## 1AC

**1AC---Platforms**

Advantage 1 is Platforms---

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

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

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

A. Against Platform Exceptionalism

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

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

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

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

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

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

**Dominant platforms stifle innovation via nascent acquisition and exclusion**

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

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

American competition policy has a big problem. Actually, it has four big problems: Amazon, Apple, Facebook, and Google. What was once a dynamic pool of smaller start-ups, the high-tech sector has now **coalesced around just four companies** that together reported over $773 billion of revenue in 2019.1 Each **reigns over its own segment** of the high-tech marketplace: Amazon controls the **retail** sector, Apple dominates **devices** and apps, Facebook owns **social media**, and Google virtually governs **the internet** itself. To the extent Silicon Valley still churns out a steady stream of startups, **it is more to feed these beasts by acquisition** than to produce meaningful rivals to their empires.2

Of course, **not everyone agrees** that this state of affairs is a problem at all. To some, the size of these firms **is merely a symptom of their success**. Relentless innovation, a customer-is-king mentality, **network effects that benefit consumers**, **and economies of scale** have made these firms ever larger and their products ever better for American consumers. Some even contest the idea that they are large at all by arguing that in a properly defined market, each firm faces significant rivalry and thus lacks market power. Some think that American antitrust law should pat itself on the back for fostering the competitive conditions that let these innovative companies thrive.3

However, this view is increasingly unpopular, and for good reason. Each of these companies, in its own way, **holds the keys to competitive entry** in many important online markets. To bring an app to market, a developer **must deal with Apple**; to reach online shoppers, retailers **must use Amazon**, and so on. **Without a meaningful choice between platforms**, independent sellers, developers, and websites must pass through **a privately maintained bottleneck** often on unfavorable terms. These restrictions on competition **harm consumers** by reducing the output and raising prices for goods that must pass through the bottleneck, and by **reducing firms’ incentives to innovate**—if they know a large portion of their profits will be **appropriated by the platform**, they have less incentive to bring new products to market. And by **controlling the throttle of technological innovation**, each dominant firm can stave off the possibility that **one of these nascent companies will build a rival network**—a platform that can break the bottleneck itself.4 Long-term, stable platform dominance means consumers likely will not see the kind of **Schumpterian innovation** associated with **great technological leaps forward**.5 Rather, consumer welfare depends on these platforms’ **internal incentives to innovate**, which are **weakened in the absence of true rivalry**.6 In short, there is a growing recognition that as much as these companies have innovation to thank for their success, their current tactics are making it hard for the next generation of disruptive innovators to take over. If antitrust law **continues to stand by,** consumers **will pay the price**.

**Scenario 1 is FinTech---**

**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.

**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.

**Scenario 2 is China---**

**Only nascent fosters transformative tech innovation**

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

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

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

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

**Only nascent innovation enables us to out-compete China—targeted remedies are key**

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

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

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

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

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

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

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

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

**Maintaining our innovative lead solves nuclear war**

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Plan---

**The United States federal government should implement light handed procompetitive regulation increasing prohibitions on anticompetitive conduct by dominant platforms.**

**The plan leads to light handed, pro-competitive regulation—that solves targeted platform harms but maintains incentives for innovation—avoids inefficient ex post remedies and burdensome structural changes**

**Rogerson**, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University. He has previously served as Chief Economist of the Federal Communications Commission, **and** **Shelanski**, Professor of Law at Georgetown University and a member of the firm Davis Polk & Wardwell LLP. He has formerly served as Director of the Bureau of Economics at the Federal Trade Commission and as Chief Economist of the Federal Communications Commission, **‘20**

(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

Both authors come to the topic of this Article with experience in regulatory agencies and with practical understanding of the difficulties and potential drawbacks of regulation. We nonetheless find three main reasons why, despite the challenges in getting regulation right, **limited regulation** might have advantages over traditional antitrust **adjudication** in the context of large-scale industries with network effects. First, and at the broadest level, **the adjudicative model** for antitrust enforcement and doctrinal development has been met with well-founded **criticism**. This does not mean that regulation is the right alternative, but it does provide a good reason to ask whether under some circumstances **a different approach** might lead to **better outcomes**. Second, **traditional antitrust remedies** might not effectively address the competitive challenges **of digital platform markets**. **Neither structural remedies** like break-up or divestiture, **nor the limited kinds of conduct remedies** that antitrust courts and agencies have been willing or able to implement, **can effectively reduce barriers to competition** without diminishing network benefits for consumers. **In contrast**, an expert agency can potentially bring the **experience** and resources required to make **more granular, detailed decisions about the costs and benefits of certain types of commercial behavior.** Third, because of network effects, conduct that courts ordinarily judge under antitrust law’s general rule of reason might have different presumptive effects, and therefore be better governed by a more **specific set of standards**, **in digital platform industries.** An expert agency might be particularly suited to determine when “outer-boundary” theories of harm **that courts rightly disfavor** for general application—theories of harm like **predation**, **refusals-to-deal**, **or acquisition of nascent competitors**— **should apply in specific contexts.**

Below, we discuss why **certain** forms of what we call **“light handed procompetitive” (LHPC) regulation** could **increase levels of competition** in markets served by digital platforms while helping **to clarify the platforms’ obligations** with respect to interrelated policy objectives, notably **privacy** and **data security**. Key categories of LHPC regulation could include interconnection/**interoperability requirements** (such as access to application programming interfaces (APIs)), **limits on discrimination**, both user-side and third-party-side data portability rules, and perhaps additional restrictions on certain business practices subject to rule of reason analysis under general antitrust statutes. These types of regulations would **limit** the ability of **dominant digital platforms** to leverage their market power into related markets or **insulate their installed base** from competition. In so doing, **they would preserve incentives for innovation** by firms in related markets, **increase the competitive impact of existing competitors**, and **reduce barriers to entry for nascent firms.**

The regulation we propose **is “light handed”** in that it largely **avoids the burdens and difficulties** of a regime—such as that found in public utility regulation—that regulates access terms and revenues based on firms’ costs, which the regulatory agency must in turn track and monitor. Although our proposed regulatory scheme would require a dominant digital platform to provide a **baseline** level of access (interconnection/interoperability) that the regulator determines is necessary to promote actual and potential competition, we believe that this could **avoid** most of the **information and oversight costs** **of full-blown cost-based regulation,** for reasons we will discuss below.14 The primary regulation applied to price or **non-price access** terms would be a nondiscrimination condition, which would require a dominant digital platform to offer the **same terms to all users**. Such regulation **would not,** like traditional rate regulation, attempt to tie the level or terms of access to a platform’s underlying costs, to regulate the company’s terms of service to end users, **or to limit the incumbent platform’s profits** or lines of business. **Instead** of imposing monopoly controls, **LHPC** regulation aims to protect and **promote competitive access** to the marketplace as the means of governing firms’ behavior. In other words, **its primary goal is to increase the viability and incentives** of actual and potential competitors. As we will discuss, the Federal Communication Commission’s (FCC) successful use of similar sorts of requirements on various telecommunications providers provides one model for this type of regulation.15

There are **several possible sources** for digital platform regulation. Congress could enact new legislation that creates an entirely **new regulatory agency** for digital platforms or could give new statutory authority to an **existing agency**. Alternatively, the FTC could promulgate **competition rules** under authority that it arguably already **has under the FTC Act of 1914**. Several commentators have argued that the FTC could use its **existing statutory authority** under the FTC Act to issue broad, antitrust rules that apply generally, to all industries.16 A much more limited, and perhaps **less controversial, manner** in which the FTC could begin to use this authority would be to **pass narrower rules that apply only to specific kinds of conduct and only to digital platform industries**. Calls to regulate digital platforms involve several issues that do not centrally fall within the purview of antitrust, notably privacy and control over certain kinds of harmful content.17 To the extent there could be trade-offs among regulatory goals—for example between a platform’s interconnecting with rivals but limiting those rivals’ access to user data, or between providing nondiscriminatory access to thirdparties but blocking those that spread harmful content—there could be **economies of scope** to having a single agency address those issues, or at least mandating that agencies **coordinate inter-related rulemaking**.

**Expert regulation is comparatively better for addressing nascent acquisition and discrimination—ex post adjudication takes too long and is too burdensome**

**Rogerson**, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University. He has previously served as Chief Economist of the Federal Communications Commission, **and** **Shelanski**, Professor of Law at Georgetown University and a member of the firm Davis Polk & Wardwell LLP. He has formerly served as Director of the Bureau of Economics at the Federal Trade Commission and as Chief Economist of the Federal Communications Commission, **‘20**

(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

This last category of restrictions involves other forms of conduct that antitrust law recognizes as **double-edged**: they could increase or maintain monopoly power, **but also create efficiencies** that benefit consumers. Antitrust law applies rule of reason analysis to such behaviors by attempting to weigh the potentially negative effects of the behavior against the positive effects, then prohibiting the behavior only if the net effect is likely to be negative.86 Of course, any quantitative measure of the net effect of a practice is uncertain, and therefore standards of proof and evidentiary burdens play a large role in determining the actual outcomes of cases.

The general point we wish to make in this Section is that, where digital platform markets are **prone to tip to durable monopoly**, the presumptions and burdens that courts ordinarily apply under antitrust law’s general rule of reason **might fail to prevent anticompetitive harms** or to provide useful industry guidance. Such settings could be **better governed** by a more **specific** and **definitive set of standards** implemented through an agency better able to understand and account for relevant industry details. To the extent such regulation could lead to **fewer errors of either over- or under-enforcement** against digital platforms, it could be **welfare enhancing** compared to traditional antitrust adjudication. For example, regulation might prohibit certain conduct under specified conditions **where it will be predictably harmful**, establish stronger presumptions about the harms from particular conduct when undertaken by digital platforms, **or implement stricter requirements** for the review of specific business activities.

One area of activity **where regulation might have advantages** over adjudication is acquisition of **nascent competitors**. Several commentators have advocated stricter prohibitions against such deals on grounds that large firms might, through acquisitions, **buy up the very start-ups that today look so insignificant** as to escape merger review but would later prove to be serious competitors.87 It is beyond the scope of this article to address the emerging work on acquisitions of start-ups. We note, however, that the question of nascent acquisitions **poses a serious challenge for antitrust enforcement**. **Generalist courts** seem **poorly suited** to deciding, case-by-case, whether a particular firm that might today have little market presence or infrastructure might later emerge as a competitor to its buyer, **especially if the nascent firm is currently more of a complement** than competitor to the acquiring firm. The technical, economic, and industry factors that make competitive-effect determinations difficult in any merger case **are particularly important in a technologically dynamic industry** where one of the merging firms is new and **evolving**. Moreover, **the alternative of waiting** to see the results of a particular merger so that courts have a record on which to review the transaction creates **very substantial incentive and evidentiary problems**. A successful merger is one in which the parties integrate in such a way that creates commercial growth,88 and therefore it will be very difficult to distinguish commercial success due to the merger from the counterfactual of success that would have resulted had the parties remained separate. Additionally, the **prospect of post consummation review** of a merger, with retroactive remedies or prohibitions, **could deter the very investment** in integration that helps ensure a successful merger.89 These concerns lead us to suggest that the process and criteria through which antitrust law applies to acquisitions of nascent competitors by large industry players might better **lend itself to guidance and administration through a regulatory entity** as opposed to the generalist adjudicatory process. While we do not think banning such acquisitions is a good idea, rules that **specify** which transactions the agency will review, what criteria and presumptions it will apply in a particular industry, and what kind of evidence it will find relevant could **provide more certainty** for businesses and **better protections for consumers**.

