 Paul Arnold, an early-stage investor and founder of Switch Ventures, commented at the Justice Department’s recent workshop on the intersection between venture capital and antitrust law that he considers markets dominated by large platforms to be kill zones.183 He explained:

[T]here’s an incredibly, **concentrated** market share because of the economies of scale or because of network effects, it’s a **really hard barrier** to overcome. And sometimes there’s an answer and often, that will **kill things**. And I think that that’s my view, that’s my, sort of, lived experience as a venture investor, but I think it’s a **common view** of a lot of venture investors.184

In the same vein, Mr. Arnold said in a submission to the Subcommittee that:

Venture capitalists are **less likely** to fund startups that compete against monopolies’ **core products** … As a startup investor, I see this often. For example, I will meet yet another founder who wants to disrupt Microsoft’s LinkedIn. They will have a clever plan to build a better professional social network. I always pass on the investment. It is **nearly impossible** to overcome the monopoly LinkedIn enjoys. It is but one example of an **innovation kill zone**.185

For example, the entrenched power of firms with weak privacy protections has created a kill zone around the market for products that enhance privacy online.186 To the extent that a firm successfully offers a service to give people tools to control their privacy, “Google or Facebook are going to want to pull that back as fast as they possibly can. They don’t want you aggressively limiting their extremely valuable information collection.” 187

Other prominent venture capitalists, such as Roger McNamee, the Co-Founder of Elevation Partners, have commented that these trends harm **more than just** startups. The advantages of dominant firms online—access to **competitively significant** sources of data, network effects, intellectual property, and excess capital—are “a barrier to a **wide range** of activities, not just startups, but actually a **lot of other** market participants.” 188

**Nascent competitors are distinctively important because of future developments.**

**Hemphill & Wu ’20** [C. Scott; Moses H. Grossman Professor of Law @ New York University School of Law; and Tim; Julius Silver Professor of Law, Science and Technology @ Columbia Law School; “Nascent Competitors,” *University of Pennsylvania Law Review* 168(7), p. 1879-1910; AS]

Future potency. Second, a nascent competitor is relevant due to its promise of **future innovation**. Its potency is not yet fully developed and hence unproven. Whether that innovation will make a difference in the marketplace is subject to significant uncertainty. That is due to the unpredictable rate and direction of technological change. This uncertainty stems from the same forces of technological progress that make innovation so **valuable**. The nascent competitor may fail in various ways: the unproven cure, despite highest hopes, may flunk its clinical trials; the technologies thought to be the future might, in fact, be overrated. This uncertainty may not be a **quantifiable risk**, like the odds in a casino, but closer to Knightian true uncertainty-in other words, not readily susceptible to measurement. 34

The unpredictable path of innovation often results in product plasticity, in which products **evolve** and are used for purposes **different** than the original. For example, in the 1990s, **mobile** tele**phones** gained popularity as a complement to a **wired telephone**, as a means for making calls on the go.35 Today, they compete with land lines, cameras, computers, televisions, and credit cards. **General purpose technologies** such as computing and Internet connectivity act as **powerful fuel** for unpredictable change.36 **Uncertainty** about what products the incumbent and the nascent competitor will actually offer in the future has a further consequence-uncertainty about the degree to which those products will actually compete.

In some cases, a nascent competitor may **already have begun** to compete in the incumbent's market, even if its potency is not yet fully proven. For example, at the time of its announced acquisition, PacBio competed with Illumina for sequencing business, and **Instagram** competed with **Facebook** for the attention of social network **users**. 37 Existing competition, where present, may be merely partial: the Netscape browser competed with Microsoft's browser but not (yet) with Windows.

