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#### Aerojet DA

#### The Lockheed-Aerojet merger will be approved soon because of existing antitrust precedent, but it’s a politicized test of the FTC

Marcus Weisgerber 21, Global Business Editor at Defense One, “Lockheed’s Proposed Aerojet Rocketdyne Purchase Sets Early M&A Test for Biden”, Defense One, 3/21/2021, https://seniordownsizingsolutions.com/rs1kstuq/frank-kendall-northrop-grumman

The Biden administration’s approval — or disapproval — of Lockheed Martin’s planned $4.4 billion acquisition of rocket engine maker Aerojet Rocketdyne could shape defense industry consolidation for years to come.

If approved, the deal would mean the absorption of the last independent American weapons-grade rocket maker. All U.S. rockets would be produced by Northrop, which bought Orbital ATK in 2018, and Lockheed, the world’s largest defense contractor. It would also turn Lockheed into a key supplier of Raytheon Technologies, its major rival in the missiles sector.

Lockheed executives told investors on a Monday morning call that the acquisition would allow the company to deliver weapons to the military faster and cheaper than it can today.

“This helps position us for even greater growth, in hypersonics, missile defense and space, which are key elements of the national defense strategy,” Lockheed CEO Jim Taiclet said.

Taiclet, who became Lockheed’s CEO in June, also cited flat U.S. defense spending projections as a reason for the sale.

“They're going to be asked to do more in these areas with a flattening budget,” Taiclet said. “Having a more efficient supplier and a more robust supplier ... in uncertain economic times is a positive for the Department of Defense and for NASA.”

The proposed deal — which is expected to close in late 2021 — comes two years after Northrop Grumman acquired rocket maker Orbital ATK, a deal stoked industry consolidation fears. The Federal Trade Commission put conditions on the deal that Northrop had to supply solid rocket motors to competitors.

“Our overall expectation is that that may be the same lens through which this particular transaction is viewed because of the similarities there,” Taiclet said.

Still, Boeing claimed Northrop’s buying Orbital ATK prevented it from entering a bid for an $85 billion contract to build new intercontinental ballistic missiles. That left Northrop as the only bidder.

Orbital ATK, now part of Northrop, and Aerojet Rocketdyne are the only two U.S. makers of the solid rocket motors used in ICBMs and missile interceptors.

“The proposed purchase of Aerojet Rocketdyne (AJRD) by Lockheed Martin (LMT) is the first test of the Biden Administration and its views on defense sector consolidation and structure,” Capital Alpha Partners analyst Byron Callan said in a Monday note to clients. “It may take weeks and months before those views are known.”

Loren Thompson, a consultant and defense industry analyst with the Lexington Institute, said Lockheed’s acquisition of Aerojet would create more competition for solid rocket motors.

“Aerojet Rocketdyne will now have the same kind of financial resources to draw on as Orbital did when it joined Northrop, assuring that both domestic suppliers of large solids can remain active in military and civilian markets,” Thompson wrote Monday in Forbes.

A number of government organizations — including the Defense Department — are involved in the regulatory approval process. When Lockheed acquired helicopter-maker Sikorsky in 2015, Frank Kendall, who served as the Pentagon’s top weapons buyer during the Obama administration, expressed concerns that the deal would reduce competition. Kendall is reportedly under consideration to become Biden’s deputy defense secretary.

#### The plan causes compensating denial of the deal

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Blocking the merger obliterates containment of hypersonic threats from Russia and China

Don Nickles 21, Chairman and CEO of The Nickles Group LLC, Former United States Senator, Former Director of Chesapeake Energy and Valero Energy, Degree in Business Administration from Oklahoma State University, “Why Lockheed's Acquisition of Aerojet Will Be A 'Boon for U.S. Innovation'”, Politico, 3/22/2021, https://www.politico.com/news/2021/03/22/lockheed-aerojet-acquisition-477491

The proposed acquisition by defense prime contractor Lockheed Martin of propulsion provider Aerojet Rocketdyne is facing some criticism due to alleged concerns that it would give Lockheed an unfair competitive advantage on missile and missile defense contracts.

Raytheon Technologies in particular has publicly complained that the combination would leave it dependent on a direct competitor for much of the propulsion in its missile offerings. Indeed, Aerojet Rocketdyne is a supplier of solid rocket motors and also is a source of defense technologies including hypersonic engines and the propulsive Divert and Attitude Control System that steers missile defense kill vehicles.

Such concerns ignore the important benefits, including the increased competition, which will result from this merger. And, Lockheed Martin has made it clear that Aerojet Rocketdyne will remain a merchant supplier, so these benefits will flow to all customers, including the U.S. government.

More importantly, the Lockheed-Aerojet merger will be a boon for U.S. innovation and competitiveness at a time when it faces growing threats from increasingly capable adversaries like China and Russia.

There are significant national advantages to bringing Aerojet Rocketdyne under the corporate roof of a prime contractor with $65 billion in annual revenue. Broadly speaking, it will provide financial stability for the propulsion provider while making more resources available for research and development in key technology areas.

As a stand-alone company with $2 billion in annual revenue, Aerojet Rocketdyne’s financial fortunes are tied to a few large programs that are subject to shifting political winds and the whims of prime contractors. A large program cancellation or a prime’s decision to change suppliers could substantially weaken the company, leaving it vulnerable to a takeover on unfavorable terms.

A well-resourced defense contractor like Lockheed Martin, by contrast, could be expected to invest in Aerojet Rocketdyne’s core propulsion capabilities. One area likely to see substantial investment is hypersonic weaponry, where the nation by some estimates has fallen behind Russia and China.

Moreover, by bringing a key link of its supply chain in house, Lockheed Martin will be positioned to offer better prices to its government customers and the transaction also will lead to efficiencies and innovation that will benefit the whole industry.

Such national benefits are not unique to the proposed Lockheed Martin-Aerojet Rocketdyne deal. Consider, for example, what United Technologies Corp. said in announcing its planned merger with none other than Raytheon, a deal which closed last year:

"By joining forces, we will have unsurpassed technology and expanded R&D capabilities that will allow us to invest through business cycles and address our customers' highest priorities,” said then-UTC chair and CEO Greg Hayes, who now sits at the helm of the combined company. “Merging our portfolios will also deliver cost and revenue synergies that will create long-term value for our customers and shareowners."

One of the public comments about the Lockheed Martin-Aerojet Rocketdyne deal is rooted in a commonly held assumption that vertical integration, in which primes take ownership of supply chains, stifles competition by giving these companies excessive marketplace clout. That view is myopic, especially in industries that are highly dynamic such as the defense industry.

Consider the case of United Launch Alliance, the Boeing-Lockheed Martin joint venture that until about a decade ago had a de facto monopoly on the business of launching operational U.S. government satellites. That monopoly was toppled by SpaceX, which builds some 85 percent of the components for its Falcon rockets, notably the engines, in house.

Experts have long cited SpaceX’s vertically integrated structure as the source of the company’s competitive strength, in large part because it eliminates supply chain profit margins. SpaceX founder Elon Musk has applied the same in-sourcing strategy in building up his Tesla electric car company, which has put U.S. industry at the forefront of a global trend in automobile manufacturing.

Vertical integration has been a fact of life in the aerospace and defense industry since the early 1990s, when the end of the Cold War triggered a wave of consolidation that continues today. On the propulsion side, a flurry of activity over a three-year period starting in 2001 reduced the number of U.S. solid rocket motor providers from five to just two: Aerojet Rocketdyne (then known as Aerojet); and ATK.

That situation lasted until 2014, when ATK merged with rocket and satellite maker Orbital Sciences Corp. to create the vertically integrated Orbital ATK. Less than five years later, Orbital ATK was acquired by aerospace and defense giant Northrop Grumman, a direct competitor to Lockheed Martin with nearly $37 billion in annual revenue.

Already the dominant supplier of large-diameter solid rocket motors, ATK can now draw on the resources of Northrop Grumman to advance its capabilities and boost competitiveness. Northrop Grumman recently won the prime contract for the nation’s next-generation ICBM, the Ground Based Strategic Deterrent, ensuring a healthy workload for its solid rocket motor business for years to come and ratcheting up the competitive pressure on Aerojet Rocketdyne.

As it happens, Northrop Grumman tapped Aerojet Rocketdyne for a smaller but significant role on its GBSD team, demonstrating that primes will join forces with competitors when it makes business sense.

Perhaps a better example — one that directly refutes assertions that competition requires subcontractor independence — is Northrop Grumman’s role in the Space Force’s all-important launch services program, where it supplied solid rocket motors for ULA’s Vulcan rocket even as it vied for that business with its own OmegA vehicle. In a similar vein, Blue Origin’s entry into that competition with its New Glenn vehicle didn’t stop it from supplying the main engine for Vulcan, which ultimately won the biggest share of launches.

The defense industry is replete with examples of companies supplying hardware and technology to rivals, even for programs where they compete head-to-head. Another relevant example: Raytheon in 1998 won a lucrative contract to supply missile defense kill vehicles incorporating DACS technology that at the time was supplied by Boeing — a competitor for that same contract.

For acquisitions that raise questions about access to critical capabilities, government regulators sometimes require consent decrees that commit the buyer to make these technologies available to competitors at market rates and to wall off proprietary information they might obtain in the process. In recent years, antitrust agencies have not shied away from investigating and enforcing compliance with consent decrees, including in the defense industry. There is no reason to think that would change in the future.

Some observers view the Lockheed Martin-Aerojet Rocketdyne merger as an early test of the Biden administration’s antitrust enforcement policies, and regulators will no doubt scrutinize it thoroughly to ensure competition is preserved. But there’s much more at stake here: This is about how the administration intends to deal with growing threats posed by peer and near-peer adversaries, who have eroded many of the technological advantages this nation has long taken for granted.

If the U.S. is to retake, and maintain, the lead in areas like hypersonic weaponry, a healthy and vibrant propulsion industry featuring players competing on a level playing field is essential. Regulators and policymakers should view this merger through that lens and render their decision accordingly.

#### Nuclear war

Dr. Richard H. Speier 17, Adjunct Staff with the RAND Corp, Founded the Office of Non- Proliferation Policy at the DOD, Recipient of the Meritorious Civilian Service Medal as the “Father of the MTCR,” now Consults in the Washington DC area; George Nacouzi, Senior Engineer at the RAND Corporation, Supports Projects within PAF (Project Air Force) and NSRD (National Security Research Division), Carrie A. Lee, Researcher at RAND, and Richard M. Moore, Researcher at RAND. 2017. “Hypersonic Missile Nonproliferation: Hindering the Spread of a New Class of Weapons.” RAND. https://www.rand.org/pubs/research\_reports/RR2137.html

Strategic Implications of Hypersonic Weapons Compressed Timelines The U.S. military uses an acronym to describe the decisionmaking and action process cycle: OODA (Observe, Orient, Decide, Act). These four steps take time, and hypersonic missiles compress available response time to the point that a lesser nation’s strategic forces might be disarmed before acting. As an illustration of the time required to act with respect to an existential missile threat, the Nuclear Threat Initiative organization estimated a timeline for a U.S. response to a massive Russian intercontinental ballistic missile (ICBM) attack, as follows:9 • 0 minutes—Russia launches missiles • 1 minute—U.S. satellite detects missiles • 2 minutes—U.S. radar detects missiles • 3 minutes—North American Aerospace Defense Command (NORAD) assesses information (2 minutes max) • 4 minutes—NORAD alerts White House • 5 minutes—first detonations of submarine-launched ballistic missiles • 7 minutes—locate president and advisers, assemble them, brief them, get decision (8 minutes max) • 13 minutes—decision • 15 minutes—transmit orders to start launch sequence • 20 minutes—launch officers receive, decode, and authenticate orders • 23 minutes—complete launch sequence (2 minutes max) • 25 minutes—Russian ICBM detonations. This timeline is not, of course, representative of two hostile parties in closer proximity or with less effective warning systems than Russia and the United States. Nor is it representative of less-than-Armageddon possibilities. However, for adjacent enemies within a 1,000-km range, a hypersonic missile traveling at ten times the speed of sound could cover that distance and reduce response times to about six minutes.10 Targets As discussed earlier, hypersonic missiles increase the threat over current generations of missiles in cases where the target nation has missile defenses. The targets in such nations would primarily be high value and heavily defended. Prime targets could include destroying a nation’s leadership and command and control, referred to as “decapitation,” to prevent the target nation from responding with an effective follow-on attack. Other key targets could be carrier strike groups, with the objective of striking a key blow or pushing the naval formation further from the coast. And, because of their time sensitivity, strategic forces and storage facilities for weapons of mass destruction (WMDs) could warrant hypersonic attack. Implications for Targeted Nations Any government faced with the possibility that hypersonic missiles would be employed against it—particularly in a decapitating attack— would plan countermeasures, many of which could be destabilizing. For example, countermeasures could include devolution of strategic forces’ command and control so that lower levels of authority could execute a strategic strike, which would obviously increase the risk of accidental strategic war; or strategic forces could be more widely dispersed— a tactic risking greater exposure to subnational capture. An obvious measure would be a launch-on-warning posture—a hair-trigger tactic that would increase crisis instability. Or the target nation could adopt a policy of preemption during a crisis—guaranteeing highly destructive military action. To be sure, such measures could be invoked against threats from current types of missiles.11 But, for nations with effective ballistic mis- sile and/or cruise missile defenses in the time frame when hypersonic missiles might proliferate, the hard choices would be forced when facing hypersonic threats. Advanced nations with adequate resources could take other steps against hypersonic threats. They could strengthen the resilience of their command and control, harden the siting of their strategic forces, and make a deterrent force mobile or sea-based. These tactics may or may not be effective, especially for lesser nations. And they certainly will be expensive—putting them out of reach of some. Even for major powers, the proliferation of hypersonic missiles will create new threats by allowing lesser powers to hold them at risk of effective missile attacks especially against “unhardened” targets, e.g., cities. Over the coming decades, the ability of a lesser nation with a handful of ICBMs to threaten major powers will continue to decrease as wide area missile defenses continue to improve. However, HGVs and HCMs will be more difficult to defend against. Implications for Major Powers The ability of hypersonic missiles to penetrate advanced missile defenses will increase the risks for nations with such defenses. Lesser powers with hypersonic weapons may see these weapons as a deterrent against greater power intervention, and feel free to pursue potentially destabilizing regional agendas. Moreover, lesser nations with hypersonic missiles could affect the force deployments of major powers. As noted above, carrier strike groups might be pushed further out to sea or an intervening power’s regional military bases might become exposed to more effective attacks. The Broader Picture of Increased Risk The ability of hypersonic forces to penetrate defenses and compress decision time could aggravate the instabilities in regions that are already tense—for example, Iran-Israel and North Korea–Japan. Conflicts in these regions could evolve to include major powers aligned on opposite sides. An Israel-Iran conflict, with the United States and much of Europe aligned with Israel and Russia and perhaps China aligned with Iran, would create new paths for escalation to an even-larger conflict. The basic roles of external actors would not necessarily change—the alignments would stay the same—but external powers might suddenly find themselves in a more-unstable situation in which their patron states are increasingly trigger-happy. As noted previously, lesser powers could gain influence over major powers by threatening a hypersonic attack. At the least, lesser powers might be emboldened if they saw themselves as possessing a deterrent against major power intervention. Finally, because hypersonic weapons increase the expectation of a disarming attack, they lower the threshold for military action.

### 1NC

#### States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should adopt the principle of separating platforms from commerce for platforms in the private sector. The federal government should not preempt this action.

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### 1NC

#### Regulation CP

#### The United States federal government should

#### increase regulatory prohibitions that adopt the principle of separating platforms from commerce for platforms in the private sector.

#### create a Digital Platform Agency responsible for industry-specific regulation of platform separation and require that platforms in the private sector are separate from commerce.

#### give all relevant regulatory agencies authority to cooperate with foreign antitrust agencies.

#### Regulation solves without ‘antitrust’ or FTC involvement

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A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

#### DPA regulation effectively spurs tech competition without setting an antitrust precedent

Tom Wheeler 20, Visiting Fellow in Governance Studies at the Center for Technology Innovation, Phil Verveer, Senior Fellow at the Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, and Gene Kimmelman, Senior Fellow at the Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, “The Need for Regulation of Big Tech Beyond Antitrust”, Techtank – Brookings Institution Blog, 9/23/2020, https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/

Enforcement of the antitrust statutes is an important tool for the protection of competitive markets. Yet, it is a blunt instrument unable to reach many nuanced competition and consumer protection issues created by the digital economy. It is inherently uncertain in outcome, reliably lengthy in process, and an after-the-fact response rather than a broad-based set of rules.

Without a doubt, Big Tech has delivered wonderous new capabilities. However, the “move fast and break things” mantra of Silicon Valley has meant that digital companies move fast and make their own rules. Antitrust statutes reflect a time when markets were relatively stable because technology was relatively stable. Today, the rapid pace of digital technology means companies can move rapidly to advantage themselves by exploiting consumers and eliminating potential competition.

Regulation, done with agility, can be an important refinement to the blunt force of the antitrust laws while being able to protect competition and consumers alike. It is not enough, however, to re-task industrial era federal agencies to oversee the digital giants. These agencies are full of dedicated professionals, but they operate on precedents and procedures built for another era when technology and innovation moved at a slower pace. In place of such industrial era muscle memory, we need a purpose-built federal agency with digital DNA.

Congress has traditionally created new expert agencies to oversee new technology platforms. Whether the Interstate Commerce Commission (railroads), Federal Communications Commission (broadcasting), Federal Aviation Administration (air transport), Consumer Financial Protection Bureau (finance), or any other of the alphabet agencies, the precedent is clear: new technologies require specialized oversight. In our report, “New Digital Realities; New Oversight Solutions” we conclude such regulation in the digital era warrants creation of a Digital Platform Agency to establish public interest expectations that promote fair market practices while being agile enough to deal with the rapid pace of digital technology.

Such an agency should be governed by a new congressionally established digital policy built on three pillars:

* Risk management rather than micromanagement: rigid industrial era utility-style regulation is incompatible with today’s rapid pace of technological change. Regulation should be based on risk-targeted remedies focused on market outcomes.
* Restoration of common law principles: for hundreds of years common law has required those providing services to anticipate and mitigate harmful effects (a “duty of care”), as well as providing access to essential services (a “duty to deal”). Oversight of Big Tech need do nothing more than reinstate such expectations.
* Agile regulation: in lieu of top-down dictates, the new agency should be the forum to involve the industry in developing enforceable behavioral standards similar to fire and building codes. Such codes introduce innovation-promoting agility to the oversight process while protecting consumers and competition.

The existing agencies of government are based on statutes and structures that reflect the relatively stable markets and relatively stable technology of the late industrial era. These policies and procedures, however, have been ambushed by the digital future.

The solution to the public interest challenges posed by Big Tech is to embrace its differences and enable subject matter experts to substitute the public interest for corporate interests. While antitrust enforcement is important, the companies can no longer be permitted to make their own rules. It is time for purpose-built federal oversight of the dominant force in our lives and our economy.

### 1NC

#### Infra PTX

#### BBB will pass---timing and focus are key

Laura Barron-Lopez 11/11, White House Correspondent for POLITICO, “Dems to White House: The only prescription is more Biden”, <https://www.politico.com/news/2021/11/11/dems-white-house-biden-520946>, November 11th, 2021

After months of deference to Congress, President Joe Biden moved more assertively last week to shepherd half his domestic agenda into law. With the other half still in limbo, Democrats want some of that Biden punch again.

Outside groups fear that congressional Democrats could come up short on Biden’s social spending package. They are concerned that moderates in the House may end up buckling if the budget scores on the bill come back worse than anticipated. And there is residual anxiety that one of the two wavering Senate Democrats — Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — could vote “no” over concerns about inflation and long-term debt.

The clearest solution to avoiding this, they argue, is more Biden.

“All eyes are on the president, all expectations are on the president,” said Lorella Praeli, co-president of the progressive Community Change Action. “We are playing our role. We are mobilizing. We're reminding people everyday what this is about.”

Praeli added that Biden must ensure there aren’t future cuts to the package, which dropped from $3.5 trillion to $1.75 trillion to accommodate centrist Democrats in the House and Senate. “This is what he campaigned on. Only the president can deliver it in the end.”

Until last week, Biden’s involvement in negotiations had been more deferential than managerial. That befuddled lawmakers, who were waiting for him to draw red lines about which priorities he wants in and out of the deal or to even demand votes. To date, Biden has publicly refrained from drawing a red line around including paid leave in the final version of the legislation, leaving the leadership in the House at odds with centrists in the Senate.

But Biden did ramp up his involvement in the negotiations last week. And Democrats viewed that as key to getting an agreement in the House on their infrastructure bill, as well as on a rule to move forward with their social spending package, which funds universal pre-K, expands Medicare access, cuts taxes for families with children 18 years old and under, and combats climate change.

Now they want more. Expectations are high for Biden to keep the House to its promise of a vote on that social spending plan the week of Nov. 15.

“They basically made a promise,” said Rahna Epting, executive director of the progressive advocacy group MoveOn. “And Biden was able to get enough progressives to vote for the bipartisan infrastructure bill, on that promise. We are expecting Biden and the Democratic Caucus will make good on their word and pass the Build Back Better Act no later than Nov 15th as stated.”

White House officials contend that Biden and his team remain in close touch with the Hill, and their legislative affairs staff continues to push the social spending bill toward a vote. The White House said it is communicating regularly with a range of lawmakers including Manchin, but did not answer when asked whether Biden has spoken to the West Virginia senator or other moderates in recent days.

“There has been no kind of slowdown when it comes to our Hill outreach,” a White House official said.

The growing demands for Biden to stay heavily involved reflect a fear in the party that the window to act on the agenda is quickly closing, especially as concerns mount about lingering inflation and the midterms near. If the House meets its deadline next week and passes the social spending bill, some Democrats want Biden to issue a deadline for the Senate to act. Others noted that the end-of-year legislative calendar is short and brutal.

The “dynamic has totally changed,” said a Democratic strategist. “The president secured this agreement with the five holdouts for House passage of BBB next week and it’s on him to enforce it.”

A top climate operative echoed that assessment telling POLITICO that Biden “will have failed” on tackling climate change if the second piece of the agenda doesn’t pass.

But the operative also expressed a newfound fear that Biden’s current effort to sell the benefits of the infrastructure bill could distract or complicate Democrats’ attempt to keep public interested in the social spending plan.

"They need to sell [physical infrastructure] but also act like it's not enough," said the activist.

"How are they also creating the urgency for BBB to get done, for it to stay on the timeline of getting it done by Thanksgiving? It's a balancing act.”

Matt Bennett, co-founder of the moderate group Third Way, agreed that the dynamics were “tricky” in trying to sell one just-passed bill as historic while simultaneously making the case that another ambitious bill is needed. Biden will travel to New Hampshire and Michigan next week to highlight the money the infrastructure bill will direct toward new roads, bridges and transit projects across the country.

“This moment that we're in is hard,” said Bennett. “It will be much, much easier when both bills are completed. There is a very profound political imperative for Democrats to get this finished, to end the infighting and sausage-making and shift to creating a narrative about what Democrats have just done for Americans because they've been utterly unable to do that.”

A number of groups plan to amp up pressure next week as Congress returns. House Speaker Nancy Pelosi and the White House have repeated their desire to have a vote on the social spending plan by the end of next week. The Service Employees International Union will descend on Capitol Hill with some 500 union members, said Mary Kay Henry, the union’s president.

“We are escalating phone calls, text messages,” said Henry. “We're bringing members into Washington next Tuesday, we have the president's back, to get Congress to act quickly and get the full back package.”

Democratic outside groups have spent more than $150 million on TV and digital ads promoting the president’s social spending plan, known as “Build Back Better.” The League of Conservation Voters and Climate Power launched new digital ads calling on the five moderates who reached an agreement with the White House and House leadership last week to follow through on their commitment to pass the second piece of Biden’s economic agenda “next week.”

The longer it takes to pass the social spending plan, the harder it becomes to keep the party unified, Democrats warn, especially amid up-and-down economic news. A new report Wednesday revealed inflation hit 6.2 percent in October, its highest point in 31 years, contributing to high gas, car and food prices. It forced Biden to quickly issue a statement addressing the issue and ever-so-slightly shift his messaging, arguing that passage of the social spending plan would combat inflation.

“Inflation hurts Americans’ pocketbooks, and reversing this trend is a top priority for me,” Biden said in a statement. “It is important that Congress pass my Build Back Better plan, which is fully paid for and does not add to the debt, and will get more Americans working by reducing the cost of child care and elder care, and help directly lower costs for American families.”

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure causes extinction

Jeff Goodell 21, American Author and Contributing Editor to Rolling Stone Magazine, Senior Fellow at the Atlantic Council and 2020 Guggenheim Fellow, “Joe Manchin Just Cooked the Planet,” Rolling Stone, 10-1-2021, https://www.rollingstone.com/politics/political-commentary/joe-manchin-reconcilation-bill-big-coal-1235597/amp/

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

Quite a legacy. But he has earned it.

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

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

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

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

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

### 1NC

#### Reg Neg CP

#### The United States federal government should convene binding negotiated rulemaking over whether to adopt the principle of separating platforms from commerce for platforms in the private sector and implement the outcome.

#### The CP competes and solves by giving industry genuine input in antitrust design AND avoids reflexive opposition and a wave of litigation in response to mandatory prohibitions

Ira S. Rubinstein 11, Adjunct Professor of Law and Senior Fellow at the Information Law Institute at the New York University School of Law, JD from Yale Law School, BA in Philosophy from Clark University, “Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes”, I/S: A Journal of Law and Policy for the Information Society, 6 ISJLP 355, Summer 2011, Lexis

2. Negotiated Rulemaking

Negotiated rulemaking (also referred to as regulatory negotiation or "reg. neg.") is a statutorily-defined process by which agencies formally negotiate rules with regulated industry and other stakeholders as an alternative to conventional notice-and-comment rulemaking. The core insight underlying negotiated rulemaking is that conventional rulemaking discourages direct communication among the parties, often leading to misunderstanding and costly litigation over final rules. In contrast, negotiated rulemaking brings together agency personnel and representatives of the affected interested groups to negotiate the text of a proposed rule based on (more honestly presented) shared information and willingness to compromise. If the negotiations succeed by achieving a consensus on a proposed rule, the resulting final rule should be of better quality, easier to implement, enjoy greater legitimacy, and lead to fewer legal challenges.

The Negotiated Rulemaking Act of 1990 (NRA) establishes a statutory framework for negotiated rulemaking under which agencies have the discretion to bring together representatives of the affected parties in a negotiating committee (for example, industry, environmental and consumer groups, and state and local governments) for face-to-face discussions. If the committee reaches a consensus, the agency can then issue the agreement as a proposed rule subject to normal administrative review processes. Proposed rules emerging from a negotiated rulemaking process are also subject to judicial review. While the NRA augments Administrative [\*378] Procedure Act (APA) rulemaking, it does not replace it. Indeed, most of the language of the Act is permissive. If negotiations fail to reach a consensus, the agency may proceed with its own rule.