**1AC---Conduct**

Advantage 2 is Conduct---

**Antitrust agencies will not investigate anticompetitive conduct on platforms – that enables a host of bad practices – centralization, access discrimination, cybersecurity.**

**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>)

That influence comes in part from data. Facebook, Google, Amazon, and similar companies are “**data-opolies**.” By that I mean companies that control a key platform which, like a coral reef, attracts to its ecosystem users, sellers, advertisers, software developers, apps, and accessory makers. Apple and Google, for example, each control a popular mobile phone operating system platform (and key apps on that platform), Amazon controls the **largest online merchant platform**, and Facebook controls the largest **social network platform**. Through their leading platforms, a significant volume and variety of personal data flows. The velocity in acquiring and exploiting this personal data can help these companies obtain significant market power.

Is it OK for a few firms to possess so much data and thereby wield so much power? In the U.S., at least, **antitrust officials so far seem ambivalent** about these data-opolies. They’re free, the thinking goes, **so what’s the harm?** But that reasoning is misguided. Data-opolies pose **tremendous risks,** for consumers, workers, competition, and the overall health of our democracy. Here’s why.

Why U.S. Antitrust Isn’t Worried About Data-opolies

The European competition authorities have recently brought actions against four data-opolies: Google, Apple, Facebook, and Amazon (or GAFA for short). The European Commission, for example, fined Google a record €2.42 billion for leveraging its monopoly in search to advance its comparative shopping service. The Commission also preliminarily found Google to have abused its dominant position with both its Android mobile operating system and with AdSense. Facebook, Germany’s competition agency preliminarily found, abused its dominant position “by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user’s Facebook account.”

We will likely see more fines and other remedies in the next few years from the Europeans. But in the U.S., the data-opolies have largely escaped antitrust scrutiny, under both the Obama and Bush administrations. Notably, while the European Commission found Google’s search bias to be anticompetitive, the U.S. Federal Trade Commission did not. From 2000 onward, the Department of Justice brought only one monopolization case in total, against anyone. (In contrast, the DOJ, between 1970 and 1972, brought 39 civil and 3 criminal cases against monopolies and oligopolies.)

The current head of the DOJ’s Antitrust Division recognized the enforcement gap between the U.S. and Europe. He noted his agency’s “particular concerns in digital markets.” But absent “demonstrable harm to competition and consumers,” the DOJ is “reluctant to impose special duties on digital platforms, out of [its] concern that special duties might stifle the very innovation that has created dynamic competition for the benefit of consumers.”

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.**

**Wealth transfer to data-opolies**. Even when their products and services are ostensibly “free,” data-opolies can **extract significant wealth** in **several ways** that they otherwise couldn’t in a competitive market:

First, data-opolies can extract wealth by getting personal data without having to pay for the data’s fair market value. The personal data collected may be worth far more than the cost of providing the “free” service. The fact that the service is “free” does not mean we are fairly compensated for our data. Thus, data-opolies have a strong economic incentive to **maintain the status quo**, in which users, as the MIT Technology Review put it, “have little idea how much personal data they have provided, how it is used, and what it is worth.” If the public knew, and if they had viable alternatives, they might hold out for compensation.

Second, something similar can happen but with the content users create. Data-opolies can extract wealth by getting creative content from users for free. In a competitive market, users could conceivably demand compensation not only for their data but also their contributions to YouTube and Facebook. With no viable alternatives, they cannot.

Third, data-opolies can extract wealth from sellers upstream. One example is when data-opolies scrape valuable content from photographers, authors, musicians, and other websites and post it on their own platform. In this case, the wealth of the data-opolies comes at the expense of other businesses in their value chain.

Fourth, data-opolies can extract our wealth indirectly, when their higher advertising fees are passed along in the prices for the advertised goods and services. If the data-opolies faced more competitors for their advertising services, ads could cost even less — and therefore so might the products being advertised.

Finally, data-opolies can extract wealth from both sellers upstream and consumers downstream by facilitating or engaging in “**behavioral discrimination**,” a form of price discrimination based on past behavior — like, say, your internet browsing. They can use the personal data to get people to buy things they did not necessarily want at the highest price they are willing to pay.

As data-opolies expand their platforms to digital personal assistants, the **Internet of Things**, and **smart technologies**, the concern is that their data advantage will increase their competitive advantage and market power. As a result, the data-opolies’ monopoly profits will likely increase, at our expense.

Loss of trust. Market economies rely on trust. For online markets to deliver their benefits, people must trust firms and their use of the personal data. But as technology evolves and more personal data is collected, we are increasingly aware that a few powerful firms are using our personal information for their own benefit, not ours. When data-opolies degrade privacy protections below competitive levels, some consumers **will choose not “to share their data, to limit their data sharing with companies**, or even to lie when providing information,” as the UK’s Competition and Markets Authority put it. Consumers may forgo the data-opolies’ services, which they otherwise would have used if privacy competition were robust. This loss would represent what economists call a **deadweight welfare loss**. In other words, as distrust increases, society **overall becomes worse off**.

Significant costs on third parties. Additionally, data-opolies that control a key platform, like a mobile phone operating system, can **cheaply exclude rivals** by:

**steering** users and advertisers to their own products and services to the detriment of rival sellers on the platform (and contrary to consumers’ wishes)

**degrading an independent app’s functionality**

**reducing traffic to an independent app** by making it harder to find on its search engine or app store

Data-opolies can also impose costs on companies seeking to protect our privacy interests. My book with Ariel Ezrachi, Virtual Competition, discusses, for example, Google’s kicking the privacy app Disconnect out of its Android app store.

Less innovation in markets dominated by data-opolies. Data-opolies can **chill innovation** with a weapon that earlier monopolies lacked. Allen Grunes and I call it the “now-casting radar.” Our book Big Data and Competition Policy explores how some platforms have a relative advantage in accessing and analyzing data to discern consumer trends well before others. Data-opolies can use their relative advantage to see what products or services are becoming more popular. With their now-casting radar, data-opolies can acquire or **squelch these nascent competitive threats.**

Social and moral concerns. Historically, antitrust has also been concerned with how monopolies can hinder individual autonomy. Data-opolies can also hurt individual autonomy. To start with, they can direct (and limit) opportunities for startups that subsist on their super-platform. This includes third-party sellers that rely on Amazon’s platform to reach consumers, newspapers and journalists that depend on Facebook and Google to reach younger readers, and, as the European Commission’s Google Shopping Case explores, companies that depend on traffic from Google’s search engine.

But the autonomy concerns go beyond the constellation of app developers, sellers, journalists, musicians, writers, photographers, and artists dependent on the data-opoly to reach users. Every individual’s autonomy is at stake. In January, the hedge fund Jana Partners joined the California State Teachers’ Retirement pension fund to demand that Apple do more to address the effects of its devices on children. As The Economist noted, “You know you are in trouble if a Wall Street firm is lecturing you about morality.” The concern is that the data-opolies’ products are purposefully addictive, and thereby eroding individuals’ ability to make free choices.

There is an interesting counterargument that’s worth noting, based on the interplay between monopoly power and competition. On the one hand, in monopolized markets, consumers have fewer competitive options. So, arguably, there is less need to addict them. On the other hand, data-opolies, like Facebook and Google, even without significant rivals, can increase profits by increasing our engagement with their products. So, data-opolies can have an incentive to exploit behavioral biases and imperfect willpower to addict users — whether watching YouTube videos or posting on Instagram.

Political concerns. Economic power often translates into political power. Unlike earlier monopolies, data-opolies, given how they interact with individuals, possess a more powerful tool: namely, the ability to affect the public debate and our perception of right and wrong.

Many people now receive their news from social media platforms. But the news isn’t just passively transmitted. Data-opolies can affect how we feel and think. Facebook, for example, in an “emotional contagion” study, manipulated 689,003 users’ emotions by altering their news feed. Other risks of this sort include:

Bias. In filtering the information we receive based on our preferences, data-opolies can reduce the viewpoints we receive, thereby leading to “echo chambers” and “filter bubbles.”

**Censorship**. Data-opolies, through their platform, can control or block content that users receive, and enforce governmental censorship of political or religious information.

**Manipulation**. Data-opolies can promote stories that further their particular business or political interests, instead of their relevance or quality.

Limiting the Power of Data-opolies

Upon closer examination, data-opolies can actually be more dangerous than traditional monopolies. They can affect not only our wallets but our privacy, autonomy, democracy, and well-being.

Markets dominated by these data-opolies **will not necessarily self-correct**. Network effects, **high switching costs for consumers** (given the lack of data portability and user rights over their data), and weak privacy protection help data-opolies **maintain their dominance.**

**Luckily, global antitrust enforcement can help**. The Reagan administration, in espousing the then-popular Chicago School of economics beliefs, discounted concerns over monopolies. The Supreme Court, relying on faulty economic reasoning, surmised that charging monopoly prices was “an important element of the free market system.” With the rise of a progressive, anti-monopoly New Brandeis School, the pendulum is swinging the other way. Given the emergence of data-opolies, this is a welcomed change.

**Scenario 1 is Breaches---**

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

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

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

B. Vulnerabilities of “Monocultures”

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

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

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

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

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

**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.

#### Scenario 2 is Search---

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

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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.**

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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**

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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 2

#### Thumpers to BizCon.

Andrew Ross Sorkin, Biden’s Antitrust Team Talks Its Way to a Win, 7/27/21, https://www.nytimes.com/2021/07/27/business/dealbook/aon-deals-antitrust.html

Tough talk on antitrust

In the Biden administration’s first major antitrust action, the government scored a victory simply by showing a willingness to fight. Aon called off its proposed $30 billion takeover of the rival insurer Willis Towers Watson yesterday, citing delays stemming from a lawsuit brought just over a month ago by the Justice Department to block the deal, which was first announced in March last year.

“This is a victory for competition and for American businesses,” Attorney General Merrick Garland said in a statement after the deal was scrapped. The government argued that merging two of the three biggest insurance brokers would “likely lead to higher prices and less innovation.” The companies countered that the government didn’t understand their businesses.

“We reached an impasse,” Greg Case, Aon’s C.E.O., said in a statement. Aon had angled for a summer trial while the Justice Department suggested winter next year. The judge set a November date, but warned of delays; Aon decided that instead of digging in, it would pay a $1 billion termination fee to Willis and move on.

Tough talk can make big deals less appealing, former antitrust officials told DealBook. “The risk and time delays of a merger challenge often cause the parties to abandon a deal,” said Doug Melamed, a Stanford law professor and former acting chief of the Justice Department’s antitrust division. President Biden’s pledge to rein in corporate power with more aggressive antitrust enforcement efforts, backed by a team of Big Tech critics, is limited by existing laws. Aon’s move highlights how trustbusters can have their way by other means.

