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### 1AC---Competition ADV

#### Contention 1 is Competition.

#### The present scope of monopolization policy permits Big Tech to engage in unilateral, exclusionary conduct---that wrecks lagging incumbents, nascent rivals, AND deters future entrants.

Jonathan B. Baker 21, Professor, Law, American University's Washington College of Law, "Protecting and Fostering Online Platform Competition," Journal of Competition Law & Economics, Vol. 17, Issue 2, June 2021, pg. 2-8.

Online platforms serve an important economic function: they facilitate economic interactions among end users and competition among sellers who connect to the platform. There are many varieties and many familiar examples. Amazon’s Marketplace connects shoppers and manufacturers, and facilitates competition among manufacturers. Apple and Google (Android) have app stores that connect applications developers and smartphone or tablet users, and facilitate competition among developers. Social media platforms (for example, Facebook and LinkedIn) connect members to one another, permit advertisers and advocates to reach members, and facilitate competition among advertisers and advocates. Search engines (for example, Google and Microsoft (Bing)) allow advertisers to interact with consumers and to compete with other advertisers.

Other online platforms include payment systems (for example, Visa and MasterCard), broadband providers, and restaurant reservation services (for example, OpenTable). Online platform markets often tend toward having a dominant platform. One reason involves network effects: as platforms gain more users, they often become more valuable to users, which may allow them to attract even more users. Network effects may be direct, as with social media and communications platforms, or they may be indirect, as with shopping platforms. More shopping platform consumers make the platform more attractive to sellers, and vice versa.

Scale economies in supply also may lead to a dominant platform. The fixed costs of platform operation may be large, while the costs of adding additional users may be small. Or important costs (for example, for product delivery) may decrease as the number of users grows.

The emergence of a dominant platform is not inevitable. In some markets, network effects and user switching costs may be naturally low or largely exhausted at a scale that allows multiple platforms to be viable. User control over data, as with portability, can reduce switching costs. Switching costs can be low in markets where users value multihoming (use of multiple platforms), and it is not prevented by the platform’s architecture or terms of use. Interoperability may permit multiple platforms to share network effect benefits. When users vary in their preferences for platform features, multiple differentiated platforms may successfully co-exist.

In markets with a dominant online platform, the most important competition may come from potential rivals and fringe competitors. If platform users are willing and able to switch to a rival with a superior product, dominance can erode. The market could even tip to the rival: as the rival benefits from increased network effects, it may attract even more users and it may become dominant. In some cases, even the mere possibility that a fringe rival or entrant could expand and replace the incumbent could constrain a dominant platform’s exercise of market power to some extent.

Exclusionary conduct by a dominant platform can suppress this key competitive force. Think, hypothetically, for example, of Google excluding Bing, Amazon excluding Walmart, or Facebook excluding Snap (Snapchat). Here, “exclusion” means disadvantaging and possibly marginalizing rivals, in addition to possibly forcing them to exit or preventing their entry. The dominant platform also may find ways to exclude nascent or potential platform rivals, not just current rivals, by impeding entry and expansion.

At the same time, exclusion of competitors does not necessarily add up to harm to competition. If one pizza parlor sets fire to a neighboring store, and there are a number of other pizza stores in the neighborhood, the local pizza market would likely remain competitive so the exclusionary conduct is most likely just a business tort, not also an antitrust violation. But when a market has a dominant firm, the loss of any rival—even a small rival or a potential one—can often reasonably be expected to reduce the odds that competition will emerge. Under such circumstances, harm to a competitor can be expected to create a material risk of harm to competition.

Dominant online platforms can adopt a number of strategies to exclude actual or potential platform rivals.4 One possible exclusionary strategy involves exclusive dealing: a dominant platform could simply forbid its sell-side users (for example, manufacturers or advertisers) from patronizing a rival platform. Platform most favored nations (price parity) provisions may have a similar exclusionary effect when the rival platform’s strategy is predicated on offering low seller prices. Or the platform may make it more difficult for rivals to attract users by increasing customer switching costs, for example, by introducing membership fees (perhaps combined with lower usage prices) or by preventing interoperability or multihoming.

The anticompetitive conduct in several prominent predigital examples of exclusionary platform conduct can be thought of as locking-in users by preventing multihoming or, alternatively, as exclusive dealing: the Lorain Journal newspaper excluded a local radio station entrant by declining to accept advertisements from merchants that advertised on the radio station;5 the FTD (telephone) flower delivery network impeded the development of rival networks by preventing its florists from signing up with other networks;6 and Mastercard and Visa prevented member banks from issuing credit cards offered by other payment systems, including American Express and Discover.7

In the digital world, dominant online platforms may adopt similar strategies to exclude platform rivals. They may also exclude platform rivals by foreclosing their access to data generated by users. With less data, or less data of certain types, an entrant or rival may have less ability to exploit network effects or obtain scale economies. In addition, dominant online platforms can exclude by acquiring potential rivals, whether nascent platform competitors or sellers of complementary (or vertically related) services that could become rivals. For example, some have suggested that Facebook harmed social media competition by acquiring Instagram, or Google maintained its advertising dominance or achieved dominance in advertising technology by acquiring DoubleClick.

When online platform owners also use the platform, moreover, they can employ exclusionary strategies against rival end users. It is not uncommon for platform owners to be users as well. Amazon runs a marketplace on which it sells private label products. Google has a search engine and also provides shopping services such as flight information. Apple runs an app store and offers services similar to those provided by some apps. For example, it offers Spotify’s music application as well as its own music application.

A platform that is also a user can impede entry or expansion by rival users through input or customer foreclosure—and it may have the incentive as well as the ability to do so by virtue of the fact that it is both user and provider. It could, for example, bias search results to favor its own products or to disfavor rivals’ products, or refuse to link to rival users. It could also target rival users for product design or price competition, perhaps using its privileged access to customer data when rival users have less access to data so they cannot easily fight back. These possibilities do not exhaust the ways a dominant platform can exclude rival platforms or rival users, but they do illustrate economic incentives and mechanisms that could lead to such reductions in competition.

II. ANTITRUST LAW AND POLICY

Antitrust law and policy seek to deter and remedy conduct that harms competition, including exclusionary conduct by dominant platforms. Such conduct can be reached by U.S. antitrust law if undertaken by agreement,8 if undertaken by a dominant firm (one with what the law terms “monopoly” power) or by a large firm with a dangerous probability of achieving monopolypower,9 if undertaken through exclusive dealing or tying in the sale of goods,10 or if undertaken through acquisition or merger.11

The evidentiary burdens of establishing competitive harm from exclusionary conduct can be demanding, however. Exclusionary unilateral conduct cannot be challenged under Section 1 of the Sherman Act, which requires proof of an agreement. If that conduct is undertaken by a firm with a share too low to prove monopoly power or dangerous probability of successful monopolization and direct proof is unavailable,12 the conduct cannot be challenged under Section 2 of the Sherman Act.13

Beyond satisfying the agreement prerequisite for Section 1 liability, or the monopoly power (or dangerous probability of success) prerequisite for Section 2 liability, the plaintiff must demonstrate that the exclusionary conduct harms competition.14 Yet, a variety of judicially created hurdles may impede doing so in meritorious cases. Courts have treated exclusionary nonprice vertical conduct as presumptively procompetitive, even in settings such as oligopoly markets and markets with dominant firms where it is well-established that vertical restraints can harm competition.15 In some cases, courts have declined to condemn exclusionary conduct that harms competition on balance if the conduct benefits competition in any way, or plausibly could do so, regardless of the magnitude of the competitive benefit.16 Importantly for dominant platforms, some commentators interpret the Supreme Court as suggesting that the prohibition on monopolization would not reach unilateral refusals to deal with a rival by a vertically integrated platform, that is, one that is also a supplier (or seller of a complementary product), unless the platform had previously supplied the rival.17 In order to adopt this suggestion as holding, however, the Court would need to overrule Lorain Journal18—a platform monopolization decision predicated on a unilateral refusal to deal that was later endorsed by both Robert Bork and the modern Supreme Court.19

The Supreme Court’s American Express decision may create additional hurdles for plaintiffs bringing meritorious exclusion cases against dominant platforms.20 It suggests that market definition is required, and direct evidence is insufficient for proving market power, in exclusionary vertical restraints cases (conduct involving an agreement between a firm and its suppliers or distributors).21 If this is how American Express is interpreted by lower courts, it may require fact-finders to analyze, for example, the extent to which different social media compete for attention, online advertisers compete with cable and print ads, or general-purpose online retailers compete with brick and mortar retailers or specialized online retailers–even when direct evidence would make it possible to demonstrate competitive harm or market power reliably without making an inference from market shares, and thus without reaching potentially difficult market definition questions. American Express may also require courts to analyze the competitive effects of conduct by transaction platforms within cluster markets encompassing end users on both sides22—which can create confusion when evaluating competitive harms.23

Beyond these legal issues, there are a number of practical impediments to bringing meritorious exclusion cases against dominant platforms. The most important problems impede challenges to the exclusion of nascent rivals and potential entrants. The antitrust laws reach such conduct,24 but it can be difficult for governmental or private plaintiffs to prove that nascent or potential rivals are a competitive threat, even when that is in fact the case, simply because those firms, by definition, lack a track record showing what they can do; the proof may end up turning more on capabilities than on past results. When exclusionary conduct deters potential rivals from even attempting entry, an antitrust case may be difficult to prove because it may be hard to tell whether the excluded firm is truly a potential entrant that could become a viable and effective competitor. These problems, particularly when exacerbated by judicial delays, mean that a range of damaging exclusionary conduct may not be deterred and that courts may be unable to restore competition (as by preserving the excluded firms).

In addition, foreclosed rivals, whether actual or potential competitors, may have little incentive themselves to challenge the exclusionary conduct of well-heeled platforms. Even where its case is strong, moreover, a rival may do better accepting a large financial settlement that leaves the platform’s monopoly power intact, rather than litigating to create competition.25

When a potential entrant is acquired, it can also be difficult to show that competition is harmed. Courts now require that the plaintiff, which is usually a government agency, show that the potential entrant would have otherwise entered the market rapidly and been viable, and that there are few other likely potential entrants.26 Evidence of competitive harm may be hard to come by because a potential entrant that has been acquired for a high price would have little incentive to support the government’s challenge.

Meritorious exclusion cases against dominant platforms are also impeded by the erroneous assumptions that some courts accept, at times encouraged by defendants and non-interventionist commentators.27 Some erroneous assumptions are about markets. It is wrong to suppose, as a general rule, that monopolies lead to more innovation than competitive markets, that forcing a monopoly platform to admit rival users will reduce innovation by both the monopolist and its rivals, that the exercise of market power rapidly self-corrects through entry, or that business practices prevalent in competitive markets, such as vertical restraints, are unlikely to harm competition when employed in oligopoly markets or markets with a dominant firm.

Other erroneous assumptions are about courts. It is also wrong to suppose, in general, that courts cannot tell whether exclusionary conduct harms competition or promotes it, that erroneous judicial precedents are more durable than the exercise of market power, or that the litigation process is manipulated by complaining competitors.

#### The impact of that behavior is magnified particularly by two factors:

#### 1. Data---the excessive monopolization causes pervasive exclusion.

Michael L. Katz 19, Sarin Chair, Strategy and Leadership, University of California, Berkeley's Haas School of Business, "Multisided Platforms, Big Data, and a Little Antitrust Policy," Review of Industrial Organization, Vol. 54, 2019, Springer.

The nature of user data has several broad implications. First, if user data are commercially valuable, lack substitutes, and are not shared across platforms, then the existence of significant increasing returns in collecting and utilizing user data can limit the number of viable competitors and create a “data barrier to entry,” especially when the accumulation of the necessary data takes considerable time.9 The resulting levels of industry concentration raise the possibility that platforms will have substantial market power and that their conduct can raise antitrust concerns.10 Indeed, some people are concerned that big data will create unlimited advantages of scale and scope that will lead to the domination of a wide swath of the economy by a handful of frms.11 \*\*\*FOOTNOTE BEGINS\*\*\* Khan (2017, p. 792) expresses this concern with user transaction data. It should be noted that, although certain transaction data may be very broadly useful, it may also be the case that, the more widely given data can be used, the greater the range of alternative user transactions that can serve as substitute sources of data. Moreover, there may be diminishing marginal returns to the sizes of datasets: At some point additional data may lead to little improvement in the performance of the algorithms that are based on those data. \*\*\*FOOTNOTE ENDS\*\*\*

Second, to the extent that user data lack substitutes and are important to a platform’s success, the possibility arises that a platform may engage in exclusionary conduct that is intended to weaken rivals’ ability to compete by limiting their access to user data or making that access more costly.12 The desire to raise rivals’ costs could motivate a wide range of conduct, including: refusing to sell data to rivals (or doing so only at elevated prices intended to raise rivals’ costs); entering into exclusive contracts with third-party data providers; or creating obstacles to user data portability (e.g., by storing data in proprietary formats or denying users control of data about them). The desire to weaken rivals could also motivate predatory behavior, whereby a platform seeks to prevent rival platforms from attracting users and sales that would otherwise generate data and strengthen the rivals’ abilities to compete.

Third, when user data are an important asset, they can be a central part of analyzing the competitive effects and/or efficiencies of a merger. In many respects, the issues that are posed are standard ones for merger policy. However, user data raise at least three issues that are somewhat novel or may arise with particular force. First, to the extent that particular datasets lack substitutes, a platform might use a merger to obtain data in order either: (a) to use those data to compete more effectively; or (b) to preempt rivals from obtaining data that would allow them to compete more effectively. Second, the role of user data may suggest reasons to consider potential entry arguments more seriously and broadly than is typical. Third, because it may be possible to share user data and because the value of a given dataset could decay rapidly, there are issues in designing remedies that are specific to user data.

Last, some of the possible uses of user data raise issues regarding price discrimination and user privacy. The latter set of issues is of particular interest. There are important questions regarding both: (a) the role of antitrust enforcement in promoting the use of efficient privacy protections; and (b) the effects that public policies that are intended to promote privacy have on platform competition and the realization of the goals of antitrust enforcement.

2 Raising Rivals’ Costs

I first examine the possibility of exclusionary conduct: If there are no good substitutes for a particular dataset that is important to a platform’s success, then a platform that controls access to that dataset may attempt to limit rivals’ access to it (or make that access more costly) in order to weaken their abilities to compete. This conduct could include refusals to sell data to rivals at reasonable prices, exclusive contracts with third-party data providers, or actions to create barriers to user data portability.

#### 2. Self-preferencing---it downgrades the ability to compete on dominant platforms.

Daniel A. Hanley 21, Policy Analyst, Open Markets Institute, "How Self-Preferencing Can Violate Section 2 of the Sherman Act," CPI Antitrust Chronicle, June 2021, pg. 4.

By unfairly modifying its operations to privilege its, another firm’s, or a set of firms’ products or services, self-preferencing enables a firm to unilaterally distort the relationships between dependent firms and customers to monopolize a market, fortify its dominance, destroy a competitor, or leverage into a new market. Self-preferencing can thus violate the Sherman Act and violate the principles of fair competition embedded in it.

Self-preferencing is not a novel behavior, but that does not put it outside the protections afforded by the Sherman Act.13 For example, the concern that a dominant technology company would use its infrastructure to sustain its dominance, leverage into new markets, and give favorable terms to some companies was a primary concern of the Department of Justice when it initiated its lawsuit that led to the breakup of AT&T in 1982.14 Other more modern examples of self-preferencing include manipulating search rankings to give a company’s own products or services an artificial boost or giving favorable search rankings for a selected few companies while blocking off access to such terms for others to monopolize an industry.15

Self-preferencing causes two primary harms to market participants and consumers. First, since self-preferencing artificially weakens a rival firm’s competitive position (who is often dependent on the provided service), it allows the perpetrator to unfairly maintain and extend its market power. When this happens, barriers to entry in an industry can increase, leading to less consumer choice, increased bargaining leverage of incumbent firms to extract or impose more favorable terms of service and conduct on dependent firms, and increased costs to dependent firms.

Second, self-preferencing causes significant exclusion and foreclosure effects, which can lessen consumer choice for alternative services. The exclusion of a firm can also cause consumers to lose out on the benefits of increased firm rivalry and potential innovation derived from it.16

The foreclosure effects caused by self-preferencing can also deprive a firm of the necessary scale to be a viable market participant.17 Moreover, even the threat of foreclosure can cause harm to consumers by deterring the entry of potential competitors since they will likely not risk entering a market that they can be unilaterally excluded from if they start challenging the dominant incumbent firm.18

#### Studies confirm both that exclusionary conduct harms innovation AND antitrust is critical resolve it.

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The big tech firms supposedly have an inconsistent attitude toward the third parties that sell on their platforms. On the one hand, they welcome these sellers because a broad array of complementary products enhances the value of their platforms.64 On the other hand, they deliberately undermine some of them when they enter a complementary market.

The critics charge that the tech giants suppress third party rivals in three main ways. First, when the platforms conduct searches for users, they allegedly bias the results, artificially downgrading third party products and elevating their own. This distortion reduces the visibility of rival products, depriving them of sales and narrowing consumer choice. Second, they allegedly use the nonpublic data they collect on individual third parties to determine which products are most popular and then offer the same products at lower prices. This targeted copying devastates the business of the third parties and undermines their incentive to develop new products. Third, the tech giants sometimes refuse to deal with third parties simply because they are competitors. For example, Amazon may agree with a branded product seller that Amazon will carry its brand – and only its brand – in a particular product category. After committing to exclusivity, Amazon allegedly removes competing sellers from its platform, curtailing consumer choice.65 Third parties cannot avoid the resulting harm because, they say, no good substitute for Amazon.com exists.66 \*\*\*FOOTNOTE BEGINS\*\*\* See, e.g., Mattioli, supra note 62 (“Because 39% of U.S. online shopping occurs on Amazon, according to research firm eMarketer, many brands feel they can’t afford not to sell on the platform.). \*\*\*FOOTNOTE ENDS\*\*\*

The following sections analyze each of these allegations, asking not only whether the asserted conduct has injured competitors but whether it has harmed consumers and whether it has resulted in monopoly power or a dangerous probability of monopoly power.

A. Biasing Search Results

Google, Amazon, and Apple have all been accused of search bias. Google’s behavior produced a major fine in Europe but, despite an extensive FTC investigation, no action in the United States. Recently, The Wall Street Journal uncovered evidence that Google had distorted the results of searches for videos to favor its own affiliate, YouTube. Other newspaper reports contain evidence of search bias by Amazon and Apple. True search bias would not be justified, since it would alter the priority of search results based on what contributes most to platform profits, not what best serves consumers. But while true search bias would be anticompetitive, there is little or no evidence, to my knowledge, that it resulted in actual or probably monopoly power.

1. Google

Federal authorities in both Europe and the United States have investigated Google for search bias. In 2017, the European Commission (EC) concluded that Google had altered its search results so that its comparison shopping service, Google Shopping, was generally placed ahead of competing services.67 Ruling that this conduct constituted an abuse of dominance, the EC fined Google €2.42 billion.68 Google had plainly redesigned its search algorithm to favor its own products. In 2007 it unveiled Universal Search, a new algorithm that gave “particular prominence to Google’s products.”69 Indeed, Universal Search placed Google Shopping “at or near the top of search results for comparative shopping services.”70 The issue was whether this priority was justified. The EC found that it was not, 71 and thus injured consumers as well as competitors.

The EC did not conclude, however, that Google’s search bias resulted in monopoly power. While Google does not charge consumers for searches or complementary services, it does charge advertisers to place messages on these products. The EC did not find, though, that Google’s new search design resulted in higher advertising rates. Although the new design reduced, often severely, the sales of rival products,72 the EC did not rule that it enabled Google to elevate its ad rates to monopoly levels. Advertisers apparently had other choices. 73

In the U.S., the FTC investigated Google’s new search algorithm but decided not to issue a complaint. Although its staff wanted to challenge some aspects of Google’s behavior, they did not recommend a complaint with respect to its search engine. 74 Like the EC, the FTC found that the sites Google downgraded lost significant traffic, but it did not conclude that Google gained monopoly power.75 Moreover, unlike the EC, it decided that Google’s new algorithm was justified. Richard Gilbert, an economist who consulted for the FTC, explained why: Universal Search produced a greater diversity of websites on the first results page and consumer responses indicated that they preferred that. 76 In short, the Commission found that Google’s new algorithm did not bias its search results; it enhanced them.77

In contrast, just last year a Wall Street Journal investigation concluded that Google had engaged in a different type of search bias: “When choosing the best video clips to promote from around the web, Alphabet Inc.’s Google gives a secret advantage to one source in particular: itself. Or, more specifically, its giant online-video service, YouTube.”78 The Wall Street Journal found that Google systematically favored YouTube in its search results even when competitors like Facebook Watch and Amazon’s Twitch carried the same or similar videos and even when the number of their views or followers was greater. 79 Google denied that it engaged in self-preferencing but did not offer an explanation for the results. 80 The Wall Street Journal’s sources maintained that Google wanted to drive traffic its way and increase its bargaining leverage with content providers, 81 reasons that hardly justify the change.

This report, in short, strongly suggests search bias, just like the reports on Amazon that follow. The House Antitrust Subcommittee Report presented additional evidence of self-preferencing, suggesting that Google continues to place its services above competing sites even when its ranking algorithm would not warrant that priority.82 None of these accounts, however, contains evidence of actual or probable monopolization.

2. Amazon

ProPublica found that Amazon’s search algorithm ranked Amazon’s products and products that use Amazon’s fulfillment services above rival products. Because placement matters so much, ProPublica concluded that this bias gave the favored products an “oft-decisive advantage.”83 A Wall Street Journal investigation uncovered another form of distortion. According to Amazon insiders, the platform altered its search algorithm so that it gives priority to products that are more profitable for Amazon. The new algorithm does not use profitability directly – Amazon’s lawyers barred that – but it employs proxies for profitability.84

Both reports indicate that Amazon has been skewing its search results to increase its net income. The reports do not analyze Amazon’s actual search algorithm; they rely on Amazon employees who are familiar with it. But if the insiders’ testimony is accurate, it indicates that Amazon has elevated its own interests above those of consumers.

Amazon’s choices, whether justified or not, do not appear to have led to monopoly power or a dangerous probability of monopoly power. The Journal report, for example, presents no evidence that Amazon has monopolized, or was about to monopolize, any relevant market. Ramsi Woodcock notes that this is a general problem with criticism of Amazon: “Critics appear not to have pointed to any evidence that Amazon has power in the individual markets for the thousands of products that appear for sale on Amazon’s website.”85 eMarketer data is consistent. It shows that Amazon’s market share of virtually every product category is small. For instance, its share of Home and Kitchen products is 11.1%, its share of Sports and Outdoor products is 5.7%, and its share of Baby products is 2.6%. The only exception is Clothing, Shoes, and Jewelry products, where Amazon’s market share is 47.7%. 86 This data is imperfect, however, because it calculates market shares based on the number of brands in a category, not total sales.87 \*\*\*FOOTNOTE BEGINS\*\*\* See id. Thus, if a single Amazon brand had much larger sales than a similar third party brand, these data would not reveal it. They would indicate that Amazon’s share and the third party’s share were the same. \*\*\*FOOTNOTE ENDS\*\*\* Yet it supports the notion that Amazon’s entry into complementary product markets has rarely, if ever, generated actual or probable monopoly power. If Amazon has been distorting search results, few if any antitrust plaintiffs could turn to the Sherman Act for relief.

3. Apple

A New York Times investigation suggested that Apple has also been biasing search results. A data analysis firm retained by the Times found that “for more than a year, the top results of many common searches in the iPhone App Store were packed with the company’s own apps. That was the case even when the Apple apps were less relevant and less popular than ones from its competitors.”88 Here, however, search bias may not have been the culprit. Two senior Apple executives acknowledged the results but maintained that they reflected the merits of Apple’s products, not deliberate distortion. The executives stated that “the company did not manually alter search results to benefit itself. Instead, they said, Apple apps generally rank higher than competitors because of their popularity and because their generic names are often a close match to broad search terms.”89 In any event, “the company had since adjusted the algorithm so that fewer of its own apps appeared at the top of search results.”90

This account is puzzling. If Apple’s original search algorithm served consumers, why was Apple was so willing to change it? Whatever the answer, the Times report contained no evidence that either the original or the revised algorithm enabled Apple to monopolize a market.

In sum, there is reason to believe that three tech giants (Google, Amazon, and Apple) have displayed search rankings that artificially favor their own products. In each case, the evidence of distortion emerged from internal sources rather than deconstruction of their search algorithms. Yet this is likely to be the only practical method of demonstrating search bias in most instances. In two cases (Google and Amazon), the companies offered no justification. In no case was there evidence that the alleged bias led to actual or probable monopoly power. Together, these two conclusions – apparent anticompetitive conduct but no dangerous probability of monopoly power – support extending the reach of the Sherman Act.

B. Copying Rival Products

Critics also charge that the tech firms routinely undercut third parties that sell on their platforms by copying their most popular products.91 They allegedly identify those products by examining the confidential data they collect on individual third parties. In other words, they use nonpublic information about specific sellers to free ride on their product ideas, depriving them of business and undermining their incentive to develop new products.92 The tech firms compound the damage when they offer their own products at lower prices.93 Even the possibility of this behavior may limit the funding available to start-ups.94 Further, the threat of copying a rival’s product can make it easier to acquire the rival at a bargain price.95

Press reports suggest that both Amazon and Apple have mimicked third party products offered on their platforms. A 2014 study found that when Amazon first offered private label women’s clothing, its list of products included “25 percent of the top items first sold through [Amazon Marketplace] vendors.”96 Six years later, The Wall Street Journal interviewed Amazon employees who admitted they studied the sales data of specific third parties to determine which private label products to offer.97 Although Amazon had prohibited this conduct, 98 the employees said they ignored the rules or found ways around them. They were willing to skirt the rules because the nonpublic data helped them determine “how to price an item, which features to copy or whether to enter a product segment based on its earning potential.”99 Likewise, several press investigations found that Apple had upgraded its apps with “the features of the most popular apps that other innovators built.”100

This practice has generated such adverse publicity and hostile Congressional reaction that Amazon made no attempt to defend it on the merits. To the contrary, in response to the Journal story, it reiterated that it prohibits its private label product teams from accessing individual seller data and announced it had opened an investigation. 101 Three months later, Amazon CEO Jeff Bezos told a congressional hearing that the investigation was continuing and that he could not “guarantee . . . that this policy has never been violated.”102 Amazon eventually responded that its prohibition had not in fact been ignored: only one employee had accessed third party data with respect to the products in question and the data was aggregated, not seller-specific.103

Despite the widespread concern with the practice, the antitrust analysis is complicated because copying a rival’s product can be procompetitive. Indeed, competition often works through copying. When an entrant copies a dominant firm’s product and offers it at a lower price, consumers benefit. Likewise, when Amazon enters a complementary product market, it matches the quality of the incumbents’ product but charges a lower delivered price, causing total market output to increase.104 Established firms study their markets to learn which of their rivals’ product improvements to adopt so they can compete more effectively.105 To be sure, intellectual property law often prohibits such mimicking in order to protect incentives to innovate, but here the third party products were not patented and their distinctive features were not trade secrets.

There is data on what happens when tech giants enter into complementary product markets. Two studies looked at Google’s entry into the sale of apps for its Android operating system.106 A third investigated Amazon’s entry into segments of the Amazon Marketplace.107 As expected, two of the studies found adverse effects on the number of products third-party sellers offered. According to one, Amazon’s entry increased the turnover of third-party products by six percentage points.108 According to another, Google’s entry reduced the total quantity of app upgrades in the targeted product space by 7.9%. 109 It also caused the developers in that space to increase the price of their apps by an average of 3.7%. 110

At the same time, all three studies found significant consumer benefits. Many consumers preferred the tech giants’ products, causing them to curtail their purchases of third party products. It is this loss of business that led third parties to reduce the number of products and product upgrades they offered. In Amazon’s case, consumers switched because of its lower prices. When Amazon moves into a product category, it matches the prices that third parties charge,111 but reduces shipping costs to zero, lowering delivered prices. 112 Consumers value this so much that they increase their total purchases in the product category. 113 This growth in output suggests that consumer satisfaction rose.114

In Google’s case, consumers switched because they preferred Google’s apps. As noted, one study found that the loss of business caused third parties to reduce the total number of app upgrades they offered in the targeted product category. But this study also found that an impending Google entry increased other aspects of product development. Third parties accelerated their upgrades of non-competing products by 4% and their development of new apps by 3-10%.115 Further, the most popular apps – those least likely to lose business to Google – responded to the threat of entry by increasing upgrades on competing apps by 7.8% and upgrades on other apps by 15%.116 Overall, innovation may have increased. The other study found that it did. Examining over six thousand apps, the authors concluded that Google’s entry into the photography space led to substantial growth in innovation. Apps affected by Google’s entry were 9.6% more likely to issue major updates than unaffected apps.117

In sum, the studies indicate that when a tech giant enters a complementary product market, the impact on consumers is mixed but generally beneficial. Many third parties do curtail product development, but when Amazon enters, it offers lower delivered prices and consumers increase their total purchases of the category. When Google enters, it offers apps that many consumers prefer, other third parties step up their development efforts, and total innovation may rise.

Given these countervailing effects, a blanket ban on copying rival products would be difficult to justify. Since Amazon’s entry increases total output and Google’s entry may well promote overall innovation, a blanket ban could easily reduce consumer welfare. A vertical break up would be even more difficult to justify, since it would prevent the tech giants from offering any complementary products, even those that involved no mimicking at all and thus no direct threat to third party innovation. 118

In one circumstance, however, it would make sense to prohibit a tech giant from copying a third party’s product. When a tech giant identifies the product by using nonpublic data about a specific third party, its copying poses a particularly direct threat to innovation. In that circumstance, no other firm is producing the product, so the third party is a pioneer, and allowing a tech giant to take a pioneering idea is especially likely to undercut innovation. In contrast, when a platform uses other information – public information about popular products119 or nonpublic information that is aggregated across multiple competitors120 – there is less danger that the platform will free ride on a single seller’s innovation. To be sure, no empirical studies address the issue – where to draw the line on tech giant product copying – and thus any choice is tentative. But the lack of empirical research is a problem with tech giant exclusion generally,121 and should not stop courts or Congress from making reasonable judgments. Accordingly, it seems desirable to bar platforms from using nonpublic data about a specific third party to decide which products to copy. This would prevent the worst instances of free riding while giving the tech giants considerable latitude to enter complementary markets with cheaper or better products.122 Enforcing this rule would require internal information, but the Wall Street Journal had no trouble obtaining such information from current Amazon employees.123

C. Refusing to Deal with Rivals

Critics have also charged the tech giants with a third form of exclusionary conduct – refusing to deal with certain firms simply because they are competitors. For instance, Amazon allegedly enters into exclusive distribution arrangements with suppliers that require it to remove competing suppliers from its platform. One of the neo-Brandeisians contends that these expulsions amount to “illegal monopolization.”124 But she does not identify any markets that Amazon has monopolized through these expulsions. 125 Moreover, when she explains why the suppliers want this exclusivity, the story she tells (if valid) is procompetitive. According to her account, the suppliers sell products that require customer service in physical stores. They also sometimes offer their products through third parties on the Amazon Marketplace. The third parties frequently discount their products, however, which causes free riding. Consumers visit the physical stores to take advantage of the in-store service but then purchase the products online. To prevent this free riding, the brands make Amazon their exclusive online outlet. 126

In this account, in short, exclusivity is a response to a market failure.127 The account may be incorrect, but there is no evidence, to my knowledge, that Amazon expels third parties in order to gain monopoly power in a third party product market and then raise prices or depreciate product quality. Moreover, if Amazon had actually entered into exclusivity agreements, the problem could be dealt with under Section 1 of the Sherman Act, which does not require monopoly power.

There are also allegations of naked exclusion – refusals to deal with a firm solely because it as a competitor. In 2016 Apple allegedly blocked Spotify from access to the App Store simply because it posed a threat to Apple Music.128 Apple denies this, 129 and in any event, the exclusion was temporary. Spotify returned and consumer choice was restored. More serious allegations of exclusion are leveled in the FTC and state complaints against Facebook. 130 They claim that Facebook denied access to its APIs to app developers that competed with it or helped others compete with it. Specifically, Facebook adopted a policy that barred apps that replicated a “core functionality” of Facebook or linked to competing social networks.131 These refusals to deal were allegedly so effective that they deterred any direct challenge to Facebook’s platform, 132 thereby maintaining Facebook’s monopoly power. The complaints cite little evidence, however, that any of the affected apps would have developed into a competing social network. On the other hand, Facebook has not, to my knowledge, offered a justification for its refusals to deal, suggesting that its goal was indeed to reduce competition. Facebook simply asserts that it no longer engages in the practice.133

Epic Games has also accused Apple and Google of refusing to deal. Both tech giants removed one of Epic’s most popular games, Fortnite, from their app stores because Epic would not pay their standard commissions (30% of revenue) on in-game purchases.134 According to Epic, Apple and Google can charge such high commissions only because they make it difficult or impossible to obtain apps except through their app stores. As a result of this exclusionary policy, Apple is the monopoly supplier of apps for Apple phones and Google is virtually the sole suppliers of apps for Android phones.

Apple claims that this exclusivity is justified because Apple can thereby provide better safety, security, and other services to app users, and that its high commissions reflect the costs of furnishing those services. 135 But if that were true, Apple’s costs of operating the App Store would have to be $15-17 billion a year, 136 which is unlikely.137 Moreover, even if Apple’s costs were that high, the fundamental issue is whether its exclusionary conduct is justified. If consumers could obtain safe and secure apps from other sources, competition would increase and Apple’s commissions – and its costs – would be forced down. Many other platforms allow users to procure apps from other sources.138

D. Conclusion

The contours of unjustified exclusion are clear. When a tech giant uses its own profitability rather than the preferences of its customers to rank search results, it distorts consumer choice. When a platform uses the confidential data it gathers on individual third parties to identify their most popular products and then duplicates them, it is likely to reduce innovation. When a tech firm refuses to deal with a competitor simply because it is a competitor, it increases the platform’s market power and diminishes the options available to consumers.