The promise of negotiated rulemaking is that by enlisting diverse stakeholders in the rulemaking process, responding to their concerns, and reaching informed compromises, better quality rules will emerge at a lower cost and with greater legitimacy. Critics counter that the process not only fails to deliver its purported benefits (and then only rarely) but that its very use undermines the foundations of administrative law by shifting the decision-making function from agencies tasked with protecting the public interest to a collection of interest groups with their own private agendas. In 2000, Jody Freeman and Laura Langbein published a comprehensive analysis and summary of an empirical study of negotiated rulemaking. The study compared participant attitudes toward negotiated versus conventional rulemaking. Based on their analysis, they concluded that "reg. neg. generates more learning, better quality rules, and higher satisfaction than conventional rulemaking" as well as increasing legitimacy, which they defined as "the acceptability of the regulation to those involved in its development." But even if this very positive analysis is taken at face value, Lubbers shows that the EPA use of negotiated rulemaking is in fact quite limited, having fallen off in recent years by almost two-thirds. Despite this decline, which Lubbers attributes to budgetary issues and the burdens of complying with federal advisory committee [\*379] requirements, Lubbers insists upon the proven value of reg. neg. in providing creative solutions to regulatory problems.

Other environmental law scholars have identified a few situations where negotiated rulemaking should provide the EPA with significant advantages. For example, Andrew Morriss and his colleagues point to situations "where the substance of the regulation requires the credible transmission of information between the regulated entities and other interest groups, and where the agency's preference for a particular substantive outcome is weak." Reg. neg. also requires "a relatively high degree of shared interest among the groups participating, the existence of gains from trade to allow parties to compromise, and a willingness by interest groups to reject the role of spoiler." These views are largely consistent with the findings of Daniel Selmi, who conducted a detailed study of the negotiation of a regional air quality rule. Selmi explained that the parties were willing to compromise for several reasons: (1) the industry believed that regulation was inevitable; (2) the environmental groups recognized that even though they preferred an outcome based on new and expensive technology, they lacked the political capital to achieve this result; and (3) the agency was not locked into a rigid, initial position, but remained open towards finding a solution that responded to information acquired during the negotiations. But the key factor in reaching a compromise was a very practical one-namely, that the facilitator had the necessary skills to assist the parties in identifying their priorities and to help them make tradeoffs in which they each achieved some of their goals.

In sum, both Project XL and negotiated rulemaking have strengths and weaknesses. Key strengths of a well-designed covenanting approach include innovation (because covenants invite firms to tap [\*380] into their own ingenuity); flexibility (in the form of tailored rules that either match the circumstances of an individual firm, as in Project XL, or the underlying conditions faced by a regulated industry based on superior expertise, as in negotiated rulemaking); greater commitment (because companies write or at least negotiate their own rules rather than having them imposed externally); more effective compliance (because internal discipline as practiced by firms that agree to rules of their own devising is likely to be more extensive and cheaper for everyone than government investigations and prosecutions); and, as a result of these benefits, lower-cost solutions. On the other hand, covenants have a number of obvious weaknesses, including higher administrative burdens associated with negotiating the rules (although this might be mitigated by lower overall costs for compliance and litigation); legal uncertainty in the case of Project XL; and a bias against small firms, which typically lack the resources necessary to negotiate facility-based standards or to participate in a negotiating committee.

C. Normative Framework for Assessing Self-Regulatory Initiatives

Having identified different types of self-regulation and their co-regulatory characteristics, and having investigated environmental covenants such as Project XL and regulatory negotiations (in keeping with Hirsch's suggestion that such covenants may provide the basis for innovative approaches to privacy regulation), this Article now presents a normative framework for evaluating the effectiveness of co-regulatory programs. Part III will apply this normative framework to four instances in which regulators have used co-regulation in the field of information privacy and assess their relative merits. The normative framework developed here melds the discussion of standard public policy criteria in Part II.A with the central features of second- generation strategies as reflected in the analysis of covenants in Part II.B. The resulting framework consists of six elements that are critical to the success of co- regulatory initiatives: efficiency, openness and transparency, completeness, strategies to address free rider problems, oversight and enforcement, and use of second-generation design features.

[\*381]

1. Efficiency

Efficiency may be defined as "achieving regulatory objectives at the lowest attainable cost." For all forms of self-regulation, efficiencies arise from harnessing industry expertise in the development of industry codes, which are inherently more flexible than legislation and may be tailored to the circumstances of individual firms, or adjusted to changes in market conditions or new technologies. In general, self-regulation costs less for government than regulatory rulemaking and enforcement because it shifts costs to industry. Whether it costs less for industry depends on the form of self-regulation and whether industry passes on its costs to consumers.

2. Openness and Transparency

Openness refers to whether the self-regulatory system allows the public to play any role in developing the underlying rules and enforcement mechanisms. Transparency, on the other hand, is a function of a system's ability "to produce and promulgate two kinds of information: (1) information about the normative standards the industry has set for itself; and (2) information about the performance of member companies in terms of those standards." In general, self-regulatory schemes publicize the existence and content of their principles (especially if their rules are determined by statute and hence publicly available). Purely voluntary codes may involve public interest groups at the discretion of member firms. When firms decide to develop codes using a consensus-based process, however, a wider range of interests is likely to be represented. Finally, performance data is not usually shared with the public and most self-regulatory organizations treat enforcement proceedings as private, but may publicly announce the outcome of any enforcement actions involving member firms.

[\*382]

3. Completeness

Completeness is the straightforward matter of whether a self-regulatory code of conduct addresses all relevant aspects of the standards governing industry practices. In privacy terms, these standards are embodied in the FIPPs, which are the benchmark against which the FTC and privacy advocates evaluate any self-regulatory privacy scheme. Unless they adhere to a pre-existing industry standard, voluntary codes often omit principles or practices that their members find too burdensome. In contrast, where government establishes default requirements on a statutory basis, incompleteness is rarely an issue.

4. Strategies to Address Free Rider Problems

Free riding occurs in voluntary programs when members enjoy the benefits of a program without having to meet its obligations. As Fiorino notes, "It reduces confidence in the reliability and quality of participants and thus affects the program's credibility." There are two main versions of the free rider problem. First, some firms may agree to join a program but merely feign compliance. And second, certain firms in the relevant sector may simply refuse to join at all. Both versions are potentially fatal to self-regulatory programs because they create a competitive disadvantage for honest participants. The first version may be counteracted by "peer group pressure, shaming, or more formal sanctions" while the second may require that "government intervenes directly to curb the activities of non-participants." Obviously, free rider problems dissipate when regulated entities are required to participate in a self-regulatory program or when codes of conduct are subject to government review and approval. Self-regulatory initiatives need to incorporate such strategies in order to prove effective.

5. Oversight and Enforcement

At an early stage of the U.S. government's support for self-regulatory privacy guidelines, the DOC commissioned a study of the [\*383] criteria for effective self-regulation. In addition to substantive criteria based on FIPPs, the DOC study identified three oversight and enforcement criteria: (1) consumer recourse, or the availability of affordable mechanisms for resolving complaints and perhaps awarding some compensation to an injured party; (2) verification, or the nature and extent of audits or more cost-effective ways to verify that a companies' assertions about its privacy practices are true and to monitor compliance with a program's requirements; and (3) consequences for failure to comply with program requirements, such as cancellation of the right to use a seal, public notice of a company's non-compliance, or suspension or expulsion from the program. Voluntary codes are often deficient in all three components. Once again, required government approval of these oversight and enforcement mechanisms ensures that baseline regulatory objectives are met.

6. Use of Second-Generation Design Features

The central features of second-generation environmental strategies are discussed at considerable length by Stewart and Fiorino. For present purposes, their insights may be boiled down (however inadequately) to the following catch phrase: self-interested mutual promises that reward good actors for superior performance. These strategies presuppose direct bargaining, information sharing, and the affected parties buying-in to cost-effective and innovative regulatory solutions. In view of these characteristics, second-generation strategies such as environmental (or privacy) covenants should achieve better outcomes than either conventional rulemaking or voluntary self-regulation.

III. Four Case Studies

This Article now presents four case studies of self-regulatory privacy schemes. The first case study focuses on the Network Advertising Initiative (NAI) Principles, a voluntary code established by an ad hoc industry advertising group that also oversees members' compliance. The second case study looks at a safe harbor solution for [\*384] U.S. firms needing to transfer data from the E.U. to the U.S. without running afoul of E.U. data protection requirements. To benefit from the safe harbor, firms have to certify that they will comply with privacy principles negotiated between the U.S. and E.U. but administered by industry seal programs. The third case study deals with FTC- approved safe harbor programs under COPPA, focusing, in particular, on that of the Children's Advertising Review Unit (CARU). Each of these three self-regulatory schemes will be classified using Priest's typology and evaluated in terms of the six factors identified above in Part II.C. The fourth and final case study begins with a brief overview of privacy covenants, both in the U.S. and abroad, and then turns to a very recent example of a voluntary covenanting approach to privacy. This last case study is less a detailed description and analysis of a specific program, and more a transitional step towards second-generation strategies.

A. The Network Advertising Initiative

On November 8, 1999, the DOC and the FTC held a public workshop on online profiling, which the FTC defined as the collection of data about consumers using cookies and web bugs to track their activities across the web. Although much of this information is anonymous in the narrow sense of not including a user's name, profiling data may include both personally identifiable information (PII) and non-personally identifiable information (non-PII). This data may also be "combined with 'demographic' and 'psychographic' data from third- party sources, data on the consumer's offline purchases, or information collected directly from consumers through surveys and registration forms." The resulting profiles often are [\*385] highly detailed and revealing yet remain largely invisible to consumers, many of whom react negatively when informed that their online activities are monitored.

The FTC recognized several benefits in the use of cookies and other technologies to create targeted ads, such as providing information about products and services in which consumers are interested and reducing the number of unwanted ads. More importantly, targeted ads increase advertising revenues, which subsidize free online content and services. On the other hand, the FTC acknowledged several major privacy concerns raised by online profiling such as the lack of consumer awareness; the scope of the monitoring activities, which occurs across multiple websites for an indefinite period of time; the potential for associating anonymous profiles with particular individuals; and the risk of companies using profiles to engage in price discrimination. Despite these concerns, the Commission, in June 2000, encouraged the network advertising industry to craft an industry-wide self-regulatory program.

Eight firms responded by announcing the formation of the NAI. Their key tenets included notice to consumers of what information network advertising firms collect and how that information is used, the ability to opt out of receiving tailored ads, and consumer outreach and education. Less than a year later, the NAI completed a [\*386] voluntary code of conduct that won the FTC's praise and informal endorsement. Under the original NAI Principles, network advertisers engaging in online preference marketing (OPM) are required to offer consumers notice and choice, both of which vary depending on whether the data collected is non-PII or a combination of PII and non-PII. The use of non-PII requires member firms to post on their websites "clear and conspicuous" notice of profiling activities, including what type of data is collected and how it is used; procedures for opting out of such uses; and the retention period for such data. The opportunity to opt-out must be accessible on the firm's or the NAI's website. Moreover, NAI firms that enter into a contract with a publisher for OPM services must require that they offer similar privacy protections to consumers. The merger of PII and non-PII for OPM purposes are subject to substantially similar notice requirements, but the choice options are more complex. Network advertisers merging PII with previously collected non-PII must first obtain a consumer's affirmative (opt-in) consent, whereas mergers of PII and non-PII collected on a going forward basis must afford consumers "robust notice" and an opt-out choice; the latter rule also applies to using PII collected offline when merged with PII collected online. Enforcement is another requirement that applies to [\*387] all NAI members, and the NAI offers several additional consumer protections as well.

For the next seven years, the NAI principles remained unchanged until two highly publicized incidents sparked renewed concerns over online profiling practices. The first incident involved a civil subpoena to Google seeking search query records. The second involved disclosure of millions of search queries by AOL. Both incidents involved leading search firms, whose business models are premised on providing free searches and a host of related services in exchange for serving targeted ads to customers based on their search queries and other data collected from users of these services. Over the next two years, consumer privacy organizations began filing complaints regarding online advertising practices and the proposed mergers between industry giants such as Google and DoubleClick. Both E.U. data protection agencies and the FTC started reviewing these activities, while the industry responded to the regulatory pressure by proposing new practices and technologies for improving search [\*388] privacy and addressing online profiling practices. Then, in 2007, the FTC held a two-day workshop focused on behavioral targeting. In connection with this workshop, the World Privacy Forum (WPF) prepared a highly critical report attacking the effectiveness of the NAI's self-regulatory scheme during the previous seven years. NAI responded to these and other criticisms by releasing a draft update to its original NAI Principles (this time soliciting public comments on the proposed changes). The newly expanded organization then published its revised code of conduct to mixed reviews.

Clearly, the NAI Principles constitute a voluntary code of conduct, exhibiting virtually all of the relevant characteristics as described in Part II.A. As such, do the original (or revised) NAI principles suffer from the shortcomings associated with voluntary codes, or do they live up to their promise of protecting consumer privacy? In other words, how do the principles fare when assessed against the six elements of the normative framework described in Part II.C?

To begin with, the principles are efficient for member firms, but less so for government (given the ongoing costs of FTC oversight) and for the public (given the negative externalities associated with behavioral profiling). Second, when the original principles were [\*389] issued in 2000, privacy advocates complained about the NAI's lack of transparency. Although the principles were posted online, the preliminary discussions between the NAI firms and the FTC were far less transparent-they took place largely behind closed doors. Third, the original principles were considered weak on notice, choice, and access; and critics were not much happier with the retrograde forms of notice, choice, and access permitted under the 2009 revised Principles. Fourth, at least in the early years, network advertising firms suffered from both versions of the free rider problem (feigned compliance and non-participation) and the NAI program did not include any mechanisms that capably addressed them. It remains to [\*390] be seen whether these issues will persist now that the FTC is again encouraging self- regulation, although current policy may change depending on whether or not Congress enacts new privacy legislation. Fifth, the NAI program is also deficient with respect to all three oversight and enforcement criteria identified in the DOC study referred to above. In terms of consumer recourse, the NAI Principles make formal provision for consumers to file complaints (which are now handled in-house) but are silent on remedies. As to verification and consequences for failure to comply, the NAI track record is extremely poor both on auditing compliance and invoking remedies (such as revocation, public suspension of membership, and referral to the FTC). Indeed, it is not clear whether such actions have occurred during its previous nine years of operation, although NAI's approach to audits seems to be changing for the better. Finally, although the more open process NAI used in revising its principles in 2009 is a good first step towards using second-generation strategies, it is still deficient in terms of direct negotiations, Coasian bargaining, and mutual buy-in.

B. The U.S.-E.U. Safe Harbor Agreement

Article 25 of the European Union Data Protection Directive (E.U. Directive) limits the transfer of personal data to a third country unless it provides an "adequate" level of privacy protection. Unlike the E.U. Directive, which is an omnibus statute protecting all personal information of European citizens, U.S. privacy protection relies on a combination of sectoral laws, FTC enforcement powers, and self-regulation. As a result of these differences, U.S. firms were uncertain about the legality of data flows from the E.U. to the U.S. under the [\*391] Article 25 adequacy standard. After several years of discussion, the European Commission (EC) and the DOC entered into a Safe Harbor Agreement (SHA) spelling out Privacy Principles that would apply to U.S. companies and other organizations receiving personal data from the E.U.

The SHA creates a voluntary mechanism enabling U.S. organizations to demonstrate their compliance with the E.U. Directive for purposes of data transfers from the E.U. They must self-certify to the DOC that they adhere to the Privacy Principles that mirror the core requirements of the E.U. Directive (i.e., notice, choice, onward transfer, security, data integrity, access, and enforcement), and repeat this assertion in their posted privacy policy. Although the FTC has agreed to treat any violation of the Privacy Principles as an unfair or deceptive practice, the SHA also defines the mechanism that firms should use to ensure compliance with these principles. These include: (1) readily available and affordable independent recourse mechanisms for investigating and resolving individual complaints and disputes; (2) verification procedures regarding the attestations and assertions businesses make about their privacy practices, which may include self- assessments (which must be signed by a corporate officer and made available upon request) or outside compliance reviews; and (3) remedies for failure to comply with the Privacy Principles, including not only correction of any problems, but also various sanctions such as publicizing violations, suspension, removal from a seal program, and compensation for any harm caused by the violation. Truste, [\*392] BBBOnline, and several other self-regulatory privacy programs already in operation when the SHA took effect then developed Safe Harbor programs specifically designed to satisfy (1) and (3). The verification requirement is satisfied by self-assessment or third-party compliance reviews.

The SHA has been described as an "uneasy compromise" between the comprehensive regulatory approach of the E.U. and the self-regulatory approach preferred by the U.S. This partly reflects the fact that in providing the Privacy Principles and related documents that form the SHA, the DOC lacked any direct statutory authority to regulate online privacy and therefore had to rely solely on its enabling statute, which only grants authority to foster, promote, and develop international commerce. Applying Priest's typology, it is clear that SHA seal programs more closely resemble regulatory self-management programs than voluntary codes of conduct. One might expect, therefore, that such programs would fare better than NAI in demonstrating greater transparency, fewer free rider issues, better coverage, and meaningful oversight and enforcement. Unfortunately, this is not borne out by the available evidence.

First, as a government initiative, the SHA Privacy Principles are highly transparent, at least in terms of DOC announcing the relevant standards that industry would need to follow. But second, as noted below, virtually no information is available regarding the performance of firms in terms of these standards. Third, SHA seal programs fare better than NAI in terms of formulating program guidelines that-at least in theory-adhere to all of the Privacy Principles. However, both the E.U. Study and the Galexia Study found that a high percentage of [\*393] participating firms did not incorporate all seven of the agreed upon Privacy Principles in their own posted privacy policies. Fourth, the SHA, like the NAI agreement, also suffers from both versions of the free rider problem- many firms self-certify their adherence to the Privacy Principles without even revising their posted privacy policies in accordance with SHA requirements and, even if one excludes firms that rely on alternative methods for demonstrating adequacy, the roughly 2,000 participants on the DOC's Safe Harbor List represent only a tiny fraction of firms that transfer data from the E.U. to the U.S. Fifth, as to oversight and enforcement, the E.C. Study noted that no complaints have been received and handled "despite frequent and even flagrant inconsistencies and violations in implementation," while according to the Galexia Study, fewer than one in four companies registered for safe harbor were in compliance with the Enforcement Principle and even fewer offered an affordable dispute resolution process. Indeed, it was not until the summer of 2009 that the FTC announced its first enforcement action against a U.S. company for violation of the SHA.

The SHA allows firms to meet the verification requirements of the Enforcement Principle either through self-assessment or outside [\*394] compliance reviews. Under the former, the firm must have in place "internal procedures for periodically conducting objective reviews" and must retain any relevant records. They must make the records available upon request in the context of an investigation or a complaint, but have no obligation to share this information with third parties. The same record-keeping requirement applies in the case of outside reviews subject to the same limitation. Thus, both internal and external compliance reviews remain opaque, making it difficult to draw any firm conclusions. Finally, while the SHA in theory fits neatly under Priest's regulatory self-management category, in practice it more closely resembles a voluntary code of conduct given the lack of accountability to government, the free rider problems, the lax monitoring of compliance by seal programs and government agencies, and until quite recently, the absence of enforcement actions or sanctions. In short, it displays none of the characteristics defining second-generation strategies.

C. The COPPA Safe Harbor

Congress enacted the Children's Online Privacy Protection Act of 1998 (COPPA) to prohibit unfair or deceptive acts or practices in connection with the collection, use, or disclosure of personal information from and about children on the Internet. The statute and Final Rule require operators of websites directed at children and of general audience websites with actual knowledge that a user is a child to meet five requirements: (1) notice; (2) parental consent prior to the collection, use, and/or disclosure of personal information from a child; (3) a right of parental review of such information; (4) proportionality; and (5) reasonable security policies.

[\*395]

COPPA provides both federal and state enforcement mechanisms and penalties against operators who violate the provisions of the implementing regulations. The statute by its terms also establishes an optional safe harbor program as an alternative means of compliance for operators that follow self-regulatory guidelines, which must be approved by the FTC under a notice and comment procedure. There are three key criteria for safe harbor approval. Self-regulatory guidelines must (1) meet or exceed the five statutory requirements identified above; (2) include an "effective, mandatory mechanism for the independent assessment of . . . compliance with the guidelines" such as random or periodic review of privacy practices conducted by a seal program or third-party; and (3) contain "effective incentives" to ensure compliance with the guidelines such as mandatory public reporting of disciplinary actions, consumer redress, voluntary payments to the government, or referral of violators to the FTC.

The avowed purpose of the COPPA safe harbor is to facilitate industry self- regulation, and it does so in two ways. First, operators that comply with approved self-regulatory guidelines are "deemed to be in compliance" with all regulatory requirements. To benefit from safe harbor treatment, operators need not individually apply for approval as long as they fully comply with approved guidelines that are applicable to their business. According to the COPPA Final Rule, such compliance serves "as a safe harbor in any enforcement action" under COPPA unless the guidelines were approved based on false or incomplete information. Second, the safe harbor allows "flexibility [\*396] in the development of self-regulatory guidelines" in a manner that "takes into account industry-specific concerns and technological developments." Industry groups interested in providing safe harbors must submit their self- regulatory guidelines to the FTC for approval. To date, the FTC has reviewed six safe harbor programs and approved four of them. With all of the approved safe harbor programs satisfying the three criteria set out in the preceding paragraph, the COPPA safe harbor exemplifies Priest's regulatory self-management category insofar as the statue sets regulatory policy and rules but assigns program sponsors the responsibility for drafting self-regulatory guidelines, implementing and operating the program, and enforcement. A brief assessment of CARU's monitoring and complaint-handling system shows the success of the safe harbor program from an enforcement standpoint.

Between 2000 and 2008, CARU reported on almost 200 cases; a few originated in consumer complaints and the rest resulted from CARU's routine monitoring of any website that may be reasonably expected to attract children or teen users. Issues ranged from inadequate privacy policies to the lack of a neutral age-screening process to collection or disclosure of PII from children without parental consent. The companies resolved all of the cases in question by agreeing to change their practices as directed by CARU. In [\*397] addition, CARU referred one case to the FTC that resulted in a $ 400,000 settlement. In a second case, the respondent entered into a consent decree with the FTC that included signing up for the CARU safe harbor. And in a third case, the FTC initiated a COPPA lawsuit based in part on CARU's determination of compliance shortcomings. This is an impressive record considering that since 2000, the FTC has brought a total of only fifteen COPPA enforcement cases. In short, CARU's compliance review and disciplinary procedures clearly have been successful in complementing the FTC's enforcement of COPPA, due in no small measure to its policy of engaging in widespread monitoring of child-oriented websites as opposed to members' sites only. This, in turn, allows the Commission to focus its resources on higher profile matters.

How well do COPPA safe harbor programs (and CARU, in particular) fare when evaluated against the now familiar normative criteria? Clearly, CARU harnesses industry expertise, but probably costs more to operate than the NAI or SHA seal programs given its extensive enforcement activities. Second, like the SHA, COPPA is very strong on producing and reporting information regarding relevant legal standards but weak on performance data. Third, as compared to both the NAI and SHA, only the COPPA safe harbor programs achieve full coverage of substantive privacy requirements as might be expected given the FTC's mandatory review of program guidelines, all of which must offer principles that "meet or exceed" statutory [\*398] requirements. Fourth, free rider problems are minimal in the COPPA safe harbor program because firms that resist joining an approved program remain subject to the statutory requirements, thereby deriving little competitive advantage from free riding. Additionally, the number of CARU investigations seems high enough to discourage feigned compliance by participating firms, especially given CARU's willingness to refer cases to the Commission, and the FTC's aggressive enforcement stance with respect to children's privacy issues. Fifth, as to oversight and enforcement, COPPA requires that approved safe harbor programs engage in ongoing monitoring of their members' practices to ensure compliance with program guidelines and the participant's own privacy notices. CARU's strong record of investigating compliance issues identified in complaints or as a result of routine monitoring (coupled with FTC's higher profile enforcement actions) rebuts the usual charge that self-regulatory programs are weak on enforcement. To the contrary, the COPPA safe harbor programs, like other well-organized and committed industry groups, "help free up scarce government regulatory resources to address the recalcitrant few rather than the compliant majority." The CARU program stands out both for publishing case reports on non-member compliance issues and for having, in fact, referred several cases to the FTC.

Finally, while the CARU program is far superior to either the NAI or SHA in terms of the preceding five criteria, it lacks many of the attributes of second- generation regulatory strategies. There is no [\*399] Coasian bargaining and too little industry buy-in. Moreover, the COPPA regulations are neither very flexible nor do they take into account "industry- specific concerns and technological developments." Although the Commission expressly characterized the assessment mechanisms and compliance incentives described in the Final Rule as "performance standards" that may be satisfied by equally effective alternatives, a review of the self-regulatory guidelines of CARU, Truste, ESRB and Privo shows relatively little differentiation by sector, technology, or innovative methods of assessment or compliance. This is at least partly the result of the safe harbor approval process, which requires a side-by-side comparison of the substantive provisions of the COPPA rule with the corresponding provisions of the guidelines. The reason firms participate in safe harbor programs is probably due less to regulatory flexibility, and more to a desire to share in the brand recognition of the program seal, to develop a closer working relationship with FTC staff, and to draw on the additional expertise of program staff.

\*\*\*\*\* [\*400]

The three preceding case studies all describe well-established self-regulatory programs and evaluates them against five public policy criteria and a sixth criteria focusing on second-generation regulatory strategies. This next section is different. It explores a few overseas cases of privacy covenants under law and then hones in on a very recent case in which U.S. firms, when threatened with prescriptive regulation, chose to engage in a multi-stakeholder process (known as the Global Network Initiative or GNI) to define privacy and free speech principles for the Internet. While it is too soon to assess the GNI against the public policy criteria, and while the GNI might fare poorly in operational terms when compared to a statutory safe harbor such as CARU, the GNI nevertheless points the way to the use of mutually self- interested bargaining to achieve superior performance by good actors.

D. Privacy Covenants

In his article discussing innovative environmental privacy tools, Hirsch's primary examples of a privacy covenant are the Dutch codes of conduct. Dutch data protection law (which is a comprehensive statute implementing the E.U. Data Directive) allows industry sectors to draw up codes for processing of personal data, which are then submitted to the Dutch Data Protection Authority (DPA) for review and approval. Specifically, organizations considered "sufficiently representative" of a sector and that are planning to draw up a code of conduct may ask the DPA for a declaration that "given the particular features of the sector or sectors of society in which these organizations are operating, the rules contained in the said code properly implement" Dutch law. Article 25(4) of the PDPA further provides that such declarations shall be "deemed to be the equivalent to" a binding administrative decision, making it similar in effect to FTC approval of COPPA safe harbor guidelines. According to Hirsch, the DPA has approved at least twelve such codes covering various industry sectors, each with its own tailored compliance plan that is nevertheless consistent with the broader requirements of the Dutch data protection law. Outside of Europe, other countries have [\*401] adopted a similar approach to privacy covenants. For example, Australian privacy law also permits organizations to develop sectoral privacy codes for the handling of personal information "designed to allow for flexibility in an organization's approach to privacy," while at the same time guaranteeing consumers "that their personal information is subject to minimum standards that are enforceable in law." Finally, New Zealand privacy law also treats approved codes of conduct as instruments of law with binding effect.

In the U.S., where comprehensive privacy law is lacking, there is no possibility of firms or industry negotiating privacy covenants with regulators, unless one wants to treat FTC consent decrees as a type of covenant. Thus, the covenanting approach in the U.S. arises only when there is a credible threat of federal privacy regulation and firms sit down with regulators to negotiate a code of conduct in lieu of regulation. In his article, Hirsch cites the OPA Guidelines as an "incomplete" step towards a covenanting approach, and gives three [\*402] reasons for this incompleteness. A more recent and telling example of a privacy covenant came about when three leading Internet firms were accused of Internet censorship in China, resulting in a very public controversy and threatened legislation.