#### No link to our mechanism—only applies to dominant firms and avoids blunt overdeterrent proposals

Rogerson, Charles E. and Emma H. Morrison Professor of Economics at

Northwestern University. He has previously served as Chief Economist of the Federal Communications Commission, and Shelanski, Professor of Law at Georgetown University and a member of the firm Davis Polk & Wardwell LLP. He has formerly served as Director of the Bureau of Economics at the Federal Trade Commission and as Chief Economist of the Federal Communications Commission, ‘20

(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

A number of commentators have advocated expanding competition enforcement through rulemaking. For example, Tim Wu advocates more regulation that he describes as “using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws.”50 Rohit Chopra contends that “[r]ulemaking would serve to advance clarity and certainty about what types of conduct constitute—or do not constitute—an ‘unfair method of competition.’”51 While the kind of regulation we suggest might fit within the frameworks of what other commentators have suggested, we propose something much more limited. We do not advocate the use of the entire toolkit of traditional utility regulation, nor do we suggest rulemaking for broader, general-purpose antitrust enforcement outside of particular contexts where agency expertise is most likely to have advantages over traditional adjudication. We focus on why regulation in the particular context of digital platforms has comparative advantages over adjudication. We focus on access rules, similar to those that regulators have used to promote competition in a variety of different industries.52 As we will discuss, the FCC has successfully used these types of regulations in various sectors of the telecommunications industry to deal with the same general sorts of competition issues that arise in digital markets.53

The kinds of regulation that one might consider for application to digital platforms include (1) interconnection and interoperability requirements and common standards, (2) limits on discrimination, (3) data portability requirements, (4) line-of-business restrictions, and (5) additional restrictions on certain business practices currently subject to rule of reason analysis under general antitrust statutes. We discuss each of these categories in more detail below. However, one issue that applies to all of the categories is worth discussing at the outset: whether the regulations should apply industrywide—namely, to all digital platforms—or only to dominant platforms. We think that in most cases it will only be necessary to apply these regulations to firms that the regulator determines are dominant. This means that a key part of the regulatory regime will be creating and applying standards to determine whether a firm is in fact a “dominant” digital provider. Note also that, in many cases, the obligations imposed on dominant digital providers will take the form of requiring the dominant provider to conform to various common standards, in order to reduce switching costs to users or to enable nondominant firms to interconnect or interoperate with dominant providers. In this case, although the standards will not be mandatory for non-dominant providers, those providers will nonetheless likely conform to the standards to take advantage of the protections offered by the regulation.

#### SMEs turns the internal link---solves impact to recession.

### 2AC---T

#### We meet—AFF creates ex ante rules that make conduct deemed anti-competitive per se illegal.

Crane, Assistant Professor, Benjamin N. Cardozo School of Law, ‘07

(Daniel, “Rules Versus Standards in Antitrust Adjudication,” 64 Wash. & Lee L. Rev. 49)

The solution, though imperfect, is to use bright-line rules as immunizing devices for broad swaths of industrial behavior while preserving a role for standards in determining liability for conduct falling outside of the safe harbors created by the rules. For many categories of conduct, such an approach minimizes the cost of configuring the law because the rule itself supplies a conclusive answer of no liability or presents a safe harbor that defendants can elect in order to minimize the likelihood of litigation. For example, specifying that a firm cannot be held liable for tying unless it has at least a 50% market share in the tying market would provide a case-dispositive safe harbor that could reduce litigation costs substantially in a large number of tying cases, even though such costs would remain in cases where the defendant's market share exceeded 50%. While it would also save costs to specify prohibitory rules for cases falling outside the safe harbor (such as making tying per se unlawful if the defendant's tying product market share exceeds 50%), the generalization of such a rule would be vastly overbroad. Bright-line rules are most appropriate in antitrust when used as immunizing devices. Relatively few categories of conduct are unambiguously harmful and can be prohibited in equally categorical terms.

#### C/I---

#### We “expand the scope” --- by modifying applicability of anti-trust laws.

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).

#### Antitrust is a type of regulation

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

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

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

#### Core antitrust laws include Sherman, Clayton, and FTC.

Waller 20 – John Paul Stevens Chair in Competition Law, Loyola University Chicago School of Law

Spencer Weber Waller, “The Omega Man or the Isolation of U.S. Antitrust Law,” Connecticut Law Review, Vol. 52, April 2020, LexisNexis

The United States defines the antitrust laws as the substantive provisions of the Sherman, Clayton, and Federal Trade Commission acts along with a small number of subsidiary statutes. This limits the scope of antitrust law to agreements between competitors, monopolization law, and the review of potentially harmful mergers and acquisitions. In contrast, the EU and other jurisdictions have led the world to a broader understanding of the meaning and reach of competition law that is only partially understood or appreciated in the United States. This Section explores that broader vision of competition including market studies and investigations; prohibitions against public anticompetitive conduct; state aids; and the use of public interest factors normally not part of the U.S. vision of the antitrust enterprise.

#### “Prohibition” includes indirect coercion and penalties.

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

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

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

### 2AC---States CP

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

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

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

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

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

State Levels of Adherence

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

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

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

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

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

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

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

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

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

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

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

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

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

State Scrutiny

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

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

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

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

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

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

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

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

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

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

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

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

Workarounds

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

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

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

State-to-State Conflicts

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

A Case Study

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 2AC---New Agent CP

#### Non-antitrust agency is bad—massive uncertainty and undermines efficient antitrust enforcement

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

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

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

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

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

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

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

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

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

#### Links to DA—new agencies leech off of existing expert agencies

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

After authorization of the entity and confirmation of leadership, a new independent agency will face basic hurdles to set up agency infrastructure and operations that can be mitigated through agency design. A new agency needs office space; internet, email, and phone service; and a complete complement of staff including not only subject matter experts but also everything from human resources to internal information technology specialists. At a prior OTI panel, David Medine, who served as the first chairman of the PCLOB and also previously served as special counsel at the CFPB, argued that a new agency should “sit on the structure of the old agency until it’s ready to separate.” Medine noted that unlike with the PCLOB, the CFPB staff benefited from being able to use Treasury Department payroll, email, and website infrastructure before the agency was ready to stand on its own. The Brown DPA is the only DPA proposal to use this model of operating on the Federal Reserve System infrastructure. Therefore, while it is more feasible for an existing agency to begin its enforcement duties, a DPA could avoid initial operational problems that other new agencies have faced if it utilized an existing agency’s infrastructure.

#### Circumvention—FTC commission structure is durable—new agency proposals are at whims of new admin

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

All three DPA bills are based on the original leadership model of the CFPB and therefore must be modified to pass constitutional muster. The bill sponsors can decide to strike the for-cause removal requirements: § 301(c)(3) in EshooLofgren, § 4(c)(3) in Gillibrand, and § 301(c)(3) in Brown. Alternatively, they could revise their bills to adopt a multi-member body similar to the FTC. However, this seems unlikely because DPA advocates seek to differentiate their proposed agencies from the FTC, and a single director model is a significant point of distinction.

There are benefits to both the independence of the FTC and the single-director DPA model. Many federal agencies are led by a single director rather than a commission, including the administrator of the Environmental Protection Agency and the attorney general of the Department of Justice (DOJ). The tradeoff to their relative efficiency is less stability. The 2018 Sourcebook of United States Executive Agencies published by the Administrative Conference of the United States endorses the multi-member commission structure as the most stable. The Conference stated, “Among the most durable agencies,” meaning those least susceptible to elimination by hostile administrations, “are those multi-member bodies located outside the executive departments with features such as party-balancing limitations and fixed terms.”

A single-director DPA model is more likely to experience dramatic swings in policy dependent on the president in office, while the FTC model tends to be more consistent across administrations. The CFPB underwent extreme changes in policy under the Obama and Trump administrations that some attribute to the single-director structure. Some scholars argue, however, that single-director agencies are much more efficient than the alternative and that these ideological swings are simply the result of directors reflecting the partisan inclinations of whichever president they were appointed by. Moreover, data privacy legislation has more bipartisan support than Dodd-Frank did when it was passed and therefore would likely not be as susceptible to the dramatic partisan shifts as the CFPB.

### 2AC---BBB

#### Bill is dead

Bade et al 2/1

– Co-author of POLITICO Playbook and 10-year veteran of the congressional press corps.

Rachael Bade, “POLITICO Playbook PM: Manchin on BBB: ‘It’s dead,’” *POLITICO*, 1 February 2022, https://www.politico.com/newsletters/playbook-pm/2022/02/01/manchin-on-bbb-its-dead-00004181.

Moments later, Insider reporter Joseph Zeballos-Roig caught sight of Manchin himself and decided to break away from the Wyden gaggle to ask whether raising the cap on SALT deductions should go in BBB.

Manchin’s response: “What Build Back Better bill? There is no … I mean, I don’t know what y’all are talking about.”

Asked if he is engaged in talks on the bill, Manchin seemed to get a bit peeved: “No, no, no, no. It’s dead.”

Just after 1 p.m., the senator was asked to clarify if he truly meant that BBB is “dead.” He said: “If we’re talking about the whole big package, that’s gone.” Would he mind a smaller version? “We’ll see what people come up with. I don’t know.”

#### It'll stay dead – Manchin gets paid to not support it

Conley 1/30 – Staff writer for Salon.

Julia Conley, “Joe Manchin reaps thousands from GOP megadonor after backing off BBB deal,” *Salon*, 30 January 2022, https://www.salon.com/2022/01/30/joe-manchin-reaps-thousands-from-megadonor-after-backing-off-bbb-deal\_partner/.

After he announced in December he would not be supporting President Joe Biden's Build Back Better Act, Sen. Joe Manchin's political action committee received the maximum allowable contribution from billionaire Republican donor Ken Langone.

The Hill reported late Friday that the wealthy investor, who supported former President Donald Trump's 2016 campaign, gave $5,000 to Manchin's Country Roads PAC less than two weeks after the right-wing Democratic senator from West Virginia said he would not join his party in supporting the president's agenda

Langone's wife also contributed $5,000 to the PAC, while other political donations the megadonor made around the same time went to the Koch family-backed Americans for Prosperity Action and the Senate Leadership Fund, a GOP super PAC.

As Common Dreams reported in November, Langone praised Manchin's "guts and courage" for standing in the way of the Build Back Better Act's passage and promised to hold "one of the biggest fundraisers" he's ever hosted to support the senator.

#### PC is ineffective – systemic factors outweigh – prefer political scientists

Rudalevige 17

Andrew Rudalevige is Thomas Brackett Reed Professor of Government at Bowdoin College, WaPo, 3/24/2017, “President Trump couldn’t pass Obamacare repeal. This is why.”, https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/24/president-trump-couldnt-pass-obamacare-repeal-this-is-why/?utm\_term=.83ddccc8a498

The decision to pull the American Health Care Act (AHCA) from the House floor on Friday is a telling reminder of the limits of presidential power when it comes to leading the legislature. Our separated system makes it hard for presidents to translate their preferences into policy, even on priority matters. As Lyndon Johnson put it, complaining about the Kennedy staff’s inability to get bills moving: “You can’t start yelling ‘frog’ at everybody and expect ‘em to jump!”