All the tech giants appear to have used one or more these exclusionary tactics. The extent of their conduct will become clearer as ongoing proceedings unfold, but at this point it seems that all the tech giants have sometimes suppressed competition in complementary markets through unwarranted exclusion. At the same time, there is no evidence, to my knowledge, that this behavior led to monopoly power or a dangerous probability of monopoly power in any of these markets. The question, then, is how to deter it. Congress could break up the tech giants, which would diminish their ability and incentive to exclude. Or it could make the conduct itself illegal by amending the Sherman Act.

#### A concerted cycle of innovation in the technology sector sustains the US edge over China---failure causes conflict through cyberspace AND within numerous hotspots. BUT it’s not solely about the strength of the military ---the health of overall growth sustains vital US posture.

Karina Verónica Val Sánchez & Nezir Akyesilmen 21, Selcuk University-Konya, "Competition for High Politics in Cyberspace: Technological Conflicts Between China and the USA," Polish Political Science Yearbook, Vol. 50, Issue 1, 2021, pg. 46-63.

For many decades, the United States used its superiority in science and technology to ensure its hegemony, but today these powers also want to exploit it and bring about a shift in the balance of power. In this respect, Drezner (2001, p. 4) argues that “countries acquire hegemonic status because they are the first to develop a cluster of technologies in leading sectors” innovations impact the domestic economy and then impact internationally. When the hegemonic power slows down its innovation rate, it enters a period of struggle with the fast follower powers until a new ‘technological hegemons’ is found. In addition, the dominant power fears that “the other superpower might achieve a significant technological breakthrough and seek to exploit it” (Gilpin, 1988, p. 162). Taken together, these contributions suggest that the hegemonic power needs to maintain an advantage and superiority technologically against the powers that challenge its dominant position; otherwise, its position may be jeopardized (Deutch, 2018).

Lim and Kennedy’s work focuses particularly on analyzing the interaction between great powers, mainly on how technology and innovation create a rivalry between the dominant state and the rising power (Kennedy & Lim, 2018, pp. 553-572). Economic superiority is one of several elements that drive the rise of ascending power. Yet, in the long run, economic development is maintained through technological innovation, which “generate spillover effects to the rest of the lead economy and then to the global economy” (Drezner, 2001). The innovation imperative is when the rising power tries to acquire or create new technology to ensure its rise. In the process, it develops strategies and policies to acquire and develop technologies, but especially increases spending on research and development (Kennedy & Lim, 2018).

As a rising power, China needs to create new products and get new technology (Reuveny & Thompson, 2001). There are three ways in which technology is acquired: making, taking, and transacting. Taking involves non-transactional means. Making is the result of supporting local producers in creating new ones. Transacting is a commercial exchange of technology (Kennedy & Lim, 2018, pp. 556-557). In this sense, it is necessary to mention that China has no complex about the idea of copying inventions, products, or technologies in order to benefit from technological advances quickly (Lee, 2018, pp. 29-55). The United States has also highlighted the successful and constant attempts by Chinese hackers to access the American network in search of possible technological secrets (Segal, 2016, pp. 119-122). Some have even commented that Chinese military equipment is very similar to that of the United States (Segal, 2016, p. 120).

China and the United States are the world’s largest investors in research and development (R&D). However, the American model of innovation is subordinated to federal support, so it is alarming that in recent years federal support for R&D has declined and especially at a time of global competition where it is estimated that by 2030 China will be the country that invests the most in R&D (McRaven, 2019, 5) surpassing the US An insightful report by the Council on Foreign Relations (CFR) recommends that the US government should increase funding from 0.7% to 1.1% of gross domestic product (GDP) annually (McRaven, 2019: 6) so that the US does not lose its technological advantage and has a greater involvement as the private sector is currently at the forefront (Glosserman, 2020).

The actions of the ascending power unleash two types of effects concerning the dominant power: which firstly experiences a threat to its national security (security externalities) and subsequently to its position in the international system (order externalities) (Kennedy & Lim, 2018, pp. 553-555). As mentioned in the first part, the US NDS states that China is a threat to the current order of the international system (order externalities) (Mattis, 2018, p. 2). Also, China’s ambitions to access emerging technologies with military applications are also perceived as a threat to US national security (security externalities). China wants to catch up with the United States in military technology and eventually overcome it (Mori, 2018, p. 2). Both the United States and China compete to dominate militarily exclusive breakthrough technology because it could shape next-generation military capabilities (Mori, 2018, p. 22).

The growing techno-rivalry has motivated both powers to adopt a techno-nationalist approach to maximize their national power. As China’s supreme leader, Xi Jinping is convinced that the technological backwardness experienced in the past as a nation is rooted not in the lack of knowledge but the lack of its application for social and economic development (Xi, 2014). That is why he has focused on removing institutional barriers “to unleash to the greatest extent the huge potential of science and technology as the primary productive force” (Xi, 2014). Xi also stated the urgency of seizing the moment to take advantage of technology “I have repeatedly said that the great rejuvenation of the Chinese nation can in no way be realized easily. In fact, the stronger we become, the greater resistance and pressure we will encounter. That is why we say that timing and resolution are vital, as historical opportunities are often ephemeral. Now we have an important historic opportunity to promote scientific and technological innovation. We must not miss it, but seize it tightly” (Xi, 2014).

Xi Jinping is sure that a nation with technological inferiority is catastrophic for the total fulfillment of the Chinese dream (Paul, 2020). That is why he is working on initiatives that will lead the nation towards the fulfillment of that dream and to realize the Two Centenary Goals (Xi, 2014), namely ‘Belt and Road Initiative’ and ‘Made in China 2025’.

A) ‘Belt and Road Initiative’ (BRI)

It was 2,100 years ago, during the Han Dynasty when the silk road began. However, it was not until 2013 that Jinping presented a modern route: Silk Road Economic Belt and the 21st Century Maritime Silk Road. A first glance suggests that it is a route connecting China to the rest of the world (more than 60 countries), but in fact, it is a broader proposal that involves many variables aligned to achieve long-term interest (Yunling, 2015). According to Jinping, One Belt and One Road (OBOR) “represent paths towards mutual benefit which will bring about closer economic integration among the countries involved, promote the development of their infrastructure and institutional innovation, create new economic and employment growth areas, and enhance their capacity to achieve endogenous growth and to protect themselves against risks.” (Xi, 2014, p. 339).

B) Made in China 2025 (MIC2025)

Since its proposal in 2015, MIC2025 represents China’s industrial policies for the next decade. The central axis is China’s transformation into a global technology power (Chen et al., 2020). Hence, it is necessary to integrate advanced manufacturing techniques into the manufacturing industry. This sector is one of the largest in the world and faces serious problems of technology and innovation; therefore, there are many backward industries. MIC2025 seeks to mitigate these deficiencies through a megaproject approach (Lin, 2020). Also, MIC2025 sketches out a three-step strategy to upgrade the Chinese manufacturing industry towards an “industry 4.0” 1) innovation and efficient manufacturing processes to achieve industrialization by 2025. 2) China should be at the level of the manufacturing base of developed countries to compete with them by 20235. 3) China will be a manufacturing superpower. For the latter strategy, MIC2025 establishes clear principles, goals, instruments, and specific industries (Cheung et al., 2016). For instance, it has five sub-plans aimed at facilitating government participation: Manufacturing innovation center construction plan, Intelligent manufacturing plan, Core industrial capability strengthening plan, Green manufacturing plan, High-end equipment innovation plan. Also, it stresses ten priorities industrial areas among them agricultural equipment, aerospace, biomedical, railway, marine engineering and ships, new energies, new materials, power generation equipment, and of course automated machine tools and robotics and the new generation of information and communication technology (ICT), which will focus on three main technological areas: microchips and related hardware, information and communication devices, and industrial processing systems and software. These last two industrial priorities are particularly relevant to technological competition.

Can the United States deter Beijing’s techno-nationalist ambitions? It depends on the seriousness of the Chinese challenge (Bey, 2018, p. 33). China is strongly responding to an innovation imperative as a rising power, putting forward strategies and plans to be able to obtain, make and take technologies (Kennedy & Lim, 2018). MIC2025 is the route the Chinese government has set out to achieve “self-sufficiency” and become a “manufacturing superpower” (Laskai, 2018b). As expected, this plan has been highly criticized by the US government. If China continues its technological push as it has so far, US superiority will likely extend for another decade until it is finally surpassed (Rasser, 2020).

Nature of the Conflict: Low or High Politics?

The Donald Trump administration has published two documents highlighting the international scenario that the United States is facing and the necessary actions to be taken. The first document is the 2017 National Defense Strategy (NDS) and 2018 National Security Strategy (NSS). In these documents is possible to identify a particularity that articulates both strategies: the return of great power competition (Trump, 2017, p. 27). The United States is involved in a great-power competition with China and Russia, and today it is the biggest national security threat they have to face (Mattis, 2018, p. 1), displacing the threat of terrorism into the background. Strategic competition is the best way to avoid large-scale conflicts (Blankenship & Denison, 2019, pp. 43-44), and to face this competition, it is necessary to maintain political, economic, military, and technological advantages (Trump, 2017, p. 3), because “every domain is contested—air, land, sea, space, and cyberspace” (Grieco, 2018, p. 3). Swaine (2018, p. 55) argues that the Chinese authorities very badly received these documents because the US “ignore Beijing’s supposedly cooperative, win-win approach and peaceful intentions” (Swaine, 2018, p. 55).

The NDS (2017) and the NSS (2018) are major shifts in US foreign policy. Distinguishing it diametrically from the foreign policy that the Obama administration had towards Russia, but especially towards China “shifting from an engagement-based approach toward a competition-based one” (Mori, 2019, p. 77). This change in approach is mainly motivated by the prolonged and failed US strategy towards China (Friedberg, 2018, pp. 15-17).

These documents serve as policy guidance for specific US national security and defense priorities. In both documents, Beijing represents a competitor and a threat to US prosperity and security. In this sense, following a competition-based approach, it is possible to identify three shifts towards China under the Trump administration:

First, the US government has begun to operate in a very coordinated way to address the unfair acts of Beijing, namely forced technology transfer, intellectual property theft, cyberespionage, cyber-theft, market access, and the large trade imbalance in China’s favor (Lau, 2020, pp. 32-34). For instance, the United States, through the Committee on Foreign Investment in the United States (CFIUS), has prevented investment in American technology companies by the Chinese venture capital firm. The power granted to this Committee by the Foreign Investment Risk Review Modernization Act (FIRRMA) is that it is even allowed to directly block potential purchases and investigate foreign entities. One of the most notorious cases is the blockade that the CFIUS made to prevent the purchase of US Lattice Semiconductor, which produces chips for the development of artificial intelligence technology (Hoadley & Lucas, 2018, p. 11). According to the White House, the purchase was blocked because its sale carries a national security risk due to Beijing’s support for the operation (Johnson, 2019a, p. 10).

Second, the United States Congress has also done its part by actively participating in the approval of several legislation limiting China. The approval of the 2019 National Defense Authorization Act (NDAA2019) allowed the increase in the Department of Defense budget. The defense spending budget increases to meet the expenses involved in modernizing the US military and maintaining military preeminence and forward-based presence. The Department of Defense has shown special attention to the need to incorporate new technologies – “big data”, artificial intelligence, quantum technology, 5G, and robotics to ensure the US military’s technological advantage and compete with China.

Third, the issues addressed by the present administration are more varied and more politically sensitive, denouncing human rights violations within China, supporting the movement “Occupy Central” in Hong Kong (Jisi & Ran, 2019, p. 3), and expressing intentions for greater political participation in areas under political tension such as Taiwan and Tibet (Sutter, 2017, pp. 70-71).

As discussed above, relations between China and the US have shifted towards a more competitive relationship. At least two broad types of competitions appear to be taking place between the United States and China. First, the dispute is mainly about being first in emerging technologies with military use. The country that achieves the most militarily relevant innovations will be the one that obtains the largest benefits (Barnes & Chin, 2018). It is estimated that the new generation of technologies will ensure military superiority, information superiority, and economic superiority (Allen & Chan, 2017). Artificial intelligence has raised several alarms in matters of national security because on the battlefield, it provides speed and lethality. It also opens vulnerabilities to strategic nuclear stability (Fitzpatrick, 2019). Both countries have prioritized the development of AI technology. China has gone one step further, projecting that by 2030 to dominate the field of AI.

The Sino-American rivalry is not only commercial but also encompasses different dimensions. It should only be noted that after the tariff measures taken by the US in 2019, immediately after the attacks on Chinese technology companies began. The Trump administration prohibited US agencies from acquiring Huawei and ZTE equipment, and imposed greater restrictions on technology exports, put up stiff resistance to the adoption of Huawei’s 5G technology at the same time that discouraged allies from allowing this technology into their countries. Allies, such as Australia, New Zealand, and Japan, followed the American instructions. In 2012, US House Permanent Select Committee on Intelligence report indicated Huawei as a company that represents a risk to the security of citizens because of dubious handling of information on devices and suspicions of a backdoor that allows them to collect information, functioning as a means of cyberespionage (Heinl, 2017, p. 140) and also a threat in the military sphere due to the company’s relationship with the People’s Liberation Army of China (PLA) (NO, 2017, p. 3). However, the accusations stated by the US have been rejected by Huawei company, and to add evidence to their statement, Huawei has allowed the equipment they produce to be examined by experts from Government Communications Headquarters (GCHQ) in search of malicious software or backdoors and so far they have not found anything wrong (Inkster, 2019, p. 109).

The international market positioning of Chinese companies is becoming more and more noticeable. Now more than ever before, China is competing more closely in the creation of advanced technologies, so one of the US priorities is to discourage the pace at which Beijing advances in technology development (Inkster, 2019, p. 109) for national security and commercial reasons (Lau, 2020, p. 22). The trade war is only one manifestation of the real competition in technology (Chen et al., 2019, p. 5; Lau, 2020, p. 19). The US attempts to counter China’s efforts to become technological leadership and maintain its position as a dominant power by driving the world into a cold war over technology.

Second, a geopolitical rivalry for dominance in third states occurs on at least three dimensions: “maritime competition, competition for infrastructure funding, and competition for the digital network” (Mori, 2019, p. 81). To counter the “Made in China 2025” plan and China’s “Belt and Road Initiative”, the United States has pushed the “Free and Open Indo- Pacific Strategy” (FOIP) (Jisi & Ran, 2019, p. 3). The strategy includes Australia, France, India, Indonesia, Japan, and the United States. The central idea is to transform the Indo-Pacific region into broader regional cooperation by thinking of the region as one maritime zone. Economic, military, maritime, and foreign policy aspects are discussed to achieve it (Scott, 2019). The United States has shared interests with Japan and Taiwan. Japan, which is at the juncture of deciding whether to counter or support China’s rapid growth (Hosoya, 2019), and of course Taiwan, whose close relationship with the United States has raised concerns in mainland China (Auslin, 2018). However, both countries are experiencing a growing maritime pressure of The People’s Republic of China (PRC) as a threat to their security (Scott, 2019, p. 49), and FOIP would help them decrease the tension with China by having the United States as an allied. The projects developed by China in recent years are interpreted as an indication that China is seeking greater global projection with geostrategic repercussions, for instance, the digital Silk Road (Vila Seoane, 2020), the Maritime Silk Road Initiative (MSRI), and the Silk Road Economic Belt (SREB) are projects with geopolitical impact (Blanchard & Flint, 2017). Jisi (2014) is of the opposite opinion. It considers a “march westwards” strategy, that is to say, the creation of multilateral relations with countries located in the west by China can benefit the relationship with the United States because it functions as a “rebalancing” that would avoid a confrontation at sea or on Chinese territory. In this sense, the mentioned proposals should not be interpreted as China’s expanding global influence (Jisi, 2020) but rather as a “rebalancing” for more balanced Sino-US relations.

The US has a special interest in maintaining regional access to Asia to counteract China’s influence. Its main strategy is to form strong alliances, such as the partnership with India (Parameswaran, 2018). However, the Trump administration has not been efficient in making allies; on the contrary, it repels them by initiating trade wars with partners and adversaries (Blankenship & Denison, 2019, pp. 51-52). In addition to the projects China is carrying out in the region and which, given their scope, extend beyond the region, it is gaining influence through economic and political involvement with different organizations such as the Association of Southeast Asian Nations (ASEAN) (Noguchi, 2011, p. 76). It also aspires to become a maritime power to “ensure access to energy resources, foreign trade, and direct investment, but also to guarantee its protection against possible external threats” (Noguchi, 2011, p. 66). The reaction of other nations to the Chinese nation with a greater global presence can impact their domestic development and their participation in the international sphere. However, the international community’s correct interpretation of China’s aspirations and values as it seeks its place in the international order will be important in shaping its relationship with the Western powers in the long run (Jisi, 2011).

There are at least three motives why Washington chose to follow a competition-based approach to China now and not before. First, the growing perception within the United States that a relationship based on engagement in the common interest has left them with few benefits, and conversely, China has taken advantage of this situation. As an example, the constant infringement of property rights and espionage for economic purposes. Second, the American business community has expressed its discontent with the unfair competition they face within China and on US soil from Chinese competition. Third, the US sees the potential in China to interfere in domestic politics and influence societal opinion, including using devices to extract data from citizens (Mori, 2019, pp. 79-80).

The following sections outline how technological competition is developing in three ways: cyberspace, military technology, and artificial intelligence.

Cyberspace: A Battlefield for the US and China Rivalry

Cyberspace has become a contested domain, a critical battleground for the United States and China. In the last decade, the increase of cyber interactions in this domain provides us with enough information to analyze the motivation for competition between these two powerful states. As a matter of fact, both countries have ambitions for wide-ranging and rapid military modernization implementing new technologies and cyber capabilities. China has consistently focused on modernizing its military forces and developing military capabilities. Firstly, to maintain its regional dominance in the South China Sea, a region in constant dispute, and secondly to be able to cope with the US military power. Also, China competes for military dominance motivated by a desire for survival that goes beyond sovereignty and territorial integrity but is expressed in terms of keeping their resources and interests intact, so military competition is necessary for their survival.

Military superiority is one of the elements that have kept the United States as a hegemonic power. Therefore, China’s actions have not gone unnoticed within the US defense and security community, and it has started to see a potential military rival in China, largely because there are many doubts regarding its capabilities and intentions. The motivations of both powers are leading us towards a direct military competition. The American government is motivated to be the leader in developing new and more sophisticated military technologies to maintain defensive military superiority but, above all, offensive to deter rivals while maintaining its global influence. For the United States, survival is one of the vital motivations to compete because within an anarchic international system, there are attempts to challenge its hegemonic role.

The PRC has begun to compete against the United States for military superiority, mostly through cyber capabilities for warfare in cyberspace (Domingo, 2016, pp. 157-158). China cannot compete with the US in conventional military force; the Lowy Institute Asia index 2018 shows the big difference in military capability among these great power; the United States score 94.6 out of 100, China 69.9, and in third place, Russia 61.4 (The Lowy Institute, 2018, pp. 5-11). China has a special interest in competing with the States in cyberspace because it takes advantage of the United States in this domain, dependence on the Internet to operate its critical national infrastructure, modest cyber defense, and weaknesses of US cyber-based systems. China is using the United States’ cyber-dependency to its advantage.

Cyber dependence is a notion employed by Valeriano and Maness (2015), which measures the dependence of a state on the Internet to carry out its daily activities and the functioning of its infrastructure. Among the most cyber-dependent states in the world is Estonia in the first place, the United States, Germany in the same degree, and a little less China (Valeriano & Maness, 2015, pp. 25-26). The more cyber dependent a state is more cyber threat faces. Furthermore, cyber dependence associated with the “network readiness” notion, disclose why it is more important to control what happens in cyberspace for some state than for others. In this case, the US and China’s network readiness are among the highest in the globe. This argument is well explained by Eriksson and Giacomello (2009, p. 209):

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After a century of humiliation, China is beginning to revise the US-led international system, so Western interpretations of cyberspace and internet governance are being put on trial (Bey, 2018, p. 32). China is negotiating with the West international cyber rules that benefit its domestic policies (Bey, 2018, pp. 34-35) to ensure its national security, which depends largely on controlling the flow of information in cyberspace and Internet filtering. Jiang (2010) notes that Washington underestimates Beijing’s capabilities to regulate the Internet. Consequently, there are an Internet Governance Wars (Franklin, 2009), between a single, connected internet promoted by the US. and a bordered internet endorsed by China, whose proposal is incompatible with the actual Internet governance regime; Internet Corporation for Assigned Names and Numbers (ICANN), the Working Group on Internet Governance (WGIG) and World Summits on the Information Society (WSIS) organizations dominated by public and private actors from the United States (Eriksson & Giacomello, 2009). American and Chinese ideas about the rules that should govern cyberspace are linked to the political positions they hold (Bey, 2018, p. 31). China is more emphatic in emphasizing the idea of cyberspace as a part of its territory over which it has sovereignty and does not allow it to function without its direct administration (NO, 2017, p. 4) and less allows the interference of external forces that impose rules on how the Internet should function within its border, cyberspace is inviolate and indivisible (Heinl, 2017, p. 136).

For the US, cyberspace represents a critical battleground because it allows competitors to operate continuously against them in search of strategic advantage and gain influence or control by breaking down networks and systems (Nakasone, 2019, pp. 13-14). The first initiative presented by the US government to counter the security challenges introduced by cyberspace is The Presidential Decision Directive 63 (PDD-63). It was developed in 1998 to protect the United States from the growing threats from cyberspace that can endanger national security. PDD-63 had a largely defensive emphasis, establishing the need to integrate computer network defense and computer network attack capabilities to maintain military dominance and address any threats from nations or non-state actors against American interests. More recently, in 2009, the United States Cyber Command was established. It is a joint command for offensive and defensive military operations in cyberspace (Sunday, 2016, p. 162).

Espionage in Cyberspace: An Old Conflict with a New Face

While state-sponsored cyber-attacks are accepted as a natural form of coexistence in cyberspace, industrial espionage and cyber-theft of intellectual property are being pointed out as the no-go line (Bey, 2018, p. 35) among great powers. China has been in an espionage dispute with the United States for over a decade (Akyesilmen, 2018, pp. 233-236). Valeriano and Maness (2015, p. 47) define cyberespionage as “the use of dangerous and offensive intelligence measures to steal, corrupt, or erase information in the Cyber-sphere of interactions”. China is expertise exploiting gaps in America’s cyberspace defenses; this tactic avoids direct confrontation in another realm of cyberspace. Espionage works as a low-level demonstration of a cyber capability. China has launched several cyber espionage campaigns against the US government and the private sector (Goodman, 2010). Unit 61398 and 61486 are two of the principal espionage groups which frequently targeting US political and military intelligence. Cyberespionage can be used long or short-term depending on the purpose. In the short-term, “consistent with covert actions, either gains access or merely sends an ambiguous signal of resolve altering short-term strategic calculus” (Valeriano et al., 2018). In the long-term, espionage seeks to manipulate the balance of information to accomplish a position of political, military, or economic advantage (Valeriano et al., 2018). China is most likely to engage in an espionage attack, both short and long-term. The US is most likely to engage in degradation operations. From 2000 to 2016, the US-Chinese dyad experience overall 48 Cyber conflicts, China 43 times initiated the incident and five by the US. The aim of China within these 48 interactions, 34, was short- and long-term espionage (Brandon & Maness, 2000-2016).

At present, for the US, the highest cost comes from intellectual property theft (IP theft) (Nye, 2017). According to Read (2014), the suitable concept for intellectual property theft performed online is economic cyberespionage, define as “the practice of infiltrating these networks to acquire a trade, technological or economic information to benefit a foreign country or foreign agent”. Because the benefits far exceed the costs, China has no incentive to restrict its behavior (Nye, 2011). For example, in 2013, Chinese hackers exfiltrate data related to the C-17, a military transport aircraft, the C-17 research, and development cost $3.4 billion. Unquestionably, economic cyberespionage is cost-effective (Segal, 2016).

Read (2014) notes that after the 2010 Google’s disclosure that China successfully infiltrated its network, the US government modified its position to the economic cyber-espionage threat. The attack on Google and at least 20 other companies is known as Operation Aurora and started in 2009. Until Operation Aurora, US politicians did not take proactive decisions to obstruct the economic cyber-espionage campaign. After Operation Aurora, the Obama administration showed significant attention to intellectual property management and economic cyberespionage. In the Sino-American relationship, these became dominant issues. In September 2015, President Obama threatened with economic sanctions against Chinese firms over state-sponsored cyber-attacks on American companies. The same year the two nations reached a bilateral agreement to halt cyberattacks used for economic espionage, which led to a decrease in this type of interaction. However, by 2018 China had started to enter the US networks again. In 2018, the United States launched The China Initiative to stop the theft of intellectual property by China and make it clear that these types of practices are not tolerated anymore (Healey, 2019). Nevertheless, to date, this remains an issue on which both nations have not reached a final agreement and remains a tense aspect of the bilateral relationship (Healey, 2019, pp. 143-144).

Intellectual Property (IP) theft can be of three types: patent theft, copyright theft, and trade secret theft. According to cyber studies literature, one of the main perpetrators of intellectual property theft is China. Trade secret theft, defense technologies, computer software, and source code are protected by US trade secret laws and are especially vulnerable to theft through hacking, international investment, or switching of companies from senior managers who take with them the knowledge to reproduce such technology (Healey, 2019, pp. 140-143). There are also American technology startups for which the Chinese market is too attractive, and the only way they are guaranteed market access is by offering to transfer technology to the Chinese government. Although American intellectual property laws protect the technology operated by these companies, American trade secrets are exposed through this legal mechanism imposed by the Chinese authorities on foreign companies. In this way, they manage to get hold of foreign technology (Healey, 2019, pp. 143-144). China’s interest in accessing and developing new technologies through cyber-espionage threatens US economic competitiveness and has long-term costs to US innovation capacity (McRaven, 2019, p. 5) and defense capability.

China’s use of cyber-attacks for industrial espionage is linked to its industrial policy. Together with several projects, cyberspace is aimed at making the country capable of producing high technology and designing its products and goods. AI technologies have received much attention from the Chinese government, and even though the United States leads this area, China is the fast-follower, allocating billions in investment and financing, since 2014 surpassed the United States in AI research and AI-related patent registration. Today is indisputable Chinese leadership in frontier technologies (McRaven, 2019, p. 40). Nevertheless, US national security points out that the illicit behavior of the Chinese government is the means by which the government has achieved some technological advance and if in the future they manage to innovate, it will be the result of IP cyber theft and illegal technology transfer (Deutch, 2018, pp. 44-45).

China has no valuable reason to stop stealing intellectual property; on the contrary, the economic, technological, and military benefits deriving from this practice are far greater. Neither economic sanctions nor bilateral treaties have been able to eliminate this type of attack. The US cyber command has stated that the constant attack to which they are subjected in cyberspace requires them to fight and defend forward because their adversaries are engaged in offensive, defensive, and espionage operations, and these threats must not go unpunished (Healey, 2019, pp. 1-5).

The US cyber forces operate with a joint cyber strategy that combines cyber deterrence and active defense strategies; which consists of a constant presence in the cyberspace of the US cyber forces to be able to analyze the behavior of the enemy and “warn targets of the details of coming (or ongoing) attacks, improving US defense” and in the use of “cyber capabilities for deterrence purposes” (Healey, 2019, pp. 5). It should also be mentioned that the US cyber mission force has the power to carry out offensive operations, in the first instance to support “operational plans and contingency operations”, and when the nation is the victim of a cyber-attack of significant proportions, it can carry out “action beyond blocking and after-action mitigation” (Kehler et al., 2017, p. 74). The 2015 White Paper on Military Strategy also made it clear that China’s actions in cyberspace also contemplate active defense understood as “strategic defense and operational and tactical offense” (Kania, 2015) cyber-attacks are a means of reaction against any action that poses a threat (NO, 2017, p. 6). The force deployed in cyberspace is a sign of the increasing militarization that is taking place in this domain (Deibert, 2011).

The Militarization of Cyber Domain: Who Leads It?

The narrative of IP theft as a national security issue allows the United States to make two strategic moves; first, it allows it to point to states directly as being responsible for the theft of IP, for example, on the occasions that the United States has pointed out this practice, it directly blames China, rather than a group of hackers like The Red Hackers. Second, the division between “domestic economic innovation and the production of classified information” (Halbert, 2016, p. 256) becomes ambiguous as a consequence, the narrative of IP theft as a threat to national security is being used to validate the dominant presence of the United States in cyberspace, enhanced surveillance and control over the Internet for national security reasons.

Halbert (2016) identifies that it was in the document issued in 2008 entitled Report to the 44th President of the United States on Cybersecurity where the relationship between intellectual property and national security began to be shaped, and subsequent to this document is that the narrative began to be repeated in the following official documents issued by US presidents about the cyberspace (Halbert, 2016). In the May 2011 report International Strategy for Cyberspace, it states that to protect economic and national interests from threats such as IP theft, diplomacy will be used first but will also seek to deter and stop potential actors from threatening US national and economic security in cyberspace (Halbert, 2016, pp. 257-258). Intellectual property as a national security issue has “achieved a level of political valence akin to the elusive threat posed by the war on terror” (Halbert, 2016, p. 261) and open the possibility of military escalation (Halbert, 2016, p. 264). The increasing militarization of cyberspace and defensive actions of the US and China raise doubts about whether cyberespionage will continue to be interpreted as an unfriendly act or will have the impact of being considered an act of war.

On the other hand, there is reason to be concerned about the “danger discourse” around intellectual property theft that is being used in the first place to mobilize the military budget towards a strong cyber strategy which requires an accumulation of cyber resources and personnel to address the growing threats from the cyber domain, including intellectual property theft from state and non-state actors. Second, it is being used to monitor internet traffic, including a more in-depth analysis of civilian data.

At the end of the Pax Britannica, the United States took the place of global leader, which it has maintained mainly because of its scientific development, which has guaranteed economic and military supremacy over the other powers around the globe (Paarlberg, 2004). However, its technological leadership seems to be under threat. In 2004, Adam Segal wrote the essay is America losing its edge? and stated, “it would be premature to declare a crisis in the United States’ scientific or technological competitiveness” (Segal, 2004). Sixteen years have passed since then, and the United States’ situation is not the same. With its economic power, China mobilizes large investments towards the technological sector and rivals the United States in scientific or technological competitiveness (McRaven, 2019). China’s intentions are not limited only to dominate labor-intensive manufacturing. The government is trying to develop China’s indigenous technological capabilities to achieve military superiority, while the United States uses the arms embargo and tightened transfers on high technology, trying to constrain China’s rise (Goldstein, 2015).

The technological development promoted by the Communist Party is recent compared to other industrialized countries. It started only 30 years ago. From 1950 to 1980, the government decided to open its market to foreign capital in exchange for technological transfer. In this period known as techno-nationalism, the manufacturing industry was primarily developed. In the 1990s, the government decided to make a strategic shift by emphasizing indigenous innovation because while neighboring countries like Korea and Japan produced high-end, high-tech products, China produced low-cost manufacturing products. By supporting enterprises through subsidies, free land, and low taxes, companies like Huawei could flourish. The government dramatically increased its participation in technological development and became the guide of a “national technological innovation” phase (Liu, 2016, pp. 4-5). It was also a strategy to counter the US embargo imposed in 1989. The embargo covers mainly US defense technology and military systems. Since 1990, the defense industry has been a priority for the Chinese Communist Party (Bräuner, 2013, pp. 557-558).

China has two purposes in enhancing its military power, in principle to weaken the US military advantages (Shifrinson, 2020, p. 197) in Asia-Pacific (Simón, 2020, pp. 5-6) following the philosophy of “win without fighting” and in the long run to catch up with the US and become a science and technology power (Kania, 2017, p. 5) to ensure military superiority in all domains. Friedberg (2018, p. 35) says that in Asia-Pacific, the US power projection system has been eroded by China’s anti-access/area denial (A2/AD). In addition, he states that China is developing a naval strategy to project power beyond its shores, reaching out to “the Indian Ocean, the Persian Gulf and off the coast of Africa” (Friedberg, 2018, p. 38). As far as China is concerned, complemented and supported by other political instruments, the military instruments of the United States have two purposes: first, to enable the integration of Beijing into the processes of cooperative security and actions compatible with American interests in general. Second, to provide security to Asian allies by demonstrating that the United States has the military capability to provide security in the area and to discourage China from using military force as a means of conflict resolution in disputed areas, whether islands or states such as Taiwan (Swaine, 2011, pp. 147-148).

The ongoing military competition between the US and China is driven by two critical characteristics of the world technological scene. First, the commercial use and development of technologies such as artificial intelligence and quantum computing have increased. These technologies are both for military and civilian use making their proliferation and reflects greater diffusion than technologies exclusively for military use, resulting in state competitors and non-state actors being able to acquire them. Second, the first line of military competition is innovation because the development of high technology requires closing the gap between development and military implementation.

Washington and Beijing have responded to the changing innovation landscape. For its part, the United States has established Defense Innovation Unit Experimental (DIU) to get involved in the ecosystem of commercial, technological innovation. Chinese leaders have consolidated a civil-military fusion strategy that removes barriers between the private sector and the military-industrial base (Laskai, 2018a). China intends to transfer the success of the technology sector into military power. The civil-military fusion strategy allows it to involve the country’s high-tech civilian companies in defense projects.

In May 2016, the Innovation-Driven Development Strategy (IDDS) was officially declared by Beijing. The focus of this strategy is China as a champion of innovation. It provides an insightful and forward-looking projection of China over the next three decades.