In the winter of 2006, Yahoo!, Google and Microsoft had to contend with highly unfavorable publicity and Congressional hearings over their controversial roles in cooperating with Chinese government efforts to monitor and censor the Internet and persecute dissidents. A few months later, Rep. Chris Smith introduced a bill that would have rendered such practices illegal and forced U.S. companies to confront a Hobson's choice: disregard restrictive Chinese licensing requirements imposed on foreign companies as a condition of providing Internet services in the Chinese market or obey Chinese censorship rules in violation of U.S. law. The companies then sat down with a cross-section of human rights organizations, socially responsible investment firms, and academics, and agreed to work on voluntary guidelines for protecting freedom of expression and privacy on the Internet. After eighteen months of negotiations and defections by several NGOs, the multi-stakeholder group reached agreement and launched the GNI, jointly committing to a set of principles and implementation guidelines as well as an accountability [\*403] system based on independent, third-party assessments. More recently, a GNI member (Google) announced that it would shut down its Chinese search engine rather than continuing to censor the results, and began automatically redirecting Chinese customers to an uncensored version of Google search hosted in Hong Kong.

Why did Yahoo!, Google, and Microsoft agree to participate in a multi-stakeholder process in which a successful outcome required convening a group of actors with divergent interests (often at loggerheads with each other), engaging in difficult and protracted negotiations, and staying at the table until a consensus was forged? As described above, the GNI negotiations were an entirely voluntary effort, with no legal mandate as to process or substance. Rather, the parties proceeded on an ad hoc basis and agreed to principles that, while based on international human rights instruments, were not subject to any formal approval criteria or government oversight. Although the U.S. State Department welcomed the GNI initiative, it did not participate in any stakeholder meetings. Cynics may say that the three firms were merely responding to a public relations crisis related to their business operations in China, which forced them to pursue a covenanting approach not only to improve their public image, but to restore public faith in their company integrity and [\*404] mollify Congressional demands for government intervention. But even if GNI was initially spurred by negative publicity and a threat of government intervention, it represents a moderately successfully example of the covenanting approach at work.

#### Antitrust litigation is uniquely complex and resource-intensive---a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Efficient court review underpins patent-led innovation---turns the case

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Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## CASE

### Advantage 1

#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### American tech dominance is high. Only antitrust threatens it.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” <https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf>]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### Antitrust destroys competitiveness and cements Chinese dominance.

Robert D. Atkinson 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “Antitrust Can Hurt U.S. Competitiveness,” Wall Street Journal, 07-05-2021, <https://www.wsj.com/articles/antitrust-can-hurt-u-s-competitiveness-11625520340>

When it comes to technology and the economy, the U.S. is grappling with two contradictory goals: competing with China in advanced technology industries and ramping up antitrust enforcement against leading U.S. tech companies.

Antimonopoly advocates argue that we can have our cake and eat it too. Go ahead and break up big tech, they say; we can still compete with China. But there is a long history of U.S. antitrust actions against technology companies, and the results suggest regulators should exercise caution.

Consider the case of Western Electric, AT&T’s equipment subsidiary. By the early 1920s, it had factories in Austria, Belgium, Canada, China, Germany, France, Italy, Japan, the Netherlands, Russia and the U.K. But because AT&T relied on it exclusively for equipment, in 1925 the Justice Department threatened AT&T with breakup unless it divested Western Electric’s foreign assets, creating International Telephone & Telegraph and ultimately giving birth to robust foreign-owned competitors.

Antitrust regulators also pressured AT&T’s Bell Labs in the early 1950s to license its newly invented transistor technology. That spurred innovation because it helped emerging companies such as Texas Instruments and Fairchild. But because of government pressure, AT&T also licensed its technology, almost for free, to foreign companies. This eventually enabled Sony to take global leadership from the U.S. in consumer electronics, and it gave a major leg up to Europe’s Ericsson and Siemens.

The U.S. also used to be the global leader in television technology thanks to the Radio Corp. of America, the pathbreaker in color television. But in the 1950s the Justice Department required RCA to let other U.S. companies use its patents at no charge. RCA had long relied on licensing revenue, so it started making money where it could—in Japan. “RCA licenses made Japanese color television possible,” technology historian James Abegglen has written.

In 1972, the Federal Trade Commission brought a similar antitrust suit against Xerox, the world’s then-leading producer of copier technology thanks in part to its Silicon Valley-based innovation incubator Xerox PARC. Evidently unimpressed, the head of the FTC’s Bureau of Competition F.M. Scherer said he would be “dissatisfied if Xerox’s market share isn’t significantly diminished in several years.” To that end, the FTC forced Xerox to give up its blueprints and other discoveries, allowing an estimated 1,700 patents to make their way to Xerox competitors. Sure enough, Xerox lost half its market share—mostly to Japanese firms such as Canon, Toshiba and Sharp. Xerox’s only viable path to survival was to strengthen its alliance with Fuji, creating a new giant, Fuji Xerox.

Two years later in 1974, the Justice Department targeted AT&T again, forcing it to break up over the objections of Commerce Secretary Malcolm Baldridge that the suit jeopardized America’s leadership position. This was the death knell for Bell Labs, arguably the most innovative organization that has ever existed.

None of this is to say that antitrust authorities should be passive or turn a blind eye to anticompetitive behavior. But they should recognize that firms’ size can be an important factor in their ability to innovate. Rather than rely on market share as the alarm bell that signals the need for antitrust enforcement, regulators should focus more on firms’ conduct, and they should look first to behavioral remedies, not structural ones. Antitrust analysis should also consider that tech companies compete globally, not nationally, so cutting them down to size usually has significant economic consequences.

The Federal Communications Commission has provided a model for the behavioral approach by conducting a series of inquiries starting in 1970 to investigate the convergence of telephone and computing services and establish rules enabling competition among established and upstart players across sectors that are increasingly intertwined. U.S. courts also provided a model in judgments against Microsoft, which compelled it to let other companies more easily integrate their software into Windows.

As policy makers now consider competition issues related to today’s large technology firms, they would be well advised to learn from this history. With Chinese internet and tech companies waiting in the wings, aggressive antitrust actions against U.S. leaders run the risk of giving a new generation of foreign rivals the boost they need to dominate global markets, just as Japanese and European firms have benefited in the past.

#### It specifically destroys startups that they said are key to innovation.

Lauren Feiner 21, News Associate at CNBC, “Start-ups will suffer from antitrust bills meant to target Big Tech, VCs charge,” CNBC, 07-24-2021, <https://www.cnbc.com/2021/07/24/vcs-start-ups-will-suffer-from-antitrust-bills-targeting-big-tech.html>

When venture capitalists invest in a start-up, their goal is to make a large return on their spend. While most start-ups fail, VCs bank on the minority having large enough exits to justify their rest of their investments.

An exit can occur through one of two means: through an acquisition or by going public. When either of these events occurs, investors are able to recoup at least some of their money, and in the best case scenario, reap major windfalls.

About ten times as many start-ups exit through acquisitions as through going public, according to the NVCA. Venture capitalists say that number shows just how important it is to keep the merger path clear.

The top five tech firms aren’t the only ones scooping up tech deals. Amazon, Apple, Facebook, Google and Microsoft have accounted for about 4.5% of the value of all tech deals in the U.S. since 2010, according to public data compiled by Dealogic.

Reform advocates have pointed to some acquisitions, like that of Instagram by Facebook, as examples of companies selling before they have the chance to become standalone rivals to larger firms. But VCs say that’s often not the case.

“They all think they could be public companies one day, but the realities are, it’s not realistic for most of these companies to achieve the size and scale to survive the public markets as of today,” said Michael Brown, general partner at Battery Ventures.

While going public is a often the goal, VCs say it can be impractical for start-ups for various reasons.

First, some start-ups may simply not have a product or service that works long-term as a standalone business. That doesn’t mean their technology or talent isn’t valuable, but just means it could be most successful within a larger business.

Kate Mitchell, co-founder and partner at Scale Venture Partners, gave the example of a company called Pavilion Technologies that made predictive technology for manufacturers and agriculture, which sold to manufacturing company Rockwell Automation in 2007.

“That’s a company that just couldn’t get to escape velocity,” she said of Pavilion. “Because they were selling globally to large plants, we couldn’t figure out how to sell the technology cost effectively.”

It was still a useful technology, but needed the infrastructure of a larger business to accelerate further, she said. After Rockwell acquired it, it became incorporated into its offerings and several employees stayed for years.

Sometimes, she said, an acquisition is a last resort before bankruptcy, and at least helps investors get some of their money back.

“It is better that they’re sold for even 80 cents on the dollar than that they go bankrupt,” she said.

In addition, going public can be difficult. The IPO process is expensive and VCs said that small cap companies often struggle on the public market in part because of the lack of analyst coverage of such businesses.

Clate Mask, co-founder and CEO of venture-funded email marketing and sales platform Keap, said greater merger restrictions on the largest companies would likely “change the calculus” for start-ups. But the shift would not be between getting and acquired and going public. Instead, he said, it could make entrepreneurs think harder about whether to raise venture funding at all.

“When you have capital behind you, you can think and operate differently,” he said, adding that entrepreneurs can take more risks with that backing.

Loss of investment and innovation

Several VCs told CNBC they were worried about the trickle-down effect that merger restrictions on the largest firms would have on the entire entrepreneurial ecosystem.

Their fear is that if companies no longer have enough viable exit paths, institutional investors that back VCs — like endowments and pension funds — will shift their money elsewhere. In turn, VCs will have fewer funds to dole out to entrepreneurs, who may see less reason to take the risk of starting a new company.

The ultimate concern is for a loss of innovation, they say, which is exactly what lawmakers are hoping to fend off with merger restrictions on the largest buyers.

“If you restrict the potential to generate exciting rewards and returns from investment, entrepreneurs could find other things to do with their time,” said Patricia Nakache, general partner at Trinity Ventures.

Nakache said placing restrictions on the largest tech firms’ ability to make acquisitions could actually discourage entrepreneurs from building companies that compete with their core businesses. That’s because many entrepreneurs like having a back-up plan incorporating possible acquirers if they can’t go public. With greater uncertainty about whether the Big Tech companies could be potential buyers, they may seek to build businesses outside of the largest players’ core offerings, she said.

VCs also warned that without the biggest players in the mix, sale prices for start-ups would drop significantly.

#### No solvency---best studies prove size doesn’t impact competitiveness, and separation decreases global influence.

Mark Jamison 20, Nonresident Senior Fellow at the American Enterprise Institute, Gunter Professor of the Public Utility Research Center at the University of Florida’s Warrington College of Business, Ph.D. in Economics from the University of Florida’s Warrington College of Business, “Breaking up Big Tech will not help the US innovate or compete with China,” American Enterprise Institute, 08-19-2020, <https://www.aei.org/technology-and-innovation/breaking-up-big-tech-will-not-help-the-us-innovate-or-compete-with-china/>

Facebook and Google have argued that breaking them up would damage US competitiveness with China. Vanderbilt Law Professor — and former advisor to Sen. Elizabeth Warren (D-MA) — Ganesh Sitaraman and former Federal Communications Commission Chairman Tom Wheeler (now at the Brookings Institution) take exception. Sitaraman argues in Foreign Affairs that breaking up Big Tech companies would bolster US national security. Wheeler writes that US tech innovation would improve if Big Tech companies were required to make their data assets available to rivals.

It is an open question how regulation might affect whatever competition there might be between the US and China, but Sitaraman and Wheeler are wrong. Sitaraman seems unaware of the five decades of academic research showing that market structure — the number and relative sizes of firms in a market or industry — does not determine the amount of innovation. Wheeler also seems unaware of how markets for ideas work. Here are my explanations.

Regulation and market structure

Both Sitaraman and Wheeler assume that government regulation can define an industry’s market structure, but they are wrong for two reasons.

First, more regulation results in industries having larger firms, not smaller ones, and it also lowers labor productivity. This has been confirmed in several economic studies (see examples here, here, and here). Regulations raise the cost of a firm being in business, which means firms need to be larger to cover those fixed costs.

The other reason is that the economics of social media, search, and e-commerce, etc. have determined today’s market structures. Breaking up the companies wouldn’t repeal these economic realities, so the current market structure would reemerge, except with possibly even larger firms.

Market structure and innovation

Sitaraman assumes that less concentrated markets are more innovative. Decades of scholarly research have shown that this isn’t the case.

In the mid-20th century, some economists believed that monopoly markets would produce more innovations than competitive markets. The argument was that a monopoly could capture more profits from innovation than a firm in a competitive market could, so monopoly markets gave more innovation.

But in the 1960s, economists began testing the hypothesis. Studies examined whether an individual firm’s size or the relative sizes of firms in an industry affected research and development or innovation. The Organisation for Economic Co-operation and Development recently released a paper summarizing the research. The summary finds that the relationships vary over time and across industries, so the best conclusion is that firm size and market structure cannot be used to affect innovation.

Ideas and data

Wheeler believes that innovation comes from companies analyzing data and selling products. Actually, in the tech space, more and more innovations are coming from decentralized, small-scale innovators. This pattern was discovered in academic research about 20 years ago and still holds.

What is happening is that innovators develop ideas for products and demonstrate their potential value. In a few instances, such as in the case of Facebook, the innovator forms a business and succeeds. But more often than not, the innovators sell their company or at least their product to an enterprise that has a proven business model. This was probably the situation with Instagram, which had a great idea and a weak business model at best before selling to Facebook, which then turned the idea into a profitable business.

Wheeler also appears to believe that if a company is unable to uniquely profit from the data it captures, the company will capture extensive data anyway. I have heard many times the argument that profits don’t matter, such as in the net neutrality debates. But the arguments are always made by people who care very much about the profitability of their retirement savings. So I think they know they are wrong.

Market structure and geopolitical competitiveness

Sitaraman also believes that smaller firms would be less likely to want to enter the Chinese market and would thus avoid being compromised by China’s influence. This might be true, but if it is, then it is also true that the US firms would be less active in all global markets, which would decrease US influence. Since part of the rivalry between the US and China is likely to include global influence, retracting US companies from the global economy would certainly decrease US competitiveness.

What’s to be done?

Clearly, some writers need to spend more time reviewing the literature: The flaws in Sitaraman’s and Wheeler’s analyses were refuted long ago by scholarly research. It would also be helpful if advocates for hands-on control of companies were humbler in their beliefs that they fully understand businesses and can redesign them at will.

#### Big companies are inevitable

Steve Denning 21, Senior Contributor at Forbes, formerly held management positions at the World Bank, “Why Biden’s War On Big Tech Is Misguided,” Forbes, 07-11-2021, https://www.forbes.com/sites/stevedenning/2021/07/11/why-bidens-attack-on-big-tech-is-misguided/?sh=42b3681261e0

We are living in a new economic age—the age of digital—and digital giants are an emblem of this fact. They reflect the immense benefits and revenue that digital can generate, in the exponential growth that digital enables and in the competitive threat they represent to traditionally managed firms.

Bigness is an inherent in the digital economy. “In markets with highly scalable assets,” write Haskell and Westlake write in Capitalism Without Capital, (Princeton, 2017) “the rewards for runners-up are often meager. If Google’s search algorithm is the best and is almost infinitely scalable, why use Yahoo’s? Winner-takes-all scenarios are likely to be the norm.” Breaking up Google into ten little Googles, requiring users to go to a different little Googles for different kinds of searches, would destroy much of the ease and convenience of Google.

#### Separation fails---there is no solution that preserves the incentive to innovate.

Gilbert ’21 [Richard J; March; Economics Professor at UC Berkeley; Information Economics and Policy, “Separation: A Cure for Abuse of Platform Dominance?” vol. 54]

There is no single formula to address concerns about the alleged abuse of market power by these platforms. Separation is an alternative to behavioral remedies of the type imposed by the European Commission in the Google Shopping case. These behavioral remedies have accomplished little to restore competition that the EC alleged was harmed by Google’s search algorithms. Separation has the potential to be a more effective remedy to restore competition allegedly harmed by the conduct of a platform owner, but separation raises many questions, including the platforms that require separation, the services that must be separated, the terms and governance of separation requirements, and procedures to evaluate appeals from line-of-business restrictions.

Structural separation is administratively feasible for some platform activities, such as the sale of merchant and proprietary products on Amazon’s online retail platform or the separation of Google’s Ad Manager from its other products and services. Some past acquisitions could be unwound. Functional separation is another alternative for some services. Amazon could establish an ethical wall between its proprietary sales and sales by independent merchants. However, structural or functional separation does not necessarily eliminate incentives for discrimination and Amazon’s use of non-confidential information obtained from sales of products on its platform can benefit consumers. For many other platform services, it is unlikely that structural or functional separation would prove to be more consumer-friendly than the line-of-business restrictions imposed on AT&T by FCC regulation and the 1984 Modified Final Judgment, which ultimately collapsed under the weight of numerous waiver requests and were replaced by the 1996 Telecommunications Act.

Courts have avoided structural remedies in part because they are difficult to implement and potentially harm corporate, shareholder, and labor interests (Waller, 2009). Yet the threat to dissolve a corporate structure can deter some future anticompetitive conduct precisely because it has disruptive consequences. For separation to serve this deterrence function, it should punish conduct that has clear and substantial anticompetitive effects and is likely to be repeated in the future absent the threat of dissolution. However, the deterrence benefit from structural or functional separation is limited for digital platforms. There is disagreement about the conduct by digital platforms that warrants harsh punishment and about effective remedies for allegedly harmful conduct. Although antitrust liability and remedy are separate concepts, it is questionable whether conduct should be liable for antitrust enforcement if enforcers cannot fashion a workable remedy for the challenged conduct (Melamed, 2009). Furthermore, many of the alleged concerns related to conduct by the major digital platforms are specific to particular business models and therefore punishments would not necessarily deter other types of conduct by the platforms.

Antitrust is a critical enforcement tool despite the difficulties of crafting effective remedies to restore or deter anticompetitive conduct. Merger enforcement can and should prevent platforms from increasing their market power or using acquisitions to eliminate nascent competitors. Monopolization law can address abuses of monopoly power, which can occur at many different levels in the chain of activities engaged by digital platforms. Along with antitrust oversight from properly designed consent decrees, the threat of monetary penalties can be an effective deterrent for anticompetitive conduct, but they must be large enough to make the conduct unprofitable, which is not the case today.

Antitrust enforcement cannot solve all of the problems raised by the concentration of market power in the digital economy. Public policy for the digital economy requires a mix of institutional approaches, including regulations, to promote competition in ways other than structural or functional separation, such as by requiring platforms to share data that create a barrier to new competition, along with stronger antitrust enforcement to address abuses of market power.

The most important lesson for structural separation of the major digital platforms gained from the history of telecommunications deregulation and other reforms is the trade-off between encouraging competition and innovation. The breakup of AT&T into separate functional and geographic units imposed by the 1984 MFJ promoted competition in some sectors of the industry that had been highly regulated. The decree arguably also stifled some innovations by erecting a wall between local telecommunications services, long distance, and enhanced information services when technology was eroding the distinctions between these services. There are no simple structural solutions that both preserve the incentive and ability of platforms to innovate and protect rivals from the consequences of that innovation.

#### China can’t gain tech dominance---other countries fill in, even without the US.

Michael D. Swaine 21, Director of the East Asia program at the Quincy Institute, Ph.D. in Government from Harvard University, “China Doesn’t Pose an Existential Threat for America,” Foreign Policy, 04-21-2021, https://foreignpolicy.com/2021/04/21/china-existential-threat-america/

Some observers claim that Beijing could somehow set standards in critical technology areas and install tech hardware around the world, to the extent that China would be able to relegate the United States to a permanently inferior status in both the commercial and military realms, thus threatening the very existence of the country. This is also highly unlikely.

Chinese companies are certainly participating in standard-setting in key areas, including 5G. But this process is highly competitive globally, and U.S., Asian, and European companies all hold major portions of the standards and the standard-essential patents that undergird the global technology ecosystem. There is little if any chance that Chinese companies could come to dominate this process. Many tech experts state that the most likely worst-case outcome of Chinese gains regarding standards and hardware would be a fragmented technology ecosystem that would impoverish all countries, not give China a level of power that would enable it to vanquish the United States.

More realistically, Beijing might over time exclude high-tech companies in the United States and other countries from its market, which might make it difficult for them to continue to grow and innovate. And Chinese financing power and supply chains could conceivably create a kind of “turnkey” solution in some developing countries that lock them into a Chinese tech ecosystem. But such developments would come nowhere near to constituting an existential threat to the United States, given the global reach of non-Chinese high-tech companies and the overall limited reach of any Chinese high-tech ecosystem in the developing world in the face of such competition.

#### Alt causes to digital authoritarianism---State department resources, OBOR.

#### And no impact---China isn’t trying and couldn’t scale up if they did.

Michael D. Swaine 21, Director of the East Asia program at the Quincy Institute, Ph.D. in Government from Harvard University, “China Doesn’t Pose an Existential Threat for America,” Foreign Policy, 04-21-2021, https://foreignpolicy.com/2021/04/21/china-existential-threat-america/

Finally, the latter set of supposedly existential normative or ideological threats consists of many elements, including Beijing’s possible overturning of the so-called global liberal international order, Chinese influence operations aimed at U.S. society, the export of China’s political values and state-directed economic approach, and its sale of surveillance technologies and other items that facilitate the rise or strengthening of authoritarian states. These threats all seem hair-raising at first glance. But while significant, they are greatly exaggerated and do not rise to the level of constituting an existential threat.

Beijing has little interest in exporting its governance system, and where it does, it is almost entirely directed at developing countries, not industrial democracies such as the United States. In addition, there is no evidence to indicate that the Chinese are actually engaged in compelling or actively persuading countries to follow their experience. Rather, they want developing nations to study from and copy China’s approach because doing so would help to legitimize the Chinese system both internationally and more importantly to Beijing’s domestic audience.

In addition, the notion that Beijing is deliberately attempting to control other countries and make them more authoritarian by entrapping them in debt and selling them “Big Brother” hardware such as surveillance systems is unsupported by the facts. Chinese banks show little desire to extend loans that will fail, and the failures that do occur are mostly due to poor feasibility studies and the incompetence and excessive zeal of lenders and/or borrowers. Moreover, in both loan-giving and surveillance equipment sales, China has shown no specific preference for nondemocratic over democratic states.

Even if Beijing were to attempt to export its development approach to other states, the actual attractiveness of that approach would prove to be highly limited. The features undergirding China’s developmental success are not replicable for most (if any) countries. These include a high savings rate; a highly acquisitive and entrepreneurial cultural environment; a state-owned banking system and nonconvertible currency; many massive state-owned industries that exist to provide employment, facilitate party control over key sectors, and drive huge infrastructure construction; and strong controls over virtually all information flows. Moreover, such a model (if you can call it that) is almost certainly not sustainable in its present form, given China’s aging population, extensive corruption, very large levels of income inequality, inadequate social safety net, and the fact that free information flows are required to drive global innovation.

Although China’s combination of economic reform policies and authoritarian political system has been around since the early 1980s, not a single nation has adopted that system either willingly or under Chinese compulsion. There are certainly many authoritarian states and fragile democracies on China’s periphery, but none of them were made that way by China.

### Advantage 2

#### All of the defense to advantage 1 applies---begs the question of whether there’s a) a problem, and b) if the aff solves it.

#### What’s the internal link to the “digital divide?” Their ev says big tech might not be ideal for developing economies, but not a single 1AC card says that reinforces the digital divide or even defines what digital inequality means in this context.

#### Small businesses fail---their studies confuse establishments with firms.

Robert D. Atkinson 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “Urban myths about economics have taken root — and the cost is high,” Washington Post, 10-18-2021, https://www.washingtonpost.com/opinions/2021/10/18/urban-myths-about-economics-have-taken-root-cost-is-high

“Small businesses are the font of job creation!” This myth originated in a 1979 research paper by MIT professor David Birch, who purported to show that between 1969 and 1976 two-thirds of jobs were created by small businesses. This was big news, and it remains conventional wisdom. However, economists scrutinized Birch’s analysis and reached different conclusions. Some pointed out that he had confused small establishments with small firms (e.g., calling a Citibank branch office a small business). Others have suggested it is not small firms that are the big job generators, but new businesses. Yet the myth persists.

#### No modeling---other countries see US antitrust as irrational, even if we get things right.

William E. Kovacic 15, Professor of Law and Policy at George Washington University, former General Counsel for the Federal Trade Commission, J.D. from Columbia University, “The United States and Its Future Influence on Global Competition Policy,” George Mason Law Review, Vol. 22, 2015, accessed via Lexis

One force that reduces the perceived legitimacy of the U.S. system is a widely accepted narrative, reflected in popular discourse and scholarly commentary, which portrays federal enforcement as irrational and unstable. 65 [\*1172] In this interpretation of modern U.S. enforcement history, antitrust policy undergoes recurring erratic shifts, with a small number of lucid intervals. For the most part, the irrationality narrative suggests that U.S. antitrust policy embraced unsupportable extremes of over-enforcement in the 1960s and 1970s, under-enforcement from 1981 to 1988 and 2001 to 2008, and achieved a sensible, balanced equilibrium only from 1993 to 2000 and 2009 to the present. 66 This accounting of antitrust history raises a troublesome question: why should any jurisdiction outside the U.S. respect a system that has lost its mind in roughly 41 of the past 55 years?

Policy-making in the irrationality narrative is sharply discontinuous, and the enforcement institutions have little evident capacity for self-assessment or correction over time. 67 Individual leaders count for everything, and institutional arrangements fail to discipline policy-making; 68 appoint a wise official and you get good results, but pick a zealot and the agency swerves toward frantic hyperactivity or utter indolence. The irrationality narrative is the public policy equivalent of an interpretation of Formula One racing that attributes the outcome in races entirely to the driver and treats the quality of the car and supporting team as largely irrelevant.

The irrationality account of U.S. enforcement history derives power from the stature of the narrators. Despite its unreliable reading of U.S. experience, the narrative's academic pedigree is daunting. Some of the greatest scholars in U.S. competition law have contributed to the story. If nonentities constructed the narrative, foreign observers would dismiss it out of hand. Instead, the narrative of irrationality and instability, often presented with the metaphor of a wildly swinging pendulum, originated and developed in the work of some of the field's most influential commentators. On many occasions outside the U.S., I have heard enforcement officials, practitioners, and scholars speak of the irrationality narrative as though it were an established truth. To these observers, the stature of the scholars who popularized the irrationality narrative invariably lends verisimilitude to the story.

As described below, the irrationality narrative of the U.S. system serves the aims of the right and the left in the debate about federal enforcement policy. For those who favor more intervention or less intervention, alike, the image of a system dangerously out of control serves to frame their own "sensible" policy proposals. By this technique, the narrator emerges as the voice of wisdom in a crazed policy environment.

[\*1173] The architecture of the modern irrationality narrative took shape in 1978 when Professor Robert Bork published the first edition of his transformative treatise, The Antitrust Paradox. 69 Professor Bork's central thesis was that "modern antitrust has so decayed that the policy is no longer intellectually respectable." 70 Each institution with a role in the implementation of the antitrust laws--the courts, the Congress, and the federal enforcement agencies--caused the decay. On antitrust matters, the Congress displayed the mentality of "the sheriff of a frontier town" who "did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people." 71 With few exceptions, the courts embraced a view of antitrust law that "teaches the necessity for government intervention when no such necessity exists, and even when intervention is positively harmful." 72 Without regard to adverse economic effects, the DOJ and the FTC "must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish." 73

In Professor Bork's telling, the implementing institutions were capricious, reckless, or bent upon self-aggrandizement. 74 As a group, the institutions have gone mad, for they have no tendency or, perhaps, any capacity to reflect on their experience, identify error, and make corrections. 75 Instead, the U.S. antitrust system had "an inbuilt thrust toward greater severity or further extension." 76 Nothing, Professor Bork warned, seemed able to contain the destructive march of intervention: "This process has no obvious stopping point." 77

The image of a system out of control served Professor Bork's rhetorical aims; it showed the urgency for reform by presenting a system in shambles. The image also distorted (more mildly, misread) current trends substantially. When The Antitrust Paradox appeared in January 1978, each institution Professor Bork rebuked--the Congress, the courts, and the federal enforcement agencies--had taken steps to rebalance the antitrust system. 78 The adjustments came slowly, but they were coming, nonetheless. If Professor Bork had acknowledged that the seemingly out-of-control institutions [\*1174] were making important adjustments, his book would have lost some (maybe much) of its force.