A quick review of political science literature on presidential success in Congress gives us several lenses through which to view Friday’s happenings. One consistent finding is that presidential personality — and the schmoozing of legislators, etc. — matters mostly “at the margins,” as George Edwards put it. In a close vote, those margins surely might matter. But systematic factors were also at play:

1. **Issues are compartmentalized.**

**Pergram 18** [Chad Pergram, Congressional reporter. “Amid Kavanaugh cacophony, Congress forges bipartisan agreements on key issues”. October 13, 2018. https://www.foxnews.com/politics/amid-kavanaugh-cacophony-congress-forges-bipartisan-agreements-on-key-issues]

**Step back from** the **Kavanaugh** cacophony. **Examine what lawmakers from both parties in both chambers accomplished** **in September and early October,** with virtually zero fanfare. Amid the turmoil, **Congress approved** **the first revamp of national** **aviation policy** in years. The Senate approved the final version of the legislation 93-6. This came after a staggering six extensions due to bickering and disagreement. Then, **Congress approved a sweeping, bipartisan** **measure to combat opioid abuse.** The House okayed the package 393-8. The Senate adopted the measure 98-1. And, there was no government shutdown. The House and Senate came to terms on two bipartisan bills which funded five of the 12 annual spending bills which operate the government. The sides agreed to latch an additional measure to one of the spending plans to fund the remaining seven areas of federal spending through December 7. President Trump briefly threatened to force a government shutdown if lawmakers didn’t include money for his border wall in the plan. But the President ultimately punted that battle until December. **Democrats praised Republicans for keeping conservative “poison pill” riders out of the appropriations** bills. That decision drew Democratic support for the measures. **The Senate approved a** **bipartisan water and infrastructure package.** **McConnell hailed** the **bipartisanship** which descended upon the Senate – even as the senators fought over Kavanaugh. Nearly in the same breath, McConnell derided boisterous, anti-Kavanaugh protesters outside the Capitol as a “mob.” McConnell insisted this week he needed the Senate to clear a slate of 15 conservative judges to lower courts before he could cut senators loose for the midterm elections. McConnell and Schumer appeared at loggerheads. McConnell’s goal was clear: extract the confirmation of these nominees – or tether to Washington vulnerable Democratic senators from battleground states to keep them off the campaign trail. Schumer knew McConnell would ultimately prevail on the nominees after the midterms. So the New York Democrat accepted McConnell’s ransom, permitting the Senate vote on a slate of nominees on Thursday night. **Schumer also extracted a concession from McConnell**: send senators home until November 13th. One may wonder how **lawmakers can find themselves in an** imbroglio **over a major issue** like Kavanaugh – yet forge major bipartisan accords on other. Frankly, that’s just politics. Politics always elicits strange bedfellows. **Successful** **lawmakers** **know they should** compartmentalize their disputes. The enemy today may be your best ally tomorrow.

1. **Congressional antitrust now.**

**Bordelon 2/4** – POLITICO Reporter

Brendan Bordelon, "Under pressure, Biden backs antitrust push," POLITICO, 2-4-2022, https://www.politico.com/newsletters/morning-tech/2022/02/04/under-pressure-biden-backs-antitrust-push-00005579

WHITE HOUSE GETS OFF THE FENCE — The Biden team came out in favor of the antitrust measures moving through both houses of Congress late Thursday — but how much public support and political capital the White House aims to spend on reining in giant tech companies remains an open question.

The move, coming hours after the Senate Judiciary Committee advanced a bill to break Apple and Google’s hold on app stores, marks the first time the White House has officially weighed in on the congressional antitrust push, Leah and POLITICO’s Adam Cancryn reported. While the White House held a “listening session” with supporters of tech antitrust reform two weeks ago, it offered a neutral readout afterward, saying only that officials “look forward to working with Congress to make bipartisan progress on the issue.”

But that polite restraint ended this week following the administration’s foray into the European Union’s draft Digital Markets Act — a package of rules designed to rein in the power of tech giants. As Leah and POLITICO EU’s Samuel Stolton and Mark Scott reported, D.C. antitrust advocates weren’t pleased with the policy paper, thinking it could undermine pending congressional legislation targeting the digital giants. The Transatlantic Consumer Dialogue — a group of 75 U.S. and EU consumer groups — called out the Biden administration Thursday for expressing “concern” about the administration’s statements on the DMA.

“The DMA does not target U.S. companies but rather targets companies that are in a position to define how goods, services, and information reach customers and which too often turn this position to their advantage to the detriment of competition and consumers’ interests,” the groups said, urging Biden to “work constructively with the EU” on finalizing the legislation.

Biden was always going to have to make a decision on whether to publicly back the antitrust bills — particularly with congressional Democrats split.

About those intraparty tensions … The moderate House New Democrats met Thursday afternoon with antitrust chair David Cicilline (D-R.I.) to talk about the tech antitrust bills. (Leah and Emily with the report.) Aides said the meeting was polite, but at least one member — Rep. Suzan DelBene (D-Wash.) — expressed serious concerns. The 97-member coalition will meet next week with two other vocal opponents, California Democrats Zoe Lofgren and Lou Correa.

#### 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.

#### No agenda – Lujan’s stroke means Dems won’t have a majority for weeks

Levine and Everett 2/1 – Marianne Levine is a reporter for POLITICO covering the Senate. Burgess Everett is the co-congressional bureau chief for POLITICO.

Marianne Levine and Burgess Everett, “Luján stroke sends Senate Democrats reeling,” *POLITICO*, 1 February 2022, https://www.politico.com/news/2022/02/01/democratic-senate-reels-after-lujan-stroke-00004432.

Sen. Ben Ray Luján's stroke diagnosis shocked the Democratic caucus Tuesday, raising the possibility the party could lose their slim working majority for the near future.

While the 49-year-old New Mexico Democrat is expected to make a full recovery, no one knew when he would return to the evenly divided Senate, or what it means for the immediate agenda.

“It’s devastating. And the only silver lining is that there’ll be a path to a full recovery,” said Sen. Chris Murphy (D-Conn.), of Luján’s diagnosis. “What a shock on an otherwise quiet afternoon.”

Luján’s unexpected medical condition comes at a moment when Senate Democrats simply don’t have any votes to spare to pass party priorities, including reviving their social spending bill and now confirming a Supreme Court justice. The latest news could leave Democrats reliant on Republican votes to move forward on nominees and other priorities.

Senate Majority Leader Chuck Schumer said Tuesday evening that Democrats are “grateful” that Luján will make a “full recovery” and that he looks forward to his return to the Senate. He predicted that “the Senate will be able to carry forward with its business.”

Carlos Sanchez, Luján's chief of staff, said that the senator checked himself into a hospital Thursday afternoon in Santa Fe after experiencing dizziness and fatigue. The senator later learned he had suffered a stroke and had to undergo decompressive surgery.

Luján was elected in 2020. He was previously a member of House leadership and ran the House Democratic campaign arm for two cycles, including 2018 when Democrats won back the House.

Some senators projected optimism about Luján’s trajectory for recovery.

“He should be out pretty quickly,” said Sen. Tammy Duckworth (D-Ill.). “ It shouldn’t affect the agenda too much. … The key thing is that they recognized the symptoms fairly quickly.”

Every few years, health problems can change the composition of the Senate, with the late Sen. John McCain’s (R-Ariz.) long absence just the most recent example. Former Sen. Mark Kirk (R-Ill.) had a stroke in 2012 and didn’t return until 2013. Former Sen. Tim Johnson (D-S.D.) missed eight months after suffering a stroke in 2006. But the stakes are higher here, since none of that happened in an evenly divided Senate, where a long absence could hamstring Schumer’s majority.

Several senators didn’t know about Luján’s diagnosis until reporters asked about when he’d return. Senate Majority Whip Dick Durbin (D-Ill.) responded: “Oh, my God,” when a reporter informed him of the news. Sen. Ron Wyden (D-Ore.), meanwhile, said he wasn’t sure most of the Democratic caucus knew.

“Jesus. He had a stroke? First I’ve heard of it,” said Sen. Jon Tester (D-Mont.).”Oh, my God. I’ll find out. I did not know that, wow. It makes me worried about him, he’s too young for that stuff.”

Democrats this week can confirm nominees without Republicans, with GOP Sen. Mitt Romney (R-Utah) absent due to a Covid infection. But Murphy suggested that, in the short-term, Democrats may need to prioritize legislation that can garner Republican votes. Bipartisan groups of senators are currently working on a Russia sanctions package, as well as updates to the Electoral Count Act to make it more difficult for lawmakers to overturn reported election results. Democrats are also trying to reach an agreement with Republicans to fund the government past Feb. 18.

Luján's stroke is the biggest health scare Democrats have faced this Congress, after more than a year with an evenly divided Senate. Sen. Patrick Leahy (D-Vt.) was briefly hospitalized six days after Democrats took back the majority last year. And throughout the year, Democratic senators have also been absent due to Covid infections. The lack of wiggle room is one reason Democrats are pushing for the chamber to act quickly on the upcoming Supreme Court confirmation.

“We’re in a 50-50 Senate, for any of us, at any time. We saw when a member gets Covid what happens in terms of the schedule,” said Sen. Debbie Stabenow (D-Mich.). “We’re all human beings, something could happen at any time.”

#### Bill is ALREADY insufficient to solve, and Manchin will cut it FURTHER

Knowles 1/7 – Senior editor at Yahoo News.

David Knowles, “Manchin keeps Democrats guessing on climate change action,” *Yahoo News*, 7 January 2022, https://news.yahoo.com/manchin-keeps-democrats-guessing-on-climate-change-action-192403874.html.

Further complicating the strategy for the party is the fact that Manchin has sought to drastically water down BBB's climate provisions. In October, he insisted that $150 billion in clean-energy initiatives be removed from the legislation. Without the Clean Electricity Performance Program as part of the bill, environmentalists pointed out, the U.S. would almost certainly fall short of its emissions targets, all but ensuring that global temperatures will rise above the 1.5°C threshold that scientists say would cause worldwide devastation.

“Joe Manchin just launched a hand grenade at Glasgow,” Michael Mann, director of the Earth System Science Center at Penn State University, tweeted in October before the U.N. Climate Change Conference in the Scottish city. “[Without] a clean energy standard in the reconciliation package, Biden admin cannot meet pledge of 50% reduction in U.S. carbon emissions by 2030. And international climate negotiations begin to collapse.”

Even if Democrats heed the advice of scientists and decide that a climate change bill is so important that it merits passing a bill stripped down of other priorities, Manchin has indicated he may still seek further changes.

“I think we have to continue to be realistic also; we have to have enough energy to run our country, and we have to have the transition as it happens, as we move from a fossil dependency to [one that is] cleaner, and you do that by using fossils in cleaner ways," Manchin said Tuesday. "You should be able to.”

In December, Manchin said one reason he had pulled support for BBB was that it shifted the country to clean energy too quickly.