1. Becoming an “innovative country” by 2020

2. Joining the leading edge of advanced innovation countries by 2030

3. Becoming a strong global innovation power by 2050

In this regard, Xi Jinping has declared: “To carry out the innovation-driven strategy, the basic thing for us is to enhance our independent innovation ability…” (Xi, 2014, p. 134) because “Under a situation of increasingly fierce international military competition, only the innovators win” (Zhong, 2017). China has developed three projects in which it has set the course for the next decades to increase its technological capabilities. Integrated Circuit (IC) 2014 Guidelines aim to reduce the dependence on US integrated circuit manufacturing by developing a local industry that produces chips and meets the consumer needs of Chinese industries. Perhaps one of the most well-known projects is Made in China 2025, an ambitious project that aims to transform the manufacturing industry through three transitions “From China’s speed to China’s quality; from China’s products to China’s brands; and from ‘made in China ‘created by China” (Liu, 2016, p. 2). Implementing this strategy requires industries to modernize their factories to apply smart technologies and solve the challenges they face, such as labor costs, pollution, and delays in production and export. Next-Generation Artificial Intelligence (AI) Development Plan aims to make China a world leader in AI by 2030.

In addition to the civil-fusion strategy, in the behavior of the Chinese government, one can identify the development of the “Going Out” strategy that encourages technology transfer from overseas (Mori, 2019, p. 82). China is investing billions in new American companies with cutting-edge products that could have military applications. China’s interest in US startups is focused on artificial intelligence and robotics. In this sense, the Trump Administration has made two important and necessary moves to define the future of the United States: reviewing carefully the process that allows Chinese investment in critical technologies and better controls on exports of sensitive technologies (Segal, 2019).

Artificial Intelligence Competition: A New Arms Race?

During the last decades, a technology that has burst onto the political scene is artificial intelligence (AI). Artificial intelligence can disrupt the international system (Demchak, 2019) and affecting the balance of power (Horowitz et al., 2018; Kania, 2017). Artificial intelligence can add sophistication, speed, precision, and lethality to military and strategic affairs (Payne, 2018). AI is a set of various computational techniques which operate in different dimensions, physically on objects: tanks, airplanes, robots can function without human intervention. In a non-tangible way, it operates in the processing and interpretation of information through image-recognition algorithms (Horowitz, 2018, p. 48). Also, AI is developed due to four analogous inputs “abundant data, hungry entrepreneurs, AI scientists, and AI-friendly policy environment” (Lee, 2018). These four inputs are found in large numbers in China.

We are entering into a phase where two great powers have an equal goal: to be the leader in all aspects of AI. Authors like Barnes and Chin (2018) estimate that this situation is triggering an escalating AI arms race because both nations want to be the first to find military applications of AI. Horowitz (2018) supports their point of view. He adds that there is a strong possibility that the use and development of autonomous lethal weapon systems will lead to an arms race. After all, military technology determines how wars will be fought and won (Sechser et al., 2019, p. 732).

The Pentagon has been closely following China’s movements, especially those involving military investment. Since 2014, the United States has initiated efforts to become a leader in AI to increase and maintain its economic and military power. Barnes and Chin note that William Roper, then the head of the Pentagon’s Strategic Capabilities, played a key role in getting the US government to take that direction and gain an advantage over China in the field of AI. However, in May 2017, a game between Ke Jie -the best player on earth of Go- against AlphaGo -one of the most advanced AIs in the world- triggered China to have its “Sputnik Moment”. AlphaGo’s victory from the Western viewpoint represented the victory of the machine over man. According to Lee for China, that game visualized in real-time by millions of Chinese affected the Chinese psyche and government policymakers, the West overwhelmingly showing its technological superiority and dominance in an era of artificial intelligence (Lee, 2018, pp. 11-29) which led the Chinese authorities to react.

Two months later of the Go game, China revealed to the world the New Generation AI Development Plan 2017, in it establishes its firm intentions to lead the world in AI by 2030, also sets out a three-dimensional agenda, namely “tackling key problems in research and development, pursuing a range of products and applications, and cultivating and expanding AI industry to 1 trillion RMB ($150 billion) by 2030” (Kania, 2017, p. 9). Since its release, China’s national AI Plan has promoted AI as a high-level priority for Beijing. Military-Civil Fusion AI has made China emerge as an AI powerhouse by working as one team with companies such as Baidu, Alibaba, Tencent, and iFlytec (Horowitz et al., 2018, pp. 12-14).

Harnessing AI Technology, the Chinese Communist Party (CCP) intends to strengthen its national and military power (Ahmed et al., 2018). According to Barnes and Chin (2018), to overtake the United States in the field of AI, China has adopted the American strategy to use it against them, firstly the creation of a Chinese version of the Defense Advanced Research Projects Agency (DARPA) called The Scientific Research Steering Committee, which will report directly to President Xi Jinping and secondly investing heavily in Zhongguancun where China’s Silicon Valley is located.

The first White House initiative in artificial intelligence was carried out in 2016 during the Obama administration’s National Artificial Intelligence Research and Development Strategic Plan. However, it was not until February 11, 2019, that the United States presented a whole-of-government strategy called AI Initiative. The fact that it took three years to present an AI strategy has been criticized, pointing to the slowness with which the White House has pushed cutting-edge technologies (McRaven, 2019, pp. 47-48). Key principles stated in Obama’s report were adopted more quickly in China than in the United States (Horowitz et al., 2018, p. 10). Dascalu (2018) compares the policies in AI presented by Obama and Trump concludes that: “the development of foreign AI policy will benefit the US as it will be a way to gain power through AI technologies and pursuing hegemony, as power will assure the survival of the US” (Dascalu, 2018, p. 35). In the last two years, the present administration has put considerable effort into prioritizing the development of artificial intelligence, a joint effort of both the White House and federal agencies to ensure that the US remains the world leader in AI. The most recent action by the White House was announced in February 2020. President’s FY21 budget commits to double AI R&D over two years and the recent adoption of AI ethics principles by the Department of Defense.

In general, both countries have prioritized AI because of the economic advantages that can be obtained from creating AI for specific uses by having the advantage of being the first IP registrars to ensure economic leadership. And secondly, the military advantage over the opponents by applying AI capabilities to their military (Horowitz et al., 2018, pp. 11-12), such as automation of decision making, command and control, and autonomous systems. For China, artificial intelligence matters because it is crucial to the future global military and economic power competition, and also, achieving leadership in AI technology is a step towards reducing dependence on international technology imports (Allen, 2019, pp. 3-4). It is crucial for the US to achieve an offset strategy -first nuclear weapons, second stealth, and precision strike- and AI is announced in the US as the third offset strategy (Payne, 2018, p. 7).

Halbert (2016, p. 262) suggests that “the data theft undertaken by the Chinese is specifically designed to improve their military and technological capacities”. However, having access to AI technology through cyber espionage or mimicry is not easy. Firstly, mimicking AI applications is expensive and complex. Governments that have developed this type of technology are forced to deal with the components in secrecy, which means that they are not found on the market mainly because they are classified. Also, the technical knowledge needed to develop, adapt, or modify algorithms and develop AI-based military capabilities requires advanced knowledge. Getting an AI application to work properly can take a long time. Secondly, the cybersecurity used by military technology to prevent hacking and spoofing is very high compared to the technology intended for civilian use, which adds an extra layer of security against copying attempts.

Is America Prepared for Winning the Competition Against China?

During the Cold War, the United States increased its power by engaging in internal and external balancing and overcoming the USSR. Since the end of the Cold War, the US has followed a strategy of primacy in different areas, domestic economic growth, technological innovation, and military might. However, nowadays, the US primacy seems to have ahead of the challenges that can take it to a level of competition similar to that of the Cold War. Blankenship and Denison (2019) question the capacity of the United States to successfully face this stage of the great-power competition against China because they perceive that the United States lacks internal and external balancing. Internal balancing is based on developing military and economic capabilities “and investing in technologies and other domestic areas that help convert the latent capabilities of the state into material strength” (Blankenship & Denison, 2019, p. 45). In contrast, external balancing represents the creation and strengthening of strategic alliances to face a common threat. As long as the United States does not change its strategy in critical areas such as human capital, a better relationship with the private sector, and R&D expenditures, the risk of losing the present competition to China is real.

#### Technological parity encourages Chinese aggression---that goes nuclear.

Gerald C. Brown 21, Defense Analyst, Valiant Integrated Services, "Understanding the Risks and Realities of China’s Nuclear Forces," Arms Control Association, 06/01/2021, https://www.armscontrol.org/act/2021-06/features/understanding-risks-realities-chinas-nuclear-forces.

Nevertheless, China’s capabilities represent a substantial threat that must not be ignored. Quantitative comparisons of nuclear arsenals are a relatively crude manner of understanding nuclear risks and, in the case of the U.S.-Chinese relationship, wholly insufficient. More than ever, U.S. policymakers need to understand Chinese nuclear strategy. In the U.S.-Chinese context, policymakers should be more focused on how conventional weapons and related strategies could impact the nuclear calculus between the two countries.

Chinese Nuclear Strategy

Unlike Russia and the United States, China has found nuclear weapons to be of rather limited utility in war-fighting. It built what it describes as a “lean and effective” nuclear deterrent, with the intentions of deterring a nuclear attack and preventing nuclear coercion.1 Strategists in Beijing have long thought that the destructive force of nuclear weapons limits their utility, while conventional forces are more flexible and usable in conflict. Conventional forces are thought to be where wars are won or lost.2 In that sense, China’s nuclear forces are intended to check U.S. nuclear dominance while winning conventional conflicts at lower levels of escalation. To make that happen, China is seeking to build a nuclear force capable of surviving a nuclear first strike and retaliating with an unacceptable level of damage. Experts have perhaps best described China’s nuclear strategy as one of “assured retaliation.”3 Instead of seeking parity with other nuclear states and being able to engage in counterforce campaigns, China finds it sufficient to maintain a more modest, secure, and survivable force. If China can sufficiently absorb a first strike and retaliate, even with only a few warheads, Beijing believes an adversary is unlikely to decide that the risk of attacking China is worth the benefit.

Since China’s first nuclear test in 1964, it has consistently maintained a public, declaratory no-first-use policy, adhering to what it describes as a “self-defensive nuclear strategy” that would anticipate using nuclear weapons only as a “counterattack in self-defense.”4 Western analysts have rightfully pointed out that a no-first-use pledge may not be entirely credible on its own. Although the pledge may be sincerely held, during a crisis, escalation could be unpredictable. Additionally, a small number of Chinese analysts have suggested that what China defines as a counterattack may be ambiguous under certain, limited conditions, such as conventional attacks seeking to neutralize China’s nuclear forces.5

Despite Western doubts, the fact remains that Chinese strategists believe that the pledge holds true. An unambiguous no-first-use stance remains the official stance of the Chinese government, and China’s nuclear strategy is built around this concept. Authoritative texts on Chinese military thinking have described three major missions for Chinese nuclear forces. In peacetime, they seek to deter enemies from launching a nuclear war with China. In wartime, they constrain the scope of war, preventing a conventional conflict from escalating to a nuclear exchange. If war does escalate to nuclear conflict, they serve to conduct nuclear counterattacks.6 The texts consistently describe only one envisioned use of nuclear weapons, the nuclear counterattack operation, in response to a nuclear strike.7

Operational practices have reinforced this. Beijing maintains a highly centralized nuclear warhead storage and handling system, with warheads typically thought to be stored unmated from their delivery vehicles rather than loaded and ready for launch.8 Further, training for nuclear brigades reflects the practice of counterattacking under nuclear conditions. Yet, there are indications of evolution. Recent U.S. government reports have suggested that some People’s Liberation Army Rocket Force (PLARF) brigades may spend time on higher alert and may seek to shift to a launch-on-warning posture in the future in order to increase survivability under nuclear attack. China has been developing a space-based early-warning system with assistance from Russia that could support this.9

Nuclear Force Projections

As the U.S. annual threat assessment noted, there are signs of recent substantial changes in Chinese nuclear forces. The most important changes have been primarily qualitative, but notable quantitative changes are also occurring. These are understandably alarming to U.S. policymakers. Although the size of Chinese nuclear forces may still be dwarfed by the U.S. arsenal, its growth represents a substantial complication for the United States. Further, although the United States and Russia are modernizing their arsenals, they have been reducing their stockpiles over the past few decades slowly but significantly. China’s nuclear expansion represents a concerning shift away from its obligations under the nuclear Nonproliferation Treaty to reduce its arsenal, and that is likely to impact U.S. and Russian decision-making.

Yet, understanding these changes in the context of China’s nuclear strategy is important. Instead of trying to reach parity with or exceed the U.S. nuclear arsenal, China seems intent on ensuring that it has an assured retaliatory capability following U.S. strikes. Given U.S. nuclear and technological superiority, China likely has never had a sufficiently survivable nuclear deterrent against the United States, a goal that was more aspirational than anything else. Revolutions in intelligence, surveillance, and reconnaissance technologies, coupled with advances in conventional precision weapons, have long rendered China’s nuclear forces vulnerable. The U.S. ballistic missile defense program threatens to intercept any surviving retaliatory force, further jeopardizing China’s retaliatory capability.

For the first time in history, the People’s Liberation Army (PLA) seems to be moving toward a survivable nuclear force capable of executing a second strike. Research suggests that Chinese nuclear expansions and modernization are oriented toward creation of a more mobile and redundant force that can survive U.S. counterforce capabilities, including conventional systems such as the Conventional Prompt Global Strike system, and its missiles being able to penetrate U.S. missile defense systems.10 Consequently, although China’s nuclear force size will expand, it does not appear likely to expand to the size of the U.S. nuclear arsenal in the near future.

There is understandable doubt about the claim of China doubling its nuclear arsenal, but it does not appear to be out of the question. China is fielding an increasing number of multiple independently targetable reentry vehicle weapons, such as the DF-5B deployed in 2015 and the recently deployed DF-5C and DF-41, that improve the ability of China’s intercontinental ballistic missile (ICBM) arsenal to penetrate the U.S. missile defense system.11 Defense Department estimates do not appear to include the DF-41, which is just starting to be deployed. Installing multiple warheads on these weapons will quickly expand the number of nuclear weapons in China’s arsenal. Further, PLARF brigades have been increasing at an unprecedented rate. The number of PLARF brigades reportedly increased from 29 to 40 between 2017 and 2020, and brigades continue to be added as new missile types are fielded.12

China’s shift to a nuclear triad will further increase the number of its nuclear warheads as these new systems are equipped. China is creating a more survivable nuclear submarine force, expanding the number of Type 094 ballistic missile submarines and developing the quieter Type 096 submarine with the JL-3 sea-launched ballistic missile as a complement. The PLA Air Force is also adopting a nuclear mission by developing a new air-launched ballistic missile that may be nuclear capable, as well as the nuclear-capable H-20 strategic bomber.13

[Chart omitted]

Significantly, not all of China’s nuclear weapons are intercontinental forces capable of striking targets located in the continental United States. China has invested in nuclear weapons that specifically threaten the immediate region. Its new air capabilities, along with recently deployed midrange and intermediate-range ballistic missiles such as the DF-21E and the DF-26, hold regional adversaries and U.S. overseas bases at risk. China also recently deployed a new hypersonic glide vehicle, the DF-17, that may be nuclear capable. Importantly, although China’s nuclear expansion may be oriented toward a strategy of assured retaliation, that does not prevent Beijing from orienting its expanding nuclear capabilities toward a more threatening posture in the future. As China’s capabilities expand, its operational doctrine may well follow suit.

Emboldened Conventional Operations

China’s nuclear forces can be considerably more concerning when not considered in isolation from other tools of war. Analysts and policymakers need to look at how nuclear weapons can affect the broader picture of warfare, including how they impact PLA conventional operations and the type of wars China envisions fighting.

China’s military strategy is focused on “winning informationized local wars,” effectively local, high tech wars in which the information domain will play a dominant role. Although the PLA’s reach is increasingly global, it has oriented itself toward local conflicts, with a particular emphasis on maritime conflicts, as the main war-fighting domain. This primarily concerns Taiwan but also the East and South China seas among others.14 In 2015, the PLA made a drastic change to its command structure, orienting itself into joint war-fighting theater commands, directly geared to fighting in these regions. The PLA seeks to deter the United States from intervening in these local wars or to defeat the United States locally if it does.

In these local wars, nuclear overmatch against the United States is hardly necessary. Instead, China is more concerned with preventing U.S. nuclear coercion and intervention and constraining the scope of any war that may erupt. PLA strategists appear to believe that the United States would not intervene in a conflict that did not directly threaten the United States if there was a risk that the conflict could escalate to the nuclear level.15 As Zhao Xijun, former deputy commander of the Second Artillery Force, has said, states “become very cautious” when contemplating military intervention against other nuclear-armed states.16

Evidence suggests that a secure second-strike force may even embolden the PLA in local conventional conflicts, allowing them to accept greater risks at lower levels of escalation. That especially holds true when considering that all sides in China’s multiple territorial claims perceive themselves as defending the status quo.17 Research has revealed the PLA’s overconfidence in its ability to control conventional escalation. Unlike in the case of nuclear weapons, Chinese documents emphasize “seizing the initiative” early in conventional conflicts. They envision using tools such as cyberwarfare and conventional missiles early, hard, and fast, even preemptively.18 Although the focus of these writings is not nuclear weapons use, conventional operations could be emboldened by perceptions of nuclear stability.

Entanglement Risks

Another complication is that firebreaks between conventional and nuclear forces are increasingly blurred in modern warfare, and substantial risks exist when conventional strategies affect nuclear forces. One notable example involves discussions on space weapons. PLA assessments have highlighted the increasing importance of this domain, and the asymmetric weakness represented by U.S. overreliance on space in conflict. Critiques of Chinese military writings point toward the offense-dominant nature of such operations and the need to control the space domain early in conflict. They further assert that attacks against U.S. satellites would carry relatively low escalation risks and could even deescalate a conflict.19

U.S. satellite systems, however, are dual use, enabling a wide range of conventional and nuclear operations. Attacks against U.S. satellites would not only affect the country’s conventional capabilities, they would jeopardize the heart of the U.S. nuclear command, control, and communications and early-warning capabilities.20 Further, although Chinese military analysts highlight the advantages of engaging in satellite attacks during conventional conflicts, the same actions would likely be taken prior to a nuclear conflict in order to degrade the effectiveness of U.S. missile defenses and ensure the effectiveness of a nuclear strike. As a result, Washington would view any Chinese attack on its satellites as profoundly destabilizing, potentially inciting a U.S. nuclear response.

Similar entanglement risks exist with Chinese forces. PLARF bases all appear to host conventional and nuclear missile brigades. These are geographically separated from each other, but most of the weapons are on mobile platforms, creating overlapping risks when deployed. Conventional and nuclear forces seem to rely on the same supply and logistics infrastructure. Although command and control infrastructure are ostensibly separate, the extent of this separation is not fully understood, and overlap seems likely to exist.21 Additionally, China’s nuclear submarine force appears to share the same onshore communications systems with Chinese conventional submarines.22

Furthermore, an increasing number of mid-range to intermediate-range weapons systems are dual use. Although the DF-21 maintains distinct conventional and nuclear variants that are typically not co-located, they are likely indistinguishable when deployed. In the case of the DF-26, conventional and nuclear warheads are likely co-located. Reports have highlighted DF-26 brigades, equipped with conventional and nuclear weapons, that hold drills in which units launch a conventional attack and then reload with a nuclear warhead to prepare for nuclear counterattacks.23

In conflict, attacks against China’s shore-based communications systems that are directed at China’s conventional submarine force would cut off its nuclear-armed submarine force as well. Campaigns against China’s vast conventional missile force would almost certainly degrade China’s nuclear force too. The fixed bases supporting PLARF brigades would be likely targets as the dual nature of these bases means conventional and nuclear forces share the same base headquarters, resulting in severed communications and logistics networks for PLA nuclear forces. Even if China’s nuclear and conventional command and control networks were sufficiently separate, it would be challenging to distinguish between them. Conventional and nuclear midrange to intermediate-range weapons would likely be indistinguishable in conflict.

How would China respond to attacks against these dual-use systems and the degradation of its nuclear force? It is somewhat comforting that China’s ICBM force is relatively distinguishable from its dual-use weapons, and the majority of the force is located deeper within the Chinese mainland. What is not obvious is how strikes against regional-range nuclear forces would be perceived by Beijing in the middle of armed conflict. If China’s nuclear forces were degraded in any way, authorities could conclude that they no longer have a survivable deterrent. In the heat of a conflict, it is difficult to assess how Chinese decision-makers would react to this.

Further, a degraded Chinese nuclear force, in the middle of a crisis, could provide a tempting counterforce target for the United States. In such a case, there would be a challenge of perceptions, with neither the United States nor China truly knowing the other’s intentions. In conflict, with the ability to destroy China’s nuclear force or at least limit damage to itself should China opt for nuclear use, would the United States decide that a counterforce strike is worth the risk? The United States would understand that if it failed to strike, China could opt to use its remaining nuclear forces and inflict substantial damage. Similarly, knowing the United States faced such a dilemma and that it could face a disabling counterforce strike, China would be faced with strong use-it-or-lose-it pressures. All of these circumstances would be exacerbated by the fog of war, a degraded information environment, and the speed required to make decisions.

Some Western analysts have speculated that China’s conventional and nuclear weapons capabilities have been intentionally entangled to heighten the risks facing adversaries and to deter conflict. There is little evidence that this was a motivator. Instead, the PLA likely sought to take advantage of economies of scale. It is far cheaper and more logical for China to use the same designs for conventional and nuclear variants to its weapons, allowing for savings on manpower, production, maintenance, and research costs. Even so, this is hardly comforting and may leave the PLA less aware of risks resulting from a comingled system. States that entangle forces intentionally are likely better prepared for the risks involved. When such entanglement arises from nonstrategic reasons, as seems likely in China’s case, states are less aware of the escalatory risks, which may exacerbate escalatory pressures in a conflict.24

War Control and Inadvertent Escalation

There is little evidence that technological entanglement is a direct, strategic choice, but there are some limited indications that China could use nuclear signaling to constrain the extent of conventional conflicts and contribute to escalation control.25 Nuclear signaling includes such actions as test launches, release of the locations of targets, an increase in readiness levels, missile deployments, or other actions to demonstrate resolve. The goal would not be necessarily to use nuclear weapons. Instead, the signaling would aim to raise fears that a conflict could credibly escalate to the nuclear level, thus “causing the enemy to dread that the possible consequences of its actions will be that its losses will exceed its gains, thereby causing the enemy to change its plans for risky activities and achieving the goal of restricting the war to a certain scope.”26 In this way, China could capitalize on the uncertainty of a potential nuclear conflict to deter intervention and constrain escalation in conventional conflicts in the Pacific region. Such risks are compounded by China’s use of purposeful ambiguity as an integral component of its approach to nuclear deterrence.27

One major problem is that such signaling by the Chinese may be indistinguishable from preparations for a nuclear attack. Yet, writings by experts on deterrence and signaling operations fail to acknowledge that these provocative actions could be misinterpreted by an adversary. In general, Chinese experts seem to believe that nuclear escalation is unlikely to be effectively controlled, but are overconfident that conventional conflict can be controlled without escalating to the nuclear level.28 Lack of awareness about escalation risks could very well make the PLA more aggressive in local conflicts.

Finally, the concept of an “existential threat” may be different in China than many perceive it to be. The PLA is not China’s professional military so much as it is the armed wing of the Chinese Communist Party, a point drilled into PLA members and emphasized in the era of Chinese President Xi Jinping, who is also general secretary of the party.29 In that sense, destruction of the party may be synonymous with destruction of the state. Such conflation of ideas could come into play in the face of a humiliating conventional defeat by China over Taiwan or another dispute that China considers central to its sovereignty. If there were a perceived risk, irrational or not, that such losses could fracture the legitimacy of the Communist Party, drastic actions could become more likely. If Beijing perceived that nuclear weapons use would ensure victory in a conflict, it might escalate to using nuclear weapons in a last-ditch effort.

Conclusion

For all the concern from U.S. policymakers about China’s nuclear expansion, relatively little attention has gone into adequately examining the country’s military and nuclear strategies. There is a tendency among many U.S. policymakers to blindly equate the challenge of China with the strategies faced by the United States and the Soviet Union during the Cold War or to mirror image their own strategic thinking onto Chinese strategists. That is insufficient and dangerous.

China’s thinking on escalation and war-fighting often differs substantially from that of the Americans and Soviets. The authoritative literature on these subjects within the Chinese system does not represent errant thoughts of lone strategists. It represents doctrinally informed guidance that culminates the work of dozens of China’s top strategists, originating from China’s most authoritative institutions with ties directly to China’s decision-making bodies, and is used to educate and inform PLA officers. Although written for an internal audience, several of the most important of these texts, such as “Science of Military Strategy” and “Science of Campaigns,” have been translated into English by U.S. scholars and need to be mined thoroughly by U.S. planners for insights.30

There is also a need for greater engagement and crisis management measures between U.S. and Chinese officials. Varying levels of formal and informal dialogues between Chinese and U.S. officials directly or between delegations of recently retired officials help alleviate misperceptions and enhance understanding of escalation triggers and redlines. Although there have been some talks at the unofficial level in recent years, Beijing remains reluctant to pursue official talks on nuclear weapons. Given the substantial misperceptions in the relationship, regular engagements are critical. Similarly, crisis management mechanisms would be to the advantage of both sides in communicating intentions and alleviating misperceptions during a crisis. Thus far, the pursuit of new initiatives has met limited success, and Beijing tends to eschew the methods that are in place. Although arms control agreements appear to be unfeasible between the United States and China for the time being, official talks and better crisis management measures would be a strong first step.

Finally, the United States needs to look at deterrence and escalation more holistically. The primary risks of nuclear escalation stemming from the U.S.-Chinese relationship do not come from nuclear weapons alone. Warfare is increasingly complicated; a greater appreciation of how conventional and nuclear strategies intersect is needed. In the Indo-Pacific theater, conventional forces may play a greater role in deterrence than many in the nuclear community acknowledge. U.S. Admiral Phil Davison, commander of the U.S. Indo-Pacific Command, recently observed that “the greatest danger the United States and our allies face in the region is the erosion of conventional deterrence vis-à-vis the People’s Republic of China.” Increasingly, this erosion affects conventional and nuclear strategies. Organizational separation within the U.S. military establishment may leave conventional and nuclear planners ill-informed of escalation risks stemming from areas outside their purview. Better integration of conventional and nuclear communities, a more holistic understanding of the risks and challenges, and a bolstering of regional conventional forces could play a significant role in managing and deterring conflict that could otherwise escalate to the nuclear level.

#### BUT, only by enabling neo-Schumpeterian competition can the US maintain dominance:

#### 1. Competition---it prevents the blocking of deployment, the collapse of defense innovation, AND circumvents Chinese theft and coercion.

Ganesh Sitaraman 20, Professor of Law at Vanderbilt Law School, "Too Big to Prevail," Foreign Affairs, March/April 2020, https://www.foreignaffairs.com/articles/2020-02-10/too-big-prevail.

When executives at the biggest U.S. technology companies are confronted with the argument that they have grown too powerful and should be broken up, they have a ready response: breaking up Big Tech would open the way for Chinese dominance and thereby undermine U.S. national security. In a new era of great-power competition, the argument goes, the United States cannot afford to undercut superstar companies such as Amazon, Facebook, and Alphabet (the parent company of Google). Big as these companies are, constraints on them would simply allow Chinese behemoths to gain an edge, and the United States would stand no chance of winning the global artificial intelligence (AI) arms race. That technology executives would proffer these arguments is not surprising, but the position is gaining traction outside Silicon Valley; even Democratic politicians who have been critical of Big Tech, such as Representative Ro Khanna of California and Senator Mark Warner of Virginia, have expressed concerns along these lines.

But the national security case against breaking up Big Tech is not just weak; it is backward. Far from competing with China, many big technology companies are operating in the country, and their growing entanglements there create vulnerabilities for the United States by exposing its firms to espionage and economic coercion. At home, market concentration in the technology sector also means less competition and therefore less innovation, which threatens to leave the United States in a worse position to compete with foreign rivals. Rather than threatening to undermine national security, breaking up and regulating Big Tech is necessary to protect the United States’ democratic freedoms and preserve its ability to compete with and defend against new great-power rivals.

DESTINATION: CHINA

Competition with China will define U.S. national security conversations for decades to come, and Americans need to think carefully about the role technology will play in this increasingly competitive environment. But to claim that the likes of Amazon and Google are helping counter China’s technological and geopolitical rise simply because they are American companies makes little sense.

Almost all big U.S. technology companies have extensive operations in China today. Google announced plans for an AI research center in Beijing in 2017 and is exploring a partnership with the Chinese Internet behemoth Tencent. Microsoft is expanding its data centers in China and has recently built an entire operating system, Windows 10 China Government Edition, for the Chinese government. Amazon’s cloud service in China is second in popularity only to that of its Chinese counterpart, Alibaba. Apple famously designs its phones in California but manufactures them in China. Facebook, notably, does not operate in China—but not for lack of trying. The company repeatedly attempted to gain access to the Chinese market only to be blocked by Chinese government officials.

Merely operating in China may seem harmless. Yet according to scholars, U.S. government officials, and even American business associations, any U.S. technology company working in China could very well be supporting the Chinese state and the expansion of digital authoritarianism. In the course of their operations in the country, U.S. companies routinely interact with Chinese companies, some of which are run or partly owned by the state. Those that are not still have informal ties to state and Communist Party officials and face strong incentives to behave as the state wishes even without direct pressure from the government. Because the Chinese market and the state are intertwined in this way, Chinese companies that partner with foreign ones are highly likely to pass along operational and technological developments to the Chinese government and military, including in ways that could advance Beijing’s emerging surveillance state and accelerate its ability to spread its model of digital authoritarianism around the world.

These challenges are particularly clear in the case of AI, as commercial innovations in that field can also have military implications. Under Beijing’s doctrine of “civil-military fusion,” Chinese researchers and private companies are working ever more closely with the government and the military, which means that technological innovations that may have originated with a foreign company active in China can find their way to supporting the People’s Liberation Army. “If you’re working in China,” Ashton Carter, a former U.S. defense secretary, has said, “you don’t know whether you’re working on a project for the military or not.”

In addition to widely known concerns about Chinese espionage and surveillance, integration with the Chinese market also opens Big Tech—and the United States—to pressure from China, which can use that influence to hurt U.S. interests. Scholars refer to this tactic—turning economic interdependence into political leverage—by a variety of terms, including “geoeconomics,” “reverse entanglement,” and “weaponized interdependence.” Whatever it’s called, China has a long track record of doing it, across countries and industries. To retaliate against South Korea’s adoption of a U.S. missile defense system in 2017, China blocked Chinese travel agencies from offering trips to the country. And after the dissident Liu Xiaobo was awarded the Nobel Peace Prize in 2010, China temporarily blocked imports from Norway.

To avoid offending Chinese officials and potentially losing access to the country’s large market, companies are adapting their behavior even outside China’s borders. Hollywood studios have been accused of rewriting scripts and editing scenes for that purpose: choosing to blow up the Taj Mahal instead of the Great Wall of China in the movie Pixels, according to Reuters, and replacing China with North Korea as the main adversary in the 2012 remake of Red Dawn, according to the Los Angeles Times. In 2019, Daryl Morey, the general manager of the NBA basketball team the Houston Rockets, tweeted in support of pro-democracy protesters in Hong Kong; soon thereafter, he deleted the post. In the days that followed, the owner of the Rockets wrote that Morey did “NOT speak” for the team, and the NBA said it was “regrettable” that Morey’s views had “deeply offended many of our friends in China.” (After a public outcry, the NBA clarified that it would not censor or fire Morey.) A year earlier, Mercedes-Benz had posted a quote from the Dalai Lama on Instagram. After an online backlash in China, the automaker quickly erased the quote, and its parent company, Daimler, said that the post had contained an “erroneous message” and had “hurt the feelings of people” in China. The People’s Daily, China’s largest newspaper, later branded Mercedes-Benz as an “enemy of the people.”

Such conduct by Western companies illustrates a broader point: they act based on their commercial interests, not in the name of abstract democratic principles or for the cause of U.S. national security. The same is true when these companies try to influence government policy. The potential stakes are high. The U.S. Department of Commerce, for instance, has the power to set export restrictions on some sensitive technologies, including AI; those restrictions may be important from a national security standpoint, even if they negatively affect some companies’ bottom lines. Yet the dominant ideology among corporate lawyers today holds that the sole aim of managers is to maximize shareholder profits, and corporate lobbyists are thus likely to advocate public policies that support those profits even if they run counter to U.S. national interests.

Practically all U.S. companies active in China are subject to such pressures to one degree or another, and how to address that predicament is another question altogether. But the size and dominance of American technology companies are part of the problem. As the U.S. technology sector becomes more concentrated and the few players in it become more dependent on the Chinese market for consumers and profits, these firms—and, by extension, the United States—become more vulnerable to pressure from Beijing. Antimonopoly policies could help remedy this problem: in a fractured market with many players, the sheer number of firms would all but guarantee that some would build supply chains that circumvented China, or build their products wholly in the United States, or simply choose not to engage in the Chinese market—whether because of idiosyncratic preferences, competitive dynamics, product differentiation, higher costs, or other factors.

Consider another industry whose structure resembles that of Big Tech: Hollywood. Like the technology industry, today’s entertainment sector consists of a handful of studios that are increasingly dominant at the box office and able to pressure theaters to give their content preferential treatment. If these big, integrated companies comply with Chinese censors out of a concern for market access, then U.S. consumers will not see content that offends the Chinese government. By contrast, in a system with a large number of small studios and competitive distribution channels, many companies would lack the size, scope, or desire to cater to the Chinese market, let alone be dependent on it. Nor would they have the power or scale to lock out new competitors through vertical integration. The result would be a market in which Americans had a range of content choices, including entertainment that might not accord with the views of foreign censors.