A second decisive contribution to the irrationality narrative came in the late 1980s and early 1990s from one of Professor Bork's harshest critics, Professor Robert Pitofsky. Though Professor Pitofsky scorned Professor Bork's calls for a vast retrenchment of antitrust enforcement, he used his own version of the irrationality narrative while setting out a more interventionist agenda. 79 Describing federal merger enforcement from the early 1960s through the early 1990s, Professor Pitofsky wrote:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example, the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors. 80

Like Professor Bork in The Antitrust Paradox, Professor Pitofsky presented a system run amok. Federal policy "careen[s] from one extreme to another," like an automobile with an impaired driver swerving across the centerline. 81 No institutional feature in the U.S. system provided needed balance. 82

In Professor Pitofsky's version of the narrative, the solution to the aberrant enforcement behavior came by way of appointments--including his own--to the federal agencies. 83 In 2002, after chairing the FTC from 1995 to 2001, Professor Pitofsky said federal merger control by the late 1990s "stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust . . . ." 84 Under the Clinton Administration's appointees, federal policy stopped "careening," avoiding the extremes of an overheated, populist-inspired activism of the 1960s and the "minimalist" program of the Reagan presidency with its "hostility to the core assumptions of antitrust." 85

For Professor Pitofsky, like Professor Bork, the narrative of a system gripped by irrational, erratic variations in behavior served an important instrumental purpose. The portrayal of a regime swinging wildly between extremes allowed Professor Pitofsky to claim the role--as suggested in the [\*1175] title of his 2002 article, Antitrust at the Turn of the Twenty-First Century: A View from the Middle--of the wise centrist. 86 Professor Pitofsky underscored the rationality of his own program by juxtaposing it against the irrationality of his predecessors. 87 Clinton Administration antitrust officials strove to claim the mantle of wise centrism. 88 As the following passage from an essay in The Economist in 2000 shows, they framed their program as a sensible middle way between the irrational interventionism of the 1960s and 1970s and the inactivity of the 1980s:

It helps that [DOJ Assistant Attorney General Joel] Klein and his counterpart at the FTC, Robert Pitofsky, have been deliberately low-key in talking about their activities, claiming that they are modest and in the legal mainstream of legal thought and economics. They concede that they have been more interventionist than the laissez-faire ideologues of the Reagan years, but they say they are nothing like the trust-busting zealots of the 1960s who saw evil in every big company or merger. 89

In reporting on the Clinton administration strategy, The Economist presents the federal enforcement policy just as the DOJ and FTC leadership wished: a "modest" and "mainstream" program standing between two eras of irrationality; one guided by "trust-busting zealots" and the other led by "laissez-faire ideologues." 90

Taken on its own terms, the irrationality interpretation of U.S. antitrust history provides a grim picture of the American system. One should be wary of a system that intermittently has lucid policymaking intervals, but its normal state is irrationality. If everything depends on the appointment of wise centrists to head the agencies, nothing good can happen when the [\*1176] choice of DOJ or FTC leadership is not so inspired. Because personalities are decisive, when the wise centrists depart, nothing in the institutions themselves can prevent the system from returning quickly to bad old habits.

As the quotation presented above illustrates, the wise centrism story acquires force if periods of thoughtless extremism bracket the sensible policy era. As developed by Professor Pitofsky and other antitrust scholars, the irrationality narrative derives its power from the system's tendency to embrace extremes. 91 Dramatic variations in performance demonstrate the absence of thoughtful policy-making. The narrator seems sane by comparison if all others appear to be deranged. Professor Pitofsky's article in 2002 about the future of antitrust policy used this framing technique. 92 He wrote that "during the Reagan years, there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization." 93

The passage quoted above highlights two recurring features of the irrationality narrative. First, Professor Pitofsky's statement uses sweeping, categorical language ("no enforcement whatsoever") to describe the period of extreme inactivity. 94 In the 2002 article and in other papers, Professor Pitofsky made strong claims of inactivity to portray the Reagan Administration antitrust program as a gross departure from good practice. 95 Second, the portrayal of events, though written with the utmost self-assurance, often cannot withstand fact-checking and is verifiably incorrect. 96

[\*1177] Professor Pitofsky has plenty of esteemed company in telling the U.S. irrationality story by making bold claims belied by actual enforcement experience. As noted above, Professor Bork's denunciation of antitrust policy circa 1978 ignored important doctrinal and policy developments that fit poorly with a system out of control. 97 The story of horrible decay is less compelling if the asserted flaws are not so horrible. Other accounts of U.S. enforcement experience by the field's leading commentators include claims that during the Reagan Administration "merger enforcement ground to a halt," 98 that antitrust "[e]nforcement ceased," 99 and that the DOJ and the FTC "did not file a single vertical case." 100 Why did the U.S. system lose its mind? The answer, say two of America's best scholars, is that "extremists" took control of the enforcement agencies. 101 Experts in the U.S. might excuse these descriptions of federal enforcement as careless hyperbole. In my experience, foreign observers are more likely to take them at face value.

The story of U.S. antitrust policy in the 1980s is considerably more complex. Crucial factual tenets of the irrationality narrative are unsupportable. Merger enforcement never halted, 102 enforcement never ceased, 103 and vertical restraints cases (at least a few) still appeared. 104 To look beyond the categorical statements of inactivity and recount enforcement developments [\*1178] accurately would reveal a more thoughtful enforcement program at work. There is a major difference, for example, between saying a merger enforcement program has disappeared, and saying that boundaries have been reset, but policed actively.

Would a fuller, more accurate account of federal enforcement trends over time reveal intense debate about the proper direction of policy? Of course. Has policy shifted across administrations, especially after a regime change? No doubt. Yet, liberated from the irrationality narrative's determination to accentuate the magnitude of changes and cast decision-makers as senseless extremists, a more faithful account of U.S. federal enforcement history would portray adjustments as more gradual and nuanced, in most cases, than the irrationality narrative suggests. The discipline imposed by institutional arrangements, not simply patterns in leadership appointments (whether irrational officials or prudent centrists), would account for refinements over time.

#### Everyone looks to the EU, not the US for antitrust.

Bradford et al. 19, Anu Bradford, Henry L. Moses Professor of Law and International Organization at Columbia Law School; Adam Chilton, Professor of Law and Walter Mander Research Scholar at the University of Chicago Law School; Katerina Linos, Professor of Law and Faculty Co-Director in the Miller Institute for Global Challenges and the Law at the University of California, Berkeley School of Law; Alexander Weaver, Associate at Linklaters LLP, J.D. from Columbia Law School, “The Global Dominance of European Competition Law Over American Antitrust Law,” Journal of Empirical Legal Studies, Vol. 16, 2019, https://scholarship.law.columbia.edu/faculty\_scholarship/2513

The Europeanization, rather the Americanization, of global competition law is notable because the US has a considerably longer history of using competition law. Indeed, the United States the Sherman Act long before the EU and its competition laws were conceived. The US has also been an influential leader in competition economics and law alike, spearheading early efforts to adopt competition law regimes in many parts of the world—including in the EU. However, after the EU adopted its own competition law, it eventually eclipsed the US as the leader in providing the template for the global expansion of competition laws, marginalizing the US’s global influence in the decades that followed. In other fields, such as corporate law, thousands of articles have been devoted to debating whether there’s a race to the top or the bottom, what mechanisms drive the race, whether shareholders or managers benefit, and more (e.g., Romano 1987; Roe 2003).11 However, because the literature on the world’s competition regimes is in its infancy, a key contribution of this article is to document that there exists a global regulatory race in the area of competition law, and that the EU is clearly winning it.

We also advance a set of explanations for why the European model has come to predominate. First, a set of “push factors” explains the EU’s ability to effectively externalize its laws. The EU’s competition law dominance can be partially traced to the EU’s conscious efforts to expand its regulations through a myriad of trade, association, and other political agreements. The EU has required many countries seeking greater market access or closer political association to adopt competition laws. In addition, as Bradford (2012) outlines in “The Brussels Effect,” the EU has the greatest ability to shape foreign jurisdictions’ laws given that the companies often apply the most stringent regulatory standard—typically the EU standard—across their global operations to capture the benefits of uniform production while maintaining compliance worldwide. Second, the EU competition law model also spreads due to strong “pull factors.” In many countries, domestic politics are more conducive to EU-style competition laws, which accommodate more diverse policy goals and defer less to markets and more to governments’ ability to correct market failures. Another major pull factor is the EU’s tendency to promulgate more precise and detailed rules, making them easier to copy in the absence of technical expertise in the adopting country.

Our findings have several implications. First, our results offer evidence of the EU’s outsized influence in regulating global markets. This narrative stands in contrast to many critics who have declared the end of the EU’s influence and ability to shape outcomes globally as its relative economic and political power wanes. Second, our results suggest that, although the law and economics movement may have had a large influence on the development of America’s antitrust law and policy, it may have had a more modest influence on the development of competition policy in the rest of the world (Bradford et al. 2020). Third, and more generally, our analysis illustrates the ability of a single jurisdiction to attract countries with starkly different characteristics into its orbit, vesting it with a sizable regulatory influence that spans economic, linguistic, and political boundaries. Out of this dynamic, a new form of globalization of norms emerges—globalization emerging as a result of EU’s unilateralism as opposed to multilateralism. Finally, beyond illuminating the regulatory influence in the competition law context, our results speak more broadly to the literature on regulatory competition, diffusion of norms, and legal transplants. Competition between the European and US regulatory schemes has been prominent in many areas, ranging from privacy (Schwartz 2013; Schwartz and Peifer 2017), to chemicals (Scott 2009), to finance (Gadinis 2010), to discrimination law (Linos 2010), to name but a few. Documenting the specific pathways through which the EU has succeeded in externalizing its models thus contributes to a broad range of fields and advances the diffusion literature, which to date has primarily focused on countries receiving foreign models and not on the entities promoting them.

#### Their ‘digital divide’ impact is about authoritarian blocs, not access---the plan does not change Chinese incentives to make a separate internet.

Johnson Wong 20, Graduate School of Public and International Affairs at the University of Ottawa, “Digital Divide: Geotechnology, Politics and the International System,” University of Ottawa, Summer 2020, <https://ruor.uottawa.ca/bitstream/10393/41017/1/WONG%2C%20Johnson%2020205.pdf>

Governing cyberspace

This fundamental difference in understanding how 5G technological innovation as a tool of the state reflected in cultural norms is at the crux of the digital divide in the international system. The principles that guide ICANN which seek a “multi-stakeholder, community-based and consensus-driven approach” to the governance of the Internet, is anathema to the harmonious and strong central state championed by autocrats and their allies. The liberal governance model of technological innovation based on pluralism, freedom and consensus, are linked to Western democracy which in turn challenges the legitimacy of the authoritarian rule of the state. To maintain their political power, and unable to escape the trappings of technological modernity, China, Russia and other authoritarians will be determined to build a separate “other”-net to compete with the Western version, and in some cases, surpass it. Muller argues,

The proclaimed differences are in interpretation and implementation, with China emphasizing the issue of priorities and progressive realization and rejecting the liberal model not as such, but the notion that it is the only model. In one respect, this reflects the indeterminacy and generality of the rhetoric of the ‘international community’. However, it also raises the question of the nature of the international community. In some liberal views, all roads lead to liberal democracy along more or less western models. However, a truly pluralist international society which accommodates cultural diversity and accepts the principle of self-determination, would accept that countries can also take a different development path, as emphasized by China (Muller, 2015, 236).

While modern liberal democracies seek to accommodate diverse perspectives and build a plural political order, geopolitical interests based on nationalistic factors continue to dominate the discourse (Sidorenko, 2015, 1260). Even within liberal governments themselves, various data protection laws are becoming a point of contention between countries, with the European Union taking a more teleological vision about its universal development model and placing its model above geopolitical power politics and nationalism, to encompass a historical imperative that they believe should be replicated around the world (Browning, 2016, 110). The irony is that a liberal system that values and respects plurality should accept equal but alternative value systems as legitimate (Muller, 2015, 219).

Digital sovereignty and the primacy of alliances

The three drivers mentioned above, 5G standardization, strategic economic dependency, and competing normative values, are transforming the international system and will result in a digital divide. Globalization continues to increase socio-economic transactions between states, and the growth of cyberspace has created economic value from consumer data. Various state operators compete with each other for consumer dollars while, at the same time, the need to cooperate to connect their networks with each other – using internationally recognized protocols – is creating tension between the public good of a seamless system, and the private interests of operators and the state (O’Hara and Hall, 2020, 10). Controversies related to 5G standard-setting by companies that are supposed to be impartial are contributing to a difficult process for all major players involved. Huawei, the leading Chinese operator that is participating on the 5G standard-setting consortium, has been repeatedly accused of being under the influence of the central Chinese state party. This poses a challenge in the existing liberal model of standardsetting for, if Huawei succeeds in its efforts to control the technical standards of 5G, will secure for the Chinese state a much bigger stake (and control) of the 5G patent licensing system. Once standards have been set and essential patents defined, companies must build to the agreed standards and pay royalties to patent licensees as required (Triolo, 2018, 10). These are supposed to be separate – and most importantly, independent – processes, but there is little doubt among the international 5G and telecommunications community that the Chinese state is directing Huawei in order to obtain a substantial stake in the upcoming technological transition in order to secure its political and economic ambitions. It is important to note that once standards are set, governments and companies will be compelled to follow them or risk being non-interoperable with the rest of the world. In some cases, this is the strategic vision for China: By controlling the vast majority of 5G licensing patents and creating networked systems that only work with Chinese-branded equipment, it will be able to project its digital power abroad and force compliance. Without access to Chinese equipment, and a licensee payment system that is indebted to a Chinese state-backed company, antagonistic states will quickly become isolated and find themselves cut off. Sidorenko argues that, “The world is becoming more unified, but not safer; traditional regional conflicts are escalating into geopolitical conflicts ushered by the phenomena of globalization and all the changes and nuances it brings to the economic, political, socio-cultural and spiritual spheres” (Sidorenko, 2015, 1261).

The relativity by which actors are able to influence the political discourse and debate state sovereignty has never before been so uncertain, with the digital world becoming the new arena for states to challenge existing norms, values and economic systems of the past. The digital realm offers a different variation of sovereignty challengers that include the dynamics of nonstate actors, such as private companies, civil society, non-governmental organizations, and even individuals, to question the legitimacy of the state and its relationship to external actors and those within the state (Timmers, 2019, 12; Adonis, 2019, 268). The fundamental challenge and struggle for states to maintain their independence in this space relies upon the extent to which state control of the technological tools, systems and structures are within their influence, and the extent to which they are able to maintain the independence of their national security networks without being isolated from the rest of the world.

Therefore, to achieve this global network based on common standards and shared values, an alliance of liked-minded partners is needed to buttress this digital divide. Timmers says, “Like-mindedness is based on shared values, whether these pertain to the individual (such as respect for privacy and autonomy) or to economy (liberal market economy) or to society and democracy (independent judiciary, freedom of expression, free elections) or to international relations (respect for the system of sovereign states and multilateralism). A wide range of governance tools can be mobilized for supervision, decision-making, and certification” (Timmers, 2019, 15). In the context of the digital divide, countries allied with authoritarian regimes will align their 5G technical standards, find commonalities in terms of political structure, and seek to share in the economic union driven by the divide. Alliances – especially historical alliances – will play a key role in accelerating this digital divide through collaboration between liked-minded states on both sides of the gap. The alliance between cooperating states will not just be an alliance of authoritarians – rather, it will be based on a common set of values and norms shared by the people and state government. These norms and values, as previously mentioned, will originate primarily from common values about the role of the state, its obligations to its peoples, and the extent that it is seen as legitimate by its citizens. Even in democracies, it is feasible for a country to ally itself with China if it finds that it shares more in common with the CCP than the US.

#### Alt causes---countries other than the US dominates

Michael Kwet 20, Visiting Fellow of the Information Society Project at Yale Law School, “A Digital Tech New Deal to break up Big Tech,” Al Jazeera, 10-26-2020, https://www.aljazeera.com/opinions/2020/10/26/a-digital-tech-new-deal-to-break-up-big-tech

After “restoring competition” to the tech economy, those who will dominate as “new market entrants” on the “open” internet will still be companies from richer countries: the US, European powers, China, etc, not low-income countries like Zimbabwe, Bolivia or Cambodia. And within low-income countries, the well-resourced classes will capture any new market opportunities that an antitrust push in the US may open.

#### Developing countries are uninterested in competition policy

Frederic Jenny 20—Professor Of Economics, Essec Business School, Paris, France; Chair Oecd Competition Committee. ("An Essay: Can Competition Law and Policy Be Made Relevant for Inclusive Growth of Developing Countries?," 1-22-2020, from SAGE Journals, https://journals.sagepub.com/doi/full/10.1177/0003603X19898621

The question then is whether and through which process the changes necessary to establish strong and independent competition authorities backed by effective legal provisions allowing them to control or denounce the worst governmental restrictions benefiting politically powerful lobbies or abuses by state-owned firms will take place, as one can doubt that the powerful beneficiaries of the status quo in those countries will have much appetite to adopt competition law frameworks that will reduce their ability to grant protection for political gains and to benefit from corrupt practices. The authors acknowledge the weak interest of governments in Sub-Saharan African nations for the adoption of competition laws. The authors refer to this dilemma (p. 28) when they state (while discussing the West African situation):

In the 1990s, responding to the World Bank conditionality, the West African states eased regulations and began to make laws concerning pricing and firms behavior more market-friendly. The States passed competition laws and established competition authorities. These laws were designed to remove obstructions to competition (…) and to let the market work to get better products and prices. But the national governments were reluctant to relinquish their regulatory roles. They did not want to just stand by when they thought prices were too high. They could not resist intervention. Thus they did not provide much support for independent competition authorities. The colonial history kept its grip and the remnants of French dirigisme hindered a shift to markets. This halting move to markets does much to explain the patterns and trends of West African competition law and policy.

#### The liberal order is resilient---China isn’t a threat

Dr. Fareed Zakaria 19, PhD in Government from Harvard University, Former Managing Editor of Foreign Affairs, Columnist for The Washington Post, “The New China Scare: Why America Shouldn’t Panic About Its Latest Challenger”, Foreign Affairs, 12/6/2019, https://www.foreignaffairs.com/articles/china/2019-12-06/new-china-scare

NEITHER LIBERAL NOR INTERNATIONAL NOR ORDERLY

To many, Beijing’s rise has sounded the death knell of the liberal international order—the set of policies and institutions, forged largely by the United States after World War II, that compose a rules-based system in which interstate war has waned while free trade and human rights have flourished. China’s domestic political character—a one-party state that brooks no opposition or dissent—and some of its international actions make it an uneasy player in this system.

It is, however, worth remembering that the liberal international order was never as liberal, as international, or as orderly as it is now nostalgically described. From the very beginning, it faced vociferous opposition from the Soviet Union, followed by a series of breakdowns of cooperation among allies (over the Suez crisis in 1956, over Vietnam a decade later) and the partial defection of the United States under Nixon, who in 1971 ended Washington’s practice of underwriting the international monetary order using U.S. gold reserves. A more realistic image is that of a nascent liberal international order, marred from the start by exceptions, discord, and fragility. The United States, for its part, often operated outside the rules of this order, making frequent military interventions with or without UN approval; in the years between 1947 and 1989, when the United States was supposedly building up the liberal international order, it attempted regime change around the world 72 times. It reserved the same right in the economic realm, engaging in protectionism even as it railed against more modest measures adopted by other countries.

The truth about the liberal international order, as with all such concepts, is that there never really was a golden age, but neither has the order decayed as much as people claim. The core attributes of this order—peace and stability—are still in place, with a marked decline in war and annexation since 1945. (Russia’s behavior in Ukraine is an important exception.) In economic terms, it is a free-trade world. Average tariffs among industrialized countries are below three percent, down from 15 percent before the Kennedy Round of international trade talks, in the 1960s. The last decade has seen backsliding on some measures of globalization but from an extremely high baseline. Globalization since 1990 could be described as having moved three steps forward and only one step back.

China hardly qualifies as a mortal danger to this imperfect order. Compare its actions to those of Russia—a country that in many arenas simply acts as a spoiler, trying to disrupt the Western democratic world and its international objectives, often benefiting directly from instability because it raises oil prices (the Kremlin’s largest source of wealth). China plays no such role. When it does bend the rules and, say, engages in cyberwarfare, it steals military and economic secrets rather than trying to delegitimize democratic elections in the United States or Europe. Beijing fears dissent and opposition and is especially neuralgic on the issues of Hong Kong and Taiwan, using its economic clout to censor Western companies unless they toe the party line. But these are attempts to preserve what Beijing views as its sovereignty—nothing like Moscow’s systematic efforts to disrupt and delegitimize Western democracy in Canada, the United States, and Europe. In short, China has acted in ways that are interventionist, mercantilist, and unilateral—but often far less so than other great powers.

The rise of a one-party state that continues to reject core concepts of human rights presents a challenge. In certain areas, Beijing’s repressive policies do threaten elements of the liberal international order, such as its efforts to water down global human rights standards and its behavior in the South China Sea and other parts of its “near abroad.” Those cases need to be examined honestly. In the former, little can be said to mitigate the charge. China is keen on defining away its egregious human rights abuses, and that agenda should be exposed and resisted. (The Trump administration’s decision to withdraw from the UN Human Rights Council achieved the exact opposite by ceding the field to Beijing.)

But the liberal international order has been able to accommodate itself to a variety of regimes—from Nigeria to Saudi Arabia to Vietnam—and still provide a rules-based framework that encourages greater peace, stability, and civilized conduct among states. China’s size and policies present a new challenge to the expansion of human rights that has largely taken place since 1990. But that one area of potential regression should not be viewed as a mortal threat to the much larger project of a rules-based, open, free-trading international system.

### Advantage 3

#### Grid Denied---Texas proves it’s resilient or thumps.

#### Adaptation solves societal collapse---the historical record goes neg.

Rebecca Onion 17, Staff Writer for Slate, “What Really Happens After Societal Collapse,” Slate, 06-21-2017, <https://slate.com/culture/2017/06/what-really-happens-after-societal-collapse.html>

The new apocalyptic horror film It Comes at Night dwells, like so many bits and pieces of pop culture lately, on what happens when a society disintegrates. “Preppers are crazy people and they’re kooky,” writer-director Trey Edward Shults told Slate’s Jeffrey Bloomer earlier this month, “but then once you start hearing that economic collapse is not insane, then you start thinking about what people do when things fall apart, and how primal that gets, and what you need to do to protect that, and that started to fascinate me.”

Most of the apocalyptic movies, books, and TV shows I’ve consumed have, like Night, taken an extremely dim view of human nature. Prepper fictions assume that weak “takers” will try to mooch off of better-prepared “makers” in the wake of the flu or an electromagnetic pulse, and that the makers will need to terminate the takers with extreme prejudice. Even more literary apocalypses feature chained-up human livestock in basements and infants on spits. I had to finally stop following The Walking Dead, once one of my favorite shows, because I couldn’t stand to watch the baseball bat scene. “There’s no trust in [the show’s] world, no kindness, unless it’s exhibited by some soft-hearted fool who’s about to end up as walker chow,” my colleague Sam Adams wrote after that episode aired.

But a commenter on Slate’s review of It Comes At Night declared himself untroubled, even mildly irked, by the darkness of this film and its kin. “I get a little bit annoyed by the constant ‘hell is other people’ themes of US post-apocalyptic movies, because it’s pretty well known what happens when society collapses, and it’s not dog-eat-dog every-man-for-himself, it’s society-rebuilding. Pretty much instantly,” the commenter wrote. “We know this because society has collapsed thousands of times, on smaller and bigger scales. What always happens is that the survivors regroup, organize, and rebuild.”

Can this ray of sunshine be trusted? I’d love to believe it can be. I asked Scott Knowles, a historian of disaster, what historians and sociologists who study collapses and disasters have to say. His answer: It depends. “We help, and also we don’t,” Knowles said in an email to me. Over the years, academic researchers have gone back and forth on the question. “This whole area of work really got going in the Cold War when defense planners wanted to model post-[nuclear] attack scenarios,” Knowles wrote. The Disaster Research Center at Ohio State University (which has since moved to the University of Delaware) “did the work over years to model community response, and they pushed back strongly on the idea of social collapse—they found instead too much of the opposite—people converge on a disaster scene!”

In a 1961 paper (unpublished until 1996), sociologist Charles Fritz laid out the case for this “contrary perspective” that disasters and other majorly stressful events don’t necessarily result in social breakdown and trauma. Fritz, who had begun his observations of disasters while stationed in Britain during the Blitz, reported that during that time he saw “a nation of gloriously happy people, enjoying life to the fullest, exhibiting a sense of gaiety and love of life that was truly remarkable,” with Britons reaching beyond class distinctions, sharing supplies, and talking to people they had never spoken with before. Marshaling sociological and historical evidence, Fritz recounts example after example of people pulling together in the middle of tragedy: black and white police and militia members uniting to maintain order during the yellow fever epidemic in Memphis in 1878; enemies forgetting old quarrels during the German bombing of Krakow in World War II; community members reporting strengthened personal relationships with neighbors after the White County, Arkansas, tornado of 1952.

Since Fritz’s work in the middle of the 20th century, other researchers have tried to fill in the blanks, looking at disasters big and small in various countries across the world. “In general,” Knowles wrote, “there is an agreement that people are pro-social” (in other words, they will try to form alliances with each other and help out, just as the commenter argues). “But of course, that has limits based on the perception of government care and assistance, the actions of law enforcement, wealth of the community, stability of communities and families, and age.” Rebecca Solnit, in her 2009 book A Paradise Built in Hell: The Extraordinary Communities That Arise in Disaster, described the deeply contradictory, and not entirely negative, effect that disasters have on communities: “In each disaster, there is suffering, there are psychic scars that will be felt most when the emergency is over, there are deaths and losses. Satisfactions, newborn social bonds, and liberations are often also profound.”

Scholar Ilan Kelman runs a site called Disaster Diplomacy that collects case studies, trying to determine why some disasters lead to greater cooperation between groups and others don’t. In one post, Kelman explains how the United States and Cuba negotiated (mostly failed) offers of mutual aid after hurricanes throughout the 2000s. “Disaster-related activities can catalyze diplomacy, but are unlikely to create diplomacy” where none existed before, Kelman wrote. If two parties—countries, or groups inside countries—have been talking about extending mutual aid and friendship already, help is likely forthcoming. If they haven’t—according to the case studies Kelman and others have gathered—it might not be. During a big and ongoing collapse, like the one climate change (or an international pandemic) is likely to be, people’s actions will be increasingly difficult to predict, because so many countries will be involved.

People are not the same everywhere and across time. I know this argument doesn’t make excellent fodder for horror films. But there are fictions that approach the imagination of disaster carefully, without assuming that “humanity” is a constant across situations, and that scarcity will always end in war. In Kim Stanley Robinson’s new climate change book New York: 2140, most of the city is submerged by rising sea levels, but new organizational structures also spring up to allocate the resources that remain. This is not an idealized future—people go hungry, and predatory capitalists profit—but it’s not dystopian either. Characters form alliances and friendships, fight for one another, and share what they have.