"To do so at a rate that is faster than technology or the markets will have catastrophic consequences for the American people like we have seen in both Texas and California in the last two years," he said.

### 2AC---FTC DA

#### Tons of antitrust now

Jon Swartz 12-28, Senior Reporter for MarketWatch, “Big Tech Heads for ‘A Year of Thousands of Tiny Tech Papercuts,’ But What Antitrust Efforts Could Make Them Bleed?”, MarketWatch, 12/28/2021, https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776

Antitrust enforcement of Big Tech is expected to take place on a scale never before seen in 2022, following years of escalating rhetoric from Washington.

So far, Wall Street has shrugged as the five companies under the microscope — Google parent Alphabet Inc. GOOGL, -0.92% GOOG, -0.91%, Facebook parent Meta Platforms Inc. FB, -2.33%, Apple Inc. AAPL, -0.35%, Amazon.com Inc. AMZN, -1.14%, and, yes, Microsoft Corp. MSFT, -0.88% — have been targeted by governments and rivals across the globe. Despite a steady drumbeat of negative headlines, tech’s quintet of heavy hitters boasted a cumulative market value of nearly $10 trillion as 2021 neared an end, after producing a collective $2.4 trillion in revenue over the past two years of pandemic misery.

The stock prices of tech companies have only been “minorly impacted because investors do not tend to make decisions based on the mere possibility of legislation,” Ashley Baker, director of public policy at the Committee for Justice, told MarketWatch.

Many investors have simply looked back on history and shrugged, according to one Silicon Valley venture capitalist.

“There is more antitrust noise, but investment people remember the Microsoft and IBM IBM, -0.19% [antitrust investigations] in which waves of innovation followed those investigations and proved they did not own the industry,” Alexandra Sasha Johnson, president of Global Tech Symposium, a Silicon Valley investment conference, told MarketWatch. “Until the Big Tech companies buy each other, this is not a problem.”

For more: Big Tech was built by the same type of antitrust actions that could now tear it down

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This could finally change in 2022 as it did in the late 1990s, when some tech companies struck a cautious stance during the Justice Department’s investigation of Microsoft for monopolistic practices, Syed said.

“The difference is that we’re talking about interconnected companies that own an industry versus just one company [with Microsoft],” she said. “And there is bipartisan support, which makes it easier politically.”

More on the antitrust challenges facing Big Tech in 2022

Amazon has mostly avoided antitrust scrutiny, but that may change in 2022

Possible Justice Department lawsuit looms over Apple, which is facing scrutiny worldwide

Google enters 2022 battling antitrust actions on multiple fronts — with more likely to come

Facebook’s acquisitions of Instagram and WhatsApp are antitrust targets, but its metaverse mergers may be the victims

Microsoft has avoided U.S. antitrust scrutiny, but Europe is a different matter

With more than a dozen pieces of anti-tech legislation, a plethora of lawsuits and regulatory fines escalating in the U.S. and abroad, as well as the Biden administration rounding out Big Tech’s nightmare team of government agency heads, 2022 is shaping up as a seminal year for tech regulation after decades of inaction.

In rapid succession this year, Biden named and nominated an antitrust team of Tim Wu (to the newly created position of head of competition policy at the National Economic Council), Lina Khan (chair of the Federal Trade Commission) and Jonathan Kanter (head of the antitrust division of the Justice Department). Each is a heralded anti-monopolist advocate who has written extensively on the topic or represented companies making antitrust claims against Big Tech.

The trio have been referred to as members of a “New Brandeis movement,” named after Supreme Court Justice Louis Brandeis, whose decisions limited the power of big business in the early 20th century. With the New Brandeis trifecta in place, and Congress evaluating more than dozen possible anti-tech bills, next year is “shaping up to be the year of Tech Takedown,” Bhaskar Chakravorti, dean of global business at the Fletcher School at Tufts University, told MarketWatch.

More troubling for tech CEOs, he said, are the “many tiny actions at the FTC, Justice Department and Congress that will continue to keep feeding the news cycles with a steady stream of actions” that add up to a “a year of thousands of tiny tech papercuts.”

Big Tech’s treacherous path to antitrust enforcement has three potentially damaging roads: federal agencies challenging acquisitions and mergers; legislation tailored to stimulate competition and curtail the influence of tech’s dominant platforms; and federal and state lawsuits.

Closer scrutiny of M&A activity

The biggest immediate impact from the Biden administration’s all-out assault could be a cooling-off period of frenzied mergers and acquisitions by the biggest players. Regulators have been empowered with examining past deals and more strenuously inspecting tech’s latest purchases.

Major movement is already happening on the M&A front because, as lawyers and executives told MarketWatch, the FTC and Justice Department have new leadership empowered to more closely review and approve mergers while they await legislation and court actions. A non-binding presidential executive order largely seen as aimed at Big Tech announced a policy of greater scrutiny of mergers over the summer, and the FTC and Justice Department each would receive $500 million in new funding to boost staff working on antitrust enforcement as part of the House-passed reconciliation bill awaiting Senate action.

The FTC is signaling greater oversight over deals, requiring affirmative consent on certain transactions, which may prolong uncertainty on merger agreements. The agency has already sued to block the largest semiconductor deal ever — Nvidia Corp.’s NVDA, -0.59% proposed $40 billion acquisition of U.K.-based chip-design provider Arm Ltd., saying the deal would “distort Arm’s incentives in chip markets and allow the combined firm to unfairly undermine Nvidia’s rivals.”

Another FTC antitrust probe, into Meta’s plan to acquire VR fitness app Supernatural for $400 million, is underway, according to a report by The Information.

The Justice Department’s direction is less clear at this point, but signals from Kanter’s confirmation hearing point to “vigorous enforcement” of antitrust laws.

“Personnel is policy. With the trifecta of Khan, Kanter and Wu, there is a new sheriff in town,” Luther Lowe, senior vice president of public policy at Yelp Inc. YELP, -0.66%, told MarketWatch. “Efforts by Amazon and Facebook to recuse Khan, and Google’s attempt to recuse Kanter, is like arsonists asking for firefighters to be removed from a fire.”

#### AFF solves link—new authority comes with new funding authorization

Bannan is policy counsel at New America’s Open Technology Institute, focusing on platform accountability and privacy, and Gambhir, New America's Open Technology Institute, ‘21

(Christine and Raj, “Does Data Privacy Need its Own Agency?” <https://d1y8sb8igg2f8e.cloudfront.net/documents/Does_Data_Privacy_Need_its_Own_Agency.pdf>)

Proposals delegating privacy law enforcement to the FTC generally bolster an existing bureau or establish a new bureau within the agency. Senator Wyden’s Mind Your Own Business Act of 2019 would create a new 50-person Bureau of Technology within the FTC and add 125 employees to the Bureau of Consumer Protection—100 of whom would do privacy enforcement work.102 This would bring the total number of FTC employees doing privacy enforcement work up to about 190. While the Wyden bill does not provide figures for how much adding 175 new employees would cost, former FTC Chairman Joseph Simons estimated that a $50 million budget increase from Congress would enable the FTC to hire 160 new staff.103 Under this proposal, the number of employees working on privacy would more than triple. However, it would still only be about one-tenth the size of the Eshoo-Lofgren DPA proposal.

#### Non-unique & turn—squo litigation model horribly costly

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business.

Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms.14 Over the last decade, expenditures on expert costs by public enforcers have ballooned.15 In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.16

Another component of the burden is that antitrust trials are extremely slow and prolonged.17 The Supreme Court has criticized antitrust cases for involving “interminable litigation”18 and the “inevitably costly and protracted discovery phase,”19 yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”20 That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.21 The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.22

#### And—shifting to regulatory model frees up resources

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials. Identifying ex ante what types of conduct constitute “unfair method[s] of competition” would obviate the need to establish the same exclusively through ex post, case-by-case adjudication. Targeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted litigation, potentially saving significant resources on a present-value basis.47

Moreover, establishing a rule through APA rulemaking can be faster than litigating multiple cases on a similar subject matter. For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation. At the same time, rulemaking is not so fast that it surprises market participants. Establishing a rule through participatory rulemaking can often be far more efficient. This is particularly important in the context of declining government enforcement relative to economic activity, as documented by the ABA.48

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

Wilson, FTC Commissioner, ‘12/10/21

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

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

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

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

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

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

#### 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.

### 2AC---Neolib K

#### Markets are a computational necessity.

Posner and Weyl 18 – Eric A. Posner is Kirkland and Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair at the University of Chicago. E. Glen Weyl is an economist and researcher at Microsoft Research New England.

Eric A. Posner and E. Glen Weyl, “Epilogue: After Markets?” *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Princeton University Press 2018, Epub (email [arg5180@gmail.com](mailto:arg5180@gmail.com) for relevant text).

Markets as Miracles

As we saw in chapter 1, many economists who were committed to the market economy also considered themselves “socialists.” Yet in the early twentieth century, socialism became identified with central planning, thanks to the role of Marxism and the French Revolution in inspiring and justifying the economic policies of the Soviet Union. Central planning also received a boost from World War I, where national control of the economy for the purpose of war production was more successful than advocates of laissez-faire could ever have imagined. This led to a heated debate about whether central planning should be used in peacetime as well.

In the popular imagination, central planning could not succeed because it provided individuals with no incentives to work. People needed the prospect of riches, or at least wages, to get them out of bed in the morning. Yet incentives were quite strong in the Soviet Union, stronger, in many ways, than they are in capitalist countries. While there was less chance under Communism to grow rich, any prisoner of the Gulag knew the fate of those who “malingered.”

Another popular argument against central planning was advanced by Nobel Laureate Friedrich Hayek in 1945. Hayek argued that no central planner could obtain information about people’s tastes and productivity necessary to allocate resources efficiently.1 The genius of the market was the way that the price system could, in disaggregated fashion, collect this information from everyone and supply it to those who needed to know it, without the involvement of a government planning board.

A related version of this argument, less well-known than Hayek’s but actually more compelling, was made a few decades earlier. The brilliant economist Ludwig von Mises argued that the fundamental problem facing socialism was not incentives or knowledge in the abstract but communication and computation.2 To see what Mises meant, consider an illustrative parable proposed by Leonard Read in his 1958 essay, “I, Pencil.” 3

Read tells the “life story” of a pencil. Such a simple thing, one would at first think. And yet as you begin to reflect, you realize the enormously complex layers of thought and planning it would require to make a pencil from scratch. The wood must be chopped, cut, shaped, polished, and honed. The graphite must be mined, chiseled, and shaped. The ferrule—the collar that connects the wood shaft and the eraser—is an alloy of dozens of metals, each of which must be mined, melted, combined, and reformed. And so forth.

Yet what is most remarkable about the pencil is not its complexity but the complete lack of understanding that anyone involved in the manufacture of the eventual pencil has about any of these steps in the process. The lumberjack knows only that there is a market for his wood and some price that induces her to buy the needed tools, cut down trees, and sell lumber down the line of production. The lumberjack may never even know that the wood is used for a pencil. The pencil factory owner knows only where to purchase the needed intermediate materials and how to run a line assembling them. The knowledge and planning of the pencil’s creation emerge organically from the process of market relations.