Of course, in theory, it is possible that a small number of big U.S. technology firms, each with monopoly-like power, might be so profitable as to have no need for the Chinese market, whereas small companies with razor-thin profit margins might depend more on that market for consumers and profits. But this hypothesis has not been borne out. The current technology sector is already highly concentrated, and yet today’s technology companies are not forsaking the Chinese market; instead, they are desperate to expand their business there.

As they do so, they will likely be subject to the same pressures bearing down on Hollywood, the NBA, Mercedes, and other entities that want to operate in China. Companies such as Amazon and Google, which both produce their own content and distribute it through their platforms, may over time be tempted to make that content palatable to Chinese censors. And because those firms have immense market power within the United States, American consumers will be left with no serious, scalable alternatives.

A more competitive technology sector, with many smaller players, would also mitigate the ill effects of lobbying, for much the same reasons. Fewer companies would be dependent on the Chinese market, and those that were would be differentiated enough to often end up on different sides of policy debates. Their lobbying efforts would be less likely to cut in a single direction and thus less likely to capture government.

THE VIRTUE OF MONOPOLY

Big Tech’s market dominance, some will argue, has benefits: free of constant worries about vicious competition, technology giants can focus on the big questions. They have the time and resources to invest copiously in cutting-edge research, where success is rare but the potential payoff—for technological innovation and thus for U.S. competitiveness and national security—is massive.

Whether or not they say it explicitly, those who want to protect Big Tech from antitrust laws and other regulations are advocating a “national champions” model—a system in which the state shields a few select big companies from competition, allowing them to spend on research and development. But there is strong evidence that this approach is imperfect, at times even counterproductive. As the legal scholar Tim Wu has noted, it is usually competition, not consolidation, that fosters innovation. Competitors have to find ways to differentiate themselves in order to survive and expand. Large, protected firms become lethargic, are slow to innovate, and rest on their laurels.

Recall the race for supremacy in the electronics industry that played out between the United States and Japan in the 1980s. Japan, according to Wu, chose to protect its national champions, giving direct government support to such powerhouses as NEC, Panasonic, and Toshiba. The United States took the opposite tack. Its largest electronics firm at the time, IBM, came under antitrust scrutiny by U.S. authorities, and the ensuing decade-long legal battle discouraged the company from engaging in conduct that might run afoul of antitrust laws. That created the space for a variety of other hardware and software companies, among them Apple, Lotus, and Microsoft, to flourish. Competition led to innovation and the creation of some of the most forward-looking companies of the era.

National champions also have an incentive to hide breakthroughs that might undermine their market power. Bell Labs, one of the pillars of AT&T’s telecommunications empire, has long been celebrated for its role as an “ideas factory.” But Bell Labs and AT&T also suppressed innovations that threatened their business model. Starting in the 1930s, for example, AT&T’s management sat on recording inventions that could have been used for answering machines, for fear this innovation might jeopardize the use of the telephone.

Skeptics might argue that this time is different—that today’s next-generation technologies are so resource-intensive that smaller companies in a competitive environment couldn’t afford the necessary investments. But even if broken up and regulated, Big Tech’s main players would have considerable money left to spend on AI, robotics, quantum computing, and other next-generation technologies. Facebook would still have billions of users without Instagram and WhatsApp. Amazon’s platform would still have enormous market power in online sales even if it wasn’t allowed to produce its own products.

Whatever resource constraints did arise could be offset by greater public investment in R & D. As the economist Mariana Mazzucato has argued, such government spending has historically been a significant driver of innovation; the Internet, for example, began as a U.S. Defense Department network. There is no reason the government could not play the same role today.

Unlike research by national-champion firms, research funded by public investment would not be tied to the profit motive. It could therefore cover a wider range of subjects, extend to basic research that does not have immediate or foreseeable commercial applications, and include research that might challenge the incumbency and business models of existing companies. Public research could also de-emphasize areas of inquiry that may be profitable but are socially undesirable. For many of the biggest technology companies, surveillance, personalized targeting, and the eliciting of particular behavioral responses lie at the heart of their business models, which means that their efforts to innovate are geared in no trivial way toward improving those tactics. An authoritarian country may see those as valuable public goals, but it is not at all clear why a free and democratic society should.

Public investment in R & D also has the potential to spread the benefits of technology, innovation, and industry throughout the United States. At present, much of the country’s technological and innovative prowess is concentrated in a few hubs—the most prominent being Northern California, Seattle, and Boston. This is not surprising, as unlike the government, technology companies have no reason to want to spread development evenly. Amazon’s competition to decide the location of its second headquarters is a good example. After inviting countless pitches from cities across the country and much public attention, the company settled on New York and Washington, D.C.—two cities that hardly need an economic boost. Public investment, as the economists Jonathan Gruber and Simon Johnson have argued, could remedy these geographic imbalances and spur successful economies in dozens of midsize cities all over the country, with spillover benefits for their regions.

Mountains of data are needed to improve AI’s precision and accuracy, and some might think that only Big Tech can collect and handle data in such vast quantities. But this need not be the case, either. The United States could create a public data commons with data collected from a variety of government sources (and regulate it with strict rules about personal privacy), for use by businesses, local governments, and nonprofits to train machines. Any new data would be fed back into the data commons, allowing the quality and quantity of the information to improve over time. Alternatively, the government could require technology companies to make their data available in interoperable formats. If those companies effectively have monopoly power over data, then they could be regulated as monopolies—with public access to the data sets as a condition for their continued protection as monopolies. No legal obstacles stand in the way of these options, and both would enable innovation and expand the number of players working on important technological developments.

SQUEEZING THE GOVERNMENT

For the moment, such public initiatives exist only as proposals. Big technology companies have considerable market power, and the U.S. government increasingly relies on their services, including to run its national security apparatus. Technology is, of course, a crucial aspect of warfare, and firms such as Amazon and Microsoft have contracts to provide cloud services to U.S. defense and intelligence agencies. These technology companies are fast becoming part of the United States’ defense industrial base—the collection of industries that are indispensable for U.S. military equipment. As they do so, the curse of monopoly capitalism that already affects the country’s overconsolidated defense sector—causing higher costs, lower quality, reduced innovation, and even corruption and fraud—will likely grow worse.

To see the challenge ahead, consider the present state of the U.S. weapons industry, which is already remarkably uncompetitive. In 2019, the Government Accountability Office found that 67 percent of 183 contracts for major weapons systems did not have a competitive bidding process. Almost half the contracts went to one of five companies—a stunning testament to the dominance of a handful of firms. And in 2018, the Defense Department released a report on the military’s supply chain that listed numerous items for which only one or two domestic companies (and in some cases none) produced the essential goods. Perhaps most striking of all, the report found that the United States no longer had the capacity to build submarines on a rapid timetable because of single suppliers and declining competition.

Unsurprisingly, as Frank Kendall, a former head of acquisitions at the Pentagon, has pointed out, large defense contractors “are not hesitant to use this power for corporate advantage.” In a recent article in The American Conservative, the researchers Matt Stoller and Lucas Kunce argue that contractors with de facto monopoly at the heart of their business models threaten national security. They write that one such contractor, TransDigm Group, buys up companies that supply the government with rare but essential airplane parts and then hikes up the prices, effectively holding the government “hostage.” They also point to L3 Technologies, a defense contractor with ambitions, in the words of its one-time CEO, to become “the Home Depot of the defense industry.” According to Stoller and Kunce, L3’s de facto monopoly over certain products means that it continues to receive lucrative government contracts even after it admitted in the settlement of a 2015 civil fraud lawsuit that it had knowingly supplied defective weapons sights to U.S. forces.

As technology becomes more integral to the future of U.S. national security, Big Tech’s market power will likely lead to much the same problems. Technology behemoths will amass defense contracts, and the Pentagon will be locked into a state of dependence, just as it is currently with large defense contractors. Instead of healthy innovation, the government will have created what Michael Chertoff, a former homeland security secretary, has called a “technological monoculture,” which is unwieldy and vulnerable to outside attack. The cost to taxpayers will increase, whether due to higher prices or fraud and corruption, and much of their money—funding that could have been available for innovation—will become monopoly profits for technology executives and shareholders.

#### 2. Dynamism---only by ensuring lagging incumbents AND potential entrants can compete will lock-in any productivity gains.

James Manyika & Michael Spence 21, Chair and Director of the McKinsey Global Institute; Philip H. Knight Professor and Dean Emeritus at Stanford University's Graduate School of Business, "A Better Boom: How to Capture the Pandemic’s Productivity Potential," Foreign Affairs, Vol. 100, No. 4, August 2021, HeinOnline. language edited.

The pandemic did more than temporarily [freeze] ~~paralyze~~ the global economy, however. It spurred businesses in practically every sector to radically rethink their operations, often accelerating plans for technological and organizational innovation that were already in the works. Overwhelmingly, firms adopted new digital technologies that enabled them to continue doing business even under severe coronavirus restrictions. The result was a profound economic transformation, one that has hastened the potential for productivity gains even in sectors that have historically been slow to change. In health care, for example, telemedicine had long promised new efficiencies and added value, but it was not until the COVID-19 crisis that it took off. In retail, with the exception of e-commerce players, firms had been slow to adopt digital sales strategies, doing so mostly as a way to complement Main Street retailing. That changed rapidly with the pandemic.

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 encouraging, 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 big 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, European countries had not experienced rapid productivity gains in the 1995–2005 period, but they did experience the postcrisis decline. 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 medium-sized 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 non-superstars 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. Moreover, long-neglected problems, including the falling share of firms’ income going to workers, rising inequality, and the long-term decline in private investment, could drag down demand. Roughly 60 percent of the post-pandemic productivity gains that we estimate could come from innovations and organizational restructuring—the one percentage point of acceleration per year between now and 2024—would stem from firm-level measures, such as automation, designed to cut labor and other business costs. Unless firms do more to boost the volume or value of their output and help workers transition by acquiring new skills, the drive for efficiency will risk generating productivity gains through a vicious, rather than a virtuous, cycle, undermining wages and jobs and weakening consumption-driven demand and investment.

A NEW AGE OF DYNAMISM?

What can businesses and governments do to capitalize on the positive short- and medium-term outlook for productivity and to improve the long-term outlook? First, they should work to speed up technology adoption and managerial innovation, helping these changes spread within and across sectors. As the recovery begins, firms that have until recently been focused on crisis management and survival should follow the lead of superstar firms by investing in technology and reorganization. The superstars can assist in this process by supporting their broader ecosystems, in particular by doing business with smaller firms that offer complementary products and services. Governments can support the process, as well, by investing in research and development.

Policymakers should also seek to strengthen competition and business dynamism. In a healthy economy, the firms that add the most value prosper and grow, while the firms that add the least value shrink or disappear: so-called creative destruction. Policymakers can revive and reinforce this natural sorting process by revising competition rules, bankruptcy procedures, and product and labor-market regulations.

Governments and businesses should also aim to bolster demand and encourage business investment, the other half of the virtuous productivity cycle. As government spending tapers off, businesses should play their part by creating broad-based revenue growth while also finding efficiencies. Additionally, they should spend more on upgrading the skills of their employees, helping them make the most of technological and organizational innovations while also reducing inequality and unemployment. Governments can incentivize such investments in human capital through tax credits that encourage retraining and by shifting the tax burden away from labor income and toward capital income.

But productivity growth isn’t everything, especially as it is measured and projected today. It does not capture important dimensions of individual and social well-being that may be significantly augmented in the post-pandemic environment. For instance, the spread of digital technologies could foster more inclusive patterns of growth, and telemedicine could deliver timely primary health-care services to millions in the developing world. Nor do measures of productivity growth account for some of the negative externalities associated with modern innovations, which will compound over time and profoundly affect people’s quality of life.

What is perhaps most notable is that productivity as it is currently measured does not account for climate change. To mitigate that risk around the world, significant investment in technologies that make energy greener and more efficient is needed. Some of this investment will increase productivity growth. Electric vehicles, for instance, are not just good for the environment; they also require less labor to produce and so raise productivity. To the extent that energy-efficient investments divert resources and talent away from other, even more potentially productive areas of the economy, they could dampen short-term productivity growth. Over the long term, however, their effect will be positive, since they will prevent a dramatic decline in future productivity, among other catastrophic outcomes. Many of these gains may never be captured by the standard productivity measures, since the gains will represent a downturn that never occurred. But some of the productivity gains could eventually be captured, especially those related to infrastructure designed to help the economy adapt to climate change.

As they prepare to exit the pandemic, governments and businesses alike will have to balance these short- and long-term goals. Yet even now, as COVID-19 continues to exact a human and economic toll, a potential upside appears to be emerging. After years of sluggish productivity and economic growth following the 2008 global financial crisis, COVID-19 has triggered a frenzy of technological and organizational innovation. Whether this frenzy leads to a new age of dynamism will depend on what governments and businesses do to sustain a virtuous cycle of ever-greater productivity.

### 1AC---Realignment ADV

#### Contention 2 is Realignment.

#### The EU is gravitating towards stricter monopoly rules targeted at unilateral exclusion by large technology firms---BUT that creates a legal gap between the EU and US that creates room for diverging enforcement. Only by moving towards alignment AND coordinating with the EC (European Commission) can feasibly solve.

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Acquisitions of Nascent Competitors— A Similar U.S./Non-U.S. Dichotomy

The amount of ink spilled, and Zoom screens filled, on nascent acquisitions is beyond measure. But that does not mean it is easy to predict what the future holds. In fact, the discussions often center as much on purported past agency “mistakes” as on what to do now and going forward. Nor do all jurisdictions have agencies with the power and discretion to reach back and challenge prior nascent acquisitions; and for those that can, they do not all face the same legal standards.

In trying to sort out (below) the nascent acquisition landscape, we find great enthusiasm in the U.S. for fixing lost opportunities from the past—but with an unclear legal path—whereas in the EU merger clearance is final. Nonetheless, for all jurisdictions there is enormous appetite to address nascent acquisitions going forward.

U.S.: Enthusiasm, But What of the Case Law?

As with other areas of enforcement, the U.S. antitrust agencies cannot, absent judicial action, simply break up Big Tech by ordering it to spin off brands and business lines it acquired as start-ups. They must go to court and prove both a statutory violation and that divestiture is the appropriate remedy to restore competition (or that an injunction is the appropriate remedy if the deal is not yet consummated). There is precedent for seeking divestiture of past acquisitions that turn out to be anticompetitive (a subject beyond our scope), but its current application is far from clear. What we highlight here are some of the substantive issues presented under U.S. law for challenging acquisitions of nascent competitors, especially when seeking permanent injunctions or divestitures. These issues, among many others, will be front and center in several of the ongoing litigations.

As a starting point, anticompetitive acquisitions typically are the subject of challenge under Section 7 of the Clayton Act. Section 7 is an incipiency statute; it prohibits mergers whose effect “may be substantially to lessen competition.”21 The original notion was to prohibit anticompetitive mergers before their effects materialize, and to prohibit potentially anticompetitive horizontal, vertical, and conglomerate mergers. Beginning in the late 1970s, however, and continuing more dramatically in the 1980s and forward, the aggressive use of Section 7 was tempered by the agencies and the courts, which feared that the law was [preventing] handicapping efficient mergers. Today, Section 7 is most commonly invoked to challenge horizontal acquisitions of substantial competitors and, at times, vertical acquisitions that may foreclose competition from either upstream or downstream rivals to the harm of consumers. Under current U.S. case law, conglomerate mergers are tough to stop as are (most relevant here) acquisitions of potential competitors—where the target firm is not yet in the market of the acquirer, but may enter, and the market loses the benefit of the entry effect.

For acquisitions involving potential (or future) competition, the Supreme Court in United States v. Marine Bancorporation, Inc. established a tough evidentiary standard: (1) that absent the merger, the potential competitor could enter the market (as a de novo entrant), and (2) that such entry would structurally deconcentrate the market or produce other demonstrable procompetitive effects.22

A present market effect is also required when considering competitors waiting in the wings—the perceived potential competition doctrine. The standard may be a challenge for cases brought under Section 7, and the question now is whether a new line of Section 7 jurisprudence can emerge. For example, could Section 7 apply if a dominant firm forms a policy to acquire all start-ups that it identifies as significant future challengers, and thus builds a moat of protection around its alleged monopoly power? Or could the acquiring firm’s own assessment, prediction, and demonstrable intent provide the requisite inference and proof that each of the acquired start-ups could and would have entered (or expanded) on its own and offered consumer-enhancing rivalry in the market? Could the FTC also make a successful challenge under the more expansive language of Section 5 of the Federal Trade Commission Act? For all of these provocative questions, it will fall to the courts, and maybe eventually to the Supreme Court, to determine the outer boundaries of Section 7.

More immediately, as we see in some of the current litigated cases, the U.S. agencies have decided on a creative mix-and-match theory to challenge acquisitions of nascent competitors, using Section 2 monopolization principles (maintaining monopoly by acquiring competitive threats) for liability, while implicitly invoking Section 7 as the remedial basis for unwinding transactions. Here, the agencies have invoked language in Microsoft:

We may infer causation [of anticompetitive effects] when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes . . . . [It] would be inimical to the purpose of the Sherman Act to allow monopolists free reign [sic] to squash nascent, albeit unproven, competitors at will . . . .23

The courts (particularly, now, in the Facebook litigation) will have to decide on the applicability of Microsoft to dominant platform acquisitions of small start-ups.24 On the one hand, courts will need to consider the alleged plan (supported by documents, in the government’s view) to stymie future competition and, on the other hand, the uncertain future of the start-ups at the time of an acquisition as compared with the actual dramatic growth and attractiveness to users of being a part of the platform’s network. While many of these principles are not new, the waters are uncharted in the courts. It will likely take years for the issues to work their way through the U.S. court system, including, in our view, likely action by the Supreme Court.

Finally, in the U.S., in theory there is always a prospect of regulation apart from courts’ antitrust decisions. But the prospect for regulation of acquisitions of nascent competitors is not necessarily rosy; it depends upon political will. Legislation may be especially challenging as the polarized factions of both the Republican and Democratic parties interact with a more moderate Democratic Executive (although one that is being advised by an aggressive progressive, Professor Tim Wu).25 If the politics align, especially with the Democrats’ new ability to garner support for legislation, the prospect of some rulemaking to proscribe dominant firms’ acquisitions of their nascent rivals under some conditions (and with new substantive standards) is not beyond question.

EU/U.K.: An Emerging Prophylactic Approach

Outside of the U.S., the enforcement and regulatory approach to nascent-competitor acquisitions is quite different—in part more restrictive, in part more flexible. On the restrictive side, unlike in the U.S., there is only “one bite at the apple” in the EU for blocking acquisitions with an EU dimension. Once a merger has received clearance from the EU it cannot be investigated again except in exceptional circumstances, such as whether the clearance was based on false or misleading information. This is why many jurisdictions are modifying their merger notification requirements to cover more (if not all) acquisitions by large tech (or other) firms. Equally important, the EU enforcers may not use Article 102 dominance law to block transactions, as the EC Merger Regulation is the exclusive regulatory authority.26 This precludes the hybrid approach currently asserted in the U.S. courts.

The flexibility is in the relative lack of constraining case law and the opportunity to explore new theories and approaches. Specifically, where the U.S. lower courts must grapple with the “potential competition doctrine” and the novelty of using Section 2 to attack consummated acquisitions, the EU and its Member States can explore new enforcement theories with few limiting parameters. Further, unlike with Articles 101 and 102, the Commission’s decisions on mergers are not frequently challenged, and even more rarely reach the Court of Justice. Hence, if the EU believes that a nascent-competitor acquisition by a dominant platform will be anticompetitive under one or more theories of harm, it may pursue that theory, subject to appeal to the General Court and Court of Justice. This provides significant flexibility and enforcement creativity.

Nor are non-U.S. jurisdictions encumbered by the Chicago School conceptions of consumer welfare that prevail in the U.S. (as applied in the merger context). Particularly in the EU and its Member States, therefore, we can anticipate a significant increase in scrutiny of all forms of nascent-competitor acquisitions based on relatively aggressive theories of harm to dynamic competition, coupled, as usual, with vigorous debate over the asserted harm and/or procompetitive justifications for the transaction.

The U.K., however, is likely to take an even more targeted approach to nascent acquisitions, consistent with its broad proposed regulation of large tech platforms. In contrast to the EU (which does not need a regulatory change to its merger review processes to address nascent acquisitions), the CMA has put nascent acquisitions directly in its new regulatory cross hairs. It apparently is more concerned with the growing power of the Big Tech platforms, even if there is a significant (sometimes large) chance that the “but for” competitive threat would never have materialized and the acquisition enhanced the offerings by the platform. As Andrea Coscelli, Chief Executive of the CMA, has highlighted, enforcers in his view need to get comfortable with the notion that the inherent uncertainty of the but-for world is still worth addressing.27 In essence, he is suggesting that competition is better preserved if the agencies take a dynamic and prophylactic approach to nascent acquisitions, a position that would be harder to argue and accept in the U.S. where inherent speculation is frowned upon in the case law both as a matter of liability and in seeking remedies, especially divestiture.

One can also anticipate, or at least prepare for, other jurisdictions to consider similar actions. The concern over nascent acquisitions by large tech firms is a recent and global one,28 and (rightly or wrongly) it appears that outside of the U.S. there may be relative convergence on these more interventionist approaches.

A General Surge in Populism, But Not Uniformity in Approach

Independently of a particular focus on tech platforms (and, primarily, the challenge of dealing with network effects), there is a drumbeat in the U.S. and elsewhere for more aggressively enforcing (or modifying) competition laws to address industry concentration and the power of individual firms.29 Whether referred to as Neo-Brandeisian or populism from a pre-Chicago School age, the thrust is similar: highly concentrated markets are said to lead to relatively higher corporate profits, wage disparity, barriers to entry, and decreased competitive opportunity. To address these perceived problems, the view is that antitrust needs to remove the constraints of a standard that proscribes only short-run, output-limiting, and price-raising conduct. Many in this group (whom we describe as Progressives) embrace a consumer welfare standard, but would apply it much more broadly and aggressively than conservatives.

Others (Neo-Brandeisians) would use consumer interests as one important focus of antitrust, but would widen the lens to consider exploitation of workers (beyond efficiency concerns), sustainability, inequality, and their perspective on democracy (freedom from business power that controls our lives). Moreover, their set of values leads to a policy position, sometimes more symbolic than actual, that seeks to break up Big Tech. For any of these objectives, particularly in the U.S., the question remains what is practical or feasible. Outside of the U.S., the more fundamental question is whether the Neo-Brandeisian debate is relevant given that in many jurisdictions competition law already is geared to control perceived power (although breaking up Big Tech has not seemed to be the first-line remedy).

In the U.S., the same limitations on case law/potential legislation dynamics are at play as with tech platforms, which may make the more aggressive proposals more aspirational than realistic. Every potential cause of action has its long-defined elements, and the consumer welfare standard that permeates theories of harm only has so much flexibility. For example, “abusive pricing” or “unequal bargaining positions” cannot be independent violations in the U.S.—separate exclusionary conduct would need to be present. Likewise, even in the merger space, market definition remains a requisite element that is probably not going to be jettisoned under current case law; whether concentration thresholds are likely to be reduced or burdens of proof shifted is a different question. For all of these long-established U.S. cases and theories, absent legislation, changes will be around the edges and incremental, as courts continue to determine how robustly the U.S. antitrust goals can accommodate such values as innovation, quality, and dynamic competition without crossing the boundaries into unreliable speculation.

While this continued iterative judicial process may add some flexibility under Section 2 and Section 7 (subject to the Supreme Court’s view), these limits will have significant effect. In the view of many, Section 5 of the Federal Trade Commission Act may have more flexibility if the FTC chooses to use it. But true “progressive” developments in the U.S. would require new legislation.

Looking forward, the House is likely to offer piecemeal legislation addressing specific areas of conduct or desired changes in the law.30 But the main focus for anticipated action should be on the Senate, as the new makeup of the Senate will likely shift the focus away from the aspirational House Majority Staff Report and onto the Senate Judiciary Subcommittee on Antitrust and Commerce, led by Senator Amy Klobuchar. Indeed, on February 4, 2021, Senator Klobuchar introduced a bill—the Competition and Antitrust Law Enforcement Reform Act—that would significantly modify Section 7 on mergers and Section 2 on monopolies (though not seeking to break up Big Tech).31 On mergers, the Act would forbid mergers that “create an appreciable risk of materially lessening competition,” where “materially” can be anything more than “de minimis.”32 It would also shift the burden of proof to the parties to disprove those effects for mergers that significantly increase concentration, involve nascent acquisitions by dominant firms (e.g., greater than 50 percent share), or involve mega mergers (over 5 billion dollars).33

As to unilateral conduct, the Act would expressly prohibit “exclusionary conduct,” defined to include any conduct that materially disadvantages competitors and presents an “appreciable risk of harming competition.”34 Again, this adopts a much more prophylactic approach than Section 2. On its face, the Act would appear to overturn Trinko, bring leveraging back into play (as well as a fairly open-ended theory of raising rivals’ costs), much like what we see in practice in the EU and elsewhere. Whether Senator Klobuchar’s bill will garner the needed votes (likely requiring 60) is hard to predict at this stage, but the general anger and frustration among some Republicans toward Big Tech (again, often concerning asserted platform-related censorship) may put many of them in a receptive frame of mind. From a competition policy perspective, and as Senate hearings begin on potential legislation, it is clear that Senator Mike Lee is the figure to follow on the Republican side.35

U.K./EU: More Flexibility, But How Far To Go?

In contrast to the U.S., other jurisdictions have significant flexibility in addressing whether and to what extent they wish to pursue a more progressive agenda for antitrust policy and enforcement. At least as it relates to economic objectives (and the consumer-welfare debate), the EU and some Member States have made their more progressive agenda clear for some time. Executive Vice President and Commissioner Vestager has elaborated on the EU’s digital-economy agenda on the global stage.

Hence, we have long seen from the EU Commission a commitment to interpreting Articles 101 and 102 in ways that promote non-discrimination among Member States, transparency for consumers, opportunities for new entrants and rivals, and no reluctance to invoke fairness in the application of competition principles. Again, this is largely baked into the Treaty itself. And what we see in the tech space, as well as other areas involving more complex markets (e.g., pharma, IP-driven industries), is the EU and Member States trying to figure out how best to apply these principles to the digital age and other complex industries, while still allowing firms to enjoy the benefits of scale and efficiencies. Sometimes the factors will all point in the same direction; but often it will be a delicate balance. Either way, as the EU continues to pursue its enforcement objectives, the debate will continue—and it will not slow down.

Finally, with the relative constraints of U.S. law and enforcement discretion, the future holds only a limited opportunity for convergence between Section 2 of the Sherman Act and TFEU Article 102, with perhaps a greater prospect in addressing mergers under Section 7 of the Clayton Act and the EU Merger Regulation. There is, however, a significant opportunity for an increase in multi-jurisdictional cooperation and coordination, especially as it relates to truly global “mega-mergers” as well as remedies. In this respect, the OECD and ICN are promoting increased cooperation among agencies. A joint OECD/ICN report on the state of international cooperation was presented at the last OECD Competition Committee in December 2020, and this is an area in which the ICN and OECD could make significant strides in the coming years, especially as non-U.S. enforcement continues to converge.36

Socio-Political Objectives: Needed Coordination and Bold Leaders

Beyond the narrowly focused debate that tends to center on the U.S. version of the consumer-welfare standard, there is a broader view of antitrust that is gaining significant traction in several parts of the globe. In the U.S., it is sometimes difficult to see competition law and enforcement evolving beyond the current case law and its free market underpinnings—each based in part on markets that generally work well, on the absence of a history of state-owned enterprise, and perhaps on a certain faith in the purity and continuity of antitrust. But for many other countries, there is an equal and growing pull from two other perspectives: first, industrial policy, recognizing a government role in partnering with industries—or prohibiting or commanding certain behaviors—ideally to the benefit of all marketplace constituents; and second, socio-political objectives as values of or constraints on antitrust, including concerns as wide ranging as sustainability and distributional equality.37 While inclusion of these considerations may be anathema to some (particularly those of the strictest Chicago-School persuasion), the future of global antitrust rightly highlights where these policies are embraced and gaining traction.

The Pandemic: A Need for Global Coordination

Along with the many other lessons to be learned from the enormous tragedy of the global pandemic, one must be that antitrust as usual is not necessarily optimal in a time where there is a critical need for certain types of supplies, innovation, and collaboration. Moreover, for global pandemics, there is the obvious question of how global market coordination can best be effectuated to meet legitimate and demonstrable needs of suppliers and consumers without creating long-term adverse effects on particular markets or consumers.

What we have learned, however, is that different jurisdictions were equipped differently—or not at all—to make antitrust-related adjustments for pandemic conditions. In the U.S., for example, there certainly was discussion, within cases or investigations, of a greater emphasis on “changing market conditions” and “failing/flailing” firm arguments to justify certain collaborations or mergers. While the authorities were open to business review consultation, for the most part the U.S. antitrust analysis was, and remains, ill-equipped to adjust for such events (although in an analogous war footing, past courts have modified antitrust analysis, though with arguably questionable justification and effect). Looking to the future, one naturally asks—as one of the authors has—whether it is not advisable to address the next pandemic with a global, ex ante industrial organization strategy rather than the piecemeal response that we saw in 2020 and that persists today? 38 Given the effect of the pandemic on both lives and markets across the globe, such an effort should have few serious detractors.

#### Those disputes trigger digital protectionism between the US and EU---BUT convergence must happen soon.

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IV. The way ahead: Convergence or divergence?

So far, this article presented how the differences between the American and European approaches to data protection provide EU regulators with motivation to strengthen antitrust enforcement in data markets. Moreover, it argued that once this process starts, the unique features of European antitrust policy will prove a perfect incubator, so that antitrust cases against US tech companies for dominance violations should grow. Americans do not share and may not understand neither the motivation nor the antitrust tools employed in the EU. 110 As the Atlantic divide on antitrust enforcement widens (and given that actual protectionist policies are on the rise) 111 calls of digital protectionism should afloat. Tensions run both ways, as Europeans may also be startled by American complaints against what they see as a regular application of the rule of law. 112

With a trade war between the EU and the US looming after a series of trade sanctions, 113 increased strains between two of the world's leading trade and security partners can do little good. 114 The digital economy is a sensitive area and the EU/US safe harbour for data transfer is proof of the damage that may arise from disputes. The first Safe Harbor came after a major trade conflict between the EU and the US over personal data. 115 By striking it down, EU Courts' placed thousands of American and European companies in disarray, 116 reason why business leaders in both jurisdictions welcomed the swift conclusion of the Privacy Shield. 117 The challenge remains, however, on whether it is desirable or possible to bridge such significant cultural differences, or at least develop clear mechanisms that prevents tensions arising from pure misunderstanding.

This remains a contingent question. On one side, convergence may never be necessary. It is perfectly reasonable and may even be optimal that different legal systems will provide different solutions to challenges of a new internet era, forcing agents to adapt to the norms of a given jurisdiction. 118 Lack of convergence is burdensome and may increase the cost of doing business across the Atlantic, 119 but the so far successful implementation of the 'right to be forgotten' experience in Europe demonstrates that both markets are large enough to justify companies adopting different solutions. The risk is that shifts in market behaviour may lead to the 'Brussels' effect' and the export of stricter standards, 120 something that may trigger unpredictable reactions by US authorities facing loss of sovereignty.

On the other, the safe harbour demonstrates how convergence is possible if parties move to bridge differences. As there is more to explore from an academic perspective in this second scenario, this section will focus on that. Bringing together such disparate regimes will require both political motivation and a coherent framework. This part argues that: (i) convergence efforts will require a balancing of the role that economics plays in antitrust enforcement on internet markets on both sides of the Atlantic; and (ii) that recent EU reforms open a window of opportunity for this to happen. In addition, it presents data portability as a mitigating measure that companies may explore to decrease tensions while and if converge does not take place.

#### Close EU-US tech cooperation is crucial to good governance, AND averting internet balkanization.

Juraj Majcin 21, PhD International Law, Graduate Institute, Geneva. Member, GeoTech Action Council, "EU-US tech cooperation: Strengthening transatlantic relations in data-driven economies," Atlantic Council, 06/16/2021, https://www.atlanticcouncil.org/blogs/geotech-cues/eu-us-tech-cooperation/.

First, the global economy and international trade have become increasingly data driven. According to the report on the future of international trade launched by the World Trade Organization in 2018, the growing digitalization of the global economy will impact international trade in three significant ways: the importance of cross-border data flows as a component of trade in goods and services will grow significantly in the coming years.; trade in digitizable goods (e.g. DVDs or physical books) will decline while trade in digital services such as streaming services and e-books will grow; and regulation of data flows and other technology legislation will become an important source of comparative advantage. Therefore, adopting an agreement on transatlantic data flows is indispensable to adapt the normative framework that governs the EU-US trade relations to the new data-based reality.

Second, innovation in the transformative technologies of the Fourth Industrial Revolution (e.g. artificial intelligence and cloud computing) requires a vast amount of data from various sources. As a consequence, countries and businesses that have access to large pools of data are more competitive than those that do not. Currently, China is often referred to as a country with access to almost infinite datasets while having data protection rules focused on national security rather than individual rights. This gives Chinese companies an enormous advantage over their European and American competitors in the development of AI and other technologies. Therefore, an agreement facilitating the exchange of data across the Atlantic via a secure and privacy-respecting framework may increase the competitiveness of both European and American companies in the global economy.