As Robinson said in a 2015 interview about dark visions of climate disasters: “There’s another scenario where we get hold of our technologies, our social systems and our sense of law and justice and we make a kind of utopia—a positive future where we’re sustainable over the long haul. We could live on Earth in a permaculture that’s beautiful. From this moment in history, both scenarios are completely conceivable.”

I hope he’s right.

#### Big tech is not key to anything.

Stephen M. Walt 21, Robert and Renée Belfer Professor of International Relations at the John F. Kennedy School of Government at Harvard University, Ph.D. in Political Science from the University of California, Berkeley, “Big Tech Won’t Remake the Global Order,” Foreign Policy, 11-08-2021, https://foreignpolicy.com/2021/11/08/big-tech-wont-remake-the-global-order

Will Big Tech transform geopolitics and perhaps one day supplant the nation-state? In a recent article in Foreign Affairs, titled “The Technopolar Moment: How Digital Powers Will Reshape the Global Order,” Eurasia Group President Ian Bremmer argues we can’t rule that possibility out. In a provocative analysis of the rapidly evolving digital space, Bremmer writes that the major technology firms—Facebook, Apple, Google, Amazon, and foreign counterparts such as Alibaba, Huawei, and Tencent—have become powerful, autonomous actors that are “increasingly shaping geopolitics.”

In particular, he suggests that these firms have created a “new dimension in geopolitics—digital space—over which they exercise primary influence.” With increasing power over “how people spend their time, what professional and social opportunities they pursue, and, ultimately, what they think,” these firms are already “exercising a form of sovereignty,” he writes. The future geopolitical environment will take one of three forms: “one in which the state reigns supreme, rewarding the national champions; one in which corporations wrest control from the state over digital space … or one in which the state fades away.” These are starkly different alternative futures, but which one is most likely?

Taken as a whole, the article is vintage Bremmer: far-reaching, mind-stretching, bridging commerce, politics, and technology, and well worth reading. (Full disclosure: Bremmer and I are good friends—except when on opposite sides of a tennis court.) But I’m not persuaded that Big Tech is as powerful or as autonomous as he thinks, and I certainly don’t think these firms will supplant or replace the nation-state at any point in the foreseeable future. Of his three alternatives, the smart money should be on states.

Physical space is essential. Digital space is optional.

To see why, let’s start with the fundamental differences between physical space and digital space. Physical space is familiar and tangible: It is air, water, food, arable land, the built environment in which we dwell and work. Physical space is essential to human life; our species cannot eat, breathe, procreate, clothe and house itself, or do much of anything else without it. You can’t surf the internet or play a virtual reality game without a place to sit and plug in your device. Our inescapable dependence on the physical environment is why humans fight over territory, control of sea routes, and other physical resources, and it is why states created borders and devised institutions such as sovereignty to regulate political authority over the inhabitable land areas in which we dwell. To make an obvious point, the indispensability of physical space is why climate change looms so large today.

By contrast, nothing in digital space is essential to human life. Its various elements are useful, ubiquitous, seductive, convenient, and, in many cases, life-enhancing—but not strictly necessary. How do we know? Because humanity managed to survive and multiply to nearly 8 billion people and counting, most of them now enjoying levels of material well-being that would boggle the minds of their ancestors. Guess what? They did this without laptops, smartphones, Facebook, or any of the other elements of digital space.

Moreover, as Bremmer admits, “technology firms cannot decouple themselves from physical space”; they invariably touch ground in somebody’s sovereign territory. Servers must be located somewhere and connect to existing power grids. The employees who write algorithms or answer help lines or fill orders in warehouses must live and work and eat and sleep in specific locations that are subject to political authority. Amazon may live in the cloud, but it also depends on fleets of trucks to deliver merchandise to actual human beings. Even techno-utopians have to build their survivalist bunkers within the borders of a real country and in accordance with its zoning laws.

My point is that it is easy to imagine human life without the digital space; all we have to do is think back to what life was like a few decades ago. But trying to imagine human life absent the physical environment in which humans evolved transports us into the realm of science fiction. If Elon Musk’s fantasies of a Mars colony ever come to fruition (and I’ll take the under on that bet), it will be a remote and tiny outlet dependent on a steady stream of supplies from Earth and in all probability inhabited by robots, not people.

None of this is to deny the importance of the digital realm. The world economy would suffer significantly if the digital space collapsed tomorrow and we had to go back to snail mail, analog devices, and other pre-digital ways of doing business, but civilization would not collapse, and our species would probably adapt quickly. Some aspects of contemporary life—such as the level of civility in our political discourse—might even improve. If we destroy the biosphere or other essential features of our physical space, by contrast, we’re toast.

Equally important, today’s digital space is not going to collapse no matter what governments decide to do; no serious person wants to smash the servers and return us to an analog world. The real question is how much and in what ways it will be regulated. Imposing limits on Google and Apple and Facebook won’t drive them out of business, although it might make them slightly less profitable and slow the headlong pace of innovation somewhat. Regulating the use of artificial intelligence or other digital tools may reduce some of the benefits of unfettered technological autonomy, but it won’t halt all progress. When there are trade-offs between security and political authority and technological innovation—and clearly there are—governments (and societies) are likely to accept somewhat less of the latter to preserve the former.

Why states will win

For all their shortcomings, states remain the dominant political form in the world today. The number of independent states has grown steadily since 1945 because different ethnic or national groups continue to crave the security and autonomy that only self-government can provide. (If you don’t understand why groups want their own state, just ask Kurds or Palestinians what life is like without one.) Some states do not protect their own populations very well, but most states do a fair job of providing basic security most of the time. And when emergencies arise—9/11, the 2008 financial crisis, a catastrophic weather event—people don’t call Tim Cook or Sergey Brin to fix the problem; they turn to the government.

Even today, corporations, banks, NGOs, and Big Tech are all ultimately backstopped by rules enacted and enforced by governments. If corporations enjoy certain privileges (such as limited liability, legal personhood, or the protection of Section 230 of the U.S. Communications Decency Act), it is because governments have given these to them. When Huawei suddenly couldn’t get the chips it needed, it was because a government decided to block these sales. States also control the ultimate weapon: the legitimate use of force. It is states that decides when and whom to fight, and when they do, citizens in nearly every country willingly march into harm’s way.

No Big Tech firm commands similar power or loyalty. Alphabet’s leaders would be arrested if they tried to use force to protect their market share, and Facebook’s many users aren’t going to take up arms to defend Mark Zuckerberg from government regulation. In short, Big Tech does not possess anything remotely like the sovereignty possessed by states, by which I mean the authority and ability to do whatever is necessary to defend themselves. In the self-help world of international politics, states are often willing to blithely break the law and do horrendous things in the name of national security. No Big Tech firm has anything like that capacity.

Is Big Tech really different?

It is possible that today’s Big Tech is a wholly new phenomenon and that ossified, corrupt, and ignorant governments will be unable or unwilling to bring it to heel. But history suggests a degree of skepticism is in order. Back in the 1970s, scholars such as Raymond Vernon, Richard J. Barnet, and Ronald E. Muller believed that multinational corporations were imposing significant constraints on the nation-state (the title of Vernon’s best-known book is Sovereignty at Bay), a thesis that slighted the central role that U.S. power (and the liberal order it encouraged) played in enabling their activities. Even now, states are cracking down on the tax havens and accounting tricks that Big Tech (and other global firms) has exploited to bolster its profits.

Look back a little further. In the early 20th century, the United States Steel Corp. was as dominant and ubiquitous as some Big Tech firms are today, accounting for two-thirds of U.S. steel production in 1901. If you wanted to build a rail line, make an automobile, erect a skyscraper, or manufacture a plow back then, it was hard to avoid doing business with it. Despite years of lobbying to avoid government regulation and obtain a host of government subsidies, today the company’s share of domestic steel consumption is a mere 8 percent. Might a similar fate await some of the colossi that now loom large in the digital arena?

Or consider the precursor to today’s digital media giants: broadcast television. In 1950, hardly any Americans had TV sets; by 1960, they were in more than 80 percent of U.S. households. Yet apart from the rather insignificant public TV stations, the content you could watch on your sets came from just three “big tech” companies: NBC, CBS, and ABC. If you got your news from the boob tube, you had your choice of just three decidedly mainstream sources, which in turn gave them enormous influence over what Americans knew and thought. Is today’s Big Tech really different?

Writing in the Financial Times, Brooke Masters offers another cautionary tale. In the 19th century, she writes, for-profit railway companies in the United States “wielded monopoly power in the areas they served: new railway stations could create viable towns, and closures could destroy them. Variations in freight rates determined whether businesses were profitable.” She notes further that these powerful companies “fought off state regulation in the 1870s,” but Congress eventually got its act together, created the Interstate Commerce Commission, and brought the railway companies to heel.

Bremmer believes that regulating Big Tech will be more difficult and technically challenging, and I agree, but the writing seems to be on the wall here, too. China has already cracked down hard on its tech sector, and Russia’s Vladimir Putin is moving in this direction as well. The United States won’t go as far as these authoritarian states have, but a desire to bring these firms back down to earth is apparent across the political spectrum. Just last week, the Biden administration blacklisted the Israeli spyware firm NSO Group, the close relationship between the two countries notwithstanding. The bottom line: The unfettered environment in which these firms have grown is disappearing, as states around the world assert their authority over a wide range of activities in the digital space.

But remember: Regulating the digital space does not mean killing it off entirely, rendering big firms unprofitable, or ending all innovation within this arena. Properly designed, greater regulation could increase innovation by breaking up restrictive monopolies while at the same time protecting society as a whole from Big Tech’s negative effects, whose magnitude we are only now beginning to recognize.

Digital technology affects our lives in myriad ways, and it will continue to do so in the years ahead. But so did electrification, the internal combustion engine, air travel, immunization, the harnessing of the atom, and the unlocking of the human genome. None of these scientific or technological revolutions transformed the geopolitical map, rendered borders irrelevant, or turned billions of people from citizens of a particular country to citizens of the world. Perhaps I lack the imagination to see the transformations that Bremmer thinks are possible in the not-too-distant future, but my money is on states.

Think of it this way: Which do you expect to be around in 100 years? Facebook or France? Apple or Argentina? Microsoft or Mexico? It’s rare for a corporation to survive an entire century, but nations and states turn out to be surprisingly long-lived. I won’t be around to see it, but I’d bet that the essential features of geopolitics in 2100 will look a lot like its core elements today. Specifically, nonstate actors of all types—including Big Tech firms—will continue to operate in a political and institutional framework set by national governments.

And if my pal Ian would like to get a bet down—with a shorter deadline, of course—I’m prepared to make a (modest) wager.

# 2NC

## Reg Neg CP

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## Regulation CP

## States CP

## Adv 1

### Competitiveness---UQ---2NC

#### Digital economy strong now---studies.

Baye ’20 [Michael Baye, James Cooper, Kenneth Elzinga, Deborah Garza, Thomas Hazlett, Benjamin Klein, Tad Lipsky, Scott Masten, Maureen Ohlhausen, James Rill, Vernon Smith, Robert Willig, Joshua Wright, and John Yun, with some professors omitted for convenience; May 20; Former Director of the FTC’s Bureau of Economics, Bert Elwert Professor of Business at Indiana University; Former Acting and Deputy Director of the FTC’s Office of Policy Planning; Economics Professor at the University of Virginia; Chair of the Antitrust Modernization Commission, Former Acting and Deputy Assistant Attorney General of the DOJ’s Antitrust Division; Former Chief Economist of the FCC, Economics Professor at Clemson University; Economics Professor at UCLA; Former Acting Director of the FTC’s Bureau of Competition, Former Deputy Assistant Attorney General of the DOJ’s Antitrust Division; Business Economics and Public Policy at the University of Michigan; Former Acting Chairman & Commissioner of the FTC; Former Assistant Attorney General of DOJ’s Antitrust Division; Nobel Laureate in Economics and Professor at Chapman University; Former Deputy Assistant Attorney General for Economics at the DOJ’s Antitrust Division, Economics and Public Affairs Professor at Princeton University; Former Commissioner of the FTC, Law Professor at George Mason University; Former Acting Deputy Assistant Director of the FTC’s Bureau of Economics, Law Professor at George Mason University; “Joint Submission Of Antitrust Economists, Legal Scholars, And Practitioners To The House Judiciary Committee On The State Of Antitrust Law And Implications For Protecting Competition In Digital Markets,” <https://laweconcenter.org/wp-content/uploads/2020/05/house_joint_antitrust_letter_20200514.pdf>]

I. The Digital Economy is Healthy, Competitive, and Benefits Consumers

We do not recount here the extensive literature calling into question claims that market power and concentration have been systematically increasing, resulting in serious consequences for consumers, workers, innovation, economic inequality, and more. 9 At best, we have an incomplete and imperfect understanding of recent market trends; there is undoubtedly more research to do. But the weight of the literature today—much of which is no more than a couple of years old and some of which is still in working paper form—does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework. It is certainly not the case that “any conclusion to the contrary reflects either an incomplete or incorrect understanding of economics and the economic literature from the last several decades.”10

The most recent studies suggest that the observed changes in national-level concentration are brought about by the expansion of more productive large firms into local markets leading to, in these economists’ own words, “more, rather than less, competitive markets.”11 Further, despite occasional claims to the contrary, the literature has not uncovered systematic competition problems in digital markets. The best interpretation of existing evidence is that the deployment of new technology by traditional industries has increased economies of scale and scope and enhanced local competition.12 None of the economic evidence supports claims about generally enhanced market power in markets inhabited by the companies that develop such technological tools.

Prominent economists across the political spectrum have offered similar analyses, all of which serve to call into question the certitude of the assertions underlying the calls for radical antitrust reform.13

The digital economy is rife with competition and innovation, and consumers are benefitting in meaningful and remarkable ways from dynamic rivalry among companies big and small. That does not mean the digital economy is, or should be, immune from antitrust scrutiny. But recent scholarship strongly suggests that competition in that sector of the economy has thrived under the existing antitrust laws, which can and should be applied when those laws are violated.

#### U.S. innovation is high and globally dominant---big business is key.

Wolf ’21 [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” <https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355>]

The Chinese elite are convinced that the US is in irreversible decline. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is exaggerated. The US retains big assets, notably in economics.

For one and half centuries, the US has been the world’s most innovative economy. That has been the basis of its global power and influence. So how does its innovative power look today? The answer is: rather good, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, 7 of the 10 most valuable companies in the world and 14 of the top 20, were headquartered in the US.

If it were not for Saudi Arabian oil, the five most valuable companies in the world would be US technology giants: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at seventh position) and Alibaba (at ninth). But those are China’s only companies in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has 12 of the top 20; China (with Hong Kong but excluding Taiwan) has three; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another crucial sector for future prosperity. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has seven of the top 10, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies are globally dominant and nearly all the most valuable non-US firms are headquartered in allied countries.

#### Companies are big because they innovate---lack of innovation is from corporate failure or gross missteps.

Robert D. Atkinson 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine,” Information Technology & Innovation Foundation, 03-10-2021, https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new

Over the past few decades, many firms have gained market share in their industries, so much so that they have been coined “superstar” firms. This phenomenon has been especially true in digital markets wherein the nation’s largest Internet firms have created the platforms that are fueling rapid growth, but it has also occurred across many industries.

Neo-Brandeisians have latched on to this development to allege that the firms’ growing market share is largely due to anticompetitive conduct, rather than inherently superior business performance. They argue that this market power in turn has allowed firms to raise margins and profits, cut spending on innovation, and unfairly preempt competitive challenges. Even when firms have grown due to superior performance, these advocates warn that the firms often preserve their advantage by adopting a variety of anticompetitive practices.

This market power explanation of superstar firms appears to be flawed. Although some firms have gained even more market share, this has generally not been because the firms used market power to succeed, nor does it suggest reduced economic welfare. Rather, in this environment, a few firms appear to have figured out how to be much more innovative and competitive, and have acted effectively on those insights, enabling them to outperform laggard firms. Indeed, there appears to be something about the nature of current process and product technologies and global market operations that enables some firms to perform better than others, creating more public value in the process. Rather than decry this development and attempt to hold back successful firms, advocates should be celebrating it and identifying ways to help lagging firms do better. If there is a policy problem, it is not due to the success of superstar firms. Instead, it is either the failure of laggards to catch up or some gross mistakes, such as BlackBerry’s persistence on smartphones with keyboards paving the way for Apple and Google’s successes.

### Competitiveness---Turn---2NC

#### Chinese companies are ready to pounce.

Loren Thompson 20, Chief Operating Officer of the Lexington Institute, Chief Executive Officer of Source Associates, Ph.D. in Government from Georgetown University, “Inventing Bogus Antitrust Arguments To Bring Down Big Tech Is Bad For National Security,” Forbes, 07-16-2020, https://www.forbes.com/sites/lorenthompson/2020/07/16/inventing-bogus-antitrust-arguments-to-bring-down-big-tech-is-bad-for-national-security/?sh=2a83a1d2784b

Over the last two generations, the U.S. economy has steadily migrated from the production of goods to the delivery of services. Although U.S. manufacturers still dominate in industries such as aerospace and U.S. farmers remain the most productive in the world, their role is the economy is being eclipsed by services.

There are many reasons for this shift, not the least of which are the income and lifestyle aspirations of American workers. Working on a farm or an assembly line is hard, and many—perhaps most—Americans would rather do something else.

The Internet has made that dream possible for a growing number of people, spawning millions of new enterprises and transforming old ones with its unique capacity to stimulate commerce. It is no coincidence that America’s greatest business successes of the new century—companies like Amazon AMZN +0.2% and Alphabet and Facebook FB +1.8%—all depend on the Internet and focus on providing services.

This is a revolutionary trend in business, and unsettling to some. There is a fear that Internet-based enterprises will destroy jobs, evade taxes, invade privacy, spread vices and otherwise cause disruption. Whatever validity these fears may have, they result from the voluntary choices of consumers rather than the business strategies of Big Tech.

It is not common in U.S. political culture to oppose trends set in motion by the behavior of millions of consumers seeking the best solutions to their needs.

Nonetheless, on July 27 some members of the House Judiciary Committee are likely to do precisely that. The committee’s antitrust panel has been investigating the nation’s biggest technology companies for a year, and on that day the CEOs of four of them will appear before the committee: Tim Cook of Apple AAPL -0.9%, Jeff Bezos of Amazon, Mark Zuckerberg of Facebook, and Sundar Pichai of Alphabet (Google GOOGL +3.3%’s parent).

This has never happened before, and it underscores the importance that both political parties assign to restraining potential excesses in an Internet-based economy. Federal law governing the Internet hasn’t changed much since the World Wide Web was in its infancy, so there’s a case to be made for legislative review.

The case for an antitrust inquiry is less convincing. Antitrust law originated over a century ago when industrialists sought to monopolize segments of the economy as a way of assuring profits. The laws were intended to prevent combinations that might weaken competition, discourage innovation and reduce consumer choice.

For instance, Standard Oil, which had come to control 90% of U.S. petroleum refining, was broken up.

The difference between Standard Oil and today’s Internet behemoths, though, is that consumers have plenty of alternatives for what Big Tech provides, and the barriers to new market entrants are not high the way they were for refiners in 1900. Apple, Amazon, Facebook and Alphabet got big because consumers preferred them to other options. That was due in no small part to their continuous innovation.

You really have to twist the intent of antitrust law to make a case against companies like Alphabet’s Google, because its market dominance in search resulted from consumer choice rather than a lack of alternatives. The imposition of antitrust sanctions would amount to punishment for success or mere bigness, rather than a rational application of regulatory power.

Or take the example of Facebook, which, like the other companies testifying on July 27, is the subject of an antitrust inquiry by the government’s executive branch. The main complaint antitrust types seem to have against Facebook is that it supposedly made acquisitions as it grew aimed at dominating social networking.

Exhibit A in this case is the 2012 acquisition of Instagram, which has become phenomenally successful under Facebook’s tutelage. At the time it was bought, though, the company had only 13 employees and no ability to scale to what it has now become. People laughed that Zuckerberg would be willing to pay a billion dollars for such a modest business.

It turned out to be a smart move, but as Instagram took off many younger users shifted their attention from Facebook to the new platform, so there was a downside.

But trying to retrospectively fit the acquisition of Instagram (or WhatsApp, or Oculus VR) into a pattern aimed at restraining competition and squelching innovation is simply misleading. There are plenty of places outside the Facebook family that people can go online to network or game or post photos or get the news, and they all innovate furiously.

The same can be said of all the Big Tech companies. They have to run as fast as they can just to stay where they are. Innovation has been the key to their success, and new market entrants are constantly emerging to challenge that success.

What makes this relevant to national security is that the new entrants increasingly aren’t American, they’re Chinese. The biggest reason U.S. manufacturing has receded since 2000 is the rise of China, and the success of companies like Beijing-based Bytedance—TikTok’s parent—is a signal that China is capable of doing the same thing to U.S. tech companies that it has already done to steel makers and electronics manufacturers.

TikTok was downloaded over 300 million times during the first quarter on 2020, making it the most downloaded app during a single quarter in history. Six of the top ten apps in India, soon to be the world’s most populous country, are Chinese. Indian authorities reversed that trend when they banned Chinese apps after a border skirmish, but America’s Internet-based service providers can expect continuous assaults by Chinese rivals for the foreseeable future.

Beijing is undoubtedly encouraging if not subsidizing such assaults. The contrast between how the Chinese government treats its tech companies and the way Washington treats its own players is hard to miss. Whether we like it or not, companies like Alphabet and Facebook have become the leading purveyors of American ideas and influence to the world. If they are hobbled, Chinese competitors will eagerly take their place.

There is no compelling argument for breaking up or otherwise sanctioning U.S. technology leaders. If you think America’s Big Tech companies have too much power, imagine how it will feel when their successors are run out of the People’s Republic.

#### Independently, weaponizing competition law rolls back years of key innovations.

Mitchell ’21 [Trace; March 3; Research Associate at the Mercatus Center at George Mason University, J.D. from George Mason University; Morning Consult, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea,” <https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/>]

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against [Google](https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws) from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The [vast majority](https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4) of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s [recent case](https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization) against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Splitting platforms into two markets screws innovation.

Yun ’20 [John M; Winter; Law Professor at George Mason University; the South Carolina Law Review, “Does Antitrust Have Digital Blind Spots?” vol. 72]

Splitting a platform into two separate markets for the purpose of antitrust analysis, however, runs afoul of a simple reality: no platform maximizes profit over just one side. 302Rather, profit maximization is determined through a joint [\*353] consideration of both sides. A platform, by its very nature, balances the interests of multiple sides and structures its price and non-price terms to achieve this balance. Further, as the Court emphasized, credit card networks are "transaction platforms," 303which are platforms where both sides share a common level of output. This also illustrates that artificially bifurcating the two sides into separate competitive effects analyses does not align with how firms actually make decisions. Antitrust law must start from these economic realities and fit the administration of the rule of reason analysis around them.

Conceptually, perhaps one of the strongest criticisms of the Court's approach is that it effectively eliminates step two of the rule of reason analysis--where the defendant bears the burden of justifying its conduct as procompetitive. 304Instead, that burden is shifted to the plaintiff in step one during which, in order to meet its prima facie burden, the plaintiff must show that the net effect is negative. 305This is an important criticism. Ultimately, the Court had to weigh two possible regimes. The first regime involves a framework where the prima facie burden is met simply with a price increase on one side. 306The second regime, which was adopted by the Court, involves a framework where the plaintiff's burden must not only include a one-sided price increase but also include "evidence of anticompetitive effects . . . such as reduced output, increased prices, or decreased quality." 307In other words, is a one-sided price increase actually and reliably evidence of anticompetitive harm? The integrated nature of the two sides does not support this proposition; consequently, the second regime better aligns with the economic realities of platforms. Importantly, Professors David Evans and Richard Schmalensee assert the following:

This is not a matter of burden-shifting. There is simply no way to know, especially in the case of a platform that provides a service that customers on each side consume jointly, whether a practice is anticompetitive without at least considering both types of customers and the overall competition among platforms. That analysis must, [\*354] therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not. 308

Additionally, under a framework where the prima facie burden is met simply with a price increase on one side, this "distorts the assignment of burdens in the form of placing a thumb on the scale for plaintiffs in platform cases by redefining 'competitive harm' to mean any harm to any group of consumers." 309The reality is that such an alternate framework would result in no real ability of the defendant to offer procompetitive justifications in step two. Evans and Schmalensee, for example, observe:

First, it isn't clear that the court could consider the other side-specific market in the second stage of the rule of reason inquiry. The trial court judge noted that pro-competitive benefits on the consumer side, in "a separate, though intertwined antitrust market," could not be used to offset anti-competitive effects on the merchant side. Second, after finding that a practice is anti-competitive in the first stage, courts seldom give much weight to pro-competitive benefits in the second stage. 310

Further, it is not entirely clear that the burden is actually higher for plaintiffs in step one--particularly for transaction platforms. For instance, output, which is shared by both sides of a transaction platform, could serve as a reliable guide to welfare effects. This focus on output is something that conforms with both the law and economics of assessing markets and market power. 311

[\*355] In sum, the interrelationship between the various sides of a platform is critical. 312Specifically, for a platform like American Express, changes in cardholders' terms have a material impact on the number of transactions that merchants will enjoy. These feedback effects between the two sides are central to assessing conduct on the platform. The rule of reason framework established by the Court in Amex properly assessed and incorporated the economic literature on platforms into an administrable, coherent approach by shifting the burden of production. Rather than increasing the burden on plaintiffs, it requires plaintiffs to do a complete analysis of the effects of a given conduct on the platform instead of on an unnatural and narrowly focused segment of an integrated market. 313

V. CONCLUSION

Presently, antitrust law is among its most unprecedented times where there is a chorus--albeit lacking complete consonance--from various stakeholders seeking significant antitrust reforms. This chorus is comprised of myriad groups of academics, politicians from across the political divide, and various digital reports. 314

Ultimately, these calls for reform too often lack completeness and are too broad and general to form a reliable guide for agencies, courts, and legislatures. This is not to say questions regarding large platforms are completely and categorically settled. Network effects are certainly a key consideration in assessing certain digital markets, but it is important to understand precisely how and to what extent they are affecting these markets. Rather than being a presumptive source of market failure, network effects are more properly assessed as a market feature that must be accounted for in order to understand firm conduct. Similarly, there is a paucity of evidence [\*356] demonstrating that the conduct of digital platforms is actually reducing welfare and harming consumers. Finally, a close reading of the Court's Amex decision reveals an opinion that carefully treads the economic literature on platforms and implements that learning into a coherent rule of reason framework.

The most radical claim being made today is perhaps the most controversial one: that current antitrust law and enforcement actually are sufficient to properly assess and adjudicate conduct involving digital platforms. Antitrust law has always had an evolutionary character that recognizes the need to adjust to new learnings. 315This does not mean that the law is necessarily efficient or always moving in the right direction. Still, as long as antitrust law is tied to measures of economic efficiency and welfare and so long as it continues to carefully examine actual evidence rather than fall victim to unfounded presumptions, it provides a more reliable body of law for fostering innovation and economic progress than do the alternatives being proposed by its critics.