Now suppose that we were to try to replicate the market relationships with a central planning board. The board would determine how much wood to chop and when, the number of workers to employ at each stage of production, the correct places and times to produce, ship, and build. Yet, to do this effectively the board would have to understand a great many things. It would have to learn from each of these specialized producers the unique knowledge of her domain of expertise that allows her to earn a living—for example, whether the lumber would have a more valuable use elsewhere in the economy (to build houses or ships or children’s toys) than as an input for pencils. Absorbing all this information and constantly receiving and processing the necessary updates to keep abreast of evolving conditions in each of these steps of the process, would overwhelm the capacity of even the most skilled managers.

And even if the board somehow had an unlimited capacity to absorb this information, it would still have the unmanageable problem of trying to act on this sea of data. Prices, supply and demand, and production relations in markets arise through a complex interplay of individuals each helping to optimize a tiny part of a broad social process. If, instead, a single board had to plan this entire dance, it would force a small number of individuals to contemplate an endless sequence of choices and plans. Such elaborate calculations are beyond the capacity of even the most brilliant group of engineers.

Mises wrote decades before the rise of the fields of computer science and information theory and lacked any way to formalize these intuitive ideas. Many of Mises’s arguments were dismissed by mainstream economists, whose increasingly narrow mathematical approach to the field Mises disdained. Mises’s critics, including Oskar Lange, Fred Taylor, and Abba Lerner, argued that the market mechanism was but one of many ways (and far from the most efficient way) to organize an economy. They viewed the economy purely mathematically, rather than computationally, and saw no difficulty in principle with solving a (very large) system of equations relating the supply and demand of various goods, resources, and services.

In a simplified picture of the economy, ordinary people perform dual functions as producers (workers, suppliers of capital, etc.) and consumers. As consumers, people have preferences regarding different goods and services. Some people like chocolate, others like vanilla. As producers, they have different talents and capacities. Some people are good at doing math, others at mollifying angry customers. In principle, all we need to do is figure out people’s preferences and their talents, and assign jobs to people who do them best, while distributing the value created by production in the form of goods and services that people really want. Rewards and penalties need to be determined to give people incentives to reveal their preferences and talents, and to ensure that they actually do what they are supposed to do. All of this can be represented mathematically and solved. That’s why socialist economists viewed the economy as a math problem the solution of which only required a computer.

Yet the later development of the theory of computational and communication complexity vindicated Mises’s insights. What computational scientists later realized is that even if managing the economy were “merely” a problem of solving a large system of equations, finding such solutions is far from the easy task that socialist economists believed. In an incisive computational analysis of central planning, statistician and computer scientist Cosma Shalizi illustrates how utterly impossible “solving” a modern economy would be for a central planning board. As Shalizi notes in his essay, “In the Soviet Union, Optimization Problem Solves You,” the computer power it takes to solve an economic allocation problem increases more than proportionately in the number of commodities in the economy.4 In practical terms, this means that in any large economy, central planning by a single computer is impossible.

To make these abstract mathematical relationships concrete, Shalizi considers an estimate by Soviet planners that, at the height of Soviet economic power in the 1950s, there were about 12 million commodities tracked in Soviet economic plans. To make matters worse, this figure does not even account for the fact that a ripe banana in Moscow is not the same as a ripe banana in Leningrad, and moving it from one place to the other must also be part of the plan. But even were there “merely” 12 million commodities, the most efficient known algorithms for optimization, running on the most efficient computers available today, would take roughly a thousand years to solve such a problem exactly once. It can even be proven that a modern computer could not achieve even a reasonably “approximate” solution—and, of course, today there are far more goods, services, transport choices, and other factors that would go into the problem than there were in the Soviet Union in the 1950s. Yet somehow the market miraculously cuts through this computational nightmare.

Markets as Parallel Processors

But all of this raises a question. If the problem is so hard to solve, how is it possible for the market to solve it? Consider Lange’s quote from our epigraph.5 The market is just a set of rules enforced by the government—not much different from a computer algorithm, although a very complex one. It’s true that no single person invented the market. Yet the rules of the market are well understood, and economists are constantly telling people to implement them. Imagine that a new country is created, and its leaders ask a western economist how best to create an economy. The economist will tell them how to set up a market—the rules of contract and property law, for example. (Indeed, economists have been running around the halls of government of developing countries and the floors of start-ups for decades doing just this.) Aren’t the economists just supplying a kind of computer program to the leaders, who by implementing it are engaging in a style of centralized planning?

To understand how the market solves the “very large system of equations,” you need to know the key ideas of distributed computing and parallel processing. In these systems, complicated calculations that no one computer could perform are divided into small parts that can be performed in parallel by a large number of computers distributed across different geographic locations. Distributed computing and parallel processing are best known for their role in the development of “cloud computing,” but their greatest application has gone unnoticed: the market economy itself.

While the human brain is wired differently from a computer, computational scientists estimate that a single human mind has a computational capacity roughly ten times greater than the most powerful single supercomputer at the time of this writing.6 The combined capacity of all human minds is therefore tens of billions of times greater than this most powerful present-day computer. The “market” is then in some sense a giant computer composed of these smaller but still very powerful computers. If it allocates resources efficiently, it does so by harnessing and combining their separate capacities.

Adopting this perspective, we must ask how the market is “programmed” to achieve this outcome. The economy consists of a variety of resources and human capacities at a range of locations, along with a system for transmitting data about these resources among individual human beings. A standard approach in parallel processing is to take information local to one location in, say, a picture or puzzle and assign this to one processor, integrating these inputs on still other processors in a hierarchical fashion. Now apply this image to the economy. In every place, we take one of the computers (humans) available to us and assign it to collect information about that location’s needs and resources and report some parsimonious “compressed” summary of all that data to other computers. For example, there might be a hierarchical arrangement of computers, with those responsible for particular locations on the ground reporting to a higher “layer” that integrates local areas and then upward from there.

Consider the following example. A person works on a farm and is in charge of ensuring that the farm is productive and that her family is happy. This person sends information about the farm and her family, not in its full richness and complexity, but in broad strokes, to district managers. One manager specializes in understanding the resources that farms need to operate—seeds, fertilizer— while another understands the resources that people living on farms need in order to be happy, including food and clothing. These managers would then aggregate these data and convey them to the next layer, perhaps a national wheat distributor or a regional supplier of products for use on farms. At every level of this chain, some information would need to be lost for the parallel processing to remain parallel and tractable: the farm manager could not detail every way in which a slightly better paved road would help in conveying goods to market or how slightly cleaner water would protect her crops. But at least she could report the largest and most important needs and hope that the loss of information only slightly reduces the efficiency of the resulting solution.

This arrangement has a flavor of central planning but also resembles a market economy. People specialize in different parts of the production chain and operate under limited information, yet are able to coordinate their behavior because the information takes a certain form. While people are experts on local conditions, they know little about economic conditions elsewhere. They know that grain prices are high and tractor prices are low, but not why this is the case. When they buy a tractor or sell grain, they don’t tell the vendor or purchaser their life story, all the conditions on their farm, and so forth. They just place an order or offer so much grain at the going price.

This “price system” thus greatly simplifies communication between different parts of the economy. In fact, economists have shown that prices are the minimum information that a farmer needs to plan her operations effectively. So long as every important way that the farm could benefit or draw down resources from the outside world has a price attached to it, this is all the information the farmer needs to make economic decisions. Any greater information would be a waste, from a purely economic efficiency perspective, though it might be interesting from time to time to develop personal relationships. Conversely, if these prices were not available, there would be no way for a farmer to know whether it pays to use new tractors or rely instead on more labor, nor would she know how many seeds to plant for next season. The farmer without such prices could easily produce too little or waste resources on a tractor that could be better used for more labor, seed, or even consumption.

In this sense, prices are the “minimum” information necessary for rational economic decision-making.7 No other system of distributed computing can be equally productive and yet require less communication.

Markets elegantly exploit distributed human computational capacity. In doing so they allocate resources in ways that no present computer could match. Von Mises was right that central planning by a group of experts cannot replace the market system. But his argument was mistakenly taken as implying that the market is “natural” rather than a human-created program for managing economic resources. In fact, there is nothing natural about market institutions. Human beings create markets—in their capacity as judges, legislators, administrators, and even private business people who frequently set up organizations that create and manage markets.

Markets are powerful computers, but whether they produce the greatest good or not depends on how they are programmed. We advocate “Radical Markets” because we believe that in the present stage of technological and economic development, when cooperation has grown too large to be managed by moral economies, the market is the appropriate computer to achieve the greatest good for the greatest number. If we see it as such, we can fix the bugs in the market’s code and enable it to generate more wealth that is distributed more fairly.

By sharpening our understanding of the role and value of markets, the computational analogy clarifies our claim that the solutions we propose are based on extending the reach of markets. The COST on wealth radicalizes markets as it puts greater responsibility on individuals to articulate their values and gives them greater ability to claim things they value highly. QV does the same in the political sphere. Our ideas on migration give individuals more scope for determining the best path for where they live and work. Our proposals on antitrust and data valuation break up centralized power and place greater responsibility on individuals and small firms to compete, innovate, and make rational economic choices to allow for the distributed computation of optimal economic allocations. But all these proposals raise the question: if the market is just a computer program that harnesses the power of individual human intellects, will it still be necessary as computer power increases?

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

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

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

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

Santa Clara L. Rev. 703)

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

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

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

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

#### The stakes are high—antitrust policy can and should be distinguished from broad political economy—conflating the two risks undoing every achievement of the past 100 years

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

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

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

Santa Clara L. Rev. 703)

The justification for a consumer welfare standard, as well as for neoliberal political economy more generally, should be distinguished from a defense of this sense of neoliberalism as a comprehensive social order which, like its Marxist rival, shares in this totalitarianizing of the economic. 150 Put simply, notwithstanding its fruits, neoliberalism should not become the very sort of utopian and totalitarian ideology that it was designed to replace. The existence of a justification for neoliberal competition policy does not mean that the wealth maximizing logic of the market should be the organizing principle for society writ large' 5 ' -or even law, as a general matter. 52 To paraphrase Schum- peter, it is the higher order question of "Meaning," upon which the indictment of neoliberalism is likely most sound and most neededhowever difficult that may be to articulate.

VI. CONCLUSION

The United States has been the preeminent embodiment of capitalism and democracy around the world. As it transitioned through what we have understood as the classical liberal, progressive, and neoliberal phases of its political economy, it played a leading role in overcoming the greatest authoritarian and totalitarian forces in modem history: the last of the monarchies of the Old Order in World War I, national socialism in World War II, and communism in the Cold War. But rather than herald a liberal and democratic end of history,'53 the current crisis of the neoliberal order is an occasion for policymakers to reflect upon precisely where things may have went wrong.

The stakes are high. But for the United States' unique achievements in republican government, victory in two world wars, and technological and economic progress, Schumpeter may very well have been proven right that the great revolution of capitalist democracy, which preceded over a hundred and fifty years of inter-Western wars, civil strife, and the resultant loss of hundreds of millions of lives, could have been merely a precursor'5 4 to a far more barbaric and inhumane system of government than what came before it,'55 and which would put to death by the tens of millions the very masses it claimed it would liberate. 156 The United States, with its unrivaled system of free enterprise, commitment to the rule of law, and inheritance of the Western tradition remains the best hope to prevent, in solidarity with its allies, the final triumph of such a totalitarian tragedy.