Third, authoritarian states such as Russia or China promote an illiberal, techno-nationalist vision of global governance based on harsh restrictions on cross-border data flows with little respect for fundamental human rights. Even more troubling is that these states export their vision of tech governance to developing countries by selling their technology and providing training programs on surveillance and other repressive techniques. They are also highly active at the multilateral level. China, for instance, promotes its approach to internet regulation as an alternative to the current internet architecture via various standardization fora and strategic documents such as China Standards 2035 or the new IP protocol proposed by China to the International Telecommunications Union (ITU). For this reason, by establishing a transatlantic framework on data governance that would ensure free flow of data while protecting human rights, the EU and United States would reiterate their commitment to free internet and set a global standard for other countries to follow.

Fourth, the COVID-19 pandemic has shown how crucial it is for governments to have well-functioning, speedy, and secure access to data of different types and origin. By using data modeling and AI technologies, public authorities can predict with greater accuracy the evolution of different public emergencies as well as long-term threats and thus adopt better informed, more precisely targeted policies. This will be of particular importance to refine societal adaptation capacity and resilience to climate change in a wide array of fields, ranging from agriculture to urban planning to public health. Secure data sharing between the US and European publics as well as research authorities may help significantly in this endeavor. However, to tackle the most pressing global issues such as global pandemics or climate change, the United States and the European Union need a data sharing framework that extend beyond the transatlantic space. Therefore, it is crucial that the EU and United States find agreement on the creation of a safe, rights-based data exchange framework that would foster the connection between experts and research institutions from other global players such as China, India, or Brazil.

#### That collapses global internet openness---extinction.

Lee C. Bollinger 13, President of Columbia University in New York City and a Member of the Faculty of the Law School, Graduate of the University of Oregon and Columbia Law School, and Julius Genachowski, Former FCC Chair, JD from Harvard Law School, Managing Director at The Carlyle Group, “The Plot to Block Internet Freedom”, Foreign Policy, 4/16/2013, https://foreignpolicy.com/2013/04/16/the-plot-to-block-internet-freedom/

The Internet has created an extraordinary new democratic forum for people around the world to express their opinions. It is revolutionizing global access to information: Today, more than 1 billion people worldwide have access to the Internet, and at current growth rates, 5 billion people — about 70 percent of the world’s population — will be connected in five years.

But this growth trajectory is not inevitable, and threats are mounting to the global spread of an open and truly "worldwide" web. The expansion of the open Internet must be allowed to continue: The mobile and social media revolutions are critical not only for democratic institutions’ ability to solve the collective problems of a shrinking world, but also to a dynamic and innovative global economy that depends on financial transparency and the free flow of information.

The threats to the open Internet were on stark display at last December’s World Conference on International Telecommunications in Dubai, where the United States fought attempts by a number of countries — including Russia, China, and Saudi Arabia — to give a U.N. organization, the International Telecommunication Union (ITU), new regulatory authority over the Internet. Ultimately, over the objection of the United States and many others, 89 countries voted to approve a treaty that could strengthen the power of governments to control online content and deter broadband deployment.

In Dubai, two deeply worrisome trends came to a head.

First, we see that the Arab Spring and similar events have awakened nondemocratic governments to the danger that the Internet poses to their regimes. In Dubai, they pushed for a treaty that would give the ITU’s imprimatur to governments’ blocking or favoring of online content under the guise of preventing spam and increasing network security. Authoritarian countries’ real goal is to legitimize content regulation, opening the door for governments to block any content they do not like, such as political speech.

Second, the basic commercial model underlying the open Internet is also under threat. In particular, some proposals, like the one made last year by major European network operators, would change the ground rules for payments for transferring Internet content. One species of these proposals is called "sender pays" or "sending party pays." Since the beginning of the Internet, content creators — individuals, news outlets, search engines, social media sites — have been able to make their content available to Internet users without paying a fee to Internet service providers. A sender-pays rule would change that, empowering governments to require Internet content creators to pay a fee to connect with an end user in that country.

Sender pays may look merely like a commercial issue, a different way to divide the pie. And proponents of sender pays and similar changes claim they would benefit Internet deployment and Internet users. But the opposite is true: If a country imposed a payment requirement, content creators would be less likely to serve that country. The loss of content would make the Internet less attractive and would lessen demand for the deployment of Internet infrastructure in that country.

Repeat the process in a few more countries, and the growth of global connectivity — as well as its attendant benefits for democracy — would slow dramatically. So too would the benefits accruing to the global economy. Without continuing improvements in transparency and information sharing, the innovation that springs from new commercial ideas and creative breakthroughs is sure to be severely inhibited.

To their credit, American Internet service providers have joined with the broader U.S. technology industry, civil society, and others in opposing these changes. Together, we were able to win the battle in Dubai over sender pays, but we have not yet won the war. Issues affecting global Internet openness, broadband deployment, and free speech will return in upcoming international forums, including an important meeting in Geneva in May, the World Telecommunication/ICT Policy Forum.

The massive investment in wired and wireless broadband infrastructure in the United States demonstrates that preserving an open Internet is completely compatible with broadband deployment. According to a recent UBS report, annual wireless capital investment in the United States increased 40 percent from 2009 to 2012, while investment in the rest of the world has barely inched upward. And according to the Information Technology and Innovation Foundation, more fiber-optic cable was laid in the United States in 2011 and 2012 than in any year since 2000, and 15 percent more than in Europe.

All Internet users lose something when some countries are cut off from the World Wide Web. Each person who is unable to connect to the Internet diminishes our own access to information. We become less able to understand the world and formulate policies to respond to our shrinking planet. Conversely, we gain a richer understanding of global events as more people connect around the world, and those societies nurturing nascent democracy movements become more familiar with America’s traditions of free speech and pluralism.

That’s why we believe that the Internet should remain free of gatekeepers and that no entity — public or private — should be able to pick and choose the information web users can receive. That is a principle the United States adopted in the Federal Communications Commission’s 2010 Open Internet Order. And it’s why we are deeply concerned about arguments by some in the United States that broadband providers should be able to block, edit, or favor Internet traffic that travels over their networks, or adopt economic models similar to international sender pays.

We must preserve the Internet as the most open and robust platform for the free exchange of information ever devised. Keeping the Internet open is perhaps the most important free speech issue of our time.

#### Specifically---disease, disasters, resource depletion and black swans.

Dr. David Eagleman 10, PhD in Neuroscience from Baylor University, Adjunct Professor of Neoroscience at Stanford University, Former Guggenheim Fellow, Director of the Center for Science and Law, BA from Rice University, “Six Ways The Internet Will Save Civilization”, Wired Magazine, 11/9/2010, https://www.wired.co.uk/article/apocalypse-no

Many great civilisations have fallen, leaving nothing but cracked ruins and scattered genetics. Usually this results from: natural disasters, resource depletion, economic meltdown, disease, poor information flow and corruption. But we’re luckier than our predecessors because we command a technology that no one else possessed: a rapid communication network that finds its highest expression in the internet. I propose that there are six ways in which the net has vastly reduced the threat of societal collapse.

Epidemics can be deflected by telepresence

One of our more dire prospects for collapse is an infectious-disease epidemic. Viral and bacterial epidemics precipitated the fall of the Golden Age of Athens, the Roman Empire and most of the empires of the Native Americans. The internet can be our key to survival because the ability to work telepresently can inhibit microbial transmission by reducing human-to-human contact. In the face of an otherwise devastating epidemic, businesses can keep supply chains running with the maximum number of employees working from home. This can reduce host density below the tipping point required for an epidemic. If we are well prepared when an epidemic arrives, we can fluidly shift into a self-quarantined society in which microbes fail due to host scarcity. Whatever the social ills of isolation, they are worse for the microbes than for us.

The internet will predict natural disasters

We are witnessing the downfall of slow central control in the media: news stories are increasingly becoming user-generated nets of up-to-the-minute information. During the recent California wildfires, locals went to the TV stations to learn whether their neighbourhoods were in danger. But the news stations appeared most concerned with the fate of celebrity mansions, so Californians changed their tack: they uploaded geotagged mobile-phone pictures, updated Facebook statuses and tweeted. The balance tipped: the internet carried news about the fire more quickly and accurately than any news station could. In this grass-roots, decentralised scheme, there were embedded reporters on every block, and the news shockwave kept ahead of the fire. This head start could provide the extra hours that save us. If the Pompeiians had had the internet in 79AD, they could have easily marched 10km to safety, well ahead of the pyroclastic flow from Mount Vesuvius. If the Indian Ocean had the Pacific’s networked tsunami-warning system, South-East Asia would look quite different today.

Discoveries are retained and shared

Historically, critical information has required constant rediscovery. Collections of learning -- from the library at Alexandria to the entire Minoan civilisation -- have fallen to the bonfires of invaders or the wrecking ball of natural disaster. Knowledge is hard won but easily lost. And information that survives often does not spread. Consider smallpox inoculation: this was under way in India, China and Africa centuries before it made its way to Europe. By the time the idea reached North America, native civilisations who needed it had already collapsed. The net solved the problem. New discoveries catch on immediately; information spreads widely. In this way, societies can optimally ratchet up, using the latest bricks of knowledge in their fortification against risk.

Tyranny is mitigated

Censorship of ideas was a familiar spectre in the last century, with state-approved news outlets ruling the press, airwaves and copying machines in the USSR, Romania, Cuba, China, Iraq and elsewhere. In many cases, such as Lysenko’s agricultural despotism in the USSR, it directly contributed to the collapse of the nation. Historically, a more successful strategy has been to confront free speech with free speech -- and the internet allows this in a natural way. It democratises the flow of information by offering access to the newspapers of the world, the photographers of every nation, the bloggers of every political stripe. Some posts are full of doctoring and dishonesty whereas others strive for independence and impartiality -- but all are available to us to sift through. Given the attempts by some governments to build firewalls, it’s clear that this benefit of the net requires constant vigilance.

Human capital is vastly increased

Crowdsourcing brings people together to solve problems. Yet far fewer than one per cent of the world’s population is involved. We need expand human capital. Most of the world not have access to the education afforded a small minority. For every Albert Einstein, Yo-Yo Ma or Barack Obama who has educational opportunities, uncountable others do not. This squandering of talent translates into reduced economic output and a smaller pool of problem solvers. The net opens the gates education to anyone with a computer. A motivated teen anywhere on the planet can walk through the world’s knowledge -- from the webs of Wikipedia to the curriculum of MIT’s OpenCourseWare. The new human capital will serve us well when we confront existential threats we’ve never imagined before.

Energy expenditure is reduced

Societal collapse can often be understood in terms of an energy budget: when energy spend outweighs energy return, collapse ensues. This has taken the form of deforestation or soil erosion; currently, the worry involves fossil-fuel depletion. The internet addresses the energy problem with a natural ease. Consider the massive energy savings inherent in the shift from paper to electrons -- as seen in the transition from the post to email. Ecommerce reduces the need to drive long distances to purchase products. Delivery trucks are more eco-friendly than individuals driving around, not least because of tight packaging and optimisation algorithms for driving routes. Of course, there are energy costs to the banks of computers that underpin the internet -- but these costs are less than the wood, coal and oil that would be expended for the same quantity of information flow.

The tangle of events that triggers societal collapse can be complex, and there are several threats the net does not address. But vast, networked communication can be an antidote to several of the most deadly diseases threatening civilisation. The next time your coworker laments internet addiction, the banality of tweeting or the decline of face-to-face conversation, you may want to suggest that the net may just be the technology that saves us.

#### The plan harmonizes divergences resulting from weak US conduct law---AND, it rejuvenates US leadership in antirust.

Eleanor M. Fox 19, Walter J. Derenberg Professor, Trade Regulation, New York University School of Law, "Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide," Nebraska Law Review, Vol. 98, No. 297, 2019, Lexis.

Like the U.S., the EU went through two important phases with regard to the question: When is single-firm conduct anticompetitive? [\*303] In the first stage, EU law was formalistic. The law was aggressive against dominant-firm conduct that excluded rival firms. It contained a broad presumption against exclusive contracts by dominant firms. The second phase came in the 1990s, and, even more dramatically, in the first decade of the new millennium. This was epitomized by the European Commission's 2009 guidance paper on dominant firm conduct. 15In this second phase and in the guidance paper, the European Commission adopted, and the courts followed, a more economic approach. 16While incorporating economic analysis into the law, Europe retained certain guiding principles and approaches reflecting the place of antitrust in the Treaty. These approaches include that EU law is about community and integration. EU competition law is sympathetic with EU internal market free-movement law, which stresses the importance of free movement of goods, services and people across Member State lines. Likewise, EU law is antagonistic to Member State restraints and the privileges states grant to favored firms. Such restraints and privileges are distortions of competition. Both aspects - respect for free movement and antagonism to state restraints - are imported into EU competition law and specifically into abuse of dominance law. EU competition law stresses market access and the right of firms to contest markets on the merits. It is sympathetic to firms' access to networks. 17It is hostile to dominant firms' use of leverage to take advantages for themselves at the expense of competitors, thereby unleveling the playing field. EU competition law does not aim to protect inefficient competitors, but rather its precedents forge a clearer path for firms to access markets on their merits, free from obstructions by dominant firms. Still, detractors (including many in the U.S. antitrust community) contend that the EU excessively enforces its antitrust law against dominant firms (often American ones), and insist that the EU approach does protect competitors at the expense of consumers.

[\*304]

C. Presumptions and Divergences

EU competition law adopted its more economic approach nearly two decades ago. However, it never adopted the "Chicago School" premises. It does not assume markets work well. It does not admonish us to trust the market - especially not when the market is concentrated and dominated by a single firm. It does not presume that antitrust intervention is likely to mess up the market and chill competition and innovation. Its teaching implies a belief that lowering barriers to entry and keeping a clear path for challengers is likely to make the market more dynamic and thus serve consumers better. When dealing with innovation incentives, U.S. cases are likely to assume that antitrust action against a dominant firm will chill the firm's incentives to invent, 18 while EU law is more likely to find that the dominant firm's challenged conduct will chill the outsiders' incentives to invent. EU cases have documented this lost innovation. 19 U.S. competition law abhors duties of dominant firms to deal with competitors, calling such duties "forced sharing" and undermining incentives to invent. 20EU law applies a contrary principle: dominant firms, especially firms with power in one market that compete in an adjacent market, have a special responsibility not to impair rivals' competition on the merits. 21

Both jurisdictions aim to preserve and facilitate sustainable low pricing even if it displaces firms that cannot keep up with the competition. U.S. law, however, makes it harder than EU law to successfully challenge below-cost pricing. U.S. law requires the plaintiff to prove a probable recoupment scenario - that is, after the predatory siege, defendant must be likely to recover its losses by charging monopoly [\*305] prices high enough and long enough. 22EU law does not require proof of probable recoupment. 23It is enough that the predator thought the scheme was worth it. Because of the strict U.S. requirements, predatory pricing violations are virtually never proved under U.S. law.

Apart from these different presumptions and principles, much of the law governing unilateral conduct is very similar on both sides of the ocean. But the different presumptions and principles have resulted in diametrically different results on nearly identical facts in key cases, especially when the conduct challenged is a refusal to deal with competitors or customers. 24The differences reveal themselves in assessing the conduct of the big data platforms, as the Article shows below.

III. IMPLICATIONS FOR HIGH TECH, BIG DATA

A handful of high tech giants dominate markets. The firms were started from scratch by entrepreneurs with great ideas, and they attract millions of users every day. They are networks and platforms, have economies of scale, and feature network effects and winner-take-all markets. On the one hand, the network effects please users (who get more "friends" or suppliers or buyers), but on the other hand, they create uncommonly high barriers to entry and reinforce their market power. The firms offer their products "free" on one side of the market (but users give up their data); on the other side, they make huge revenues from advertising, including by selling the data of their users. The high tech firms operate with low-price models, not the high prices that traditionally attract antitrust attention. Some have been exposed for serious misuses or lax protection of data as well as for acquiring personal data from third party sources without permission. Some have waged media campaigns of false information against critics. They offer services in competition with the firms they host on their platforms, and they prefer their own products and demote their rivals, undermine creative start-ups by appropriating their ideas, mine the data of the firms they host to preempt the next big thing, snap up the start-ups that are potential competitive threats, and breach privacy rights of the platform's users. Much of this conduct may violate consumer protection and privacy protection laws. A question is whether the [\*306] firms are also violating the competition laws. Does the answer depend on whether the laws are those of the U.S. or those of the EU (and the many jurisdictions that follow EU law)? It might.

The conduct we shall examine poses challenging questions under Section 2 of the Sherman Act, which prohibits monopolization. The first step of analysis is defining the market, and the exercise of market definition is difficult. 25The second step is proof of monopoly power. Monopoly power is traditionally defined as the power to raise price above a competitive price and reduce output for a significant time. 26In platform markets, this proof may not be possible. The third step is proof of conduct that is anticompetitive. The court may require the plaintiff to establish that the conduct lowers output and raises prices 27by anticompetitive means. This may not be possible. The platforms are accumulating and using new forms of power. The big tech abuses do not fit neatly into the "Chicago School" requirements.

Under EU competition law, the case for abuse of dominance is easier to make. EU law is less demanding of proof of definition of the market. Moreover, a firm might hold a dominant position even when it does not have monopoly power under the neoclassical economists' definition. Status as a "gatekeeper" (power over a dominant platform) might suffice. 28A firm might abuse its dominance when it uses its power in one market to get significant competitive advantages in an adjacent market and does so by conduct that blocks rivals' access and has no competitive merit, 29even if it does not get market power in the second market.

These qualities of EU law make it a more flexible tool than the Sherman Act to deal with the new problems posed by high tech/big [\*307] data. Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, also has this flexibility, at least in theory. 30

IV. THREE EXAMPLES OF ALLEGED PLATFORM ABUSE

A. Google/Comparative Shopping

1. EU Law

In the Google/Comparative Shoppingcase, the European Commission condemned Google, as the dominant search engine, for demoting its rivals and preferring itself on its platform. Here are the salient facts it found:

Google held more than 90% of the general search market in Europe. It launched comparison shopping services. Google was not the first to offer comparative shopping services on its platform; others preceded it. Google entered this market in 2004 with a product called Froogle. But Froogle was not a good product. When Google Search treated Froogle neutrally with its rivals, Froogle performed poorly. This means, under neutral treatment, Froogle did not rank high on the responses to consumer search queries; it was relegated to back pages where it did not get many clicks - and clicks are the way products generate revenues through advertising. In 2008, Google changed its strategy fundamentally to automatically give a prominent place to Google's product (which was renamed and revamped as Google Shopping). Thereafter, Google Shopping appeared at or near the top of search results for comparative shopping services, and it began to appear with rich graphical features. Google Search demoted rivals' services. Even the services of rivals that were most highly ranked by the original neutral algorithm began to appear on average only on page 4. Users seldom access, much less click on, links on page 4. (The top search result on the computer page receives about 35% of the clicks; page 1 results receive about 95%; the first result on page 2 receives about 1%.) As a result of Google Search's software program change, traffic on Google Shopping increased substantially and traffic on the rivals, in spite of their merit, decreased substantially. While the Commission did not question Google's choice to display rich graphic features for the Google service at the top of the page of search results, the [\*308] Commission did question the fact that rivals could not get the same advantage. As a result of its strategy, Google Shopping increased its share in all thirteen markets in the European Economic Area, in many by a large amount.

Summarizing the changes caused by the demotions, the Commission said:

\* "Since the beginning of each abuse, Google's comparison shopping service has increased its traffic 45-fold in the United Kingdom, 35-fold in Germany, 19-fold in France, 29-fold in the Netherlands, 17-fold in Spain and 14-fold in Italy."

\* "Following the demotions applied by Google, traffic to rival comparison shopping services on the other hand dropped significantly. For example, the Commission found specific evidence of sudden drops of traffic to certain rival websites of 85% in the United Kingdom, up to 92% in Germany and 80% in France. These sudden drops could also not be explained by other factors. Some competitors have adapted and managed to recover some traffic but never in full." 31

The Commission concluded that Google abused its dominance by using its leverage in search to give its own comparative shopping service a significant advantage. The Commission found that Google had no objective justification for this conduct. It found that Google's change to prefer its own comparative shopping service was not a product improvement. Google had claimed as an improvement its addition of rich format on top of the results presented for the Google Shopping entry, but the Commission concluded that this addition could not be counted as an improvement because Google gave the embellishment to its product alone.

The Commission required Google to treat its own service equally with rivals' services. As usual, it required the undertaking to submit a plan to achieve compliance with the decision. As well, the Commission fined Google 2.42 million euros.

The case is on appeal to the European General Court. It will be judged in view of the Court of Justice's case law including the recent Inteljudgment, 32which emphasizes competitive effects. Whether a dominant firm's use of leverage to shift significant market share to itself, seriously narrowing market opportunities for competitors, violates EU competition norms will be decided on appeal. 33

[\*309]

2. U.S. Law

How would the Google/Comparative Shopping facts be analyzed under Section 2 of the Sherman Act? The jurisprudence suggests several good arguments for Google. First, market definition and market power would be contested matters. Google asserts that vertical searches are good alternatives to general search, enlarging the market so as to minimize Google's monopoly share of general search. Enlarging the market to include advertising (the paid side of the market) would likewise expand proof problems, even though Google has been labeled as dominant in online advertising with a 37% share. Second, whatever the market, Google's market power will be seriously contested, with Google insisting that it cannot and does not raise prices, reduce output, or lower quality. Third, in a similar comparative shopping case, it would be difficult for a U.S. court to find an anticompetitive abuse under Section 2 of the Sherman Act. Google is not an essential facility under U.S. law. It has no antitrust duty to deal fairly, let alone to deal at all, with firms that want to use its platform, except in rare circumstances. 34Moreover, it may be unlikely that, by reason of its demoting strategy, it acquired market power in the adjacent market (comparative shopping web services). It may be doubtful that it has power to limit output either in general search or in comparative shopping web services. As a result of the conduct, consumers/users are not confronted with a price rise, even though they do suffer a non-quantifiable loss by being given second-best information in answer to their queries, loss of the benefits of the improved performance that stronger head-on competition could bring, and loss of access to innovative products squeezed out by the demotions. (Whether the impugned conduct elevates prices charged to advertisers remains to be explored.) 35The losses, including chilling incentives of the demoted rivals, is speculative and, even if true, Google would urge that the antitrust enforcement itself chills Google's incentives to deliver innovative products. U.S. law is sympathetic to the assumption that it does. 36

The facts of Google/Comparative Shopping find parallels across the GAFA platforms. The abuse problem is probably not one of output limitation. The problem is the distortion of the market so that the firm [\*310] with power, leverage and a conflict of interests succeeds for reasons other than its merits, and the meritorious competition of rivals is suppressed.

What might the AmEx case add to the analysis? AmEx could open the door to full two-sided-market analysis, minimizing the market power and the antitrust harm. 37 AmExmakes it hard to infer market power from exclusionary effects. AmExputs a set of incumbent-preferring arguments into the mouth of Google. 38

We suggest below that the Federal Trade Commission, enforcing Section 5 of the Federal Trade Commission Act (which prohibits unfair methods of competition), could overcome the above obstacles more easily than could a court under Section 2 of the Sherman Act.

B. Facebook-Abuse of Data

1. German Law

On February 7, 2019, the German Federal Cartel Office (FCO) held that Facebook has violated the German abuse of dominance law by gathering personal data from sources beyond Facebook (e.g., every time the user clicks on "like") without the users' knowledge or permission, and using the data to compile a unique database on each user, enabling Facebook to offer advertisers distinctly targeted advertising and thus to enhance its revenues. The FCO characterized the violation as an exploitative one - Facebook exploited users, rather than excluded rivals. The appellate court, however, has suspended the FCO's order pending appeal, after expressing doubts about the legal basis for the decision. 39The following are some of the findings and analysis, as summarized by the FCO. 40

[\*311] Market, Market Power, and Dominance

Facebook is the largest social network in the world. It holds a dominant position in the German market for social networks, having more than a 90% market share. It has 2.3 billion active users worldwide, with 1.5 billion using Facebook daily. Facebook users in Germany number some 323 million monthly and 23 million daily. As to competition in Germany, Facebook faces only some small German providers, and their suitability as an alternative social network is limited in view of Facebook's economies of scale and network effects.

The FCO expressly based the assessment of market power on more than market share. It referenced recent amendments to the German Competition Act to include as indicia of market power: "competitively relevant data, economies of scale based on network effects, the behaviour of users who can use several different services or only one service and the power of innovation-driven competitive pressure ... ." 41Identity-based direct network effects were deemed an important factor in assessing Facebook's market power. Also important were indirect network effects stemming from advertiser-financed services: the larger the user base, the more audience for ads and the more profits to advertisers. Economies of scale that produce cost-savings "provide Facebook with a far greater scope for strategic decisions than its competitors have." 42Facebook invoked multi-homing as a countervailing force, but the FCO found the contention not established. Moreover, the FCO found: "Facebook has superior access to competition-relevant data, in particular the personal data of its users. As social networks are data-driven products, access to such data is an essential factor for competition in the market." 43Lack of access to data "can be an additional barrier to market entry." 44

The Harm to Competition

The FCO found that Facebook imposes exploitative business terms. "The damage for the users lies in loss of control: They are no longer able to control how their personal data are used. They cannot perceive which data from which sources are combined for which purposes ... ." 45Facebook "violates the constitutionally protected right to informational self-determination." 46Further competitive harm is caused to advertising customers, who are faced with a dominant supplier of advertising space in social networks.

[\*312] In finding an exploitative abuse, the FCO drew on contract principles and data protection principles, importing their values into antitrust analysis. Reference to the General Data Protection Regulation, the FCO said, helped to confirm Facebook's lack of justification for exploiting users' data. The FCO recognized Facebook's legitimate interests in processing the data, but found that the legitimate interests did not outweigh the harm to users' interests.

Facebook's Conduct Poses a Competition Problem

The FCO said that access to market data is essential to the market position of social network companies. "Access to data, above all in the case of online platforms and networks," 47is specified as a relevant factor for dominance by the German Competition Act. "Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers." 48

Remedy

The FCO imposed no fine. Its aim was to change behavior. Facebook was required to submit a plan for compliance.

\* \* \*

The German Federal Ministry for Economic Affairs and Energy is further studying digital platforms and abuse of market power to determine whether modernization of the law is necessary. An expert committee issued a report, 49and a follow-up committee is tasked to suggest means to implement the initial report.

European Competition Commissioner Margrethe Vestager, while studying the report, noted "the importance of monitoring data monopolies and internet gatekeepers that can choke off data access to rivals." 50Moreover, the Directorate-General for Competition commissioned its own report. 51Meanwhile, a new Commission has been constituted. Vestager has not only been reappointed the Competition Commissioner, she has been appointed Executive Vice President for the EU's digital policy.

[\*313]

2. U.S. Law

Abuse in the collection and use of data, especially by the big data companies, is a big concern in the world. The abuses and their remedies are being studied in many jurisdictions in addition to Germany and the EU, including Australia, Japan and the UK.

Section 2 of the Sherman Act offers no parallel application to the German case. In the United States, a plaintiff would face difficulties at the outset in defining the market and proving monopoly power. But more basically, the claim of violation by abuse of data collecting, including from third party sites, and collecting and using the data surreptitiously and deceitfully, does not fit with the U.S. antitrust laws. The Sherman Act imposes no special responsibility, not even on a monopoly firm, to have regard for rivals or users. The right to refuse to deal (or to deal on chosen terms) is strong. Moreover, the German Facebook violation is an exploitative violation, not an exclusionary one, and Section 2 does not prohibit exploitative behavior (e.g., excessive prices). 52The German Facebook proceeding did not include exclusionary practices. Such practices, alleged elsewhere, include Facebook's cutting off user access to an improvement by Vine, a video-creating and sharing platform, apparently because Facebook took the Vine product to be a competitive threat to it. 53

Might lessons from AmExplay a role in the analysis? Let us postulate that consumers, including business users, are harmed on one side of the market. Their valuable data is coerced from them, aggregated from third party sources, and monetized lucratively. The social network charges zero (plus the data) to users and sells curated space to advertisers, making possible the zero user-charge. AmExand other decisions would counsel to count positively Facebook's efficiencies in data use and improvement of its services though collection and use of its data trove.

The FCO did consider the advertiser side of the market. It concluded that Facebook exploited advertisers as well as users. It did take note of efficiency benefits through increased accuracy of advertisers in targeting likely buyers, and benefits of the network's declining marginal costs, but it counted those advantages as contributors to Facebook's power, not as contributors to the public's or consumers' welfare. The FCO determined that the users' interests outweighed Facebook's interests. It so concluded not because, if monetized, the [\*314] Euro-amount of the gains to Facebook was less than the Euro-amount of the losses to users, but on quasi-constitutional grounds: people have a right to control their data and to know how it is going to be used; it was wrong for a dominant firm to coerce users to give up their data rights if they were to use Facebook's service at all.

While Section 2 of the Sherman Act has strict limits, Section 5 of the FTC Act is a more flexible vehicle. The FTC is not bound to ignore a problem just because Facebook's conduct may be exploitative rather than exclusionary or just because it interfaces with data privacy. Moreover, the FTC has consumer protection powers and Facebook's behavior raises serious consumer protection concerns. Indeed, the FTC already has a file on Facebook and has just penalized Facebook $ 5 billion for sharing with Cambridge Analytica, a political consultant to then-candidate Trump, data of 87 million Facebook users, which it used to compile voter profiles. 54If a data privacy problem is mixed with a consumer protection problem and possibly an antitrust problem (e.g., an abusive cut-off of access, or an anticompetitive acquisition), the FTC is well placed to consider the abuses together for whatever synergies may be mined. If vested with the multi-faceted matter, the FTC could consider formulating some rules and controlling principles, such as banning self-dealing and disallowing efficiency as a defense to coercion and deception.

C. Start-Ups: Nipping Competition in the Bud

Major platforms such as Facebook, through their massive data troves collected in part from the targets themselves, are well positioned to identify the promising start-ups that pose the greatest competitive threats to the platform, and buy them up or stamp them out. Because the start-ups typically lack significant revenues, the acquisition may be below the turnover thresholds required for premerger filing in some jurisdictions. Moreover, any single such acquisition may just be ignored as too insignificant.

Competition authorities in several jurisdictions are considering the need to be tougher on dominant platforms' systematically buying their most promising and threatening would-be rivals. Germany has revised its merger control thresholds to add a value-of-the-transaction test and to include debt as part of value, so that these rising-star start-ups do not escape assessment. 55The most commonly cited examples [\*315] of allegedly anticompetitive "snap-ups" is Facebook's acquisitions of Instagram and of WhatsApp, both of which platforms provide important alternatives for social network users seeking a model friendlier to younger users.

The future of such start-ups may be highly speculative at the time of acquisition. But what if, as it has been alleged, the dominant platform either buys up or stamps out all potentially threatening start-ups to preserve its dominance? The tale of Snapchat may be a cautionary one. Facebook pursued Snapchat. Snapchat said no. Then Facebook appropriated Snapchat's signature innovation: stories - a photo and video post-platform. The story is told in Facebook is Killing Snapchat with the Format It Created. 56

The big data strategies are reminiscent of tales of the Standard Oil Trust. By some reckoning the conduct may be called efficient. So was Standard Oil's conduct, as insisted by historian John S. McGee. 57But the efficiencies of Standard Oil's strategies did not prevent the giant predatory trust from being Exhibit A to the very enactment of the Sherman Act and did not dissuade the Supreme Court from breaking it up. 58

There are several big challenges to thwarting the so-called "killer acquisitions." One is to be able to identify the anticompetitive qualities of the acquisition at the time of vetting. The second is this: suppose the acquisitions are indeed harmful to competition today. It is possible under existing U.S. antitrust law, although not common, to obtain divestiture of assets whose acquisition turned out to be anticompetitive. The challenge, however, is to prove both that the consolidation is on balance anticompetitive (in spite of efficiency aspects such as better use of data), and that divestiture will noticeably produce competition and make consumers/users better off. Third, the possibility of sale to the dominant platform has been an incentive for start-ups to start up in the first place. One would want to be able to predict that the loss of this route to "success" would not cause more harm than good.

[\*316]

V. PROPOSALS

The "do nothing" and the "break them up" approaches are extreme policy approaches that at the one end would leave real competition problems unaddressed and at the other would apply blunt instruments to cure huge state-of-the-world dilemmas that pose daunting implementation problems and are sure to leave unfilled expectations in their wake.

There are three reasons why the United States might wish to take Europe's big data initiatives more seriously. First, European competition law is the law in a substantial part of the world. If the U.S. wants to be relevant in international transactions, it must appreciate European perspectives. Second, top down regulation is a possible substitute for antitrust. If the antitrust agencies ignore abuses of economic power that people care about, more intrusive regulation is likely to fill the gap. European competition policy gives some insight into how antitrust, complemented with consumer protection and privacy protection, can be an alternative to more intrusive regulation. 59Third, Europe may be right in some not insignificant ways.

We focus on the third point. Europe may be right. We address the skeptics who insist that there is no competition problem and that, if there is, it cannot be solved except by remedies that are worse than the disease. Is there a competition problem? Let us return to the three problems analyzed: (1) the Google/Comparative Shopping problem; (2) the German Facebook problem; and (3) acquisitions by dominant platforms of potentially threatening start-ups. Starting with the last, it is now recognized that the acquisitions of nascant competitors might be anticompetitive. If so, they are fair game for divestiture - if divestiture will indeed produce the desired competition. Going forward, these acquisitions should be vetted more seriously.

There is a philosophical divide between those who want to give more breathing space to even dominant platforms to buy promising start-ups whose futures are speculative, and those who are alarmed that the platforms are snapping up all threatening startups and are thereby insulating themselves from the competitive forces that could make them accountable. 60These are the usual philosophical tugs and play out with little fanfare (or get submerged) in the course of technocratic merger review.

The middle category - the German Facebook case - is largely a problem of deception, privacy invasion, and exploitation of people who [\*317] provide their data. While the German FCO was able to blend the several disciplines, the underlying problem treated in the German Facebook case is not likely to be seen as an antitrust problem in the United States.