### Competitiveness---Turn---Startups

#### Mergers incentivize startup innovation---blocking them destroys all venture capital investment.

Gary Dushnitsky & Daniel Sokol 21, Associate Professor of Strategy and Entrepreneurship at London Business School, Senior Fellow at the Mack Institute for Innovation Management at the Wharton School of the University of Pennsylvania, Ph.D. from New York University; Professor of Law at the University of Florida Levin College of Law, Senior Of Counsel at Wilson Sonsini Goodrich & Rosati, J.D. from the University of Chicago, “Competition laws could be a death knell for startup mergers and acquisitions,” The Hill, 07-22-2021, https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of misguided antitrust legislation. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have unintended consequences that would hamper innovation and entrepreneurship. The result is that certain potential deals will never leave the boardroom and others will be abandoned because the risks of antitrust intervention are too high.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in collateral damage across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will not take the risk of investing in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many merger and acquisition exits and thus lessen the incentives for founding and growing a business. It therefore makes investment in innovative ventures less likely since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may wither.

For the past two decades, acquisitions have constituted the most common entrepreneurial exit for U.S.-based VC-backed innovators. Not only do acquisitions account for the larger number of liquidity events, but they also cover a wide range of low and medium valuations. Why do larger companies acquire smaller ones? Most often, it is to unlock the power of complementary assets. That is, to combine the novel product or service from the startup with distribution channels, manufacturing capabilities, marketing prowess and regulatory expertise of the acquirer. These combinations are key to successfully and rapidly introducing innovation in the market, as has been demonstrated in numerous industries. But the proposed legislation would block a lot of the value creation through complementary assets that a combined company post-merger offers.

A change in merger rules also hurts efforts at diversity and inclusion. Many first-time VC funds introduce investors of more diverse backgrounds. Moreover, the new cadre of venture capitalists make it their mission to support founders of diverse backgrounds. As a result, smaller new funds often pursue innovation in companies, sectors or geographies that have been neglected in the past. Yet, it is these funds and companies that may be most affected by a decrease in rewarding acquisitions.

The proposed legislation may also change the structure of innovation. To the extent that large incumbents are precluded or delayed from accessing the broader universe of entrepreneurial ventures, legislation may create ‘walled innovation gardens.’ Within those walls, new ideas may be cultivated but only pre-selected startups can reach and win incumbents' attention. This runs the risk of stifling innovation (for incumbents) and also can impact scale-up opportunities (for startups) and compensation and longevity of the VC funds that backed them.

For incumbents, the risk is that they draw from a limited pool of innovators and, therefore, miss out on other/better innovations beyond the focal pool. For entrepreneurs, it implies that many would be unable to scale or sell their companies, especially if the acquisition route is blocked. Finally, for VC funds, the shift of incumbents' resources towards corporate venture builders can decrease capital availability and the prospects of future funds in two ways: first, a decrease in established corporations as an important source of limited partners in their funds, and second, a decrease in M&A activity.

The world of entrepreneurship is complex. There is a history of poorly thought-out legal rules negatively impacting business growth and innovation. The proposed antitrust legislation imposing limits on mergers by incumbent firms, motivated by a desire to increase the number of tech firms competing, will instead reduce M&A exit opportunities for founders and the VC investors who back them. It may also decrease the number of new VC funds founded, and could have a disparate impact specifically on social-based investing relating to sustainability and diversity that plays a large role in many first-time funds’ investment decisions. Policymakers should think carefully about these likely impacts before endeavoring to rewrite U.S. antitrust laws.

## Advantage 2

### They don’t want it---2NC

#### Developing countries are uninterested in competition policy

Frederic Jenny 20—Professor Of Economics, Essec Business School, Paris, France; Chair Oecd Competition Committee. ("An Essay: Can Competition Law and Policy Be Made Relevant for Inclusive Growth of Developing Countries?," 1-22-2020, from SAGE Journals, https://journals.sagepub.com/doi/full/10.1177/0003603X19898621

The question then is whether and through which process the changes necessary to establish strong and independent competition authorities backed by effective legal provisions allowing them to control or denounce the worst governmental restrictions benefiting politically powerful lobbies or abuses by state-owned firms will take place, as one can doubt that the powerful beneficiaries of the status quo in those countries will have much appetite to adopt competition law frameworks that will reduce their ability to grant protection for political gains and to benefit from corrupt practices. The authors acknowledge the weak interest of governments in Sub-Saharan African nations for the adoption of competition laws. The authors refer to this dilemma (p. 28) when they state (while discussing the West African situation):

In the 1990s, responding to the World Bank conditionality, the West African states eased regulations and began to make laws concerning pricing and firms behavior more market-friendly. The States passed competition laws and established competition authorities. These laws were designed to remove obstructions to competition (…) and to let the market work to get better products and prices. But the national governments were reluctant to relinquish their regulatory roles. They did not want to just stand by when they thought prices were too high. They could not resist intervention. Thus they did not provide much support for independent competition authorities. The colonial history kept its grip and the remnants of French dirigisme hindered a shift to markets. This halting move to markets does much to explain the patterns and trends of West African competition law and policy.

### Dependency Trap---No Modeling---EU---2NC

#### The US can’t overtake the EU---prefer comparative evidence.

Spencer Weber Waller 20, John Paul Stevens Chair in Competition Law at the Loyola University Chicago School of Law, “The Omega Man or the Isolation of U.S. Antitrust Law,” Connecticut Law Review, Vol. 52, 2020, accessed via Lexis

Much of the growing and persistent isolation of U.S. antitrust is a function of history and path dependence. Antitrust in the United States began at the state level in the 1880s with the federal government following a decade [\*195] later with the Sherman Act. 436The open-ended, broadly worded, almost constitutional, language of the Sherman Act was a product of its times and the U.S. common law system. While the United States has been influential to varying degrees in the adoption of other jurisdictions' competition systems, the other systems all were adopted or modified into their modern forms much later and in very different legal and societal climates. 437There is no reason to think that copying the United States was the principal reason for their outcome or evolution. 438

There is every reason to believe that most competition systems around the world have emulated the EU rather than the United States. Competition law is part of the "acquis communautaire" that all member states are required to incorporate into their own national law. 439All current member states have national competition law that closely tracks the competition laws of the EU and may not conflict with its core provisions. 440Special provisions also allow member states to have broader laws regarding abuse of a dominant position. 441

Many of these competition provisions were explicitly adopted by countries in order to facilitate eventual membership in the EU. Other countries adopted EU style provisions out of necessity or choice in connection with their membership in the EU or the European Free Trade Agreement, or to secure preferential trade agreements with the EU. 442Still others have colonial or cultural ties with EU countries that made EU style competition law a more natural fit.

Even Japan and Germany, where the United States exerted more direct influence following the end of World War II, quickly modified their original [\*196] competition laws to fit their indigenous needs and diverged from whatever U.S. roots from which they grew. 443If there is a competition for the hearts and minds of the world's one hundred thirty plus competition systems, the EU has long since acquired a dominant position.

Two recent examples illustrate this type of divergence where very different jurisdictions either adopted or modified their competition laws ultimately adopting language and approaches developed for their national needs more in line with EU competition principles. More than fifteen years ago, China began a systematic study of world competition systems to develop its first competition law as part of the promotion of its socialist market economy. Scholars note that the PRC relied on key EU, and less so U.S., concepts and sources in selecting the rules, procedures, and institutions that best suited their needs. 444

Chile also has modified its competition laws in recent years. The new statutory language echoes that of Articles 101 and 102, even though key concepts remain undefined by guidelines or precedent. For example, Article 3(a), amended in 2016, prohibits agreements or concerted practices that involve competitors and consist of fixing sale or purchase prices, limit production, allow them to assign market zones or quotas, or affect the result of bidding processes, as well as agreements or concerted practices that confer them market power, consist in determining marketing conditions, or that exclude competitors. 445Article 3(b) incorporates the familiar EU notion of abuse of dominance. 446

The dominance of EU style competition policy seems unlikely to abate. Similarly, it is difficult to see which jurisdiction has bucked, or is likely to buck, that trend and adopt the narrow substantive, procedural, institutional, and remedial U.S. approach as its playbook for competition policy.

### Dependency Trap---Alt Causes---2NC

#### Plan doesn’t solve digital divide

Rebecca Fogel 20, Communications Assistant at Urban@UW and CBE Office of Research, “The Digital Divide: Gender and technology in an unequal world,” Urban@UW, 11-06-2020, https://depts.washington.edu/urbanuw/news/the-digital-divide-gender-and-technology-in-an-unequal-world/

All over the world, digital literacy and access to technology are commonly divided along gender and racial lines. During a global pandemic that has forced an even stronger reliance on technology than before, the disproportionate and inadequate access that lower-income women of color face is clear, both around the United States and in the Global South. Many women in cities across the Global South rely on the informal marketplace to buy and sell goods, from soap and toilet paper to clothing and fresh fruit. Access to mobile phones and the internet can provide necessary channels for women to access mobile money for their entire family, as well as emotional support as they shoulder more work in the household (World Bank [web], Feb 2020). With strict lockdowns and restrictions in place during the pandemic, these financial avenues and support systems have been slashed. In the Global South, barriers to digital equity are exacerbated by the availability, or lack thereof, of technological infrastructure, financial constraints, and cultural or institutional norms. In a world where women are commonly disenfranchised, “the digital divide could increasingly prevent women from accessing life-enhancing services for education, health, and financial inclusion in a world that has become virtual overnight” (World Bank [web], June 2020). Stronger and more efficient technological infrastructure in cities across the world will allow anyone, but especially women, to connect to much needed social and financial services, especially during the COVID-19 pandemic.

#### China captures the market

UN 19, “‘Digital divide’ will worsen inequalities, without better global cooperation,” United Nations, 09-04-2019, https://news.un.org/en/story/2019/09/1045572

US and China pull ahead, Africa and Latin America trail behind

The United States and China create the vast majority of wealth in the digital economy, the study reveals, and the two countries account for 75% of all patents related to blockchain technologies, 50% of global spending on the “Internet of Things” (IoT), more than 75% of the cloud computing market, and as much as 90% per cent of the market capitalization value of the world’s 70 largest digital platform companies.

The rest of the world, particularly countries in Africa and Latin America, are trailing considerably behind, and this trajectory is likely to continue, further contributing to rising inequality, said UN Secretary-General António Guterres, in a foreword to the report.

“We must work to close the digital divide” he writes, “where more than half the world has limited, or no access to the Internet. Inclusivity is essential to building a digital economy that delivers for all”.

We must work to close the digital divide, where more than half the world has limited or no access to the Internet António Guterres, UN Secretary-General

Massive increase in data on the horizon

Despite the impact that digital data has already had, the world is still in the early days of the data-driven economy, according to the study, which forecasts a dramatic surge in data traffic in the next few years.

This reflects the growth in the number of people using the Internet, and the uptake of frontier technologies such as blockchain, data analytics, artificial intelligence, 3D printing, IoT, automation, robotics and cloud computing.

Platforms to rule the world

Wealth and power in the digital sphere are increasingly being held by a small number of so-called “super platforms”, comprising the seven global brands Microsoft, Apple, Amazon, Google, Facebook, Tencent and Alibaba.

### Dependency Trap---LIO D---2NC

#### China won’t dislodge the order AND it’s resilient and adaptable, anyway

Jake Sullivan 18, Senior Fellow at the Carnegie Endowment for International Peace, Former National Security Adviser to Vice President Joe Biden and Director of Policy Planning at the U.S. Department of State, J.D. from Yale Law School, March/April 2018, “The World After Trump: How the System Can Endure,” https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump

But the existing order is more resilient than this assessment suggests. There is no doubt that Trump represents a meaningful threat to the health of both American democracy and the international system. And there is a nonnegligible risk that he could drag the country into a constitutional crisis, or the world into a crippling trade war or even an all-out nuclear war. Yet despite these risks, rumors of the international order’s demise have been greatly exaggerated. The system is built to last through significant shifts in global politics and economics and strong enough to survive a term of President Trump.

This more optimistic view is offered not as comfort but as a call to action. The present moment demands resolve and affirmative thinking from the foreign policy community about how to sustain and reinforce the international order, not just lamentations about Trump’s destructiveness or resignation about the order’s fate. No one knows for certain how things will turn out. But fatalism will become a self-fulfilling prophecy.

The order can endure only if its defenders step up. It may be durable, but it also needs an update to account for new realities and new challenges. Between fatalism and complacency lies urgency. Champions of the order must start working now to protect its key elements, to build a new consensus at home and abroad about needed adjustments, and to set the stage for a better approach, before it’s too late.

A RESILIENT ORDER

In a world where the major trends seem to spell chaos, it is fair to place the burden of proof on those who claim that the current order can continue. Yet well before Trump, it had already demonstrated its capacity to adapt to changes in the nature and distribution of power. Three basic factors account for such resilience—and demonstrate why the emphasis now should be on protecting and improving the order rather than planning for the aftermath of its demise.

First, most of the world remains invested in major aspects of the order and still counts on the United States to operate at its center. The passing of U.S. dominance need not mean the end of U.S. leadership. That is, the United States may not be able to direct outcomes from a position of preeminent economic, political, and military influence, but it can still mobilize cooperation on shared challenges and shape consensus on key rules. In the years ahead, although Washington will not be the only destination for countries seeking capital, resources, or influence, it will remain the most important agenda-setter.

Some context is important. The U.S.-led order was built at a unique moment, at the end of World War II. Europe’s and Asia’s erstwhile great powers were reduced to rubble, and a combination of dominance abroad and shared economic prosperity at home allowed the United States to serve as the architect and guarantor of a new order fashioned in its own image. It had not just the material power to shape rules and drive outcomes but also a model many other countries wanted to emulate. It used the opportunity to build an order that benefited itself as well as others, with clear advantages for populations at home and abroad. As the international relations scholar G. John Ikenberry has put it in this magazine, the resulting system was “hard to overturn and easy to join.” The end of the Cold War and the fall of the Soviet Union served to reinforce and extend American preeminence.

This precise state of affairs was never going to last forever. Other powers would eventually rise, and the basic bargain would one day need to be revisited. That day has arrived, and the question now is, do other countries want a fundamentally different bargain or simply some adjustments? A comprehensive 2016 rand analysis found that few powers display an appetite for dismantling the international order or transforming it into something unrecognizable. And while Trump’s election has forced countries to contemplate a world without a central role for the United States, many still view the president as an aberration and not a new American normal, especially given that the United States has bounced back before.

Even China has concluded that it largely benefits from the order’s continued operation. Around the time of Trump’s inauguration, breathless reports interpreted Chinese President Xi Jinping’s comments on an open international economy and climate change as indicators that China planned to somehow take over for the United States. But what Xi was really signaling was that China does not want near-term radical change in the global system, even as it seeks to gain more influence by taking advantage of the vacuum left by Trump. And to the extent that Beijing has set out to construct its own parallel institutions, particularly when it comes to trade and investment, thus far these institutions largely supplement the existing order rather than threatening to supplant it.

## Adv 3

### 2NC

#### The internet will never entirely collapse

**Mnookin 12** Seth Mnookin teaches science writing at MIT and blogs at the Public Library of Science, Download the Universe, March 23, 2012, "The Frozen Future of Nonfiction", http://www.downloadtheuniverse.com/dtu/2012/03/why-the-net-matters-how-the-internet-will-save-civilization-by-david-eagleman-canongate-books-2010-for-ipad-by-set.html

At least, that’s what I assumed before I read Why The Net Matters, Eagleman’s frustrating 2010 e-book about how and why the Internet will save civilization. (I reviewed the $7.99 iPad version, which is the platform it was designed for; a stripped-down, text-based version is available on the Kindle for the portentous price of $6.66.) The problems start with Eagleman’s premise, which is so vague and broad as to be **practically** meaningless. There are, he writes, just “a handful of reasons” that civilizations collapse: “disease, poor information flow, natural disasters, political corruption, resource depletion and economic meltdown.” Lucky for us (and Eagleman does offer readers “[c]ongratulations on living in a fortuitous moment in history”), the technology that created the web “obviates many of the threats faced by our ancestors. In other words...[t]he advent of the internet represents a watershed moment in history that just might rescue our future.” On the other hand, it just might not: In order to make his point, Eagleman **either ignores or doesn’t bother to look** for any evidence that might undercut it. The first of six “random access” chapters that make up the bulk of Why The Net Matters is devoted to “Sidestepping Epidemics,” like the smallpox outbreak that helped bring down the Aztec Empire. In the future, Eagleman writes, the “protective net,” in the form of telemedicine, telepresence (“the ability to work remotely via computer”), and sophisticated information tracking, will save us from these outbreaks. That all sounds lovely, but what of the fact that we’re currently experiencing a resurgence in vaccine-preventable diseases such as measles...a resurgence which is fueled in no small part by misinformation spread over that very same “protective net”? A few chapters later, in a section celebrating the benefits of the hive mind, Eagleman invokes Soviet pseudoscientist Trofim Lysenko, a famed quack who took over the U.S.S.R.’s wheat production under Stalin. Because the Soviet Union spanned 13 time zones, Eagleman writes, “central rule-setting was disastrous for wheat production. … Part of the downfall of the USSR can be traced to this centralization of agricultural decisions.” That sounds nice, and might even be true—but it’s not a point that’s supported by Lysenko, whose main shortcoming was not that he believed in a one-size-fits-all approach; it was that he was a fraud. Moving to the present day, Eagleman addresses wildfires that swept through Southern California in 2007, which, he writes, “brought into relief the relationship between natural disasters and the internet.” At the beginning of the outbreak in October, Californians were glued to their television screens, hoping to determine if their own homes were in danger. But at some point they stopped watching the televisions and turned to other sources. A common suspicion arose that the news stations were most concerned with the fate of celebrity homes in Malibu and Hollywood; mansions that were consumed by the flames took up airtime in proportion to their square footage, which made for gripping video but a poor information source about which areas were in danger next. So people be­gan to post on Twitter, upload geotagged cell phone photos to Flickr, and update Facebook. I had been fairly obsessed with the wildfires, and since I didn’t remember this “common suspicion,” I decided to check the article Eagleman cites as the source of this info, which was a Wired blog post titled “Firsthand Reports from California Wildfires Pour Through Twitter.” It contained no references to a celebrity-obsessed news media; instead, the piece described how “the local media [was] overwhelmed.” It also talked about a San Diego resident who was “[a]cting as an ad hoc news aggregator of sorts” by “watching broadcast television news, listening to local radio reports and monitoring streaming video on the web” and then posting information, along with info gleaned from IMs, text messages, and e-mails, to his Twitter account.

#### No cyber war or retaliation

Jasmine Rodet 18, Master’s Degree in Cyber Security, Strategy, and Diplomacy from the University of New South Wales, Cyber Security Program Manager at Fortescue Metals Group, “The Threat of Cyber War is Exaggerated”, 11/11/2018, linkedin.com/pulse/threat-cyber-war-exaggerated-jasmine-rodet/

For the regular person on the street, the term ‘cyber war’ is more likely to bring to mind the 1983 movie “WarGames” and the doomsday articles that appear regularly in the media about the ‘cyber battlefield’ and an impending World War III. This essay argues that the threat of cyber war is exaggerated and although it can, by definition, be stated that we are already in a state of cyber war, the impact on states is negligible compared to conventional war domains.

The argument is presented in 3 steps. The first step is to define cyber war and cyber weapons, referencing scholars and experts in the area of conventional war and the cyber domain. The second step is to explore who has been exaggerating the threat of cyber war and what their motivations might be. The third is to explore the evidence and quantify the probability and impact that cyberwar has had on states to date.

‘Cyber war’ is a term often used interchangeably in media with cyber-crime, cyber-attacks, cyber-conflict and cyber-incidents, creating confusion amongst the public and scholars alike. Clausewitz (1989, 75), in his book, On War, defines war as ‘an act of force to compel the enemy to do our will’. Rid (2012, 7) on the other interprets Clausewitz use of ‘force’ as meaning ‘violent’ force. According to Rid, if an act is not potentially violent, it is not an act of war. However, Stone (2013, 107) describes ‘cyber war’ as a politically motivated act of force, not necessarily lethal and not necessarily attributable. The definition by Powers and Jablonski states more simply that cyber war is the utilisation of digital networks for geopolitical purposes (Nocetti 2016, 464). Neither of the latter two definitions requires violence to qualify as cyber war. Under these definitions, the Stuxnet cyber-incident in 2010 and the Estonia incident in 2007 would constitute an act of cyber war, and as such we could say that nations have been at cyber war in the past and are likely to continue to engage in cyber war in years to come.

For this essay, I will use Stones definition to argue that even though states may engage in cyber war, the concept of cyber war is exaggerated. It seems that cyber war is deliberately exaggerated in the media and by politicians for financial and political gains. There are countless examples in the media and in politics of the exaggeration of the threat of cyber war and the language used plays a big factor in creating a sense of fear in the community.

The Four Corners report, Hacked, is a classic example where the reporter, Andrew Fowler describes the current situation in Australia as ‘… a secret war where the body count is climbing every day’ (Fowler 2013). The documentary reveals nothing violent or lethal about cyber incidents. The documentary is actually about hackers working from locations overseas, having targeted key Federal Government departments and major corporations in Australia.

In another example, NATO may be interpreted as exaggerating the threat of Cyber War when they invited Charlie Millar to present at their Conference for Cyber Conflict at the NATO Cooperative Cyber Defence Centre of Excellence in 2017. Millar is an independent security evaluator, and his presentation was titled ‘Kim Jong-il and me: How to build a cyber army to attack the US’. He later presented similar content at Def Con 2018. His presentation described the steps he would take to mount a cyber war, including the types of people he would engage, how much he would pay them, what his strategy would be and how much it would cost in total.

Who stands to gain from the exaggeration and hype? Logically, one group would be those that gain financially from the sale of cyber protective services and software. According to Valerino, 57% of technical experts surveyed said that we are currently in a cyber arms race and 43% said that the worst-case scenarios are inevitable (Valeriano and Ryan 2015). Translate this into sales and Gartner projects worldwide security spending will reach $96 Billion in 2018, up 8 Percent from 2017 and to top $113 billion by 2020 (Gartner 2017).

Additionally, there may be political motivations to exaggerate the threat of cyber war. Cyberspace is not well understood by the general public and fear is natural. In the US’s cyber security debate, observers have noted there is a tendency for policymakers, military leaders, and media, among others, to use frightening ‘cyber-doom scenarios’ when making a case for action on cyber security (Dunn 2008, 2).

There is some evidence to suggest that more recently in the political arena; we may be maturing in our understanding of the real threat of cyber war. The Tallinn Manual, an academic, non-binding study on how international law applies to cyber conflicts and cyber warfare, was written at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence. It was first published in 2013 with the title ‘The Tallinn Manual on the International Law of Cyber War’. In 2017, it was re-released with the revised title ‘Tallinn Manual 2.0 on the International Law of Cyber Operations’. The change in title from ‘war’ to ‘operations’ signifies a more moderate use of language from NATO and is an acknowledgement that cyber incidents generally fall below the threshold at which International Law would declare them to be a formal act of war. Experience over the 4 short years from 2013 to 2017 has demonstrated that cyber incidents tend to have a low-level impact on the target state. As the book’s authors put it ‘the focus of the original Manual was on the most severe cyber operations, those that violate the prohibition of the use of force in international relations, entitle states to exercise the right of self-defence, and/or occur during armed conflict’ while the new version ‘adds a legal analysis of the more common cyber incidents that states encounter on a day-to-day basis and that fall below the thresholds of the use of force or armed conflict’ (Leetaru 2017).

To get a better sense if cyber war is exaggerated, we must also consider the probability of cyber war in the future. The probability of cyber war should be weighed up against the probability of conventional war. Where tensions are already high, for example, between North Korea and the US or Russia and Estonia, I would argue that cyber war is more likely than conventional war. This is due to factors including; cyber warfare is less costly than conventional warfare, states are less rational in their decision space in the cyber realm, states find cyber attribution very difficult to achieve so attacks can be undertaken covertly and cyber war is considered ‘a challenge’ and central to the hackers’ ethos (Junio 2013, 128). Further, Sanger describes in his book, The Perfect Weapon, cyber weapons (such as cyber vandalism, Distributed Denial of Service (DDOS), intrusions and advanced persistent threat (APT)) as the ‘perfect weapons’ for the following reasons;

They are cheap: When compared to Nuclear weapons, there are only a handful of nations globally that can afford the technology to create a nuclear weapon.

They are easily accessible: Unlike a Nuclear bomb that requires uranium, a highly protected metal, in the production process, a cyber weapon can be created with minimal investment and highly available IT infrastructure.

They can be dialled-up or dialled-down relatively easily. A ballistic missile, the force of the explosion cannot be adjusted as easily as a DDOS attack. A DDOS attack can be adjusted to last an hour, a few days or a few weeks.

They have a huge range in how they are used: Sabotage as with Stuxnet, Espionage as with the Chinese industrial spying on the US, North Korea’s infiltration of Sony, the Iranians attack on Las Vegas Sands Corp. casino operators.

The significant factor is that cyber weapons can and are being used every day for discrete, low-level cyber conflicts to undermine and disrupt rivals, but historically it has not progressed to open conflict, nor has it warranted a military response (Sanger 2018). Additionally, massive cyber operations would necessarily impact the civilian population and violate the immunity of non-combatants. The conditions of war dictate that this is “taboo” and to date, rival states have shown restraint in their use of cyber weapons for this reason (Valeriano and Ryan 2015). It appears that the threat that cyber weapons represent to national security is overstated and the threat of cyber war is overstated.

The US and likely other highly networked nations appear reticent about using cyber weapons for significant cyber conflict given their vulnerabilities. Ironically, NSA programs such as PRISM have made the US more of a target given the sheer volume of sensitive information stored in one place. Regardless of US defences, there is no way to make this information completely secure from intrusion, and as such, the very act of storing the information makes them more vulnerable.

Rid (2012) is among some academics who argue that cyber war has never and will likely never eventuate. The benefits of being on this side of the debate mean that public funding can be allocated away from offensive cyber security initiatives to other, potentially more important initiatives, such as public health and housing. The government is constantly under pressure to prioritise public spending and it is imperative that they have realistic, accurate projections regarding the risk of cyber war, the probability and the impact, to allow them to focus spending on the most important areas.

#### Won’t take down the grid

Victoria Craig 16, Analyst at Fox Business, Citing the Senior Manager of Industrial Control Systems at Mandiant, “The U.S. Power Grid is 'Vulnerable,' But Don't Panic Just Yet”, http://www.foxbusiness.com/features/2016/02/02/u-s-power-grid-is-vulnerable-but-dont-panic-just-yet.html

The idea of the nation's power grids becoming the next battleground for cyber warriors could make hacking into consumers’ credit card accounts and personal information seem like child’s play. While U.S. power companies are likely targeted by foreign governments and others in increasingly sophisticated breaches, actually shutting off the lights and causing chaos is far more complicated than many pundits make it seem. Dan Scali, senior manager of industrial control systems at Mandiant, a cybersecurity consulting arm of FireEye ([FEYE](http://www.foxbusiness.com/quote.html?stockTicker=FEYE)), explained that while cyber criminals may gain access to power and utility data systems, it doesn’t necessarily mean the result will be a power outage and a total takedown of power grid control systems. In other words, the power grid is controlled by more than just a panel of digital buttons. “Losing the control system is bad from the perspective that it takes you out of your normal mode of operations of being able to control everything from one command center, but it doesn’t mean you’ve lost control or all the lights go out [in the city],” Scali explained. While many of the systems have been modernized to include digitized control panels, if a hacker were to infiltrate the system, a utility worker could still have the ability to manually control the machines by flipping a switch, pushing a button, or tripping a breaker. As the world saw with the recent attack in Ukraine, which caused a blackout for 80,000 customers of the nation’s western utility, the biggest problem may be ensuring the power grid’s control systems are not vulnerable to cyber break ins. The January attack in Ukraine was likely caused by a corrupted Microsoft Word attachment that allowed remote control over the computer, according to the U.S. Department of Homeland Security. Scali said there was no evidence from the incident in Ukraine that the hacker’s malware was able to physically shut down the power. “It wiped out machines, deleted all the files. Kill disk malware made it impossible to remotely control things. It caused chaos on the business network, and the area where control system operations sat. But the attacker, we believe, would have had to actually used the control system to cause load shedding, which caused the power to go out, or trip breakers to cause the actual problem. Malware itself didn’t turn the power out,” Scali said. He said what most likely happened in that incident was the hacker stole user credentials and logged into the system remotely. The bottom line: Yes, a similar event could happen in the U.S. And corporate America is concerned. A recent survey released in January on the state of information security, conducted by consulting firm Pricewaterhouse Coopers, showed cybersecurity as one of the biggest concerns among the top brass at U.S. power and utilities firms. Part of the problem, Brad Bauch, security and cyber sector leader at PwC said, is the interconnectedness of the industry’s tools. “Utilities want to be able to get information out of [their] systems to more efficiently operate them, and also share that information with customers so they have more real-time information into their usage,” he explained. While allowing access to their own consumption data allows the companies to give their customers more of what they want, it also opens up a host of access points for hackers, making the systems more vulnerable than they otherwise would be. But to say that the power grid is susceptible to cyber hackers is a bit of an oversimplification.