The competition policy community, which during the neoliberal period accustomed itself to a comfortable and technocratic discourse about which conduct rules will maximize consumer welfare, 157 must adapt its thinking by considering changes to antitrust law within the context of a broader debate that questions not only the consumer welfare consensus, but also the neoliberal principles upon which contemporary antitrust is premised. In this debate, competition policymakers should remain steadfast in their conviction that history has justified a consumer welfare standard as the lodestar of antitrust law158 --even if incremental changes are appropriate in some areas. Simply put, the inability for antitrust law to operate as an economic, social, or political panacea does not mean it isn't working.

Rather, what is good policy for antitrust law may not be good policy for all organs of society, and the fundamental problem with neoliberalism may not so much as involve what has been gained, but what has been lost-that is, so to speak, Burke's "chivalry" or Schumpeter's "holy grail"-within neoliberalism's broader program to generalize the market form across society. 159 Seeking to use antitrust or other market tools as a means to understand, let alone solve, larger social problems fundamentally fails to grasp the deeper forms of which societies have historically been constituted. 60 Even if man is a homo economicus- as he always has been' 6 '-that is certainly not all he is, and his economic nature need not and should not come at the expense of the higher rational faculties that ground moral and political order. These questions, as uncomfortable as they may be, far outstrip the search of the New Brandeisians and others for a golden mean in the Herfindal- Hirschman index that balances the interests of capitalism and democracy in a given market. They are also more important.

The hope lies not, moreover, in a return to either Jeffersonian democracy or New Deal progressivism. 162 Just as the analysis of the problem may be better found on the classical "anthropological' 163 analysis, to avoid the Scylla and Charybdis of tyranny and ochlocracy, a path forward for America and the West lies in its unique and millennia- old tradition of republican government. In particular, if liberal capitalist democracy continues to falter,164 the United States can take the lead in looking back to the cosmopolitan and meritocratic model of republican Rome1 65 that inspired Presidents166 and abolitionists167 -even if America ultimately chartered a different course. 68 The West's ability to once again renew its civilization around a rightful heir-lest imposters claim the title-to its great tradition of right order, individual liberty, and progress in the condition of man may hang in the balance.

#### Their alternative vision of industrial organization is meaningless and will just create a different version of squo market failures

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

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

Penn Law. 1964)

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

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

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

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

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

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

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

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

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

The movement antitrust attack on “consumer welfare” reflects both a misunderstanding of that term, and an exaggeration of its influence on recent antitrust jurisprudence. This point is critical because much of movement antitrust blames the consumer welfare principle for the current state of antitrust law. Consumer welfare as it is properly used today refers to the welfare of consumers as consumers, pure and simple.34 Speaking objectively, consumer welfare is improved by high output and low prices, as well as high quality. Under this definition the welfare of producers, competitors, or anyone other than consumers who might be affected by a practice is ignored. In addition to its substantive advantages, this principle has a powerful administrative advantage: it does not require courts to compute welfare “tradeoffs,” because there is nothing to trade off.35

In sharp contrast, Robert Bork very famously used the term “consumer welfare” when he was really referring to the combined welfare of both producers and consumers.36 He observed that an economic tradeoff occurs when a supplier practice causes monopolistic increases in consumer prices but also reduces the supplier’s costs.37 Most peculiarly, for Bork the word “consumer” referred to suppliers as well as customers.38 For Bork, a practice that generated one hundred dollars in seller profits but buyer losses of sixty dollars would be counted as a net improvement of “consumer welfare.” Bork also believed, however, that actual computation of welfare tradeoffs in individual cases would be too difficult. Further, an attempt to do so would overlook important efficiencies. Rather, efficiencies should be presumed, even when the challenged practice creates market power.39 That presumption of efficiency without proof is one of the most controversial aspects of Bork’s approach to the welfare question.

These two understandings of consumer welfare have produced a troublesome ambiguity in antitrust law ever since. For example, some of those who write in movement antitrust today attribute the consumer welfare principle to Bork,40 and as a result blame it for higher prices that accrue to producers. But the important thing is that high producer profits for Bork was part of the consumer welfare that antitrust law should produce.

This ambiguity about definition has also affected Supreme Court usage of “consumer welfare.” The Supreme Court has never categorically embraced any particular definition of consumer welfare, even though it has used the term several times. Six majority opinions speak of consumer welfare. Two were quotations from Bork’s The Antitrust Paradox, suggesting that the Court was either speaking of producer welfare as well, or else that it did not appreciate the difference between Bork’s definition and true consumer welfare.41 Plaintiffs won both cases, however, and the holdings are consistent with true consumer welfare. Indeed, in one of them, Reiter v. Sonotone Corp., the Supreme Court held that end-use consumers had standing to pursue price fixing, making it an important consumer welfare decision.42

Of the remaining four uses, two involved predatory pricing cases observing that consumer welfare would be enhanced by a period of below-cost pricing that was not followed by recoupment of losses through subsequent higher prices.43 That would very likely be true. An unsuccessful attempt at predatory pricing would result in lower consumer prices temporarily, but no subsequent period of high prices. The final uses of consumer welfare are related to the Leegin Creative Leather Products, Inc. v. PSKS, Inc. decision holding that some instances of resale price maintenance may promote consumer welfare. The first was Leegin itself44 and the second was Ohio v. American Express Co., making essentially the same observation.45 That could also be true under either definition of consumer welfare.

Four additional usages of the term are in dissents.46 Finally, the term appeared in Justice Brennan’s concurring opinion in the Jefferson Parish Hospital District No. 2 v. Hyde tying case. Justice Brennan observed that some ties could impair horizontal competition, injuring consumer welfare.47 A few other cases never use the phrase “consumer welfare” but do speak more generally about benefits to consumers.48 None of these Supreme Court decisions distinguish the Bork definition of consumer welfare from the true consumer welfare position. Beyond the Supreme Court, the strongest case for application of a consumer welfare principle is in merger law under the Horizontal Merger Guidelines, which embrace a consumer welfare principle to the extent that they tie merger policy to the effect on output and consumer prices.49

One of the most disturbing things about movement antitrust is its indifference or even disparagement of low consumer prices. Without citing any evidence, some of its protagonists proclaim that most Americans are not concerned with high prices that might result from monopoly, but rather with “loss of their properties, hence their independence, even their dignity.”50 They recommend harsh rules against vertical integration without ever stating a test, other than a very general suggestion that vertical integration leads to leveraging and foreclosure.51 They call for a return to the merger enforcement standards expressed in the 1968 Merger Guidelines—for example, blocking any merger between a firm with fifteen percent of a market and any other firm whose market share is one percent or more. The relevance of these numbers is not apparent, other than their suggestion that firms are

currently too big.52

Clearly, high prices are not the target. The movement’s proponents denigrate the importance of prices to merger analysis—for example, objecting to the fact that, while the 1968 Merger Guidelines were not particularly focused on consumer prices, guidelines issued in the 1980s and after were. Indeed, low prices appear to be the enemy that antitrust must combat.53 Movement protagonists argue in favor of resale price maintenance, not in order to promote lower cost distribution, but rather to protect less efficient retailers’ higher margins from predatory pricing—without any evidence of a type of predatory pricing that resale price maintenance could combat.54 They enthusiastically embrace Louis Brandeis’s repeated arguments that “price-cutting” is in fact “the most potent weapon of monopoly—a means of killing the small rival.”55 Much of the resale price maintenance that Brandeis supported occurred at the behest of dealer cartels who forced suppliers to use resale price maintenance as a way of disciplining price cutters.56

Certainly, big business can cause harm to the lives of Americans in other ways than through competitive pricing. But these ways need to be articulated, supported by evidence, and then sorted into those things that are conceivably within the domain of antitrust and those that are not. Promiscuous application of the antitrust laws so as to make big firms smaller and prices higher could cause irreparable harm, not only to consumers, but to the entire economy.

## 1AR

### Adv 1

#### Big tech has no *incentive* to innovate—only new firms solve

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

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

The dominant tech companies certainly have the digital assets, capital, and other resources necessary to push innovation forward. But what innovation? The companies’ fiduciary responsibility is to their shareholders, not something broader. In a March 2020 speech, the U.S. deputy attorney general cited economic research that “an incumbent’s incentive to innovate is lessened because the resulting innovation replaces existing profitable sales … innovations are more likely to come not from a monopolist, but from an outsider without existing sales to replace.”53

The experience with the 20th century's dominant tech company, AT&T, graphically illustrates this point. Innovation under corporate control is innovation for corporate benefit. This is not evil, simply an exercise in fiduciary reality. To have America’s competition with China controlled by limited fiduciary interests, however, is not necessarily in the overall national interest. Beyond the risk of the dominant companies making innovation decisions based on self-interest is the nature of the global economy itself. The argument that Big Tech is the alternative to China only works if these same companies are not in alliances with China. As the dominant companies increasingly view themselves as international players, the pressure builds for them to have a “China strategy” that, intentionally or not, accrues to the benefit of China.54 Google has announced an AI center in China.55 Amazon is the second largest cloud service provider in China, after Alibaba.56 Apple, of course, famously builds its hardware in China. These are not untoward acts; however, when the United States builds its plan for competing with China around companies doing business in China, such reality becomes relevant. “Big companies are what are investing in technologies like AI the most,” Google CEO Sundar Pichai told CNN. “As a company we now invest sometimes thinking 5 to 10 years ahead without necessarily worrying about short term profits,” he said. Such investments are, indeed, important, but “thinking 5 to 10 years ahead” is not unique to large companies; it is what innovators and venture capitalists do as a matter of course.57 The challenge for those innovators and their investors is that while capital can buy creativity, intelligence, and computing power, they are disadvantaged when the data they need is being hoarded by the dominant companies.

Big Tech’s bottleneck on the data necessary for AI is not in the national interest. The dominant companies cite their data hoards as a critical asset for the United States and a reason why government policy should be hands-off. If that data is a critical national asset, however, why should only a handful of companies be allowed to control that asset to the detriment of smaller, innovative companies?

#### Our comparative advantage is disruptive innovation not bigness

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

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

The centralized control of China creates an antientrepreneurial force. While the Chinese culture has historically been quite entrepreneurial, the Chinese government’s current control of the population works against that tradition. Because hierarchical operations have little room for creativity, a popular Chinese expression is: “The more you try, the more you fail.” The “more you try” to think creatively outside the hierarchy-dictated orthodoxy, the greater the personal risks, a China-based digital consultant explained to me. The attitude of Thomas Edison’s “I have not failed 10,000 times, I’ve successfully found 10,000 ways that won’t work” does not find a home in the top-down environment of China.36

We need to take advantage of the American entrepreneurial spirit. The freedom to try and fail and to try again is as American as baseball. The beacon of opportunity this represents to the world is a national asset. But we need to have the digital tools to take advantage of those opportunities.