We come, then, to category number 1: gatekeepers abuse the users of their platforms who compete with them, systematically downgrading the rivals, sabotaging their inventions, and appropriating their ideas to outcompete them. How to define the market, how to assess market power, how to identify an abuse as anticompetitive, and how to devise a remedy are all contested issues. In part, the divide is ideological. Do we stress that Google (for example) created its platform, conclude that it should be able to use it as it likes, and assume that legal duties will handicap invention? Or do we highlight Google's conflict of interests and observe that downgrading often-better rivals is inefficient as well as unfair? Do we emphasize that clogging the path to market interferes with the competition process, chills the incentives of the platform users, and defeats expectations of consumers, who expect best answers to their queries? In this late day of the political economy debate, the divide will not be closed by evidence or economics. The popular sentiment, however, tends to coincide with the concerns about power, its abuse, and the unaccountability of the dominant platforms. 61

Here are six suggestions for U.S. law, based on this author's perception that the big data antitrust abuses are real and pressing:

1. Recognize that the dominant big data platforms have economic power sufficient to cause competitive harms. When conduct of a dominant platform has demonstrable anticompetitive qualities, we should simplify the proofs of power and effects and get quickly to the question of procompetitive justifications. 62Anticompetitive qualities include clauses and conduct to frustrate multi-homing, interoperability, and data portability. If the platform engages in conduct to raise rivals' costs, to make alternatives infeasible, or to marginalize rivals, the burden should shift; and if defendants offer no credible procompetitive [\*318] explanation or justification, the conduct should be prohibited. The Federal Trade Commission is well situated to do this job. 63

2. Much conduct is likely to require deeper study of pros and cons. The FTC should examine the practices, listen to the justifications, and judge the conduct. It should not be required to prove that the platform's conduct will lessen output in the relevant market as a condition precedent to finding an offense. Output limitation is not the problem. To clarify the law, the FTC might write rules under its rule-making authority.

3. In the case of a dominant platform that also hosts its own services on the platform, the gatekeeper has a conflict of interest. The FTC should seriously consider establishing a duty of dominant platforms to treat all firms that are rivals on the platform (including its own) neutrally. As a first step the FTC should require the platform either to announce clearly regarding search query returns: "You are advised that we give preference to our own product" 64or to offer neutral, merit-based treatment. This can be done immediately. Writers and implementers of the algorithm should be rewarded on the basis of the system's performance, not on the basis of the platform's own products' performance.

#### AND there is a growing divergence and lack of coordination with Japan and South Korea.

Markus Dominik Müller 20, University of Vienna, East Asian Economy and Society, "Antitrust Regulation in Japan and South Korea – What Influence Does Chicago School of Antitrust Exercise on Competition Policy and Digital Economy," SSRN, 03/04/2020, pg. 24-26.

Globally, a sharp increase in digital economy competition has led to the creation of online marketplaces of different sizes over the last two decades (Katz 2019b). For scholars, the term ‘digital economy’ corresponds closely to e-commerce (Meyerling 2017, 454). Although some argue that it has become increasingly difficult to distinguish between a ‘non-digital’ and a ‘digital’ economy as “digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy” (OECD 2015, 54). A large number of institutions and academics are dealing with the question of competition regulations for multisided platforms in the digital economy (Katz 2019a, 2019b; Van Gorp & Batura 2015; Hayashi & Arai 2019). In general, microeconomic theory is at the origin of any competition policy as competitive markets allocate resources efficiently in the absence of market failure. One calls this proposition the ‘basic theorem of welfare economics’ (Hatta 2017, 2). Both, South Korea and Japan, favor an open market, which has major, highly competitive players though. Their largest domestic internet shopping companies are Rakuten, Amazon and Coupang, with market shares between 29% (Rakuten) and 20% (Amazon) in Japan (Endo 2017). South Korean e-commerce company Coupang dominates the daily active users’ rate in the country reaching almost four million users per day (Song 2019). Figure 5 presents the top 5 online shopping places in South Korea.

[Chart omitted]

For the violation of respective competition laws, full investigations have been conducted against different companies of the digital economy, foremost large market players such as Google, Amazon, Rakuten, and Coupang (Takeuchi & Sugihara 2019; Inagaki & Lewis 2018; Lee 2019; CPI 2019b). These companies play major roles in infringement cases (Autor et al. 2017, 2).

The advancements of technology and the subsequent challenges for competition law are part of Japan’s and South Korea’s concerns. Many researcher, so also Song (2016) stressed on the importance of consumer protection within South Korea’s Consumer Protection Policy. Visible in recent debates, issues or challenges surrounding antitrust law are currently attracting significant attention in both countries. The Japan Fair Trade Commission (JFTC), for instance, has established a study group to clarify the issue about ‘collective data collection’ as well as ‘digital cartels’ and concludes that there is a high necessity for “vigilance against monopolization or oligopolization of digital platforms” (JFTC 2018a). At the end of February 2019, the antitrust agency carried out sector wide inspections of large digital, globally operating platforms. In doing so, the JFTC sought to demonstrate its “strong interest in the e-commerce sector” concerning anti-competitive corporate behavior (Takamiya 2019). In South Korea, investigations are currently ongoing into unfair competition among tech companies. According to Joh Sun-wook, the new head of the fair trade commission, the priority under her direction is “reducing data monopolies and enforcing better protections for customer information” (CPI 2019c). The focus is on leading companies in the ICT sector, including Google, Naver, Facebook and Apple, among others (CPI 2019a, 2019c). These are crucial steps as Japan as well as South Korea have several firms infringing on competition law, these cases are subject to the national antitrust regulators (Baek 2018; CPI 2019b).

#### That crushes US relations with both countries.

Michael K. Young 01, Dean and Lobingier Professor of Comparative Law and Jurisprudence, The George Washington University Law School, "Lessons from the Battle Front: U.S.-Japan Trade Wars and Their Impact on the Multilateral Trading System," pg. 764-774, 2001, HeinOnline.

The United States' decisions in 1993 and 1995 to decline participation in the services framework agreement and thereafter to withdraw from the WTO maritime and telecommunications talks were certainly described in part in terms of the inadequacy of the market opening offers of other countries. At the same time, the United States also made quite clear that at least a major part of the problem was that other countries were unwilling to make their financial, services, telecommunications, and shipping markets sufficiently resemble those of the United States. 26 Reshaping, not merely opening, markets was clearly the agenda. 27 Failure to achieve that agenda resulted in the U.S. decision to pass on the agreement, at least for the time being.

This is not to say that the Clinton administration was the first to advance such a trade policy. At a minimum, this phenomenon can be traced at least as far back as the mid 1980s when the spiraling U.S. trade deficit resulted in strong pressure for protectionism in the United States. In response to that pressure, the Reagan Administration called upon representatives of companies in many of the major export oriented industries to voice their support for free trade. 28 These interest groups did champion free trade, but because of their export orientation, these groups also argued that free trade in the United States could only be sustained in conjunction with similar market opening concessions abroad. The link between open markets in the United States and open markets elsewhere in the world thus became an increasingly significant component of U.S. trade ideology. This ideology may have its roots much further back, indeed perhaps as far back as Charles Wilson, who articulated the most basic version of this ideology, namely, "What was good for our country was good for General Motors, and vice versa."29

At the same time it is important to note that when Wilson first chanted his mantra, the United States was more confident of its preeminent place in the international economic pecking order, and more secure in its belief that it could sustain an open world trading system almost entirely on its own, at least for a while. That sense of preeminence has historically been the most likely factor in keeping in check the natural inclination of U.S. trade negotiators to seek identical market opening concessions as a prerequisite to keeping U.S. markets open. Starting at the end of World War II, in other words, the United States had the will and the economic power to sustain the world trading system by unilaterally opening up its markets as both an example and an invitation to the rest of the world. Over time a number of countries followed suit, and they, as well as the United States, prospered greatly.

More recently in the United States, however, a general perception has developed that by itself, it can no longer sustain the world trading system and that other countries must open up their markets in a non-reciprocal way, or at least as much as the United States. This is needed, the belief dictates, in order to set an example and to extend an invitation to freer trade, just as the United States did after World War II. The perception is equally strong that those countries most capable of taking such action-in particular Japan, the single most capable country-have unfortunately not shown any international leadership. 30 These countries, rather, wrongly consider trade negotiations to be an oriental bazaar (and, in the bargain, probably also misunderstand the dynamics of the bazaar relationships). Their main object is to exact as many concessions as possible from the other side, while giving as little as possible in return. This short-sighted strategy has gradually eaten away at the U.S. inclination to keep its markets open without reservation or reserve.

Obviously, this overstates the case somewhat. The United States has never been that unselfish, nor should anyone expect any country to behave entirely unselfishly. The United States' creation of the current world trading system was, at least in part, designed to encourage economic development and in the bargain, create markets for U.S. goods, not to mention reductions in requirements for U.S. aid. The United States must have also hoped that political stability and democracy would follow in the wake of market openness. Throughout all the trade negotiations that followed the creation of the GATT, in addition, the United States bargained-and bargained hard-for concessions that would particularly benefit U.S. interests.

From the very beginning it is still unarguable that the United States had the most open markets of any major country, as it almost certainly does today.31 Despite the openness of those markets, the United States willingly committed itself to most favored nation principles and made access available to any and all countries that met even the most minimal requirements of openness. In order to exact market-opening concessions from other countries, the United States also, by and large, did not close its markets, though it occasionally threatened to do so, at least on a bilateral basis. Even somewhat overstating U.S. beneficence, it does not overstate the failure of leadership on the part of virtually every other country in the world.3 2 It is precisely that failure of leadership, combined with a strong domestic perception that the United States no longer enjoys comparative economic advantage over the rest of the world, which has lead to a fundamental rearticulation of U.S. trade policy, a rearticulation that found its clearest, but by no means first, articulation in the Clinton administration.

C. Consequences of a Shift in Trade Ideology?

A trade policy rooted in notions of reciprocity, narrowly defined, has significant theoretical economic and political problems, to be sure. Such problems are not reviewed here, as they are well covered elsewhere, and in any event are well known to trade negotiators in the United States and elsewhere.

What may be less considered and understood, however, are two other very important ways in which this shift in ideology may affect the world trading system. First, this shift may have the consequence of moving us toward attempts at harmonization of economic regimes, even in cases where such harmonization is neither economically rational nor politically justifiable or sustainable. 33

Second, this shift in ideology may, have very practical, real-world consequences in the way the United States formulates its trade policy and conducts its trade negotiations. Given the large role the United States plays in international trade negotiations, such a shift can reverberate deeply throughout the world and probably ought to be carefully considered. While a precise determination of each consequence is difficult from this temporal vantage point, such an examination is the purpose herein.

One should focus particularly on seven possible consequences of this shift in ideology and rhetoric, including: (1) an expansion of the range and types of regulatory action (and inaction) that might legitimately be considered "barriers" to trade; (2) an increased tendency for U.S. trade negotiators to examine private sector activity that might impede trade; (3) substantially increased pressure by U.S. negotiators to use numerical yardsticks in trade agreements; (4) a shift in attention to countries with which the United States has a large trade deficit, and away from countries with which the United States has legitimate rule-based grievances under trade treaties; (5) increased use of those domestic U.S. laws designed to give the U.S. president added powers to force open foreign markets; (6) an increased propensity to abandon certain other fundamental principles that have guided at least U.S. trade negotiations during the postwar period; and (7) a greater emphasis on opening markets through bilateral and regional trading agreements and arrangements, rather than through multilateral negotiations under the auspices of the WTO.

Let us briefly examine the overall structural changes that this change in ideology may occasion and then turn to the possible practical, short-term consequence that might logically and practically derive from a shift in trade ideology.

III. STRUCTURAL CONSEQUENCES OF A SHIFT IN TRADE IDEOLOGY

The existence of rather explicit barriers to trade like quotas and tariffs have hidden the relevance and importance of "reciprocity" or "comparability" from view for many years. As long as goods and services were denied entry by explicit barriers, negotiations focused on such explicit barriers. The initial Bretton Woods agreement dealing with trade, not surprisingly, was called the General Agreement on Tariffs and Trade, and even less surprisingly the first number of negotiations dealt principally with quotas and tariffs.3 4

As the importance of tariffs and quotas as barriers to trade diminished, however, the world trading regime turned its attention to other issues, including, most importantly for our purposes, nontariff and non-quota barriers to trade, such as licensing requirements, safety and health standards, and myriad other domestic measures that had the effect of discouraging the importation of foreign goods and services, or disproportionately disadvantaging such goods and services once they entered the country.35 Such measures are much harder to identify and even harder to remove than simple tariffs and quotas. The negotiations accordingly became much more complex and technical. The avowed goal, however, remained the same, to make it easier for foreign goods and services to compete on an equal footing with domestically imported goods.

Over time, of course, a number of things happened that made at least legislators, if not necessarily trade negotiators, despair of ever achieving "free" and "fair" access to foreign markets. It indeed became increasingly less clear exactly what "free" and "fair" meant. Despite all the reductions in trade barriers supposedly achieved through the GATT, bilateral U.S. trade deficits, and even the overall trade deficit, began to rise substantially.

Powerful voices in the political process became restless. Perhaps U.S. trade negotiators could not accurately identify the real barriers to its trade. Perhaps U.S. trade negotiators were too inclined to sacrifice U.S. economic interests to other geopolitical interests. The U.S. Congress accordingly took major steps to realign the basic domestic trade negotiating institutions, and the way in which those institutions operated.3 6 First, responsibility for conducting trade negotiations was shifted from the Department of State to the White House. Second, private interests were increasingly empowered to force the Executive Branch to act on their complaints. Finally, the president's discretion to refrain from acting on those complaints was gradually whittled away both by legislation that explicitly reduced executive discretion in certain trade matters and by the threat of more such legislation or worse.3 7

Still, the deficits - or at least the perception of the deficits - continued to rise, the comparative position of the U.S. among the world's economies continued to decline (or at least it was perceived to decline), and people began to wonder whether the United States was attacking the right problem. Perhaps the problems were more structural and institutional. Various negotiations were designed at least in part to address these broader structural issues. Such negotiations included the obvious, such as the Structural Impediments Initiative (SII) talks with Japan. 38

As a formal matter, these talks were designed to effect fundamental structural changes that would ease the task of importing into Japan and the United States. 39 As a practical matter, these talks were created to give U.S. trade negotiators a forum to urge institutional changes that would make Japan look more like the United States.40 The list of U.S. demands left little doubt about that approach. 41 The United States urged alterations in the pattern of enforcement of basic laws, such as those governing competition policy and corporate governance, to allow appreciably more private enforcement. 42 They suggested the creation of mechanisms, principally judicial mechanisms that would allow private individuals to question more directly the legality and propriety of administrative action. 43 They suggested changes in the operation of the stock market, at least some of which would have facilitated mergers and acquisitions. 44

The list is long, and each demand can be explained in terms of its possible salutary impact on trade. A careful examination of each of the demands, nevertheless, leaves little doubt that when addressing a perceived problem, U.S. trade negotiators invariably thought the best solution forJapan was to make its economic system look more like that of the United States.

To some extent that conformity is what the originators of the competition policy debate also had in mind. It is not a coincidence that this debate began in earnest after Lord Leon Brittan's famous speech in Davos. 45 In that speech he noted the still-obvious difficulties of importing into some markets, despite the elimination of myriad formal trade barriers, including many nontariff barriers. He then asked whether all the participants in the world trading system could-or perhaps should-continue to provide benefits to those difficult countries, if those difficult countries, for some reason or another, did not seem to provide equivalent benefits to the rest of the world. The logical conclusion that flows from this line of inquiry (though not necessarily the conclusion that Lord Brittan seemed to draw) is that some economies might be somehow structurally or institutionally incompatible with the economies of the rest of the world, and countries with incompatible economies should not enjoy the benefits of access to the markets of the rest of the world, if they could not readjust their markets to allow the rest of the world to take advantage of their markets.

One obvious framework for considering the structure of economies, of course, was through the prism of competition policy. Talks commenced about how to create legal frameworks that would ensure that competition reigned supreme in every country. These negotiations in the Organization for Economic Cooperation and Development (OECD) and elsewhere were highly technical in nature, and competition law specialists increasingly tend to opine that while laws may vary, many, if not most developed countries have anti-competition policy regimes that allow competition to flourish, at least in most industries. 46 It is, therefore, perhaps hard to recall that in their infancy, the rhetoric surrounding these talks made it seem that the trade negotiations were actually about restructuring every economy in the world so that they would all resemble the free-booting, winner-take-all, aggressively competitive economic system of the United States. 47 As the more technical experts came to the fore, the nature of these discussions changed dramatically, of course, but in the beginning, at least, the rhetoric surrounding these talks -like the SII talks- made it seem that the principal agenda was to make the rest of the world look as much like the United States as possible.

As the SII talks faded in utility and importance and as the competition policy talks turned technical, fora for urging the rest of the world to reshape itself in the image of the United States shifted partly to the WTO. The fundamental appeal of this approach, nevertheless, did not necessarily vanish, but seems to have resurfaced at least in part in the bilateral quest for reciprocity or comparability.

Now, those terms "reciprocity" and "comparability" do not have to mean that the United States seeks to make the economy of its counterparts resemble its own. It could mean merely that the United States seeks what has traditionally been sought in trade negotiations: an import regime that does not discourage imports, and does not disadvantage imports after they enter a country and attempt to compete with domestically-produced goods.

In light of the recent history of trade ideology in the United States, however, that is not what the terms "comparability" and "reciprocity" mean. It appears, rather, that U.S. trade negotiators are demanding that our trade partners make their markets open both to a degree and in a manner comparable to that of the United States. Despite all the reductions in trade barriers, after all, economic structures and institutions that still seem to disadvantage U.S. goods continue to exist in many countries. This has generated something like trade battle fatigue among U.S. trade policymakers, along with many members of Congress. In the bargain, many are convinced that a market can be as open to foreign goods and services as the United States if, and only if that market in fact resembles the U.S. market in both structure and function.

This is not to say it is necessarily sensible or desirable, from either an economic or political point of view, to try to make the rest of the world look like the United States. Many internal barriers to trade and free competition can be reduced or eliminated by means other than making each country's economic system identical to all the others, indeed even stronger.48 The relatively soft approach of "harmonization" is not always the most economically efficient or socially desirable way to expand free trade. 49 Mechanisms other than "harmonization" can often be used to better effect in addressing internal barriers to trade and competition. For purposes of economic efficiency, and certainly for political and social policy purposes, the key clearly is not necessarily to make all the world's economic systems resemble each other. The key, rather, is to make them operate in such a manner that goods can flow freely in and out and that all goods, once in, can compete equally. That does not require identical or even necessarily harmonized systems.

Discovering precisely what changes are necessary within each system, and then effecting such changes is laborious, difficult, time consuming, and, to date at least, largely unsuccessful. U.S. politicians and their executive charges do not always operate in a political climate that allows them the leisure to unravel each of these problems, and then urge U.S. trade partners to adopt optimal solutions compatible with U.S. trade partners' current economic structure and desired social policies. It is often much easier to simply urge trade partners to make themselves over in the trade image of the United States in order to become as trade friendly as the United States. Convincing U.S. trade partners of the wisdom of this course is not especially easy either, but the solution to that is simply to threaten that access to the U.S. markets will be restricted in the event that-and to the extent that-it perceives its markets to be restricted. While, as a matter of strict logic, the desire to make the rest of the world as open to trade as the United States does not necessarily lead the United States to urge its trading partners to become more like it, the political milieu within which trade policy formation occurs in the United States thus increasingly pushes in that direction. The Clinton Administration was certainly not the first to feel this pressure, nor the first to urge, either explicitly or implicitly, U.S. trading partners to become more like the United States. It simply was the most explicit in making this the foundational premise for developing and executing its trade policy.

U.S. attitudes about trade agreements in areas of emerging importance, such as telecommunications and financial services, also leave little doubt that the United States is reluctant to promise to keep its markets open until the rest of the world opens their markets adequately. An examination of U.S. objections to proposals put on the table in recent negotiations over those two subjects leaves little doubt that the core concern about most of those proposals was lack of sufficient promises that the offering countries would restructure their markets to look like the United States. 50 The United States seems to simply have trouble understanding how a telecommunications market can be considered truly open and freely competitive if it does not resemble the U.S. market to some considerable degree. The same is true with respect to financial services, though in this sector, resemblance takes on a regulatory dimension, i.e., that the foreign country provides U.S.-style prudential regulations.

With reductions in explicit barriers to trade, such as quotas and tariffs, perhaps it was inevitable such a point would be reached; nevertheless, it does portend a fundamental shift in rhetoric in trade negotiations. For the first time in postwar history, it may put the major trading countries on an ideological collision course. This, in turn, may either severely undermine the basic developed country consensus regarding free trade or dramatically change the nature of trade negotiations and the underlying institutional framework that supports those negotiations. In either case, this shift in conceptual framework cannot long be ignored if the hope is to continue expansion of world trade through multilateral agreements and multilateral institutions.

#### Absent that, a North Korea war is inevitable.

EAF 21, "Biden’s high stakes on repairing Japan–South Korea relations," East Asia Forum, 07/12/2021, https://www.eastasiaforum.org/2021/07/12/bidens-high-stakes-on-repairing-japan-south-korea-relations/.

US President Joe Biden has put priority on mending US alliance relationships in the Asia Pacific region, bringing US allies together in a united approach on China and restarting US negotiation to denuclearise North Korea. Deepening US–Japan–ROK trilateral cooperation is a key mechanism, critical to his agenda. But the current tensions and deep-seated complexities of the Japan–South Korea relationship continue to be serious stumbling blocks.

The stakes are high for Japan and South Korea to repair their economic, diplomatic and security cooperation. They are both economically advanced democracies whose prosperity is rooted in a free and open global trading system and with important roles to play as leaders in the region.

Japan and South Korea are both important US allies in East Asia and efforts on alliance deepening, bolstering deterrence capabilities, reducing the US security burden and persuading the United States to stay engaged in the region would be better channelled trilaterally.

Japanese and South Korean efforts to engage and shape China as a responsible and constructive regional stakeholder, such as through the China–Japan–ROK trilateral, would be more effective if Japan and South Korea were working together with common purpose.

US–Japan–ROK trilateral contingency planning vis-a-vis North Korea is imperative given the need for US troops based in Japan and the Japanese Self Defense Forces logistical support in case a major crisis were to erupt on the Korean Peninsula.

#### Extinction.

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But the United States has consistently refused to adopt a “no first use” policy — a policy not to be the first one in a conflict to use a nuclear weapon, and to use them only if the other side uses them first. That means Trump could theoretically decide to launch a nuclear strike before an adversary’s nukes go off in America. In the heat of battle, the US military might detect an incoming nuclear attack from North Korea and the president could decide to respond with a similar strike. Either way, the president is the one who ultimately decides to put the process of launching a nuclear strike in motion — but he still has a few steps to complete. 2) A US military officer opens the “football” Once the president has decided the situation requires a nuclear strike, the military officer who is always by the president’s side opens the “football.” The leather-clad case contains an outline of the nuclear options available to the president — including possible targets, like military installations or cities, that the US’s roughly 800 nuclear weapons ready to launch within minutes can hit — and instructions for contacting US military commanders and giving them orders to launch the missiles with warheads on them. 3) Trump talks with military and civilian advisers The president is the sole decision-maker, but he would consult with civilian and military advisers before he issues the order to launch a nuclear weapon. A key person Trump must talk to is the Pentagon’s deputy director of operations in charge of the National Military Command Center, or “war room,” the heart of the Defense Department that directs nuclear command and control. The president can include whomever else he wants in the conversation. He would almost certainly consult Gen. John Hyten, commander of US Strategic Command, since Hyten is responsible for knowing what the US can hit with its nuclear weapons. But Trump would likely also include Defense Secretary James Mattis, National Security Adviser John Bolton, and Gen. Joseph Dunford, chairman of the Joint Chiefs of Staff, in that conversation as well. The chat also doesn’t have to be held in the White House’s Situation Room; it can happen anywhere over a secured phone line. If any of the advisers felt such an attack would be illegal — like if Trump simply wanted to nuke Pyongyang despite no apparent threat — they could advise the president against going ahead with the strike. Last November, Hyten publicly said he wouldn’t accept an illegal order from Trump to launch a nuclear attack. “He’ll tell me what to do, and if it’s illegal, guess what’s going to happen?” Hyten told an audience at the Halifax International Security Forum last year. “I’m gonna say, ‘Mr. President, that’s illegal.’” He continued by outlining what the military could consider an illegal order: if a nuclear attack isn’t proportional to the actual threat, for instance, or if the attack would cause unnecessary suffering. However, what does and doesn’t constitute a “legal” order is still up for debate and was the focus of a congressional hearing last November. Either way, if Hyten refused to follow the order, Trump could fire him and replace him with someone who would carry it out. 4) The president gives the official order to strike After the conversation, a senior officer in the “war room” has to formally verify that the command is coming from the president. The officers recite a code — “Bravo Charlie,” for example — and the president must then respond with a code printed on the “biscuit,” the card with the codes on it. Then members of the “war room” communicate with the people who will initiate and launch the attack. Depending on the plan chosen by the president, the command will go to US crews operating the submarines carrying nuclear missiles, warplanes that can drop nuclear bombs, or troops overseeing intercontinental ballistic missiles on land. 5) Launch crews prepare to attack The launch crews receive the plan and prepare for attack. This involves unlocking various safes, entering a series of codes, and turning keys to launch the missiles. Crews must “execute the order, not question it,” Cirincione told Maizland. 6) Missiles fly toward the enemy It could take as little as five minutes for intercontinental ballistic missiles to launch from the time the president officially orders a strike. Missiles launched from submarines take about 15 minutes. And then the president waits to see if they hit their target. The three main risks of nuclear war — and one wild card Those that have nuclear weapons, many have argued, will never use them. The destruction and human devastation is so unimaginable that it’s hard to believe a world leader will launch them again, they say. But no one can guarantee they won’t be used at least once more — and that possibility keeps most nuclear experts up at night. They disagree wildly as to what the next nuclear use might look like or how it might happen, but they almost unanimously cite the same three risks. 1) US vs. North Korea war The potential nuclear conflict between the United States and North Korea worries most experts — and likely most people on Earth. That makes sense: Trump and Kim, the North Korean premier, spent most of 2017 threatening to bomb each other with nuclear weapons. Kim actually gained a missile capable enough of reaching the entirety of the United States, although questions remain about whether it could make it all the way with a warhead on top and detonate. Still, there remains a genuine fear — perhaps slightly allayed now following Washington and Pyongyang’s diplomatic thaw — that the leaders might escalate their public squabble into a nuclear conflict. In February, Yochi Dreazen wrote for Vox that “a full-blown war with North Korea wouldn’t be as bad as you think. It would be much, much worse,” in part because “millions — plural — would die.” As Dreazen recounts, the US would likely have to send in around 200,000 troops to destroy Kim’s nuclear arsenal. Seoul, South Korea’s capital, would soon — if not already — lie in ruins due to North Korea’s large artillery capabilities. None of that may even be the worst part: Bruce Klingner, a 20-year veteran of the CIA who spent years studying North Korea, told me that Iraqi leader Saddam Hussein had stood by in 2002 as the US methodically built up the forces it used to invade the country — and oust Hussein — the following year. He said there was little chance that Kim would follow in Hussein’s footsteps and patiently allow the Pentagon to deploy the troops and equipment it would need for a full-on war with North Korea. “The conventional wisdom used to be that North Korea would use only nuclear weapons as part of a last gasp, twilight of the gods, pull the temple down upon themselves kind of move,” said Klingner, who now works for the conservative Heritage Foundation. “But we have to prepare for the real possibility that Kim would use nuclear weapons in the early stages of a conflict, not the latter ones.” In effect, any attempt to overthrow the Kim regime would prompt North Korea to launch nukes at the United States. Washington would almost certainly respond in kind, leading to one of the worst wars in world history. 2) US vs. Russia war Few experts discounted the idea that the US and Russia could yet engage in a nuclear war despite a decades-long standoff. After all, they’ve come close a few times. Here are just two examples: In September 1983, a missile attack system made it seem like the US had launched weapons at the Soviet Union. One man, Soviet Lt. Col. Stanislav Petrov, decided it was a false alarm and didn’t report the alert. Had he done so, Moscow likely would’ve responded with an actual nuclear strike. Stanislav Petrov, a former Soviet military officer known in the West as “The man who saved the world’’ for his role in averting a nuclear war over a false missile alarm, died in May, 2015 at age 77. Stanislav Petrov, a former Soviet military officer known in the West as “The man who saved the world’’ for his role in averting a nuclear war over a false missile alarm, died in May 2015 at age 77. Pavel Golovkin/AP Two months later, a too-real NATO war game — Able Archer 83 — made the Soviets believe Western forces were preparing for an actual attack. Moscow put its nuclear arsenal on high alert, but ultimately, neither side came to nuclear blows. Today, two main reasons explain why a US-Russia nuclear fight is a major concern. The first is the most obvious: Moscow just has so many nuclear weapons. Russia is the only country that could match the US bomb-for-bomb in any conflict. The longer Moscow has its weapons, the thinking goes, the higher the chance it uses them on the US — or vice versa. The second reason is the most troublesome: Washington and Moscow may be on a collision course. Russia is expanding further into Europe and encroaching on NATO territory. There’s even fear that Putin might authorize an invasion of a Baltic country that once was a part of the Soviet Union but is now in NATO. If that happens, the US would be treaty-bound to defend the Baltic country, almost assuredly setting up a shooting war with Moscow. Experts disagree on what would happen next. Some, including the Trump administration, claim Russia would use nuclear weapons early in a fight as a way to “escalate to deescalate” — do something so brash at the start of a conflict that it has to end before it gets even worse. Others say Russia would use the weapons only if its forces are on the brink of defeat. Magnets depicting Russian President Putin and President Trump on sale in Helsnki, Finland. Magnets depicting Russian President Putin and President Trump on sale in Helsnki, Finland. Alexander Demianchuk\TASS via Getty Images But Olga Oliker and Andrey Baklitskiy, experts on Russia’s nuclear strategy, wrote at War on the Rocks in February that Moscow’s “military doctrine clearly states that nuclear weapons will be used only in response to an adversary using nuclear or other weapons of mass destruction,” or if the country’s survival is in doubt. In other words, they say Russia would only use nukes in retaliation or to avoid certain extinction. Washington, of course, would likely respond with its own nuclear strikes after Moscow dropped its bombs. At that point, they’d be in a full-blown nuclear war with the potential to destroy each other and much of the world (more on that below). 3) India vs. Pakistan war India and Pakistan have gone to war four times since 1947, when Britain partitioned what had been a single colony into Hindu-majority India and Muslim-majority Pakistan. The worry today, though, is that a fifth conflict could go nuclear. Protesters hurl stones towards police and paramilitary men during clashes on the outskirts of Srinagar, India, on October 16, 2018. Protesters hurl stones towards police and paramilitary men during clashes on the outskirts of Srinagar, India, on October 16, 2018. Waseem Andrabi/Hindustan Times via Getty Images After decades of testing, India officially became a nuclear power in 1998. Islamabad, which had started a uranium enrichment program in the 1970s, soon joined New Delhi in the nuclear club. Two of their fights — the 1999 Kargil War and the 2001-’02 Twin Peaks Crisis — happened with fully functioning nuclear arsenals, but ultimately, neither country chose to use them. But the opportunity keeps presenting itself. Each side claims the other has violated an ongoing ceasefire in the contested, but India-administered, Kashmir region. The region continues to be roiled by violence; for instance, six people were killed in separate instances on September 27. The dispute over Kashmir is a key reason for current India-Pakistan tensions — and has the potential to spiral out of control. Javier Zarracina/Vox Some fear that India and Pakistan may reach for the proverbial nuclear button sooner rather than later. Here’s just one reason why, according to an April report by Tom Hundley for Vox: The Pakistan navy is likely to soon place nuclear-tipped cruise missiles on up to three of its five French-built diesel-electric submarines. ... Even more disturbing, Pakistani military authorities say they are considering the possibility of putting nuclear-tipped cruise missiles on surface vessels. ... Pakistan says its decision to add nuclear weapons to its navy is a direct response to India’s August 2016 deployment of its first nuclear submarine, the Arihant. A second, even more advanced Indian nuclear submarine, the Arighat, began sea trials last November, and four more boats are scheduled to join the fleet by 2025. That will give India a complete “nuclear triad,” which means the country will have the ability to deliver a nuclear strike by land-based missiles, by warplanes, and by submarines. In effect, India and Pakistan are in a nuclear arms race, and historical enemies will soon patrol dangerous waters in close proximity with nuclear weapons aboard their vessels. While there’s no real indication a fifth India-Pakistan war is on the horizon, it’s possible one flare-up puts both countries on the path to a nuclear crisis. Wild card: Trump’s temperament Cirincione, the head of the Ploughshares Fund, told me the risk of nuclear war is increasing because of one factor: Trump. “He is the greatest nuclear risk in the world, more than any person, any group, or any nation,” he said. “The policies he is pursuing are making most of our nuclear risks worse, and he is tearing down the global institutions that have reduced and restrained nuclear risks over the last few decades.” Activists marches with a model of a nuclear rocket during a demonstration against nuclear weapons on in Berlin, Germany, on November 18, 2017. About 700 demonstrators protested against the escalation of threat of nuclear attack between the US and North Ko Activists marches with a model of a nuclear rocket during a demonstration against nuclear weapons on in Berlin, Germany, on November 18, 2017. About 700 demonstrators protested against the escalation of threat of nuclear attack between the US and North Korea. Adam Berry/Getty Images Here’s what he means: The administration’s Nuclear Posture Review, released in February, lowered the threshold for dropping a bomb on an enemy. Basically, the US said that it would launch low-yield nuclear weapons — smaller, less deadly bombs — in response to nonnuclear strikes, such as a major cyberattack. That was in contrast with previous US administrations, which said they would respond with a nuke only in the event of the most egregious threats against the US, like the possible use of a biological weapon. The document also calls for more, smaller weapons on submarines and other platforms to attack enemies. Many experts worry that having tinier nukes makes them more usable, thereby increasing the chance of a skirmish turning into a full-blown nuclear war. (Think, for example, of the US-China trade war escalating to the point that Trump thinks his only option is to launch a smaller nuke, or how Trump could respond to Beijing after a devastating cyberattack on US infrastructure.) Plus, increasing the arsenal in this way would partially undo decades of the US’s work to stop nuclear proliferation around the world. Some experts, like Georgetown’s Kroenig, say having smaller tactical weapons is actually a good idea. Our current arsenal, which prioritizes older and bigger nukes, leads adversaries to think we would never use it. Having smaller bombs that America might use, then, makes the chance of a nuclear conflict less likely. “It gives us more options to threaten that limited response,” Kroenig told me. “We raise the bar with these lower-yield weapons.” But the Trump risk may have less to do with what kinds of bombs he has and more to do with his temperament. Take his tweet from January 2 toward the end of his spat with Kim Jong Un, the North Korean leader: Donald J. Trump ✔ @realDonaldTrump North Korean Leader Kim Jong Un just stated that the “Nuclear Button is on his desk at all times.” Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works! 475K 7:49 PM - Jan 2, 2018 Twitter Ads info and privacy 324K people are talking about this While tensions with North Korea were high early on in Trump’s presidency, he has yet to face a situation, like his predecessors did, where it seemed nuclear war was likely. The 13-day Cuban missile crisis in October 1962, where the Soviet Union had secretly placed missiles in Cuba — just 90 miles from the US mainland — comes to mind. Members of President John F. Kennedy’s team, especially his military advisers, called for airstrikes on Cuba and even an invasion. But Kennedy decided to set up a blockade of the island and try to work out a diplomatic settlement with the Soviets, in part because a military confrontation might turn nuclear. Ultimately, the situation ended when they agreed on a deal: The Soviets would withdraw the missiles from the island, and the US would take out its missiles in Turkey. Before that conclusion, both sides came as close to nuclear war as ever. Customers gather to watch President John F. Kennedy as he delivers a televised address to the nation on the subject of the Cuban Missile Crisis, on October 22, 1962. Customers gather to watch President John F. Kennedy as he delivers a televised address to the nation on the subject of the Cuban Missile Crisis, on October 22, 1962. Ralph Crane/The LIFE Picture Collection/Getty Images How would Trump handle himself in a similar situation? Would he resist the urges of some in his military brass to strike an enemy — perhaps with a lower-yield nuke — or would he simply tweet out a threat in a hair-trigger moment? The fact is we don’t know — but what we do know about Trump makes his demeanor in such a situation a potential, even if very small, nuclear risk. Here’s what happens in a nuclear attack The theory around whether someone might drop a nuclear bomb takes away from the most serious matter in these discussions: the human and physical toll. Simply put, a nuclear strike of any magnitude would unleash suffering on a scale not seen since World War II. And with the advances in nuclear technology since then, it’s possible the devastation of the next nuclear strike would be far, far worse. It’s hard to picture what the effect of a modern-day nuclear attack would actually look like. But Wellerstein, the nuclear historian, created a website called Nukemap that allows users to “drop” a specific bomb — say, the roughly 140-kiloton explosive North Korea tested in September 2017 — on any target. So I did just that, detonating that North Korean device on the Capitol building in the heart of Washington, DC — and, well, see for yourself: Christina Animashaun/Vox Roughly 220,000 people would die from this one attack alone, according to the Nukemap estimate, while another 450,000 would sustain injuries. By comparison, America’s two nuclear attacks on Japan in 1945 killed and injured a total of around 200,000 people (granted, Hiroshima and Nagasaki had smaller populations than the Washington metro area). It’s very likely that North Korea wouldn’t launch just one bomb, but multiple at DC and likely some at New York City, the West Coast, and possibly US military bases in Guam and/or Hawaii. But for simplicity’s sake, let’s focus on the effects of this one horrible attack. The center yellow circle is the fireball radius — that is, the mushroom cloud — which would extend out about 0.25 square miles. Those within the green circle, approximately a 1.2-square-mile area, would face the heaviest dose of radiation. “Without medical treatment, there can be expected between 50% and 90% mortality from acute effects alone. Dying takes between several hours and several weeks,” according to the website. Radiation poisoning is a horrible way to die. Here are just some of the symptoms people sick with radiation get: Nausea and vomiting Spontaneous bleeding Diarrhea, sometimes bloody Severely burnt skin that may peel off The dark grey circle in the middle is where a shock wave does a lot of damage. In that 17-square-mile area, the bomb would flatten residential buildings, certainly killing people in or near them. Debris and fire would be everywhere. People in the bigger yellow circle, a 33.5-square-mile area, would receive third-degree burns. “There’s a bright flash of light,” Brian Toon, a scientist and expert on nuclear disasters at the University of Colorado Boulder, told me about when the bomb goes off. Those exposed to the light, which would stretch for miles, would get those burns if their skin were exposed. The light would also “easily ignite fires with flammable objects like leaves, twigs, paper, or your clothing,” he added. The victims may not feel much pain, however, because the burn will destroy pain nerves. Still, some will suffer major scarring or have the inability to use certain limbs, and others might require amputation, according to Wellerstein’s site. A mother tends her injured child, a victim of the atomic bomb blast at Hiroshima. A mother tends her injured child, a victim of the atomic bomb blast at Hiroshima. Keystone/Getty Images The biggest circle encompasses the near entirety of the air-blast zone: a 134-square-mile area. People can still die, or at least receive severe injuries, in that location. The blast would break windows, and those standing near the glass might be killed by shards, or at least shed blood from myriad cuts. Those who survive the bombing and its effects will have to walk through burning rubble and pass lifeless, charred bodies to reach safety. Some of them will ultimately survive, but others will succumb to sustained injuries or radiation. The wind, meanwhile, will carry the irradiated debris and objects — known as fallout because they drop from the sky — far outside the blast zone and sicken countless others. As for Washington, it will likely take decades and billions of dollars not only to rebuild the city but clean it of radiation entirely. It’s worth reiterating that all of the above are estimates for one strike on one location. An actual nuclear war would have much wider and more devastating consequences. And if that war spiraled out of control, the effects after the conflict would be much worse than the attacks themselves — and change the course of human history. “Almost everybody on the planet would die” It’s possible you have an idea of what a post-nuclear hellscape looks like. After all, disaster movies are obsessed with that kind of world. But scientists and other nuclear experts care deeply about this issue too — and their research shows the movies may be too optimistic. Alan Robock, an environmental sciences professor at Rutgers University, has spent decades trying to understand what a nuclear war would do to the planet. The sum of his work, along with other colleagues’, is based on economic, scientific, and agricultural models. Here’s what he found: The most devastating long-term effects of a nuclear war actually come down to the black smoke, along with the dust and particulates in the air, that attacks produce. People walking through the ruins of Hiroshima in the weeks following the atomic bomb blast. People walking through the ruins of Hiroshima in the weeks following the atomic bomb blast. Bernard Hoffman/The LIFE Picture Collection/Getty Images In a nuclear war, cities and industrial areas would be targeted, thereby producing tons of smoke as they burn. Some of that smoke would make it into the stratosphere — above the weather — where it would stay for years because there’s no rain to wash it out. That smoke would expand around the world as it heats up, blocking out sunlight over much of Earth. As a result, the world would experience colder temperatures and less precipitation, depleting much of the globe’s agricultural output. That, potentially, would lead to widespread famine in a matter of years. The impact on the world, however, depends on the amount of rising smoke. While scientists’ models and estimates vary, it’s believed that around 5 million to 50 millions tons of black smoke could lead to a so-called “nuclear autumn,” while 50 million to 150 millions tons of black smoke might plunge the world into a “nuclear winter.” If the latter scenario came to pass, Robock told me, “almost everybody on the planet would die.”