### Systemic Risk---Impact D---2NC

#### Their account of systemic risk is ahistorical and essentializing.

Haldon et al. 20, John Haldon, Shelby Cullom Davis '30 Professor of European History Emeritus at Princeton University, Ph.D. from the University of Birmingham; Arlen F. Chase, Visiting Professor of Anthropology at Pomona College, Ph.D. from the University of Pennsylvania; Warren Eastwood, Lecturer in Physical Geography at the University of Birmingham; Martin Medina-Elizalde, Associate Professor at the University of Massachusetts, Amherst, Ph.D. from the University of California, Santa Barbara; Adam Izdebski, Research Leader at the Max Planck Institute for the Science of Human History, Ph.D. from the University of Warsaw; Francis Ludlow, Assistant Professor of Medieval Environmental History at Trinity College Dublin, Ph.D. from Trinity College Dublin; Guy Middleton, Senior Researcher at the Czech Institute of Egyptology at Charles University, Ph.D. from Durham University; Lee Mordechai, Historian studying the Eastern Roman Empire at The Hebrew University of Jerusalem, Ph.D. from Princeton University; Jason Nesbitt, Associate Professor of Anthropology at Tulane University, Ph.D. from Yale University; B.L. Turner, Distinguished Global Futures Scientist in the Julie Ann Wrigley Global Futures Laboratory at Arizona State University, Ph.D. from the University of Wisconsin—Madison, “Demystifying Collapse: Climate, environment, and social agency in pre-modern societies,” Millennium, Vol. 17, No. 1, 11-09-2020, https://doi.org/10.1515/mill-2020-0002

Collapse is a term that has attracted much attention in social science literature in recent years, but there remain substantial areas of disagreement about how it should be understood in historical contexts. More specifically, the use of the term collapse often merely serves to dramatize long-past events, to push human actors into the background, and to mystify the past intellectually. At the same time, since human societies are complex systems, the alternative involves grasping the challenges that a holistic analysis presents, taking account of the many different levels and paces at which societies function, and developing appropriate methods that help to integrate science and history. Often neglected elements in considerations of collapse are the perceptions and beliefs of a historical society and how a given society deals with change; an important facet of this, almost entirely ignored in the discussion, is the understanding of time held by the individuals and social groups affected by change; and from this perspective ‘collapse’ depends very much on perception, including the perceptions of the modern commentator. With this in mind, this article challenges simplistic notions of ‘collapse’ in an effort to encourage a more nuanced understanding of the impact and process of both social and environmental change on past human societies.

There are substantial disagreements about how the term ‘collapse’ should be understood and used in historical and other contexts, the more so since questions of scale and chronology, which lie at the heart of the matter, are rarely paid more than token attention. The use of ‘collapse’ often dramatizes long-past events, ignores human agency, and even serves to mystify and ‘orientalize’ the past intellectually. Tales of mysterious and abrupt collapse have both romantic and tragic appeal as well as serving to generate catchy parables for our own times, especially when our contemporary relationship with the natural environment is so fraught with concern.[1] It is often also the case that older ideas and interpretations are accepted as simple truths by non-archaeologists and non-historians unfamiliar with the results of more recent specialist research, partly because such ideas have become myths or memes that have taken on a life of their own. Additionally, the views of some specialists can become privileged and accorded the status of ‘facts’, especially by those outside the academic context, rather than being regarded as hypotheses that must be subject to ongoing critique or as narratives that are open to serious questioning.

Just as it is important for archaeologists and historians to engage with palaeoclimatic data and to participate in interdisciplinary projects, it also is vital for non-historians/archaeologists to engage seriously with the ever-changing historical and archaeological literature and to understand the provisional nature of historical and archaeological reconstructions and hypotheses of causality. In recent academic and public discourse ‘collapse’ is often deployed in contrast to ‘sustainability’, as though these are the only options, thus overly simplifying much more complex relationships and developments observed historically.[2] This simplification also has negative impacts on current debates about future planning and the potential for contemporary societal and political systems to respond to the challenges presented by global climate and environmental change.

This is not the place to review the extensive literature on how to define and deploy ‘collapse’ in social science literature. Like others before us,[3] we argue here that the application of the concept as an historiographical tool needs to be done with greater nuance and less casually than is generally the case. The work of historians is frequently deployed by others – comparative social scientists, climate and environmental historians, and those working on sustainability scenarios and future planning to illustrate their own particular arguments – sometimes with misleading results where the complexities of the historical processes and their outcomes are not made sufficiently clear to those outside the discipline.[4] And there are indications in the recent literature that crude ‘collapsist’ descriptions of past historical events or sets of events have had unfortunate effects on contemporary debates about sustainable responses to current or predicted future challenges. While there is room for the concept of collapse to evolve, historians and archaeologists must in general be much more precise about how they use it.[5]

### Systemic Risk---Big Tech Not Key---2NC

#### If society does collapse, it isn’t because of big tech.

Nesrine Malik 21, Columnist for The Guardian, 2017 Society and Diversity Commentator of the Year, “Our society is troubled. Beware those who blame it all on big tech,” The Guardian, 10-24-2021, https://www.theguardian.com/commentisfree/2021/oct/24/society-blame-big-tech-online-regulation

Every time a dramatic, unforeseen political event happens, there follows a left-field fixation that some out-of-control technology created it. Whenever this fear about big tech comes around we are told that something new, even more toxic, has infiltrated our public discourse, triggering hatred towards politicians and public figures, conspiracy theories about Covid and even major political events like Brexit. The concern over anonymity online becomes a particular worry – as if ending it will somehow, like throwing a blanket at a raging house fire, subdue our fevered state.

You may remember that during the summer’s onslaught of racist abuse towards black players in the England football team, instead of reckoning with the fact that racism still haunts this country, we busied ourselves with bluster about how “cowards” online would be silenced if we only just demanded they identify themselves.

We resort to this explanation, that shadowy social media somehow stimulate our worst impulses, despite there being little evidence that most abuse is from unidentifiable sources. After England’s defeat in the Euro 2020 final, Twitter revealed that 99% of the abuse on its site directed at England footballers was not anonymous.

The same arguments were made in the aftermath of MP David Amess’s killing – that doing something about online abuse would make politicians safer. It was a rehash of a 2018 moment when Theresa May pledged to regulate online behaviour because a “tone of bitterness and aggression has entered into our public debate”.

Good old social media, always there to paper over the giant cracks of our political failures. Bad tech is a convenient fall guy for a whole gang of perpetrators. It has been particularly useful in recent years, when Brexit has enabled rightwing politicians and press to engage in the most divisive, dangerous rhetoric, particularly towards the country’s political and legal institutions, then point to social media when that rhetoric serves its purpose of eroding tolerance and trust.

But when parliament and the supreme court – attacked by the media and politicians for variously being saboteurs, traitors and opponents of the will of the people – come under fire from members of the public, that is an entirely different matter. The faceless public becomes the only protagonist. This allows everyone, from the mainstream press to publishers of far-right conspiracy theories, to distance themselves from the scene of the crime and innocently propose earnest-sounding solutions to our country’s crises of racism and loss of faith in our politics.

The corrupting influence of technology companies is also a compelling explanation for them because it means that something can be done. This is partly down to a sort of dominant liberal technocratic sensibility that reaches for a tool kit to fix social and political problems, as one would approach a broken machine. The result is “solutionism”, the belief there is a technological remedy for most issues, because human behaviour is essentially rational and can be mapped out, analysed and then adjusted.

It’s all so much easier than squaring up to the gnarly facts that the world is messy; humans are infinitely suggestible and manipulable; and most of the time our political behaviour is a manifestation of long-term currents spread by political parties and dominant economic ideologies. This reluctance to trace how we arrived at a place we don’t like was clearly demonstrated by the stubbornness with which so many people held to the belief that Brexit was an aberration. Not acknowledging that it was, in fact, a culmination of a campaign that lasted years, and the result of our failed economic model and of decades of anti-immigration obsession. Someone must have cheated, these people told themselves, so a sort of tech calamity thesis carried the day. And the perfect culprit presented itself in the form of Cambridge Analytica and a convenient cartoon cast including shady Russian powers, Nigel Farage and Dominic Cummings.

The right, too, loves a tech panic to explain away unhappy results. Tech growing faster than it can be controlled and then turning on its creators is a universal bogeyman, a nervousness captured in Isaac Asimov’s first law of robotics in 1942: “A robot may not injure a human being or, through inaction, allow a human being to come to harm.”

When companies reach the scale and reach of Facebook, they can appear, to the right, a little too much like big governments infringing on individual privacy and freedoms. This fear is then easily capitalised on, and all sorts of unlikely victims can claim they are silenced by platforms biased against their politics. When Donald Trump intends to launch a new social media network to “stand up to the tyranny of big tech”, he is echoing the whine of many across the political spectrum. Those who, rather than admit their thinking is less popular than they would like, prefer to believe they are simply conspired against.

Social media companies do regularly fail in their responsibilities to manage the kind of hate speech and abuse that poses a danger for everyone from vulnerable children to ethnic minorities and members of parliament. It is clear that the management of harmful content online cannot be left to tech platforms themselves and that some form of regulation is now long overdue. One hopes the current UK online safety bill will now address that.

But fixating solely on reforming big tech risks turning into a huge displacement exercise. While we rightly focus on the excesses of tech platforms that have turned abuse and lies into lucre, we must also realise that the bad robot theory is tempting because it places the problem not only outside of our institutions, but outside of our very selves. There are other anonymous players who need to be named in this crisis of discord – those parties in our politics and our media who have created so much discontent and hostility that it all regularly overflows in the sewers of social media.

# 1NR

### Biz Con

#### Decline turns the case---agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### Business confidence is strong, driving economic recovery

Michael Halloran 9-14, M.B.A. from Carnegie Mellon University, Former Aerospace Research Engineer, Equity Strategist; Janney, “Despite Potential Headwinds, Key Labor Market Indicators Bode Well for the Economy,” https://www.janney.com/latest-articles-commentary/all-insights/insights/2021/09/14/despite-potential-headwinds-key-labor-market-indicators-bode-well-for-the-economy

However, we remain encouraged by the recovery that has been unfolding since the economy began reopening. We continue to see improvement in important cyclical sectors of the economy while consumers are historically healthy and still have pent-up demand. Business confidence has rebounded with strong corporate profits that should support further capital spending and hiring (there are now more job openings than there are unemployed people by a record amount).

We expect to see further improvement in the international backdrop, supported by unprecedented fiscal and monetary stimulus and accelerating rates of vaccination. Although the impact of the Delta wave is still being felt, recent evidence confirms the effectiveness of vaccines in limiting deaths and hospitalizations. With the pace of vaccination now picking up in the areas most impacted by this wave—Asia and Australia—the case for fading headwinds leading to improving economic growth later this year remains positive.

The signals from financial markets themselves remain positive. Despite consolidating last week, stocks remain near record highs while the 10-year Treasury remains well above the lows of earlier this summer when concerns about Delta first emerged.

These factors support our view of a durable economic recovery from the pandemic that should continue supporting stock prices. A healthy labor market is a critical element for a sustainable recovery that supports profit growth and last week’s news from the labor market remains encouraging.

#### Recovery’s sustainable because CEOs remain confident---new regulatory risks end the upswing

Lananh Nguyen 10-19, Wall Street Reporter for the New York Times, BA from Tufts University, “Wall Street Sees a Record Deal Spree as a Reason for Optimism”, New York Times, 10/19/2021, https://www.nytimes.com/2021/10/15/business/wall-street-banks-earnings-mergers.html

The dealmakers at the nation’s biggest banks are the busiest they’ve ever been. Interest rates are low, private equity firms flush with cash are looking for promising investments, and companies are aggressively pursuing mergers at a breakneck pace.

Wall Street banks announced blockbuster quarterly profits this week from a record wave of transactions that shows no signs of ebbing: Even in the face of surging inflation and shaky consumer sentiment, corporate clients are ready to deal — and bank leaders say that’s a reason to be optimistic about the economic recovery.

“Whenever C.E.O. confidence is high, M&A activity increases,” David M. Solomon, Goldman Sachs’s chief executive, said in an interview Friday after the bank reported third-quarter earnings of $5.38 billion, surpassing analyst forecasts. “The world’s resettled a bit coming out of the pandemic, and that is now giving a lot of companies an opportunity to really take note of where they want to go.” A record $1.6 trillion in mergers and purchases were struck worldwide in the quarter, according to a research report from Refinitiv. That, in turn, set records for advisory businesses across Wall Street: Goldman Sachs and Morgan Stanley tallied record revenues, JPMorgan Chase and Bank of America announced all-time high fees, and Citigroup’s mergers and acquisitions bankers had their best quarter in a decade.

Goldman Sachs has already had the most profitable year in its history — earning $17.7 billion so far — with three months to go. In the most recent quarter, its bankers closed transactions including the $32 billion spinoff of Universal Music Group by the French conglomerate Vivendi and Salesforce.com’s $28.1 billion purchase of Slack Technologies. Those were two of the 10 biggest deals completed in the three-month period ending in September, according to Dealogic.

Morgan Stanley also had two top-10 deals: the chip maker Analog Devices’s $20 billion acquisition of a competitor, Maxim Integrated, and the $12.3 billion purchase of Proofpoint, a cybersecurity company, by the private equity firm Thoma Bravo.

Sharon Yeshaya, Morgan Stanley’s chief financial officer, said the financial, health care and technology industries in the Americas and Europe have been the hottest areas, but momentum was building elsewhere, too.

“What we’re seeing is really strong pipelines,” Ms. Yeshaya said in an interview after the bank reported a jump in profits to $3.7 billion. “The strength is broadening.”

The frenetic pace has persisted despite the economic upheaval caused by the pandemic, trade disputes and geopolitical tension, Matt Toole, director of deals intelligence at Refinitiv, wrote about the record quarter. Buoyant stock markets, low borrowing costs and the emergence of new buyers from special purpose acquisition companies will continue to prop up activity, he wrote.

“With the all-time full-year deal making record broken in less than nine months and five consecutive quarters of more than $1 trillion in M&A activity, we have very little data to make true historical comparisons,” Mr. Toole wrote.

Even so, there are plenty of factors that could put the brakes on. Tougher regulators in the United States, rising prices for goods and services and central banks’ moves to cut back on stimulus efforts “will all contribute to how much further this cycle has to go,” he wrote.

Even as they maintained an optimistic outlook, bank chiefs acknowledged there were many factors that could slow things down, including supply-chain problems that have lasted for months and driven up prices for materials and goods. And economic indicators remain mixed: While bank bosses cited increasing consumer spending as a positive sign, consumer confidence is falling.

Perhaps the biggest potential disrupter remains the Federal Reserve. Officials at the central bank could dial back some of their support measures for the economy as soon as next month, and have begun debating when they might need to raise interest rates to tame inflation.

But Jason Goldberg, an analyst at Barclays, said the uneven recovery just isn’t a major concern for the banks right now, especially when it comes to the deals they’re helping line up. Volatility is historically the biggest hurdle to dealmaking, he said, so analysts are watching the stock market closely. But he expected global deal activity to remain high for some time.

“You’re seeing many companies across industries re-examining their business models coming out of the pandemic,” Mr. Goldberg said. And they have a range of reasons to strike deals, he said: building scale, bolstering their digital operations, smoothing out their supply chains and making use of stockpiled cash.

Mr. Solomon of Goldman Sachs says the number of deals the bank is working to complete is evidence of an “extraordinarily robust” climate. Still, he cautioned that deal making may recede slightly from its breakneck pace.

“We’re clearly recovering coming out of the pandemic, but it’ll be interesting to see the trajectory of the recovery” and what other economic factors come into play, Mr. Solomon said. “But at the moment, with high corporate confidence, that’s having an impact on M&A in a positive way.”

#### Global growth is stable but the next month is key

Eric Winograd 10-29, Senior Vice President and Senior Economist for Fixed Income at Alliance Bernstein, MA in international studies from the Paul H. Nitze School of Advanced International Studies, BA in Asian Studies from Dartmouth College, “For The Global Economy, It's Next Stop... Policy Normalization”, Seeking Alpha, 10/29/2021, https://seekingalpha.com/article/4463112-global-economy-policy-normalization

November is likely to mark the start of a transition phase for the global economy. For almost two years, major central banks have thrown extraordinary waves of support into shoring up economic activity and financial markets against the COVID-19-induced crisis. Now, officials in many countries seem ready to begin the march back toward a more normal policy setting.

At the conclusion of its November 3 policy meeting, we expect the Federal Reserve to announce the start of tapering: reducing the pace of its quantitative easing purchases and signaling a return to using interest rates as the primary monetary policy tool. The Bank of England (BoE) meets the next day, and may raise interest rates - or at least signal that a rate hike is imminent. Many smaller central banks are embarking on the same transition.

Why Start Normalizing Monetary Policy Now?

Why the change? We see both good and bad reasons. The good reason is that the world economy has, by most measures, largely recovered from the trials of the pandemic. US and global gross domestic product (GDP) are well on their way back to, or even above, pre-crisis levels. With growth recovered and likely to remain strong in 2022, there’s not as much need to lean heavily on policy support.

#### Even targeted antitrust sends a broad signal of aggressive overregulation

Raymond J. Keating 21, Chief Economist for the Small Business & Entrepreneurship Council and Adjunct Professor in the MBA Program at the Townsend School of Business at Dowling College, “Antitrust Fictions (and Actions) Will Have Real, Negative Economic Consequences”, SBE Council, 6/18/2021, https://sbecouncil.org/2021/06/18/antitrust-fictions-and-actions-will-have-real-negative-economic-consequences/

It needs to be understood that while supposedly targeting so-called “Big Tech,” these intrusive regulations and substantial costs would fall on competitors as well, thereby actually discouraging competition in technology markets. For good measure, moving ahead with his kind of hyper-antitrust regulation of tech firms lays the groundwork for doing so in other industries, such as in retail, energy, health and medical sectors, and so on. This is what Senate anti-trust crusaders hope to accomplish.

The message is clear: Beware entrepreneurs, businesses and investors if you become too successful or if you cross certain political constituencies. The government stands ready to punish you via intrusive and costly regulation.

#### The plan’s abrupt expansion creates major uncertainty that disrupts business planning

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### Bolstering consumer demand is key and their ev says that’s unlikely to last

UK is BLUE

1AC Manyika ’21 [James; Chair and Director @ McKinsey Global Institute; and Michael Spence; Philip H. Knight Professor and Dean Emeritus @ Stanford University's Graduate School of Business; “A Better Boom: How to Capture the Pandemic's Productivity Potential,” *Foreign Affairs* 100(4), p. 107-117; AS]

Surprising as it may seem, out of the deepest economic crisis since World War II could come a new era of productivity gains and prosperity. Whether that happens will depend largely on the decisions that governments and businesses make as they prepare to exit the pandemic in the coming months. In the short and medium term, the prospects for increased productivity-and prosperity-are encourag2 ing, as the United States and other countries spend heavily on economic recovery and businesses reap the benefits of digitization. But the outlook is less optimistic over the long term, since governments cannot spend indefinitely and consumer and investment spending may not fill the gap.

Governments and businesses must therefore seek to create the conditions for sustained productivity growth and prosperity, in particular by facilitating the diffusion of technological and organizational innovations and bolstering consumer demand. Out of a major global crisis could come a major jolt of productivity growth-but only if policymakers and business leaders make the most of this moment.

THE PRODUCTIVITY PARADOX

The history of productivity growth can be understood as a succession of technological revolutions, from the steam engine to the computer. Each offered the promise of accelerated productivity and economic growth, and each eventually delivered. But there has often been a delay between innovation and adoption, and another between adoption and economic impact. The economist Robert Solow summed up these apparent discrepancies in a 1987 article in The New York Times Book Review, writing, "You can see the computer age everywhere but in the productivity statistics." His formulation became known as "the Solow paradox."

But then came the revolution in information and communication technologies between 1995 and 2005, a decade in which the Solow paradox was temporarily resolved. Widespread adoption of these technologies was accompanied by a simultaneous acceleration in productivity, which grew at an annualized rate of 2.5 percent in the United States, a full percentage point faster than the rate between 1970 and 1995. Companies invested heavily in information and communication technologies and reorganized their operations and managerial practices around them. They did so out of the desire to gain a competitive edge, but also because of relatively robust consumer demand for their products.

Productivity growth accelerated in several sectors as a result, driving growth in the U.S. economy as a whole. This period was characterized by an unusual combination of large spurts in productivity growth in a few big sectors employing many workers, such as retail and wholesale, and even larger productivity growth in smaller sectors, such as those that produced computers and electronic products. In both bi and small sectors, there was a virtuous cycle of employment growth to meet demand and even faster growth in the value of the output from these sectors. The value of outputs across all sectors of the economy grew by 3.4 percent per year between 1995 and 2005, whereas the total number of hours worked grew by only 0.9 percent per year.

But the boom did not last. Between 2005 and 2019, annual productivity growth in the United States fell by more than half, to 1.0 percent. In the aftermath of the 2008 global financial crisis, from 2010 to 2019, it was even lower, at 0.6 percent. Unlike the United States, z European countries had not experienced rapid productivity gains in the 1995-2005 period, but they did experience the postcrisis decline. r Between 2010 and 2019, annual productivity growth fell below one percent in France, Germany, and the United Kingdom.

The Solow paradox was back. After a decade of rapid productivity gains, the information technology revolution had reached a point of diminishing returns. But the next wave of technology-the digitization of processes, big data and analytics, cloud computing, the Internet of Things-was not yet ready to fill the gap. Despite early breakthroughs in image recognition and natural language processing, few firms had begun to make use of artificial intelligence technologies, and digitization was proceeding slowly. We estimated, based on a sector-by sector assessment, that in 2015, the United States had reached only 18 percent of its digital potential and Europe had reached only 12 percent. Moreover, a gap had opened up between the firms that were digital leaders and those that were digital laggards-a gap that other researchers found was correlated with a gap in labor productivity.

This gap in technology adoption was widening at a time of weak consumer demand for goods and services, in large part due to the aftereffects of the financial crisis. Firms scaled back their investments, and fewer new businesses were created. Making matters worse, the share of income that flowed to top earners and the owners of capital increased, while the share that went to labor decreased, further weakening demand.

Across the United States and Europe, the vast majority of sectors experienced declines in productivity growth. Only four percent of all sectors recorded productivity jumps in 2014, compared with an average of 18 percent of sectors that achieved substantial increases in productivity in the previous two decades. Growth in gross value added-a measure of a firm's or a sector's contribution to GDP-declined from 3.4 percent annually between 1995 and 2005 to 1.8 percent between 2005 and 2019. Growth in hours worked remained roughly unchanged, at 0.7 percent, throughout both periods.

These two very different periods of economic activity in the United States reveal much about the underpinnings of productivity growth. It stems first and foremost from the widespread adoption of technological innovations, especially general-purpose technologies such as electricity and the Internet. But it also stems from the managerial innovation and reorganization of functions and tasks that occur when firms adopt new technologies. Both of these processes must spur leaps in productivity growth in many sectors, or at least in a few large ones, so that productivity jumps in the economy as a whole. Finally, adoption and reorganization within and across sectors must be driven by competition, which incentivizes firms to innovate and helps spur technological diffusion.

Not all productivity growth is created equal, however. Productivity growth can be achieved through gains in the volume or value of outputs for a given number of hours worked, or it can come about as a result of a reduction in hours worked for a given output. Often both happen at the same time. But it is when the former exceeds the latter that a virtuous cycle is created in which innovation and investment generate growth in employment and wages, which in turn generates demand for increased (or more valuable) output. This is what happened during the period from 1995 to 2005. When the latter source of productivity growth exceeds the former, however, a vicious cycle results in which firms reduce labor costs faster than they grow the volume or value of their outputs, which in turn puts pressure on employment and incomes.

POST-PANDEMIC POTENTIAL

The pandemic has primed advanced economies for another period of rapid productivity growth. It is too early to say for sure whether such growth will be the product of a virtuous or a vicious cycle, but signs point to the former. Despite uncertainty, stress, and plummeting economic activity in the early days of the covID-19 crisis, many firms boldly deployed and used new general-purpose technology-especially digital technology-in ways that have driven virtuous productivity gains in the past. In October 2020, we surveyed 900 C-suite executives in various sectors and countries and found that many had digitized their business activities 20 to 25 times as fast as they had previously thought possible. Often, this meant shifting their businesses to online channels, since roughly 60 percent of the firms we surveyed experienced a significant increase in customer demand for online goods and services as a result of the pandemic.

Before the pandemic, e-commerce was forecast to account for less than a quarter of all U.S. retail sales by 2024. But during the first two months of the covID-19 crisis, e-commerce's share of retail sales more than doubled, from 16 percent to 33 percent. And that growth did not just reflect brick-and-mortar firms setting up shop online for the first time. Firms that were already highly digitized before the pandemic significantly expanded their online capabilities to meet the surge in demand. They also reorganized their operations, including their logistics, to complement what they were doing digitally-for example, by expanding their direct-to-home delivery capabilities.

Businesses also strove to become more efficient and agile. In Europe and North America, nearly half of the respondents to our survey said that they had reduced their operating expenditure as a share of revenue between December 2019 and December 2020. Two-thirds of senior executives said they had increased investment in automation and artificial intelligence, whether to help warehouse and logistics operations cope with higher e-commerce volumes or to enable manufacturing plants to meet surging demand. Many companies used technology to reduce the physical density of their workplaces or to enable contactless service-for instance, by expanding self-checkout in grocery stores and pharmacies and employing online ordering apps for restaurants and hotels. Other businesses, such as meatpacking and poultry plants, accelerated the deployment of robotics to reduce their need for labor. If there was one lesson from the pandemic, it was that digital capability and resilience go hand in hand.

But even as the arrival of vaccines has made it possible to imagine a return to relative normalcy in parts of the developed world, continued digitization and the adoption of other technological innovations promise to deliver still more productivity gains. The largest of these gains-roughly an additional two percentage points per year-could come in the health-care, construction, information technology, retail, pharmaceutical, and banking sectors. In health care, for instance, accelerating the use of telemedicine beyond the pandemic could drive incremental productivity growth for years. According to one recent U.S. poll, 76 percent of patients expressed interest in using telemedicine in the future, and industry experts project that the services for 20 percent of health-care spending could be delivered virtually-up from 11 percent before the pandemic. Other sectors, including automotive, travel, and logistics, show less-but still substantial-potential for productivity growth as a result of more flexible task scheduling, leaner operations, and smarter procurement.