Where competition has already begun, its existence might inform a **positive prediction** about future competition. In addition, a particular acquisition might be **challenged** on account of lost current competition. However, current competition is not an essential feature of **nascent competition**. It is the further, **future developments** that give nascent competition its **distinctive importance**.38

**Their internal link is all theory and ignores practical incentives against innovation**

**Baker**, JD, PhD, Research Professor of Law at American University Washington College of Law, former FCC Chief Economist, former Senior Economist on Presidential Council of Economic Advisors, Jerry S. Cohen Award for Antitrust Scholarship, **‘19**

(Jonathan, *The Antitrust Paradigm: Restoring a Competitive Economy*, Chapter 6, Harvard University Press)

Oligopoly and monopoly markets **could perform well** if markets with dominant firms were typically more innovative than markets with more competitive structures. Justice Scalia endorsed this defense of monopoly in dicta in the 2004 case of Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP.29 Scalia's opinion suggested that monopolies are temporary and hence self-correcting, and that monopolies are not troublesome because they foster market growth.Jo He took a Schumpeterian perspective on competition, depicting firms with dominant positions, able to exercise market power, as routinely supplanted by innovative firms that enter by offering superior products or services. He also supposed that monopolies are innovative, not just rivals seeking to supplant them. 31 To similar effect, David Evans and Keith Hylton view antitrust's prohibition against monopolization as trading off the consumer harm from prices hikes against the benefits monopoly confers in enhancing incentives to innovate. 32

This dynamic-competition defense of concentrated markets and market power is **unconvincing**. The defense ignores several important ways that **greater competition enhances incentives to innovate**, some of which I identify in Chapter 1. The defense does not account for the incentives of firms facing product-market competition to **escape that rivalry through innovation**. Nor does it account for the **converse**: the Arrovian point that firms have **less incentive to innovate** when doing so would **cannibalize rents on current products.** The defense also fails to account for the role that competition in innovation itself plays in fostering the development of **new, better, or lower-cost products** and services. The defense focuses **exclusively** on the incentive of firms to invest in research and development (R&D) arising from their ability to appropriate the gains from innovation, while ignoring the incentive of firms to increase R&D investment in response to greater investment by their rivals.33 Nor does the defense account for **empirical evidence** showing that greater competition is commonly **more important for enhancing innovation** incentives than is the greater appropriability that a monopoly could confer.34 The defense also ignores the ability of firms exercising market power to **restrict, deter, or eliminate new forms of competition** through exclusionary conduct.35 To relax antitrust rules on the rationale that one firm is enough for markets to perform well w**ould undermine innovation incentives under the guise of protecting them**.

**False negatives outweigh false positives.**

**Baker**, JD, PhD, Research Professor of Law at American University Washington College of Law, former FCC Chief Economist, former Senior Economist on Presidential Council of Economic Advisors, Jerry S. Cohen Award for Antitrust Scholarship, **‘19**

(Jonathan, *The Antitrust Paradigm: Restoring a Competitive Economy*, Chapter 6, Harvard University Press)

In arguing that the costs of false positives outweigh those of false negatives, antitrust conservatives often highlight the **supposed durability** of erroneous judicial precedents. "If the court errs by condemning a beneficial practice," Easterbrook writes, "the benefits may be lost for good" through the precedential effect of the judicial decision.67 Easterbrook expresses particular concern with erroneous Supreme Court decisions,68 presumably because lower courts' errors of law are frequently corrected on appeal.69

It is **hard to credit the claim** that bad precedents systematically outlive market power .7° Erroneous precedents may not disappear overnight, but neither do cartels nor single-firm dominance. It took seven years for the Supreme Court implicitly to overrule the erroneous precedent of Appalachian Coals7,1 which had allowed coal producers to cartelize during the Great Depression, and ten years explicitly to overrule Schwinn, 72 which had made vertical intrabrand non price agreements illegal per se. Yet these lengths of time are **comparable to the typical duration** of cartels **cut short by antitrust enforcement** and, in consequence, **less than the cartels' likely duration if market forces were the sole mechanism for correction.** 73

Furthermore, even before the Court overrules an erroneous precedent, a number of circumstances may **limit its practical effect**. Precedents may be undermined by lower courts,74 abrogated by legislative action,75 or narrowed, procedurally or substantively, by the Court itself.76 The instances in which the Supreme Court has overruled its own antitrust decisions, the range of mechanisms available for correcting bad court decisions, and the Supreme Court's thoroughgoing adoption of the Chicago school's critique **all call into question** Easterbrook's claim that **erroneous judicial precedents, even from the Supreme Court, are more durable than monopolies and cartels**.77