### 1AC---Plan

#### Plan: The United States federal government should limit significantly anticompetitive unilateral exclusion in the technology sector.

### 1AC---Solvency

#### Contention 3 is Solvency.

#### The plan deters and remedies exclusionary conduct.

John B. Kirkwood 21, Professor of Law, Seattle University School of Law. American Law Institute. Executive Committee, AALS Antitrust and Economic Regulation Section. Advisory Board, American Antitrust Institute. Advisory Board, Institute for Consumer Antitrust Studies, "Tech Giant Exclusion," Florida Law Review, Forthcoming, pg. 42-43, 01/15/2021, SSRN.

The tech giants, as we have seen, have excluded third parties selling on their platforms by demoting them in search results, using nonpublic seller-specific data to boost their own products, or refusing to deal with them simply because they are competitors. While this behavior is not widespread, it appears to be unjustified and anticompetitive. It enhances the tech giants’ market power and injures their customers. Yet no one in the United States has successfully challenged any of this conduct.

The most likely reason is that the conduct did not violate the Sherman Act. It is unilateral, not collusive, and it did not result in actual or imminent monopoly power. 224 This gap should be closed. The Sherman Act should be amended to reach unilateral exclusion by the tech giants that reduces competition significantly, even if it is unlikely to generate or maintain monopoly power. Further, the Department of Justice and the FTC should be authorized to obtain civil penalties if they establish a violation of this new section. This would couple public civil penalty enforcement with private treble damage actions, magnifying the deterrent effect of antitrust law.

These twin sanctions would alter the tech giants’ financial calculus. They would not deploy exclusionary tactics unless the likely gains outweighed the prospect of substantial financial penalties. Of course, that might not stop them in every case. They may figure that if they can disable rivals for a time they can achieve sufficient scale economies or network effects to ward off future entry, thereby earning long-run profits that would exceed the cost of any sanctions they have to pay.225 But they cannot count on that and the issue is not easy to resolve.226 In the face of such uncertainty, stiff financial sanctions are likely to reduce the incidence of exclusionary conduct. This is particularly so in complementary product markets, where the tech giants cannot generally hope to gain the scale and network advantages they possess in their core businesses.227 \*\*\*FOOTNOTE BEGINS\*\*\* 227 For example, Amazon sells private label batteries on amazon.com. Even if it could capture more of this complementary market for itself, it is unlikely to attain significant advantages over third party competitors like Eveready and Duracell. \*\*\*FOOTNOTE ENDS\*\*\*

The existence of Section 5 of the Federal Trade Commission Act is no reason not to expand the Sherman Act. In theory, Section 5 covers anticompetitive conduct that falls short of monopolization, but as Section A explains, its remedies are limited and its track record has been disappointing. Section B addresses the risk that expanding the Sherman Act would unduly deter procompetitive conduct. This risk can be minimized, however, by confining the amendment to the tech giants and including proof requirements that would defeat most challenges to desirable conduct. Section C describes the recent Congressional support for this change. Section D uses a detailed example to demonstrate that it would be workable in practice.

### IF TIME

#### Back to Realignment.

#### Only federal agencies, particularly the FTC, can ensure effective cross-border coordination with the EC to mitigate disputes.

Despina Pachnou 17, Organization for Economic Co-operation and Development, "Directorate for Financial and Enterprise Affairs Competition Committee," Roundtable on the Extraterritorial Reach of Competition Remedies, Working Party No. 3: Co-operation and Enforcement, December 2017, pg. 8-11.

5. The Agencies’ Cooperation with Foreign Jurisdictions on Remedies

18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.35 Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.36 The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.37

6. U.S. Case Examples

19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers.

6.1. Merger Cases

20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.’s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.38 Similarly, in the General Electric-Alstom SA merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department’s investigation “facilitated [the Department’s] investigation and helped formulate remedies that [preserved] competition in the United States and internationally.”39 A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions. 40 There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.41

21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority’s remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco’s acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.42

22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets “remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau (“CCB”)]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States.” 43 An extraterritorial remedy was also required to resolve Department’s investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer “to meet current and future demand for Modelo Brand Beer in the United States,” which resolved concerns that the merger would harm competition in twenty-six local U.S. markets. 44

# 2AC

## Competition ADV

### Innovation Turn---2AC

#### Antitrust increases business confidence and growth broadly.

OECD 14, Organization for Economic Cooperation and Development, “Factsheet on how competition policy affects macro-economic outcomes”, OECD, October 2014, https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf

Most importantly, it is clear that industries where there is greater competition experience faster productivity growth. This has been confirmed in a wide variety of empirical studies, on an industry-by-industry, or even firm-by-firm, basis. Some studies seek to explain differences in productivity growth between industries using measures of the intensity of competition they face. Others look at the effects of specific pro-competitive interventions, particularly trade liberalisation or the introduction of competition into a previously regulated, monopoly sector (such as electricity).

This finding is not confined to “Western” economies, but emerges from studies of the Japanese and South Korean experiences, as well as from developing countries.

The effects of stronger competition can be felt in sectors other than those in which the competition occurs. In particular, vigorous competition in upstream sectors can ‘cascade’ to improve productivity and employment in downstream sectors and so through the economy more widely.

The main reason seems to be that competition leads to an improvement in allocative efficiency by allowing more efficient firms to enter and gain market share, at the expense of less efficient firms (the so called between-firms effect). Regulations, or anti-competitive behaviour preventing entry and expansion, may therefore be particularly damaging for economic growth. Competition also improves the productive efficiency of firms (the so called within-firms effects), as firms facing competition seem to be better managed. This can even apply in sectors with important social as well as economic outcomes: for example, there is increasing evidence that competition in the provision of healthcare can improve quality outcomes.

There is also evidence that intervening to promote competition will increase innovation. Firms facing competitive rivals innovate more than monopolies (although after such competition a firm may of course end up with a monopoly through a patent). The relationship is not simple: it is possible that moderately competitive markets innovate the most, with both monopoly and highly competitive markets showing weaker innovation. However, as competition policy does not focus on making moderately competitive markets hyper-competitive, but rather on introducing or strengthening competition in markets where it does not work well, this would still imply that most competition policies serve to promote innovation.

Because more competitive markets result in higher productivity growth, policies that lead to markets operating more competitively, such as enforcement of competition law and removal of regulations that hinder competition, will result in faster economic growth.

Is there evidence that pro-competitive policies are effective?

In addition to this evidence that competition promotes growth, there have been studies directly of the effects of competition law itself, and of product market deregulation. Although it is difficult to distinguish the effects of individual policy changes, there are some studies showing that introducing competition law raises productivity. Conversely, the selective suspension of antitrust laws in the USA during the 1930s seems to have delayed recovery.

Many studies of the effect of competition law use international comparisons of different countries’ experiences, to assess whether countries with competition laws (or longer-standing, or more effective competition laws) achieve faster economic growth. The task is a difficult one because of many other factors that affect the overall economic growth rate, including other policies introduced at the same time (e.g. Eastern Europe’s transformation after 1989). Some studies find no effect, but the overwhelming majority of such studies do find a positive effect of competition law on economic growth. Most ascribe this effect to increased productivity, although there may also be an effect on investment, especially in developing countries, perhaps because competition laws boost business confidence and reduce corruption.

#### Congress can tailor it towards a particular area.

Harry First & Eleanor Fox 20, Charles L. Denison Professor of Law, New York University School of Law; Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, "Big Tech and Antitrust – Calling Big Tech to Account under U.S. Law," House of Representatives Judiciary Committee, Antitrust Subcommittee, August 2020, pg. 11.

Second, we urge Congress to consider specific legislation that would simplify litigation in a way that would allow courts more easily to achieve the goals of the National Competition Policy. One important way to do that would be to specify evidentiary presumptions that would shift the burden of justification to defendants. Courts in antitrust cases have often used presumptions, but the courts today more often use them to defeat antitrust claims. Congress could, for example, require dominant firms to justify certain exclusionary conduct, or their giant mergers. Congress could also make rules special to certain types of acquisitions; for example, acquisitions of nascent competitors by industry leaders.

## Realignment ADV

## OFF

### T Must Be Ban---2AC

#### 2. Counter-interp---‘prohibitions’ include regulation---reject arbitrary distinctions.

John G. Koeltl 7, United States District Judge, “United States Baseball v. City of New York”, United States District Court for the Southern District of New York, 509 F. Supp. 2d 285, 297, 2007 U.S. Dist. LEXIS 63234, 8/27/2007, Lexis

The City responds that its home rule and police powers are broader pursuant to Article IX, Section 2(c) of the New York State Constitution, New York Home Rule Law § 10(1)(a)(12), and New York General City Law § 20(13) than the plaintiffs suggest. These provisions give the City the power to enact laws for the "safety, health, well-being, and welfare" of its residents. The City asserts [\*\*29] that the Bat Ordinance does not constitute a "prohibition" because it does not condemn all use of non-wood bats. It bars their use in competitive high school baseball games, but not for example in high school practices, junior high school games, "pick up" games, or youth league games that are not school-sponsored. Moreover, the City persuasively argues that the suggested distinction between "prohibitions" and other "regulations" is artificial and untenable, because all regulations prohibit some conduct that is incompatible with the regulatory standards and all "prohibitions" leave some conduct untouched. For example, a New York court upheld as a valid exercise of the police power a New York City law banning the possession in a public place of a knife with a blade of at least four inches in length in People v. Ortiz, 125 Misc. 2d 318, 479 N.Y.S.2d 613, 620 (Crim. Ct. 1984). The plaintiffs suggest the law at issue in Ortiz was a not a "prohibition," but it appears to be at least as complete a prohibition as the Bat Ordinance, which prohibits only certain uses of bats with certain defined characteristics.

### Racial Capitalism K---2AC

#### Their view of racial capitalism is reductive---it is an expression of power that becomes hegemonic via institutional entrenchment---viewing it as fixed effaces the agency to change the future that is never settled and proceeds dialetically.

Lewis R. **Gordon 17**. Philosophy Prof @ UCONN. 12/2017. “Thoughts on Afropessimism,” Critical Exchange on Afro pessimism. Contemporary Political Theory, pp. 1–33.

I begin with this tale of philosophical abstraction to contextualize Afropessimism. Its main exemplars, such as Jared Sexton and Frank Wilderson III, emerged from academic literary theory, an area dominated by poststructuralism even in many cases that avow ‘‘Marxism.’’ Sexton (2010) and Wilderson (2007) divert from a reductive poststructuralism, however, through examining important existential moves inaugurated, as Daniel McNeil (2011, 2012) observed, by Fanon and his intellectual heirs. The critical question that Afropessimism addresses in this fusion is the viability of posed strategies of Black liberation. (I’m using the capital ‘‘B’’ here to point not only to the racial designation ‘‘black’’ but also to the nationalist one ‘‘Black.’’ Afropessimists often mean both, since blacks and Blacks have a central and centered role in their thought.) The world that produced blacks and in consequence Blacks is, for Afropessimists, a crushing, historical one whose Manichaean divide is sustained contraries best kept segregated. Worse, any effort of mediation leads to confirmed black subordination. Overcoming this requires purging the world of antiblackness. Where cleansing the world is unachievable, an alternative is to disarm the force of antiblack racism. Where whites lack power over blacks, they lose relevance – at least politically and at levels of cultural and racial capital or hegemony. Wilderson (2008), for instance, explores my concept of ‘‘an antiblack world’’ to build similar arguments. Sexton (2011) makes similar moves in his discussions of ‘‘social death.’’ As this forum doesn’t afford space for a long critique, I’ll offer several, non-exhaustive criticisms. The first is that ‘‘an antiblack world’’ is not identical with ‘‘the world is antiblack.’’ My argument is that such a world is an antiblack racist project. It is not the historical achievement. Its limitations emerge from a basic fact: Black people and other opponents of such a project fought, and continue to fight, as we see today in the #BlackLivesMatter movement and many others, against it. The same argument applies to the argument about social death. Such an achievement would have rendered even these reflections stillborn. The basic premises of the Afropessimistic argument are, then, locked in performative contradictions. Yet, they have rhetorical force. This is evident through the continued growth of its proponents and forums (such as this one) devoted to it. In Bad Faith and Antiblack Racism, I argued that there are forms of antiblack racism offered under the guise of love, though I was writing about whites who exoticize blacks while offering themselves as white sources of black value. Analyzed in terms of bad faith, where one lies to oneself in an attempt to flee displeasing truths for pleasing falsehoods, exoticists romanticize blacks while affirming white normativity, and thus themselves, as principals of reality. These ironic, performative contradictions are features of all forms of racism, where one group is elevated to godlike status and another is pushed below that of human despite both claiming to be human. Antiblack racism offers whites self-other relations (necessary for ethics) with each other but not so for groups forced in a ‘‘zone of nonbeing’’ below them. There is asymmetry where whites stand as others who look downward to those who are not their others or their analogues. Antiblack racism is thus not a problem of blacks being ‘‘others.’’ It’s a problem of their not-being-analogical-selves-and-not-evenbeing-others. Fanon, in Black Skin, White Masks (1952), reminds us that Blacks among each other live in a world of selves and others. It is in attempted relations with whites that these problems occur. Reason in such contexts has a bad habit of walking out when Blacks enter. What are Blacks to do? As reason cannot be forced, because that would be ‘‘violence,’’ they must ironically reason reasonably with forms of unreasonable reason. Contradictions loom. Racism is, given these arguments, a project of imposing non-relations as the model of dealing with people designated ‘‘black.’’ In Les Damne de la terre (‘‘Damned of the Earth’’), Fanon goes further and argues that colonialism is an attempt to impose a Manichean structure of contraries instead of a dialectical one of ongoing, human negotiation of contradictions. The former segregates the groups; the latter emerges from interaction. The police, he observes, are the mediator in such a situation, as their role is force/violence instead of the human, discursive one of politics and civility (Fanon, 1991). Such societies draw legitimacy from Black non-existence or invisibility. Black appearance, in other words, would be a violation of those systems. Think of the continued blight of police, extra-judicial killings of Blacks in those countries. An immediate observation of many postcolonies is that antiblack attitudes, practices, and institutions aren’t exclusively white. Black antiblack dispositions make this clear. Black antiblackness entails Black exoticism. Where this exists, Blacks simultaneously receive Black love alongside Black rejection of agency. Many problems follow. The absence of agency bars maturation, which would reinforce the racial logic of Blacks as in effect wards of whites. Without agency, ethics, liberation, maturation, politics, and responsibility could not be possible. Afropessimism faces the problem of a hidden premise of white agency versus Black incapacity. Proponents of Afropessimism would no doubt respond that the theory itself is a form of agency reminiscent of Fanon’s famous remark that though whites created le Ne`gre it was les Ne`gres who created Ne´gritude. Whites clearly did not create Afropessimism, which Black liberationists should celebrate. We should avoid the fallacy, however, of confusing source with outcome. History is not short of bad ideas from good people. If intrinsically good, however, each person of African descent would become ethically and epistemologically a switching of the Manichean contraries, which means only changing players instead of the game. We come, then, to the crux of the matter. If the goal of Afropessimism is Afropessimism, its achievement would be attitudinal and, in the language of old, stoic – in short, a symptom of antiblack society. At this point, there are several observations that follow. The first is a diagnosis of the implications of Afropessimism as symptom. The second examines the epistemological implications of Afropessimism. The third is whether a disposition counts as a political act and, if so, is it sufficient for its avowed aims. There are more, but for the sake of brevity, I’ll simply focus on these. An ironic dimension of pessimism is that it is the other side of optimism. Oddly enough, both are connected to nihilism, which is, as Nietzsche (1968) showed, a decline of values during periods of social decay. It emerges when people no longer want to be responsible for their actions. Optimists expect intervention from beyond. Pessimists declare relief is not forthcoming. Neither takes responsibility for what is valued. The valuing, however, is what leads to the second, epistemic point. The presumption that what is at stake is what can be known to determine what can be done is the problem. If such knowledge were possible, the debate would be about who is reading the evidence correctly. Such judgment would be a priori – that is, prior to events actually unfolding. The future, unlike transcendental conditions such as language, signs, and reality, is, however, ex post facto: It is yet to come. Facing the future, the question isn’t what will be or *how do we know what will be* but instead the realization that whatever is done will be that on which the future will depend. Rejecting optimism and pessimism, there is a supervening alternative: political commitment. The appeal to political commitment is not only in stream with what French existentialists call l’intellectuel engage´ (committed intellectual) but also reaches back through the history and existential situation of enslaved, racialized ancestors. Many were, in truth, an existential paradox: commitment to action without guarantees. The slave revolts, micro and macro acts of resistance, escapes, and returns help others do the same; the cultivated instability of plantations and other forms of enslavement, and countless other actions, were waged against a gauntlet of forces designed to eliminate any hope of success. The claim of colonialists and enslavers was that the future belonged to them, not to the enslaved and the indigenous. A result of more than 500 years of conquest and 300 years of enslavement was also a (white) rewriting of history in which African and First Nations’ agency was, at least at the level of scholarship, nearly erased. Yet there was resistance even in that realm, as Africana and First Nation intellectual history and scholarship attest. Such actions set the course for different kinds of struggle today. Such reflections occasion meditations on the concept of failure. Afropessimism, the existential critique suggests, suffers from a failure to understand failure. Consider Fanon’s notion of constructive failure, where what doesn’t initially work transforms conditions for something new to emerge. To understand this argument, one must rethink the philosophical anthropology at the heart of a specific line of Euromodern thought on what it means to be human. Atomistic and individualsubstance-based, this model, articulated by Hobbes, Locke, and many others, is of a non-relational being that thinks, acts, and moves along a course in which continued movement depends on not colliding with others. Under that model, the human being is a thing that enters a system that facilitates or obstructs its movement. An alternative model, shared by many groups across southern Africa, is a relational version of the human being as part of a larger system of meaning. Actions, from that perspective, are not about whether ‘‘I’’ succeed but instead about ‘‘our’’ story across time. As relational, it means that each human being is a constant negotiation of ongoing efforts to build relationships with others, which means no one actually enters a situation without establishing new situations of action and meaning. Instead of entering a game, their participation requires a different kind of project – especially where the ‘‘game’’ was premised on their exclusion. Thus, where the system or game repels initial participation, such repulsion is a shift in the grammar of how the system functions, especially its dependence on obsequious subjects. Shifted energy affords emergence of alternatives. Kinds cannot be known before the actions that birthed them. Abstract as this sounds, it has much historical support. Evelyn Simien (2016), in her insightful political study Historic Firsts, examines the new set of relations established by Shirley Chisholm’s and Jesse Jackson’s presidential campaigns. There could be no Barack Obama without such important predecessors affecting the demographics of voter participation. Simien intentionally focused on the most mainstream example of political life to illustrate this point. Although no exemplar of radicalism, Obama’s ‘‘success’’ emerged from Chisholm and Jackson’s (and many others’) so-called ‘‘failure.’’ Beyond presidential electoral politics, there are numerous examples of how prior, radical so-called ‘‘failures’’ transformed relationships that facilitated other kinds of outcome. The trail goes back to the Haitian Revolution and back to every act of resistance from Nat Turner’s Rebellion in the USA, Sharpe’s in Jamaica, or Tula’s in Curac¸ao and so many other efforts for social transformation to come. In existential terms, then, many ancestors of the African diaspora embodied what Søren Kierkegaard (1983) calls an existential paradox. All the evidence around them suggested failure and the futility of hope. They first had to make a movement of infinite resignation – that is, resigning themselves to their situation. Yet they must simultaneously act against that situation. Kierkegaard called this seemingly contradictory phenomenon ‘‘faith,’’ but that concept relates more to a relationship with a transcendent, absolute being, which could only be established by a ‘‘leap,’’ as there are no mediations or bridge. Ironically, if Afropessimism appeals to transcendent intervention, it would collapse into faith. If, however, the argument rejects transcendent intervention and focuses on committed political action, of taking responsibility for a future that offers no guarantees, then the movement from infinite resignation becomes existential political action. At this point, the crucial meditation would be on politics and political action. An attitude of infinite resignation to the world without the leap of committed action would simply be pessimistic or nihilistic. Similarly, an attitude of hope or optimism about the future would lack infinite resignation. We see here the underlying failure of the two approaches. Yet ironically, there is a form of failure at failing in the pessimistic turn versus the optimistic one, since if focused exclusively on resignation as the goal, then the ‘‘act’’ of resignation would have been achieved, which, paradoxically, would be a success; it would be a successful failing of failure. For politics to emerge, however, there are two missing elements in inward pessimistic resignation. The first is that politics is a social phenomenon, which means it requires the expanding options of a social world. Turning away from the social world, though a statement about politics, is not, however, in and of itself political. The ancients from whom much western political theory or philosophy claimed affinity had a disparaging term for individuals who resigned themselves from political life: idio¯te¯s, a private person, one not concerned with public affairs, in a word – an idiot. I mention western political theory because that is the hegemonic intellectual context of Afropessimism. We don’t, however, have to end our etymological journey in ancient Greek. Extending our linguistic archaeology back a few thousand years, we could examine the Middle Kingdom Egyptian word idi (deaf). The presumption, later taken on by the ancient Athenians and Macedonians, was that a lack of hearing entailed isolation, at least in terms of audio speech. The contemporary inward resignation of seeking a form of purity from the loathsome historical reality of racial oppression, in this reading, collapses ultimately into a form of moralism (private, normative satisfaction) instead of public responsibility born of and borne by action. The second is the importance of power. Politics makes no sense without [power] it. But what is power? Eurocentric etymology points to the Latin word potis as its source, from which came the word ‘‘potent’’ as in an omnipotent god. If we again look back further, we will notice the Middle Kingdom (2000 BCE–1700 BCE) KMT/ Egyptian word pHty, which refers to godlike strength. Yet for those ancient Northeast Africans, even the gods’ abilities came from a source: In the Coffin Texts, HqAw or heka activates the ka (sometimes translated as soul, spirit, or, in a word, ‘‘magic’’), which makes reality. All this amounts to a straightforward thesis on power as the ability with the means to make things happen. There is an alchemical quality to power. The human world, premised on symbolic communication, brings many forms of meaning into being, and those new meanings afford relationships that build institutions through a world of culture, a phenomenon that Freud (1989) rightly described as ‘‘a prosthetic god.’’ It is godlike because it addresses what humanity historically sought from the gods: protection from the elements, physical maledictions, and social forms of misery. Such power clearly can be abused. It is where those enabling capacities (empowerment) are pushed to the wayside in the hoarding of social resources into propping up some people as gods that the legitimating practices of cultural cum political institutions decline and stimulate pessimism and nihilism. That institutions in the Americas very rarely attempt establishing positive relations to Blacks is the subtext of Afropessimism and this entire meditation. The discussion points, however, to a demand for political commitment. Politics itself emerges under different names throughout the history of our species, but the one occasioning the word ‘‘politics’’ is from the Greek po´lis, which refers to ancient Hellenic city-states. It identifies specific kinds of activities conducted inside the city-state, where order necessitated the resolution of conflicts through rules of discourse the violation of which could lead to (civil) war, a breaking down of relations appropriate for ‘‘outsiders.’’ Returning to the Fanonian observation of selves and others, it is clear that imposed limitations on certain groups amounts to impeding or blocking the option of politics. Yet, as a problem occurring within the polity, the problem short of war becomes a political one. Returning to Afropessimistic challenges, the question becomes this: If the problem of antiblack racism is conceded as political, where antiblack institutions of power have, as their project, the impeding of Black power, which in effect requires barring Black access to political institutions, then antiblack societies are ultimately threats also to politics defined as the human negotiation of the expansion of human capabilities or more to the point: freedom. Anti-politics is one of the reasons why societies in which antiblack racism is hegemonic are also those in which racial moralizing dominates: moralizing stops at individuals at the expense of addressing institutions the transformation of which would make immoral individuals irrelevant. As a political problem, it demands a political solution. It is not accidental that Blacks continue to be the continued exemplars of unrealized freedom. As so many from Ida B. Wells-Barnett to Angela Davis (2003) and Michelle Alexander (2010) have shown, the expansion of privatization and incarceration is squarely placed in a structure of states and civil societies premised on the limitations of freedom (Blacks) – ironically, as seen in countries such as South Africa and the United States, in the name of freedom.