Overall, these innovations and organizational changes could accelerate productivity growth by around one percentage point per year between now and 2024 in the United States and the six large European economies that we analyzed (France, Germany, Italy, Spain Sweden, and the United Kingdom). This gain would result in a productivity growth rate twice as high as the rate after the 2008 global financial crisis, and in the United States, it would expand per capita GDP by roughly $3,500 by 2024. That would be a stunning outcome, but it will hinge on continued technology adoption by firms and the maintenance of robust demand.

Even more productivity gains could be on the horizon thanks to other advancements. The accelerating revolution in biology, for instance, could transform sectors from health care and agriculture to consumer goods, energy, and materials. Biological innovation has already enabled the rapid development of new vaccines for covID-19. Equally impressive revolutions in energy could make possible the widespread adoption of solar and wind power, especially in light of recent progress toward better (and cheaper) batteries. Artificial intelligence is also advancing rapidly, but is still a long way from being deployed widely across companies and sectors. When and if that happens, the productivity gains could be enormous.

FOLLOW THE DIGITAL LEADER

Future gains in productivity, even those that boost overall growth, are likely to be uneven. We analyzed metrics that have the potential to unleash future productivity growth-such as research-and-development spending, revenue, capital expenditures (including digital expenses), and mergers and acquisitions-and found that especially in the United States, a small number of large superstar firms accounted for a disproportionately large share of the activity in all these categories. From the third quarter of 2019 to the third quarter of 2020, U.S. superstars (defined as the top ten percent of firms by profit) saw much shallower declines in capital expenditures and revenue than did other companies. During the same period, U.S. superstars spent $2.6 billion more on R & D than they did the previous year, while all other firms spent just $1.4 billion more.

If this investment, innovation, and technology adoption gap between superstars and the rest of the large firms and smaller, less profitable firms persists, any post-pandemic acceleration in productivity growth could fall short of its potential. Small and mediumsized enterprises have been hit disproportionately hard by the covID-19 crisis. As a result, many of them are unable to make big investments in future productivity and are therefore liable to fall even further behind the superstars. This is what happened in the aftermath of the 2008 global financial crisis, when only a minority of companies achieved productivity growth.

But there is room for cautious optimism about the ability of nonsuperstars to close some of the gap. Before the pandemic, the superstars tended to be highly digitized and innovative in their managerial approaches, as well as more profitable and resilient. They were therefore better placed to weather and even take advantage of the shock. But as the hardest-hit firms and sectors recover, and as early digital adaptors demonstrate the enormous potential of these technologies, many of the digital laggards could begin to catch up. Indeed, in another survey of executives we conducted in December 2020, about 75 percent of respondents in North America and Europe said they expected investment in new technologies to accelerate substantially between 2020 and 2024, up from 55 percent between 2014 and 2019. This expected uptick was similar across firm sizes.

Another reason for optimism is that in 2020, a year that saw the darkest economic days of the pandemic, 24 percent more new businesses were created in the United States than in 2019. Europe lagged behind the United States on this metric, with new business creation staying roughly flat in 2020 in France, Germany, and the United Kingdom and declining by more than 15 percent in Italy and Spain. If the American increase in business dynamism persists, however, it should contribute to more productivity growth.

Investment, innovation, and technology adoption are only one-half of the virtuous cycle of productivity growth, however. The other half is demand for the expanded output that results-in other words, income growth from increased productivity has to flow to people who will spend that additional money. In the short term, the outlook for demand is good, especially for countries that have made progress toward vaccinating their populations and could be among the first to open up their economies. Pent-up demand and savings from the pandemic could be unleashed all at once, resulting in a strong initial bounce in demand led by consumers. In the United States, President Joe Biden's $1.9 trillion economic support bill should push demand even higher.

In the medium term, the outlook for demand is also relatively solid, although it will depend on the size, deployment, and longevity of government spending. In the United States, Biden now has set his sights on a large infrastructure package. As his administration shifts its focus from economic relief to investment in productive areas, it could also increase productivity growth by raising demand to match potential supply, creating a high-pressure economy, that is, one with low unemployment and high growth. The outlook in continental Europe, where large-scale government economic support is harder to coordinate, is less certain. Nonetheless, the EU has put in place an unprecedented plan totaling some $900 billion to boost investment in the digital and green energy transitions.

But government spending on this scale will likely be time-limited, making the long-term outlook for demand less rosy.

#### Delta has peaked and will abate BUT won’t derail growth regardless

Dr. Vivekanand Jayakumar 21, Associate Professor of Economics at the University of Tampa, “The Delta Variant Will Slow But Not Derail The Ongoing Economic Recovery”, The Hill, 8/23/2021, https://thehill.com/opinion/finance/568957-the-delta-variant-will-slow-but-not-derail-the-ongoing-us-economic-recovery

Despite growing downside risks, the likelihood of a return to lockdowns (which could derail the U.S. economic recovery) is quite small. Once the virus spread peaks in the next few weeks and then gradually abates, it is likely that the economy will regain its momentum and some of the activity that was slated to take place in the third quarter will end up being shifted to the fourth quarter, thus boosting year-end growth.

Even as vaccines exhibit reduced efficacy against the delta variant, and despite a general waning in vaccine effectiveness over time, it is critical to note that they are still able to lower the odds of hospitalization, prevent serious illness and dramatically reduce mortality risks. Fear of the delta variant has boosted vaccination rates of late. The Biden administration’s push for a booster shot, though controversial, should offer U.S. residents additional protection.

Furthermore, the overall economic impact of each successive wave of the COVID-19 outbreak has lessened as both employers and workers in the U.S. have learned to adapt to the pandemic. In places like the U.S. and UK, there is a growing realization that we need to learn to live with the coronavirus. The Atlantic’s Sarah Zhang recently observed: “When enough people have gained some immunity through either vaccination or infection – preferably vaccination – the coronavirus will transition to what epidemiologists call ‘endemic.’ It won’t be eliminated, but it won’t upend our lives anymore.”

#### It won’t derail recovery

Dr. Mark Zandi 21, Chief Economist of Moody's Analytics, PhD from the University of Pennsylvania, BS from the Wharton School, “Here's What the Delta Variant Means for the Economic Recovery”, CNN, 8/18/2021, https://www.cnn.com/2021/08/18/perspectives/economic-recovery-delta-variant/index.html

The US economy's immediate prospects appear inextricably tied to how the wave of infections and hospitalizations set off by the Delta variant of Covid-19 plays out. While it seems unlikely that the variant would become so disruptive that it undermines the recovery, there are mounting reasons to be worried that it may become a significant headwind to near-term economic growth.

#### Underlying strength will power through it

Simon Kennedy 21, Executive Editor for Economics at Bloomberg News, Degree in Economics and Journalism from the City University of London and Concordia University, “The Global Economy Is Shrugging Off the Delta Variant, For Now”, Bloomberg News, 8/11/2021, https://www.bloomberg.com/graphics/global-economic-recovery-q3-nowcast/

Even as delta risks loom, early signs from the third quarter show growth accelerating and inflation peaking after its recent jump, a reassuring sign for policy makers and investors worried about the risks of faltering demand and surging prices.

Global gross domestic product in the third quarter is on track for a 1.8% expansion from the previous three months, according to a “nowcast” from Bloomberg Economics. That’s an improvement from the solid pace in the previous quarter, and leans against fears that the delta variant will slow the recovery from last year’s recession.

At the same time, consumer prices are set to advance at a less troubling pace, as inflation in the U.S. peaks and then eases back from elevated summer readings. That will be welcomed by central bankers such as Federal Reserve Chair Jerome Powell who had bet the inflation spike would prove temporary.

“Nowcasts can’t see into the future and the delta variant means the picture could change quickly,” said Bjorn Van Roye and Tom Orlik, economists at Bloomberg Economics. “For now though, the data is flagging a positive start to the third quarter, with the global recovery accelerating, and inflation moderating.”

Back on Track

For the world as a whole, output is recovering back toward the pre-pandemic trajectory

Chart, line chart

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From U.S. retail sales to China factory output, Bloomberg Economics nowcasts bring together hundreds of data points to provide a high frequency read on the pace of growth across major economies ahead of the official GDP data.

#### Business confidence is strong, driving economic recovery

Michael Halloran 9-14, M.B.A. from Carnegie Mellon University, Former Aerospace Research Engineer, Equity Strategist; Janney, “Despite Potential Headwinds, Key Labor Market Indicators Bode Well for the Economy,” https://www.janney.com/latest-articles-commentary/all-insights/insights/2021/09/14/despite-potential-headwinds-key-labor-market-indicators-bode-well-for-the-economy

However, we remain encouraged by the recovery that has been unfolding since the economy began reopening. We continue to see improvement in important cyclical sectors of the economy while consumers are historically healthy and still have pent-up demand. Business confidence has rebounded with strong corporate profits that should support further capital spending and hiring (there are now more job openings than there are unemployed people by a record amount).

We expect to see further improvement in the international backdrop, supported by unprecedented fiscal and monetary stimulus and accelerating rates of vaccination. Although the impact of the Delta wave is still being felt, recent evidence confirms the effectiveness of vaccines in limiting deaths and hospitalizations. With the pace of vaccination now picking up in the areas most impacted by this wave—Asia and Australia—the case for fading headwinds leading to improving economic growth later this year remains positive.

The signals from financial markets themselves remain positive. Despite consolidating last week, stocks remain near record highs while the 10-year Treasury remains well above the lows of earlier this summer when concerns about Delta first emerged.

These factors support our view of a durable economic recovery from the pandemic that should continue supporting stock prices. A healthy labor market is a critical element for a sustainable recovery that supports profit growth and last week’s news from the labor market remains encouraging.

#### Business optimism is strong and growing---this is paving the way for investment and expansion

Jeff Hubbard 21, Chair of the Connecticut Business & Industry Association, Senior Vice President and Regional Manager of Liberty Bank, “Survey: U.S. Business Optimism Hits Record High”, 8/5/2021, https://www.cbia.com/news/economy/survey-us-business-optimism-hits-record-high/

Nearly nine in 10 U.S. business leaders are optimistic about their company's performance over the next six months according to a new survey.

The JPMorgan Chase 2021 Business Leaders Outlook Pulse survey found 88% of business leaders were bullish about their company's immediate future, the highest percentage recorded in the survey's 11 years, and up from 56% a year ago.

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Released last month, the survey also showed that 82% of business leaders are optimistic about their industry’s performance, a significant jump from 45% a year ago.

“After enduring the challenges of the last year and a half, businesses are feeling overwhelmingly positive about what’s ahead,” JPMorgan Chase Commercial Banking head economist Jim Glassman said.

“The focus now is on navigating growing pains to harness the momentum of the economic recovery, which is comparatively a good problem to have.”

U.S. Economy

Survey findings reveal growing confidence in the national economy, with 75% of survey respondents expressing optimism with the recovery, a 40 percentage point increase from a year ago.

Just over half (53%) said they were optimistic about the global economy, the highest level since 2018 and up from just 17% last summer.

JPMorgan Chase says that confidence is driving ambitious growth plans, with 80% of business leaders expecting increased revenues and/or sales.

Almost half (46%) expect to make increased capital investments—a 28-point jump from a year ago—while 38% say their credit needs will increase over the rest of 2021.

#### Businesses are confident because Biden seems predictable

Nicole Goodkind 21, Politics and Business Reporter at Fortune Magazine, BS in International Relations from Cornell University, “Business Leaders Hope They Can Satisfy Biden’s Big Climate Goals With Their Own Promises—Not Regulation”, Fortune Magazine, 2/16/2021, https://fortune.com/2021/02/16/biden-climate-change-goals-business-leaders-regulations/

And even while staring down the barrel of new regulations and standards, business leaders say they feel good with Biden at the helm: His consistency and lack of ambiguity create a safe, or at least a less volatile, environment to conduct business in.

Sure, some companies took advantage of the lack of oversight by the Trump administration, but many expressed dismay about the former President's unpredictability. His big-picture views on climate policy were unclear and subject to change. The rapid undoing of Obama-era regulations, which manufacturers had spent money and time to meet, sent them into a tailspin.

Corporate confidence fell to its lowest level in a decade under Trump, an astounding feat considering that the stock market was simultaneously hitting new highs, inflation was low, and interest rates were low.

#### Polling proves

Verdict 21 – Verdict Retail Research Service, “Business Optimism Improves for the Second Straight Month in July: Poll”, Pharmaceutical Technology, 8/5/2021, https://www.pharmaceutical-technology.com/news/business-optimism-improves-for-the-second-straight-month-in-july-poll/

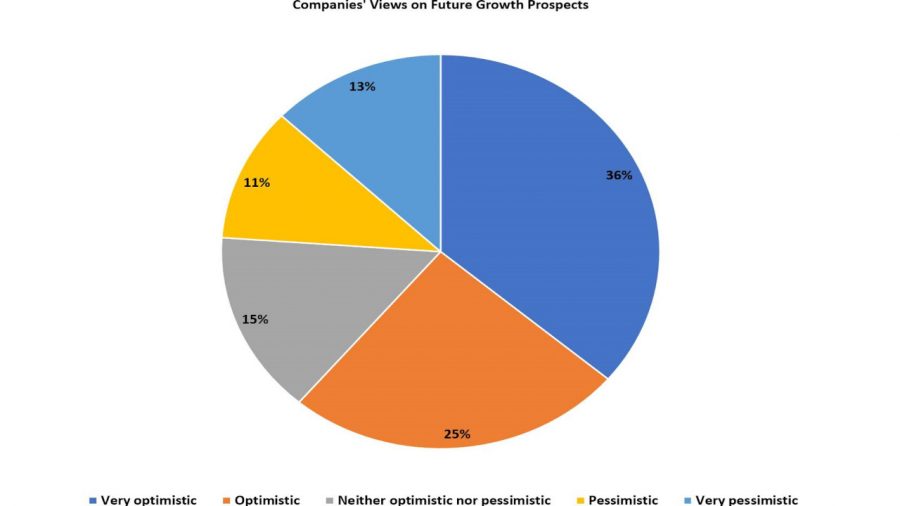
Verdict has been conducting a poll to study the trends in business optimism during COVID-19 as reflected by the views of companies on their future growth prospects amid the pandemic.

Analysis of the poll responses recorded in July shows that optimism regarding future growth prospects increased to 61% from 60% in June marking the second straight month of improvement in business optimism. Easing of COVID restrictions and increase in the rate of vaccination had led to improvement in business optimism in June.

The respondents who were optimistic increased by two percentage points to 25% in July, while those very optimistic decreased by one percentage point to 36%.

The respondents who were pessimistic increased by one percentage point to 11%, while those who were very pessimistic declined by two percentage points to 13%, from 15% in June.

The percentage of respondents who were neutral (neither optimistic nor pessimistic) remained unchanged at 15%.



The analysis is based on 1,697 responses received from the readers of Verdict network sites between 01 July and 31 July 2021.

Increase in consumer expenditure and hiring boost optimism

Optimism among small businesses in the US increased for the first time since January this year, according to the National Federation of Independent Business report. The optimism increased from 103.6 in June to 105.2 in July owing to improved economic outlook, strong consumer demand, and solid hiring activity.

Consume confidence in the US improved from 128.9 in June to 129.1 in July and was the highest recorded since February 2020, according to the Conference Board’s Consumer Confidence Survey®. Consumer optimism continued to increase as a large percentage of consumers plan to increase expenditure and purchase homes and major appliances.

#### a) Benefits of antitrust require perfect application that’s impossible in practice---costly false positives are inevitable

Thomas A. Lambert 11, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri Law School, JD from the University of Chicago Law School, BA from Wheaton College, “The Roberts Court and The Limits of Antitrust”, Boston College Law Review, 52 B.C. L. Rev. 871, May 2011, Lexis

The enforcement provisions of the antitrust laws ensure that courts are routinely called upon to make these sorts of judgments in lawsuits by private plaintiffs. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a lawsuit in federal court. 25 To account for the fact that many antitrust violations occur in secret and thus escape condemnation, the statute seeks to optimize the deterrent effect of private enforcement by permitting each successful plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 What we end up with, then, is a body of law that is ultimately aimed at maximizing competition (understood in terms of market output), is quite general in its literal proscriptions, becomes "fleshed out" by generalist courts adjudicating private disputes, and is highly attractive to private plaintiffs seeking super-compensatory recoveries.

Taken together, these aspects of American antitrust law--all of which predate the Roberts Court by decades--render antitrust adjudication an inherently limited enterprise. In most challenges to novel business practices (and the prospect of treble damages guarantees that there will be many such challenges), whether liability is appropriate will be difficult to determine. Challenges to concerted conduct are frequently perplexing because a great many, perhaps most, output-enhancing business innovations involve cooperation among independent economic [\*877] actors, frequently competitors. 27 Challenges to unilateral conduct that may enhance market power are often hard to resolve because all actions that help a seller win business from its rivals--even pro-consumer actions like most price cuts--technically "exclude" those rivals. 28 Distinguishing output-reducing collusion from output-enhancing coordination (in section 1 cases) and unreasonable from reasonable exclusionary acts (in section 2 cases) can be exceedingly difficult. 29 To draw the necessary distinctions, judges and juries usually must weigh conflicting testimony from economic experts and reach conclusions on a number of complex subsidiary issues, such as the contours of the relevant market, the existence and magnitude of entry barriers, and the elasticity of demand and/or supply for the product at issue.

Antitrust adjudication is thus exceedingly, and inevitably, costly. 30 Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. 31 The fact finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is "unreasonable" because it reduces overall market output). 32 Taken together, these costs constitute the decision costs of an antitrust adjudication.

But those are not the only relevant costs. Given the complexity of the issues presented in antitrust cases, mistakes are inevitable, and those mistakes will themselves impose costs. On the one hand, when a fact finder wrongly acquits an anticompetitive practice, market power is created or enhanced, causing loss in the form of allocative inefficiency; [\*878] consumers are injured because output is lower and prices higher than they otherwise would be. 33 On the other hand, when a fact finder wrongly convicts a practice that is, in fact, output-enhancing, the market is denied the greater output (and lower prices) that practice would have produced, and a productive inefficiency results. Again, consumers are injured by reduced output, less product variety and innovation, and higher prices. Taken together, the productive inefficiencies spawned by false positives (hereinafter "Type I errors") and the allocative inefficiencies resulting from false negatives (hereinafter "Type II errors") constitute the error costs of antitrust adjudication. As explained below, there are good reasons to believe that the costs of false positives will exceed those of false negatives. 34 But, for present purposes, the important point to see is that antitrust adjudication will inevitably involve some mistakes, and those mistakes--be they false acquittals or false convictions--will impose social costs. 35

#### b) Follow-on---the plan creates the fear of future unrelated AND politicized amendments

Gregory E. Neppl 19, Partner at Foley and Lardner LLP, JD from Duke University School of Law, BA from Duke University, “Antitrust Enforcement “Reform” as a Political Issue: The Good, the Bad, and the Ugly”, 11/7/2019, https://www.foley.com/en/insights/publications/2019/11/antitrust-enforcement-reform-political-issue

New Merger Guidelines

New merger guidelines that reflect non-competition considerations (such as job security) would modify the consumer welfare standard discussed above and, in the absence of new statutory authority, likely contravene Section 7 of the Clayton Act as currently drafted. One problem with such “new guidelines” – unhinged from “competition” or “competitive effects” – is that successive administrations might amend (or reinterpret) such guidelines in response to whatever political issue du jour allowed that administration to win political power. While antitrust enforcement is not free of politics currently (i.e., the President does nominate the Assistant Attorney General (Antitrust Division), appoint the FTC Chairperson, and nominate FTC commissioners when openings arise, and the House and Senate subcommittees with antitrust enforcement oversight regularly hold hearings on high-profile mergers), both DOJ and FTC have a respectable history of pursuing enforcement efforts generally free from partisan politics. The issuance of new merger guidelines that reflect non-competition considerations may open the door to regular amendments to the guidelines and increase the likelihood that partisan politics could replace factual and economic analysis in merger evaluations. Such an outcome would not promote business confidence. Moreover, “bright-line” merger guidelines – setting caps for vertical mergers, horizontal mergers, and total market share – would ignore the fact that vertical foreclosure risks and “market power” are in practice not so easily quantifiable. The agencies already employ market share screens (such as HHI) to identify those mergers more likely to require close scrutiny. Bright-line caps, however, would necessarily threaten certain mergers that are competitively neutral, or even pro-competitive, through resulting efficiencies and synergies.

#### c) Negativity bias is dominant---firms think the worst

Tom Barkin 19, President and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy”, 7/11/2019, https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

#### Studies prove biz con’s key AND depends on perceptions of political stability

Gabriel Caldas Montes 21, PhD Candidate in the Department of Economics at Fluminense Federal University and Fabiana da Silva Dr. Leite Nogueira, PhD in Economics from Universidade Federal Fluminense, Professor of Economics at the Universidade de Vassouras, “Effects of Economic Policy Uncertainty and Political Uncertainty on Business Confidence and Investment”, Journal of Economic Studies, April 2021, Emerald Insights

1. Introduction

The literature on business confidence is vast. If on the one hand some studies indicate that business confidence acts as a leading indicator of macroeconomic activity and influences the economic environment, on the other hand, some studies investigate the determinants of business confidence (Khan and Upadhayaya, 2020).

Although many advances have been made, the literature on the determinants of business confidence continues to evolve. Some studies analyze not only the effects of macroeconomic variables, but also the effects of other variables able to create (or reduce) uncertainties, such as corruption (Montes and Almeida, 2017) and monetary policy credibility (Montes, 2013; de Mendonça and Almeida, 2019). These studies reveal that low credibility and high levels of corruption reduce confidence due to the uncertainties that emerge.

Uncertain economic scenarios created by economic policy uncertainty undermine confidence, and affect the decision making of entrepreneurs, who, for example, postpone investment and employment decisions in order to gain more information (Bloom et al., 2018). Regarding the definition of economic policy uncertainty, Al-Thaqeb and Algharabali (2019) points out that “*Policy uncertainty is the economic risk associated with undefined future government policies and regulatory frameworks*” (Al-Thaqeb and Algharabali, 2019, p. 2). Baker et al. (2016) and Al-Thaqeb and Algharabali (2019) suggest that economic policy uncertainty delay economic recoveries during periods of recession as businesses and households postpone their decisions about investment and consumption expenditures due to market uncertainty. Nevertheless, regarding the effects of economic policy uncertainty on research and development (R&D) expenditures and innovation outputs, Tajaddini and Gholipour (2020) find positive relationships for a set of 19 developed and developing countries, thus, contradicting those that claim a negative association between economic policy uncertainty and R&D expenditure.

Since the work of Bloom (2009), and due to existing controversies in the literature, studies investigate the effects of uncertainty shocks on different economic variables (e.g., Baker et al., 2016; Bachmann et al., 2013; Colombo, 2013; Nodari, 2014; Donadelli, 2015; Gulen and Ion, 2015; Moore, 2017; Istiak and Serletis, 2018; Bahmani-Oskooee and Nayeri, 2018; Bahmani- Oskooee et al., 2018; Mumtaz and Surico, 2018; Gholipour, 2019; Greenland et al., 2019; Istiak and Alam, 2019, 2020; Tajaddini and Gholipour, 2020). In general, the findings suggest that macroeconomic variables such as GDP, investment and employment are adversely affected by increased economic policy uncertainty.

The political environment is also a source of uncertainty that affects the economy. Studies provide evidence that the instability of the political environment has negative effects on the economic environment (e.g., Barro, 1991; Alesina and Perotti, 1996; Svensson, 1998; Carmignani, 2003; Aisen and Veiga, 2006, 2013; Durnev, 2010; Zouhaier and Kefi, 2012; Julio and Yook, 2012; Uddin et al., 2017; Azzimonti, 2018; Jens, 2017). These studies show that political instability has negative effects on inflation, GDP and unemployment.

Political uncertainty reflects instabilities on the political scene (i.e., involving politicians). The instabilities arising from the political scenario are associated to uncertainties regarding possible changes in the “rules of the game” and in the functioning of institutions. Hence, the uncertainty related to the political system is a key feature affecting the business environment, which entrepreneurs must consider when deciding, for instance, to start or expand their businesses. The effects of political uncertainty are stronger when firms and politicians have close connections and political favors might be at play.

One can suggest economic policy uncertainty reduces entrepreneurs’ optimism about the future of the economy and their business. Similarly, an uncertain political environment can deteriorate business confidence, producing negative effects on the economic environment. Hence, some important questions arise. Does political uncertainty affect business confidence? Is business confidence affected by economic policy uncertainty? Are political uncertainty and economic policy uncertainty transmitted to investment decisions through business confidence? These questions are particularly important for developing countries since these countries often present higher levels of political uncertainty and economic policy uncertainty.

#### Failure causes bankruptcies and unemployment---it’s unique: confidence is slowly recovering with stable support

Dr. Laurence Boone 20, PhD in Economics from London Business School, OECD Chief Economist, Master Degree in Econometrics from the University of Reading, MAS in Modelization and Quantitative Analysis from Paris X-Nanterre University, “Building Confidence Crucial Amid An Uncertain Economic Recovery”, OECD Interim Economic Report, 9/16/2020, https://www.oecd.org/newsroom/building-confidence-crucial-amid-an-uncertain-economic-recovery.htm

With the COVID-19 pandemic continuing to threaten jobs, businesses and the health and well-being of millions amid exceptional uncertainty, building confidence will be crucial to ensure that economies recover and adapt, says the OECD’s Interim Economic Outlook.

After an unprecedented collapse in the first half of the year, economic output recovered swiftly following the easing of containment measures and the initial re-opening of businesses, but the pace of recovery has lost some momentum more recently. New restrictions being imposed in some countries to tackle the resurgence of the virus are likely to have slowed growth, the report says.

Uncertainty remains high and the strength of the recovery varies markedly between countries and between business sectors. Prospects for an inclusive, resilient and sustainable economic growth will depend on a range of factors including the likelihood of new outbreaks of the virus, how well individuals observe health measures and restrictions, consumer and business confidence, and the extent to which government support to maintain jobs and help businesses succeeds in boosting demand.

The Interim Economic Outlook projects global GDP to fall by 4½ per cent this year, before growing by 5% in 2021. The forecasts are less negative than those in OECD’s June Economic Outlook, due primarily to better than expected outcomes for China and the United States in the first half of this year and a response by governments on a massive scale. However, output in many countries at the end of 2021 will still be below the levels at the end of 2019, and well below what was projected prior to the pandemic.

If the threat from COVID-19 fades more quickly than expected, improved business and consumer confidence could boost global activity sharply in 2021. But a stronger resurgence of the virus, or more stringent lockdowns could cut 2-3 percentage points from global growth in 2021, with even higher unemployment and a prolonged period of weak investment.

Presenting the Interim Economic Outlook, covering G20 economies, OECD Chief Economist Laurence Boone said: “The world is facing an acute health crisis and the most dramatic economic slowdown since the Second World War. The end is not yet in sight but there is still much policymakers can do to help build confidence.”

She added: “It is important that governments avoid the mistake of tightening fiscal policy too quickly, as happened after the last financial crisis. Without continued government support, bankruptcies and unemployment could rise faster than warranted and take a toll on people’s livelihoods for years to come. Policymakers have the opportunity of a lifetime to implement truly sustainable recovery plans that reboot the economy and generate investment in the digital upgrades much needed by small and medium-sized companies, as well as in green infrastructure, transport and housing to build back a better and greener economy.”