If America is going to out-innovate China, then American innovators need access to the essential capital asset of the 21st century: data. The large digital companies are wildly powerful and profitable not only because they have siphoned great amounts of personal data from consumers, but also because they then assume the role of gatekeeper to block access to that data. “Even well-intentioned gatekeepers slow innovation,” Amazon founder and CEO Jeff Bezos wrote in his 2011 letter to shareholders.37 He was describing the benefits of openness in the fledgling Amazon Web Services, yet it is an important message if America is to out-innovate China. Competition with China is advanced by picking the lock of gatekeepers and opening the flow of digital assets to competition-driven innovation in the U.S.

#### The “regs bad for national security” narrative is fake

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

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

“Mark Zuckerberg says breaking up Facebook would pave the way for China’s tech companies to dominate,” the respected tech blog Recode Decode headlined.8 Zuckerberg said in an interview: “If we adopt a stance which is that, okay, we’re going to, as a country, decide that we’re going to clip the wings of these [American] companies, then there are plenty of other companies out there that are willing and able to take the place of the work we’re doing … And they don’t share the values that we have.” Google CEO Sundar Pichai was less subtle about equating regulatory oversight with national security. He told CNN: “I worry that if you regulate for the sake of regulating, it has a lot of unintended consequences … [including] implications for our national security.”9

Of course, no one is talking about regulation simply “for the sake of regulating.” The tech companies would like us to believe in a binary reality: the necessity to choose between national security and protecting competition and consumers. The responsible alternative is to recognize the legitimacy of both sets of concerns and develop a national strategy to do something about both.

The result of the China bogeyman strategy is to create a false narrative. Across the spectrum of digital activities, tech companies are exploiting an international challenge to constrain the kind of governmental oversight that promotes domestic competition. The result not only hurts consumers, but also hurt’s competitive innovation and thus America’s ability to enhance national security and to compete abroad. We should have more faith in American capitalism. We don’t become stronger or more innovative by outsourcing innovation with China-like policies to anoint national heroes.

### Adv 2

#### We don’t constrain firm profits OR cause uncertainty.

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Northwestern University. He has previously served as Chief Economist of the Federal Communications Commission, and Shelanski, Professor of Law at Georgetown University and a member of the firm Davis Polk & Wardwell LLP. He has formerly served as Director of the Bureau of Economics at the Federal Trade Commission and as Chief Economist of the Federal Communications Commission, ‘20

(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

In particular, we argue that specific regulation of digital platforms could create more definite and reliable pathways for increasing competition in the markets served by these firms. As we explain below, these types of regulations would limit the extent to which dominant digital platforms are able to control competition in vertically related or complementary markets, preserve incentives for innovation in related markets, increase the competitive impact of existing competitors, and reduce barriers to entry. We will refer to this type of regulation as “light handed pro-competitive” (LHPC) regulation. As we noted in the introduction and will discuss in more detail, the regulation we propose attempts neither to base access terms on a firm’s costs nor to restrain a firm’s allowable returns. It therefore does not rely upon the elaborate mechanisms of public utility regulation, whether those mechanisms be directly rate-of-return based or be more incentive-based, like a price-cap regime. Instead of replacing competition with monopoly controls, LHPC regulation aims to govern firms’ behavior and market power by protecting and promoting competition. Its primary goals are to provide competitive incentives and to increase the viability of actual and potential competitors. To achieve these objectives, the regulatory scheme could require a dominant digital platform to provide a baseline level of access (interconnection and interoperability), which the regulator determines is necessary to promote entry by actual and potential competitors. The primary regulation applied to access terms would take the form of prohibiting a dominant platform from discriminating among users in access prices (if any) or other terms of access.

#### Our mechanism drives clarity and predictability

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.43 The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.44 An agency must publish the final rule in the Federal Register at least thirty days before the rule becomes effective.45 These procedural requirements promote clear rules and provide clear notice. As the Supreme Court has stated, a “fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”46 Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively and will allow market entrants and entrepreneurs to compete on more of a level playing field.

#### Squo is actually worse---case by case is inherently unpredictable.

Chopra, Commissioner, Federal Trade Commission, and Khan, FTC Chair, Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, ‘20

(Rohit and Lina, “The Case for “Unfair Methods of Competition” Rulemaking,” 87 U. Chi. L. Rev. 357)

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process. One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication “may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen[people], the private bar, and the government agencies.”7 Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.8

#### Companies have to deal with major litigation costs regardless.

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

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

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

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

#### Case-by-case adjudication model locks in bad precedent

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(William and Howard, “Antitrust Enforcement, Regulation, and Digital Platforms,” 168 U. Penn. L. Rev. 1911)

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement.46 The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a caseby-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct’s actual effects warrant.47 Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves.48 Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

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#### Cap sustainable

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Ronald. February 16. “Is Degrowth the Only Way to Save the World?” <https://reason.com/blog/2018/02/16/is-degrowth-the-only-way-to-save-the-wor>

Unless us folks in rich countries drastically reduce our material living standards and distribute most of what we have to people living in poor countries, the world will come to an end. Or at least that's the stark conclusion of a study published earlier this month in the journal Nature Sustainability. The researchers who wrote it, led by the Leeds University ecological economist Dan O'Neill, think the way to prevent the apocalypse is "degrowth."

Vice, pestilence, war, and "gigantic inevitable famine" were the planetary boundaries set on human population by the 18th-century economist Robert Thomas Malthus. The new study gussies up old-fashioned Malthusianism by devising a set of seven biophysical indicators of national environmental pressure, which they then link to 11 indicators of social outcomes. The aim of the exercise is to concoct a "safe and just space" for humanity.

Using data from 2011, the researchers calculate that the annual per capita boundaries for the world's 7 billion people consist of the emission of 1.6 tons of carbon dioxide per year and the annual consumption of 0.9 kilograms of phosphorus, 8.9 kilograms of nitrogen, 574 cubic meters of water, 2.6 tons of biomass (crops and wood), plus the ecological services of 1.7 hectares of land and 7.2 tons of material per person.

On the social side, meanwhile, the researchers say that life satisfaction in each country should exceed 6.5 on the 10-point Cantril scale, that healthy life expectancy should average at least 65 years, and that nutrition should be over 2,700 calories per day. At least 95 percent of each country's citizens must have access to good sanitation, earn more than $1.90 per day, and pass through secondary school. Ninety percent of citizens must have friends and family they can depend on. The threshold for democratic quality must exceed 0.8 on an index scale stretching from -1 to +1, while the threshold for equality is set at no higher than 70 on a Gini Index where 0 represents perfect equality and 100 implies perfect inequality. They set the threshold for percent of labor force employed at 94 percent.

So how does the U.S. do with regard to their biophysical boundaries and social outcomes measures? We Americans transgress all seven of the biophysical boundaries. Carbon dioxide emissions stand at 21.2 tons per person; we each use an average of 7 kilograms of phosphorus, 59.1 kilograms of nitrogen, 611 cubic meters of water, and 3.7 tons of biomass; we rely on the ecological services of 6.8 hectares of land and 27.2 tons of material. Although the researchers urge us to move "beyond the pursuit of GDP growth to embrace new measures of progress," it is worth noting that U.S. GDP is $59,609 per capita.

On the other hand, those transgressions have provided a pretty good life for Americans. For example, life satisfaction is 7.1; healthy life expectancy is 69.7 years; and democratic quality stands at 0.8 points. The only two social indicators we just missed on were employment (91 percent) and secondary education (94.7 percent).

On the other hand, our hemisphere is home to one paragon of sustainability—Haiti. Haitians breach none of the researchers' biophysical boundaries. But the Caribbean country performs abysmally on all 11 social indicators. Life satisfaction scores at 4.8; healthy life expectancy is 52.3 years; and Haitians average 2,105 calories per day. The country tallies -0.9 on the democratic quality index. Haiti's GDP is $719 per capita.

Other near-sustainability champions include Malawi, Nepal, Myanmar, and Nicaragua. All of them score dismally on the social indicators, and their GDPs per capita are $322, $799, $1,375, and $2,208, respectively.

The country that currently comes closest to the researchers' ideal of remaining within its biophysical boundaries while sufficient social indicators is...Vietnam. For the record, Vietnam's per capita GDP is $2,306.

"Countries with higher levels of life satisfaction and healthy life expectancy also tend to transgress more biophysical boundaries," the researchers note. A better way to put this relationship is that more wealth and technology tend to make people happier, healthier, and freer.

O'Neill and his unhappy team fail drastically to understand how human ingenuity unleashed in markets is already well on the way toward making their supposed planetary boundaries irrelevant. Take carbon dioxide emissions: Supporters of renewable energy technologies say that their costs are already or will soon be lower than those of fossil fuels. Boosters of advanced nuclear reactors similarly argue that they can supply all of the carbon-free energy the world will need. There's a good chance that fleets of battery-powered self-driving vehicles will largely replace private cars and mass transit later in this century.

Are we about to run out of phosphorous to fertilize our crops? Peak phosphorus is not at hand. The U.S. Geological Survey (USGS) reports that at current rates of mining, the world's known reserves will last 266 years. The estimated total resources of phosphate rock would last over 1,140 years. "There are no imminent shortages of phosphate rock," notes the USGS. With respect to the deleterious effects that using phosphorus to fertilize crops might have outside of farm fields, researchers are working on ways to endow crops with traits that enable them to use less while maintaining yields.

O'Neill and his colleagues are also concerned that farmers are using too much nitrogen fertilizer, which runs off fields into the natural environment and contributes to deoxygenated dead zones in the oceans, among other ill effects. This is a problem, but one that plant breeders are already working to solve. For example, researchers at Arcadia Biosciences have used biotechnology to create nitrogen-efficient varieties of staples like rice and wheat that enable farmers to increase yields while significantly reducing fertilizer use. Meanwhile, other researchers are moving on projects to engineer the nitrogen fixation trait from legumes into cereal crops. In other words, the crops would make their own fertilizer from air.

Water? Most water is devoted to the irrigation of crops; the ongoing development of drought-resistant and saline-tolerant crops will help with that. Hectares per capita? Humanity has probably already reached peak farmland, and nearly 400 million hectares will be restored to nature by 2060—an area almost double the size of the United States east of the Mississippi River. In fact, it is entirely possible that most animal farming will be replaced by resource-sparing lab-grown steaks, chops, and milk. Such developments in food production undermine the researchers' worries about overconsumption of biomass.

And humanity's material footprint is likely to get smaller too as trends toward further dematerialization take hold. The price system is a superb mechanism for encouraging innovators to find ways to wring ever more value out less and less stuff. Rockefeller University researcher Jesse Ausubel has shown that this process of absolute dematerialization has already taken off for many commodities.

After cranking their way through their models of doom, O'Neill and his colleagues lugubriously conclude: "If all people are to lead a good life within planetary boundaries, then the level of resource use associated with meeting basic needs must be dramatically reduced." They are right, but they are entirely backward with regard to how to achieve those goals. Economic growth provides the wealth and technologies needed to lift people from poverty while simultaneously lightening humanity's footprint on the natural world. Rather than degrowth, the planet—and especially its poor people—need more and faster economic growth.