### Antitrust PIC---2AC

#### Government spending crushes sustainable growth.

Brian M. Riedl 8, senior fellow at the Manhattan Institute focusing on economic policy, previous staff director of the Senate Finance Subcommittee on Fiscal Responsibility and Economic Growth, previous chief economist to Senator Rob Portman, previous director of budget and spending policy on Marco Rubio’s presidential campaign, served as the Heritage Foundation’s lead research fellow on federal budget and spending policy for ten years, master’s degree in public affairs from Princeton, 2008 “Why Government Spending Does Not Stimulate Economic Growth,” The Heritage Foundation, 11-12-08, Available Online at <http://www.heritage.org/budget-and-spending/report/why-government-spending-does-not-stimulate-economic-growth>

In a throwback to the 1930s and 1970s, Democratic lawmakers are betting that America's economic ills can be cured by an extraordinary expansion of government. This tired approach has already failed repeatedly in the past year, in which Congress and the President:¶ Increased total federal spending by 11 percent to nearly $3 trillion;¶ Enacted $333 billion in "emergency" spending;¶ Enacted $105 billion in tax rebates; and¶ Pushed the budget deficit to $455 billion in the name of "stimulus."¶ Every one of these policies failed to increase economic growth. Now, in addition to passing a $700 billion financial sector rescue package, lawmakers have decided to double down on these failed spending policies by proposing a $300 billion economic stimulus bill. Even though the last $455 billion in Keynesian deficit spending failed to help the economy, lawmakers seem to have convinced themselves that the next $300 billion will succeed.¶ This is not the first time government expansions have failed to produce economic growth. Massive spending hikes in the 1930s, 1960s, and 1970s all failed to increase economic growth rates. Yet in the 1980s and 1990s-when the federal government shrank by one-fifth as a percentage of gross domestic product (GDP)-the U.S. economy enjoyed its greatest expansion to date.¶ Cross-national comparisons yield the same result. The U.S. government spends significantly less than the 15 pre-2004 European Union nations, and yet enjoys 40 percent larger per capita GDP, 50 percent faster economic growth rates, and a substantially lower unemployment rate.[1]¶ When conventional economic wisdom repeatedly fails, it becomes necessary to revisit that conventional wisdom. Government spending fails to stimulate economic growth because every dollar Congress "injects" into the economy must first be taxed or borrowed out of the economy. Thus, government spending "stimulus" merely redistributes existing income, doing nothing to increase productivity or employment, and therefore nothing to create additional income. Even worse, many federal expenditures weaken the private sector by directing resources toward less productive uses and thus impede income growth.¶ The Myth of Spending as "Stimulus"¶ Spending-stimulus advocates claim that government can "inject" new money into the economy, increasing demand and therefore production. This raises the obvious question: Where does the government acquire the money it pumps into the economy? Congress does not have a vault of money waiting to be distributed: Therefore, every dollar Congress "injects" into the economy must first be taxed or borrowed out of the economy. No new spending power is created. It is merely redistributed from one group of people to another.[2]¶ Spending-stimulus advocates typically respond that redistributing money from "savers" to "spenders" will lead to additional spending. That assumes that savers store their savings in their mattresses or elsewhere outside the economy. In reality, nearly all Americans either invest their savings by purchasing financial assets such as stocks and bonds (which finances business investment), or by purchasing non-financial assets such as real estate and collectibles, or they deposit it in banks (which quickly lend it to others to spend). The money is used regardless of whether people spend or save.¶ Government cannot create new purchasing power out of thin air. If Congress funds new spending with taxes, it is simply redistributing existing income. If Congress instead borrows the money from domestic investors, those investors will have that much less to invest or to spend in the private economy. If Congress borrows the money from foreigners, the balance of payments will adjust by equally reducing net exports, leaving GDP unchanged. Every dollar Congress spends must first come from somewhere else.¶ This does not mean that government spending has no economic impact at all. Government spending often alters the composition of total demand, such as increasing consumption at the expense of investment.¶ More importantly, government spending can alter future economic growth. Economic growth results from producing more goods and services (not from redistributing existing income), and that requires productivity growth and growth in the labor supply. A government's impact on economic growth is, therefore, determined by its policies' effect on labor productivity and labor supply.¶ Productivity growth requires increasing the amount of capital, either material or human, relative to the amount of labor employed. Productivity growth is facilitated by smoothly functioning markets indicating accurate price signals to which buyers and sellers, firms and workers can respond in flexible markets. Only in the rare instances where the private sector fails to provide these inputs in adequate amounts is government spending necessary. For instance, government spending on education, job training, physical infrastructure, and research and development can increase long-term productivity rates-but only if government spending does not crowd out similar private spending, and only if government spends the money more competently than businesses, nonprofit organizations, and private citizens. More specifically, government must secure a higher long-term return on its investment than taxpayers' (or investors lending the government) requirements with the same funds. Historically, governments have rarely outperformed the private sector in generating productivity growth.¶ Even when government spending improves economic growth rates on balance, it is necessary to differentiate between immediate versus future effects. There is no immediate stimulus from government spending, since that money had to be removed from another part of the economy. However, a productivity investment may aid future economic growth, once it has been fully completed and is being used by the American workforce. For example, spending on energy itself does not improve economic growth, yet the eventual existence of a completed, well-functioning energy system can. Those economic impacts can take years, or even decades, to occur.¶ Most government spending has historically reduced productivity and long-term economic growth due to: [3]¶ Taxes. Most government spending is financed by taxes, and high tax rates reduce incentives to work, save, and invest-resulting in a less motivated workforce as well as less business investment in new capital and technology. Few government expenditures raise productivity enough to offset the productivity lost due to taxes;¶ Incentives. Social spending often reduces incentives for productivity by subsidizing leisure and unemployment. Combined with taxes, it is clear that taxing Peter to subsidize Paul reduces both of their incentives to be productive, since productivity no longer determines one's income;¶ Displacement. Every dollar spent by politicians means one dollar less to be allocated based on market forces within the more productive private sector. For example, rather than allowing the market to allocate investments, politicians seize that money and earmark it for favored organizations with little regard for improvements to economic efficiency; and¶ Inefficiencies. Government provision of housing, education, and postal operations are often much less efficient than the private sector. Government also distorts existing health care and education markets by promoting third-party payers, resulting in over-consumption and insensitivity to prices and outcomes. Another example of inefficiency is when politicians earmark highway money for wasteful pork projects rather than expanding highway capacity where it is most needed.¶ Mountains of academic studies show how government expansions reduce economic growth:[4]¶ Public Finance Review reported that "higher total government expenditure, no matter how financed, is associated with a lower growth rate of real per capita gross state product."[5] ¶ The Quarterly Journal of Economics reported that "the ratio of real government consumption expenditure to real GDP had a negative association with growth and investment," and "growth is inversely related to the share of government consumption in GDP, but insignificantly related to the share of public investment."[6] ¶ A Journal of Macroeconomics study discovered that "the coefficient of the additive terms of the government-size variable indicates that a 1% increase in government size decreases the rate of economic growth by 0.143%."[7] ¶ Public Choice reported that "a one percent increase in government spending as a percent of GDP (from, say, 30 to 31%) would raise the unemployment rate by approximately .36 of one percent (from, say, 8 to 8.36 percent)."[8]¶ Economic growth is driven by individuals and entrepreneurs operating in free markets, not by Washington spending and regulations. The outdated idea that transferring spending power from the private sector to Washington will expand the economy has been thoroughly discredited, yet lawmakers continue to return to this strategy. The U.S. economy has soared highest when the federal government was shrinking, and it has stagnated at times of government expansion. This experience has been paralleled in Europe, where government expansions have been followed by economic decline. A strong private sector provides the nation with strong economic growth and benefits for all Americans.

### States CP---2AC

#### It fails---patchwork implementation muddies the plan’s signal, causes capture, and leads to duplication.

Jacob P. Grosso 21, J.D. Candidate at the University of Richmond School of Law and B.A. from George Mason University, “The Preemption of Collective State Antitrust Enforcement in Telecommunications”, University of Richmond Law Review, 55 U. Rich. L. Rev. 615, Winter 2021, Lexis

A. Benefits of Preempting Collective State Action

Preemption would result in cognizable benefits to the regulatory and business spheres. These benefits would include clear guidance, increased enforcement efficiencies, and the ability to pursue nonenforcement agendas and broader policy goals.236 Businesses would receive clear guidance on the legality of their business choices. State antitrust enforcers would redeploy costs to state-specific issues. Federal enforcers would be able to effectively pursue broader policy goals.

Consolidated enforcement and regulatory schemes would provide clarity to businesses through more uniform regulations and decreased litigation concerns. This consolidation, in turn, would reduce costs for the government and the competitors while encouraging competition and unnecessary compliance costs.237 Clear regulations serving a common goal, without the inherent biases of individual state interests, can provide clarity to businesses and preserve the balancing of consumer welfare with the aggregate social welfare. Individual states make decisions based on their individual needs, as seen in the T-Mobile-Sprint merger.238 When federal law conflicts with state law, federal law controls.239 Despite this standard, multistate task forces continue to come forward as the interpreters of federal law.240 This approach poses problems because of the inherent state biases that underlie the enforcement actions. Preemption could decrease the effects of individual state biases on the guidance given to competitors.

Antitrust analysis considers geographic differences in determining the concentration of a market, meaning a one-size-fits-all approach does not work for aggregating individual state markets.241 This restructuring would reduce the effects of an individual state’s interests on collective action.242 While any individual state may be best served by one plan, the economy as a whole might suffer for that decision.243 “Divergent approaches to the exercise of enforcement discretion are not just possible, they are likely.”244 States likely face pressure from several groups that can influence their enforcement decisions, as well as the selfish motivation to protect their consumers regardless of the cost to national welfare.245 Uniform, clear guidance at the federal level, without state interference, will reduce opportunities for the individual motivations of states to negatively impact a clear enforcement scheme. Adding states as parties to a telecommunications antitrust lawsuit complicates the suit by increasing the number of parties that must agree to a settlement.246 The effects of the preemption and resulting enforcement system will create efficiencies for federal and state enforcers, as well as for businesses. For telecommunications antitrust enforcement actions, this will limit costs to the federal agencies, prevent the duplication of effort (in reviewing transactions), and eliminate the costs of coordination that NAAG multistate enforcement teams face.247 Extending even beyond telecommunications, this results in a net positive for the antitrust sections of state attorneys general offices to redeploy resources to monitor and combat anticompetitive behavior in the state-specific areas that these sections were designed to handle.248

The reduced litigation could represent a net positive for both state governments and competitors. Even responding to discovery requests from one state can cost two to nine million dollars.249 Dealing with multiple suits, as in the T-Mobile-Sprint merger, causes a compounding of these costs resulting from duplication of effort. For T-Mobile, the firm has now faced multiple reviews concerning the same issues that it believed it had resolved. The FCC review alone took 317 days.250 In total, from the initial merger review submission on April 28, 2018, until April 1, 2020, it took two years to close the transaction.251 The T-Mobile-Sprint merger exemplifies how further delays can slow the competitor’s ability to continue with business, as it must divert attention to compliance and litigation efforts. 252

#### Gets struck down via the DCC, CC, AND Supremacy Clause.

Daniel A. Lyons 19, Professor at Boston College Law School, “State Net Neutrality”, Summer 2019, 80 U. Pitt. L. Rev. 905, Lexis

D. Dormant Commerce Clause

Independent of the Communications Act, state regulation of the Internet may also run afoul of the Dormant Commerce Clause. The Dormant Commerce Clause doctrine prevents states from imposing undue burdens on interstate commerce. It is a judge-made doctrine, derived from the negative implication of the Constitution's grant to Congress of the power to regulate commerce between the states. 245 Its "central rationale . . . is to prohibit state or municipal laws whose object is local economic protectionism." 246 Thus, state laws that explicitly discriminate against [\*941] interstate commerce face "a virtually per se rule of invalidity." 247 But even a facially nondiscriminatory state law may nonetheless run afoul of the doctrine if it unduly burdens interstate commerce. Courts evaluate such claims under the test announced in Pike v. Bruce Church: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 248

The Pike balancing test played an important role in shaping early Internet regulation, because of concern about spillover effects when states regulate online conduct. In the prominent case of American Library Association v. Pataki, a district court struck down a New York law that prohibited the intentional use of the Internet to send pornographic messages that would be "harmful to minors." 249 The court conceded that shielding New York minors from pornography constituted a legitimate state interest. 250 But it found this interest was outweighed by the significant chilling effect the law would have on wholly out-of-state conduct. 251 Because information posted to the Internet is available everywhere simultaneously, those who disseminate information online could face liability for posting content that arguably ran afoul of New York's law, even if they had no intention of communicating with New York residents. 252 this, in turn, would chill communication to recipients in states where the content was legal, thus imposing an undue burden on interstate commerce far in excess of what little local benefits were likely to result from enforcement. 253

Like many balancing tests, the doctrine is somewhat unpredictable, turning on the facts of individual cases. Many state regulations create spillover effects; the Dormant Commerce Clause only invalidates those that, in the court's judgment, impose a greater burden on interstate commerce than they reap in local benefit--which can differ from case to case. For example, in National Federation of the Blind [\*942] v. Target Corp., 254 Target argued that California's disability law burdened interstate commerce by requiring it to modify a nationwide website to meet California requirements--which effectively imposed California law on the company's transactions with all customers, even those outside California. 255 The court found this argument was premature at the motion to dismiss stage, explaining that Target could develop a California-specific website, and even if it chose not to do so, its decision to develop one product for a nationwide market does not necessarily implicate the Commerce Clause. 256 At a minimum, factual development was necessary to determine the "practical effect" of the law on interstate commerce before the court could decide the Dormant Commerce Clause issue. 257

National Federation of the Blind's focus on practical effects reflects the insights of Professors Jack Goldsmith and Alan Sykes, whose seminal Yale Law Journal article, The Internet and the Dormant Commerce Clause, brought some clarity to this somewhat confusing corner of the law. 258 Goldsmith and Sykes highlight that the primary justification for the Dormant Commerce Clause is to "ensure[] free trade among the states and thereby secure[] the associated economic benefits." 259 They thus support the consideration of economic efficiency as the lodestar for such claims: "[T]he appropriate statement of the extraterritoriality concern is that states may not impose burdens on out-of-state actors that outweigh the in-state benefits." 260

A full application to broadband regulation is beyond the scope of this article. But it is worth noting that like early state attempts to regulate online conduct, state-level network traffic management regulations are susceptible to a Dormant Commerce Clause challenge. The Internet is a national (indeed, global) network, meaning that attempts to regulate the flow of traffic on that network are likely to have extraterritorial effects. If state net neutrality rules survive a preemption analysis, states should be ready for the claim that such regulations unreasonably burden [\*943] interstate commerce and, therefore, contravene the Dormant Commerce Clause doctrine.

### CIL CP---2AC

#### No precedent or solvency---rollback.

Michelle M. Kundmueller 02, Ph.D. candidate, Department of Political Science, University of Notre Dame, former attorney at Wildman, Harrold, Allen & Dixon, specializing in constitutional law, Ph.D., M.A. Political Science, University of Notre Dame, J.D. University of Notre Dame Law School, B.A. Politics and Law, Flagler College, "The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?" The Journal of Legislation, Vol. 28, pg. 369-372, 2002, Hein Online.

The argument against direct incorporation of customary international law focuses on several perceived evils, with the primary focus resting on lack of constitutional justification and incompatibility with constitutional principles such as separation of powers and democratic rule. In a Note that focuses specifically on the question of whether customary international law supersedes federal statutes, Garland A. Kelley takes a moderate position, claiming that customary international law should not supercede federal law, but that "American courts must attempt to reconcile U.S. federal statutory law with conflicting international norms and standards, whenever possible.",42 In the course of explaining why federal law ought not be superseded by customary international law, based on constitutional interpretation, Kelley makes an argument for how customary international law has the potential to threaten some of the most basic premises of American constitutional government.

Kelley challenges the claim that the last-in-time doctrine applies to customary international law, pointing out that the Supremacy Clause leaves ambiguous "how conflicts between separate classes of supreme laws are to be resolved., 43 While conflicts between different types of federal law would normally be resolved through the last-in-time doctrine, Kelley notes that with customary international law this does not result in a comfortable outcome." The precise date of a doctrine of customary international law becoming effective, because of the nature of customary international law, is impossible to determine; hence, any date chosen is entirely arbitrary. Unless one is willing to accept the premise that customary law is constantly in the process of being renewed-and, thus, that customary international law always trumps legislative federal law-this issue presents a serious practical obstacle to the application of the last-in-time rule.

In a discussion of jus cogens, a specific form of customary international law, Kelley discusses two more fundamental problems of incorporation. Not only is the literature on jus cogens conflicting as to the substance of jus cogens, but the issue of who, in the arena of domestic law, will determine both the substance and applicability of jus cogens does not have an obvious answer.45 The issue of where to lodge the power of applying customary international law creates a dilemma, but this is not the most daunting problem. Kelley claims that "the most serious objection" is "that ceding peremptory power to jus cogens norms is fundamentally at odds with basic American constitutional values."46 Modern customary international law conflicts with domestic legal issues, issues concerning the self-governance of Americans. Kelley explains that the heart of the problem lies in the potential for customary international law, over which Americans have no direct control, to undermine democracy and the consent of the governed.

If our form of constitutional government stands for anything, it is the belief that no law is law without the consent of the governed, as expressed through our elected representatives. Preempting domestic statutory law with norms of customary international law, particularly customary international law based not on the practice of nations, but on declarations that are purposeful and hopeful, is to apply law that has been generated by non-United States law-making procedure.47

Kelley contends that the loss of a truly consent-based government would not be the only casualty of customary international law's dominance over federal legislation: such implementation would necessarily come at "considerable cost, upsetting the safeguards inherent in at least three basic U.S. constitutional values and assumptions ....",48 Because directly incorporating customary international law as dominant over federal law would necessitate using the courts as the applying and interpreting body, such incorporation by definition gives previously unknown power to the courts. This power, as Kelley points out, comes at a price. The judicial branch's gain would come at the expense of the President, Congress, and state governments. According to Kelley, such costs are "excessive and illegitimate."49

In an article on the authoritative sources of customary international law in the United States, Harold G. Maier argues that both the

governmental structure of the United States and the functional nature of international law itself compel the conclusion that the authoritative source of public international law in the United States is the will of the United States body politic as reflected in federal law ... not the will of the world community of nations. 50

Maier bases much of his argument on the role of territorial sovereignty. Territorial sovereignty and nationhood both require "possession of the internal authority to decide whether to violate international obligations."51 Not only is the authority to choose whether to follow international norms vested in the body politic of each nation, but, as a practical matter, this is the only method through which international law can be translated to the domestic front. In the words of Maier, "[i]t is this functional reality, as much as any language of the courts or of the Constitution, that supports the proposition that United States decision makers are not bound by the Constitution to apply rules of customary international law in domestic fora."52

In practice, this theory demands "active affirmative participation" of a nation's "authoritative decision-makers" for customary international law to have "applicability within a nation's legal system."53 Maier explains what this means within the framework of the U.S. legal system, stating that the "principles of international law are accessible to the federal courts when they decide cases by the common law method. 5 4 While available to courts, "those principles are given domestic legal effect by the authority of the court applying them in its traditional common law process, not by some metaphysical omnipresence of the international legal regime."5 The courts exercise their discretion in applying and interpreting customary international law.

Customary international law is further checked and, ultimately in the scheme of U.S. law, balanced by the legislative branch. As the will of the people of the United States-as determined through our own law-making process-dominates the common law findings of the judiciary, so the legislative findings of Congress, when they contravene a court's holding concerning customary international law, reverse the holding of the court system. In the words of Maier, when there is "conflict between the will of the people, reflected by the act of their government institutions, and the will of the international community reflected in customary international law, the municipal will must necessarily control .... 56 Maier believes that, within pal will must necessarily control .... ."" Maier believes that, within the U.S. political and legal systems, customary international law can and rightfully does have a guiding role to play; ultimately, however, the decision-making authority is still retained by the people and government, none of whom are "subject to the limitations created by an international legal regime."57

### Tech Leadership DA---2AC

#### Present tech innovation is inefficient AND useless.

Ashish Arora et al. 20, Senior Associate Dean for Strategy. Rex D. Adams Professor of Business Administration, Fuqua School of Business, Duke University; Sharon Belenzon, Professor, Strategy, Fuqua School of Business, Duke University. Research Associate, National Bureau of Economic Research; Andrea Patacconi, Professor, Strategy, Norwich Business School; Jungkyu Suh, PhD, Business, Duke University, "The Changing Structure of American Innovation: Some Cautionary Remarks for Economic Growth," Innovation Policy and the Economy, Vol. 20, 2020, NBER.

A defining feature of modern economic growth is the systematic application of science to advance technology. Many innovations that spurred economic growth in the twentieth century, including synthetic fibers, plastics, integrated circuits, and gene therapy, originated from advances in the natural sciences, engineering, and medicine. Science, by producing “a potential for technology far greater than existed previously,” clearly distinguishes modern economic growth from previous economic epochs (Kuznets 1971).

However, despite sustained increases in the quantity of scientific knowledge, productivity growth in most advanced economies has stagnated in recent decades in comparison to a “golden age” in the mid-twentieth century. Using data from the United States, Gordon (2016) shows that real gross domestic product (GDP) per hour (i.e., labor productivity) grew substantially in the middle of the twentieth century, from 1.79% per year between 1870 and 1920 to 2.82% per year between 1920 and 1970. However, in the most recent period (1970–2014), productivity grew by a modest 1.62% per year. Gordon concludes that productivity rose between 1920 and 1970 largely because of significant technological progress, but more recently technical advance has been much less potent in spurring growth. This slowdown is surprising given the sustained expansion of scientific input (measured in terms of research dollars spent) and output (measured by academic articles published) from American academia, as shown in figure 1.1

Chart

Description automatically generated

Gordon (2016) attributes the rapid pace of technological progress between 1920 and 1970 to the development and extension of earlier fundamental technologies, such as the internal combustion engine and electricity. This process, which was often accompanied by important advances in science and engineering, was largely carried out by researchers working in corporate labs, which by the 1920s had replaced individual entrepreneurs as the primary source of American invention. As Gordon writes:

Much of the early development of the automobile culminating in the powerful Chevrolets and Buicks of 1940–41 was achieved at the GM corporate research labs. Similarly, much of the development of the electronic computer was carried out in the corporate laboratories of IBM, Bell Labs, and other large firms. The transistor, the fundamental building block of modern electronics and digital innovation, was invented by a team led by William Shockley at Bell Labs in late 1947. The corporate R&D division of IBM pioneered most of the advances of the mainframe computer era from 1950 to 1980. Improvements in consumer electric appliances occurred at large firms such as General Electric, General Motors and Whirlpool, while RCA led the early development of television.

(Gordon 2016, 571–72)

By the 1980s, however, many corporations began to look to universities and small start-ups for ideas and new products.2 Large corporations’ reliance on externally sourced inventions grew, and many leading Western corporations began to withdraw from scientific research (Mowery 2009; Arora, Belenzon, and Patacconi 2018). Some corporate labs were shut down and others spun off as independent entities. Bell Labs had been separated from parent company AT&T and was placed under Lucent in 1996; Xerox PARC had also been spun off into a separate company in 2002. Others had been downsized: IBM under Louis Gerstner redirected research toward more commercial applications in the mid-1990s (Bhaskarabhatla and Hegde 2014).3 A more recent example is DuPont’s closing of its Central Research and Development Lab in 2016. Established in 1903, DuPont research rivaled that of top academic chemistry departments. In the 1960s, DuPont’s central research and development (R&D) unit published more articles in the Journal of the American Chemical Society than Massachusetts Institute of Technology (MIT) and California Institute of Technology (Caltech) combined. However, in the 1990s, DuPont’s attitude toward research changed and after a gradual decline in scientific publications, the company’s management closed its Central Research and Development Lab in 2016.4

These examples are backed by systematic evidence. National Science Foundation (NSF) data indicate that share of research (both basic and applied) in total business R&D in the United States fell from about 30% in 1985 to below 20% in 2015 (fig. 2). The figure also shows that the absolute amount of research in industry, after increasing over the 1980s, barely grew over the 20-year period between 1990 and 2010. Other data show the same decline. Utilizing data on scientific publications, Arora et al. (2018) show that the number of publications per firm fell at a rate of 20% per decade from 1980 to 2006 for R&D performed in American listed firms. The authors also find that the drop is even more dramatic for established firms in high-quality journals. For articles within the top quartile of journal impact factor scores, the magnitude of the drop increases to more than 30%. Large firms’ withdrawal from science can also be gleaned from the list of R&D 100 awards winners. Fortune 500 firms won 41% of the awards in 1971 but only 6% in 2006 (Block and Keller 2009). Over the same period, total industry R&D and patenting grew steadily, as did university-performed research (see fig. 6). This evidence points to the emergence of a new division of innovative labor, with universities focusing on research, large firms focusing on development and commercialization, and spin-offs, start-ups, and university technology licensing offices responsible for connecting the two.

Chart, histogram

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### Infrastructure DA---2AC

#### Biden’s wrecked

Alex Seitz-Wald 9-27, Political Reporter at NBC News, BA from Brown University, “Biden In A Bind On The Border: 'The Politics Finally Got The Better Of Their Policy'”, NBC News, 9/27/2021, https://www.nbcnews.com/politics/joe-biden/biden-bind-border-politics-finally-got-better-their-policy-n1280044

Biden is stuck between immigration advocates in his own party on one side and Republicans, who insist he’s still not doing enough to control the border, on the other, leaving the White House politically isolated and with no clear refuge.

“President Biden needs to show moral clarity in this moment,” said Julián Castro, the former Obama Cabinet member and 2020 Democratic presidential candidate. “If he doesn’t, the coalition that elected him will collapse.”

There were no snakes and alligators, as Trump reportedly wanted on the U.S.-Mexico border. But the images of Border Patrol agents on horseback chasing Haitian asylum-seekers attempting to cross the Rio Grande has many of Biden’s allies comparing him to his predecessor and questioning his commitment to the larger reform project.

The administration has attempted to distance itself from actions taking place under its oversight.

Homeland Security Secretary Alejandro Mayorkas called the images “horrible and horrific,” and the White House said horses will no longer be used in the area.

Vice President Kamala Harris, who has been tasked with dealing with some border issues, released an eyebrow-raising readout of a call she held with Mayorkas speaking to her nominal subordinate the way she might to a hostile a foreign leader.

But none of it seems to have helped much.

The administration’s top envoy to Haiti resigned in protest of the "inhumane, counterproductive decision" to deport Haitian refugees back to a country seemingly everyone agrees is unsafe as it grapples with political unrest and the aftermath of a hurricane and earthquake.

And Republicans are still insisting Biden is promoting “uncontrolled illegal immigration into the country,” as Missouri Sen. Josh Hawley said during a hearing with Mayorkas.

For some, like Frank Sharry, the longtime head of the immigration advocacy group America's Voice, it’s all too familiar to see a Democrat have their dreams — and backbone — crushed by a media firestorm over an immigration flashpoint.

“I’ve been in this debate for 40 years, and it feels like groundhog,” Sharry said, noting every president for decades has dealt with surges of Haitian and Central American migrants.

Back in March, when a different surge of migrants was in the news, many of the questions at Biden’s first news conference were about the border. The new president stood by his plan for a regional approach to stem the flow of migrants, fix the asylum system and “undo the moral and national shame of the previous administration.”

But since then, Biden has faced one challenge after another, from the pandemic to the pullout of Afghanistan, with his poll numbers declining along with the prospects for his domestic legislative agenda on Capitol Hill, leaving little political capital left for a fight on one of the most divisive issues in the country.

#### No backlash---it has support from the public, Congress, media, and interest groups.

Robert Manduca 19, Assistant Professor, Sociology, University of Michigan, "Antitrust Enforcement as Federal Policy to Reduce Regional Economic Disparities," The ANNALS of the American Academy Political and Social Science, Vol. 685, Issue 1, 09/10/2019, SAGE.

Among possible federal regional development policies, reinvigorated antitrust enforcement stands out in several ways that make its establishment as a policy more likely. First, it is salient and familiar to voters. Most voters have encountered monopolies in their daily lives, whether they be airlines, utilities, internet providers, or tech platforms. Almost everyone has had a negative experience with a company too large or omnipresent to avoid in the future. Breaking such companies up offers a response to angry customers who would otherwise not have any way to express their frustration.

Moreover, aggressive antitrust enforcement has a long history in the United States, and it was widely practiced within the lifetimes of many voters. It has been a stated principle of capitalist economics since Adam Smith (Smith 1827), albeit one that has often been honored in the breach. In the United States specifically, antitrust enforcement fits with a longstanding American skepticism toward “bigness” (Lemann 2016; Rosen 2016). Perhaps for these reasons, the current antitrust movement has managed to find support among both liberals and conservatives. A poll conducted in September 2018, for instance, found that 65 percent of Americans—and 54 percent of Trump voters—think the government “should do more to break up corporate monopolies” (Dayen 2018). And leading proponents of antitrust enforcement in Congress and the media are found on both sides of the aisle (Crane 2018).

Perhaps more important than its broad appeal among voters, antitrust enforcement has the potential to attract support, or at least avoid opposition, from a wide range of organized interest groups. Of particular note is the potential for corporate ambivalence on this issue. Unlike many progressive economic policies, many companies—including quite powerful ones—stand to benefit from a reinvigorated antitrust regime. Yelp, for instance, has been a major critic of Google’s abuse of its search monopoly for several years (Dougherty 2017). When AT&T attempted to acquire T-Mobile in 2010, some of the most vocal opposition came from competitor Sprint (Singel 2011), though that did not stop Sprint from initiating its own bid for T-Mobile recently. Even Walmart, the largest retailer in the country, recently joined with other brick and mortar retailers to call on the Federal Trade Commission (FTC) to examine “persistent oligopolies in other parts of the retail system,” specifically singling out the market power of Amazon and Google (Dodge 2019). Companies like these could potentially become strong supporters of specific antitrust enforcement actions or a new antitrust movement in general.

#### Winners win

Paul Kane 21, Senior Congressional Correspondent and Columnist at the Washington Post, “Day-to-day, Biden’s Agenda Looks Rocky. But Congressional Democrats Say Things Are Far Rosier If You Take The Long View.”, Washington Post, 7/24/2021, https://www.washingtonpost.com/powerpost/biden-agenda-democrats-congress/2021/07/24/83b776be-ebc0-11eb-ba5d-55d3b5ffcaf1\_story.html

There is, so far at least, little fear that Democrats are spreading themselves too thin by eschewing the traditional practice of focusing on a handful of domestic policy issues in the first two years of an administration.

“Political momentum and political capital is like a muscle. The more you exercise it, the more of it you have. It is not like a finite resource that you can run out of if you spend too much of it. What happens is that if we do a lot of positive things, then we’ve got more political clout to do even more positive things,” Sen. Brian Schatz (D-Hawaii) said.

### AT: Grid Impact

#### There are still tons of gaps

David Smith 21, Vice President of Business Planning & Performance at National Grid, “The Grid in the Infrastructure Package – What’s In, What’s Out, What’s Next”, GridForward, 8/19/21, https://gridforward.org/the-grid-in-the-infrastructure-package-whats-in-whats-out-whats-next/

What’s Not In The Package

Demand-Side Flexibility

Demand response and wider demand side management capabilities are essentially not funded in the bi-partisan package. One section encourages utility demand side management considerations, but no real funding goes to bringing demand side resources on the grid. With the potential of FERC 2222 to bring aggregated demand side and distributed resources into markets, much more widely available and adopted controllable devices, and other market developments necessitating the type of resource coming on the grid, this is a bit striking.

Building Automation

Support to ensure that buildings have higher level controls and capabilities to respond to grid signals was also not in the package. See comments in demand side and DER integration above and below.

Distributed Resource Integration

It’s not a future state, but a current need, in which aggregated edge resources can provide significant value to the grid. Turning distributed assets (solar, storage, EVs, thermostats, generators, hot water heaters, and much more) into a resource requires new technology, evolved models, new partnerships and more. Support to help this transition is essential. When well established values can be equitably dispersed to owners and all grid customers (and for the benefit of the system itself), we will have reached a new milestone in the evolution of our energy system – the grid has not reached this place yet and investing to get there is critical.

Analytics & Digital Infrastructure

Real-time grid telemetry to better understand and optimize the dynamics of the system was essentially not in the package and is also not present in most parts of the grid. What’s the saying ‘you can’t manage what you don’t measure?’ Are there exciting things you can do with the roughly 70% of advanced meters that are now deployed? Absolutely! But additional investments are required to apply a suite of capabilities, largely powered by the cloud, to the grid and it’s time that we take them off the shelf and use them.

Renewable Energy

Remember that part of the grid that actually creates the energy we need to run our economy? There are a handful of minor areas of investment in targeted deployments and demonstrations here and there offering a few hundred million dollars. But this package does not help fund the build-out of clean energy resources, nor the grid capabilities to help facilitate it. Economics of resources like wind and solar in many jurisdictions are just so cost-effective that their additions have largely won out over recent years, but if we want a lower carbon society we have to dramatically expand renewable resources. And, importantly, we must build a grid that ensures affordable, reliable power gets to people and businesses when they need it. It seems that the reconciliation package may have central aspects to helping support the further build-out of clean energy resources, but if the IPCC report that came out this week didn’t wake you up to the needs I’m not sure what else may.

### FTC Tradeoff DA---2AC

#### No resources AND thumpers

Michael Kades 21, Director of Markets and Competition Policy, former attorney at the Federal Trade Commission; Equitable Growth Foundation, “Competitive Edge: Congress Needs to Restore the Federal Trade Commission’s Authority to Seek Monetary Remedies When Companies Break The Law,” 7/28/2021, <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/>

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.)

Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor [Andy Gavil discusses a potential silver lining](https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/) in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws.

I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct.

Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision.

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### No spillover between parts of the FTC

Spencer Weber Waller 5, Professor of Law and Director of the Institute for Consumer Antitrust Studies at the Loyola University Chicago School of Law, “In Search of Economic Justice: Considering Competition and Consumer Protection Law”, Loyola University Chicago Law Journal, 36 Loy. U. Chi. L.J. 631, Winter 2005, Lexis

Despite this more comprehensive mission, the FTC is organized in a way that tends to emphasize the separation of these fields, rather than the common elements of the agency's mission. The FTC has a Bureau of Competition and a separate Bureau of Consumer Protection, with a Bureau of Economics to support the work of both endeavors. The Bureau of Competition ("BC") primarily engages in the investigation and enforcement of mergers and complex civil antitrust cases with a recent emphasis on intellectual property and health care issues. The Bureau of Consumer Protection ("BCP") primarily investigates and challenges outright fraudulent conduct. 9 The FTC website details recent BCP activity involving Internet sales, telemarketing, false health and fitness claims, identity theft and similar issues. 10 These are all very different issues from the day-to-day focus of the competition staff. This basic split is further mirrored in the Bureau of Economics ("BE"), where the staff tends to specialize in either competition or consumer protection. Any crossover of staff and cooperation occurs primarily in competition advocacy before legislatures or regulatory agencies, and not in case selection and investigation.

### AT: Oil Shocks Impact

#### A ton of alt causes---their author

David Koranyi 16, Chief Advisor of City Diplomacy for the Mayor of Budapest, former Director of the Atlantic Council's Eurasian Energy Futures Initiative, “A US Strategy for Sustainable

Energy Security”, Atlantic Council, March 2016, https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/AC\_SP\_Energy.pdf

Pillar 1. Accelerate the Energy Sector Transition and Solidify the American Innovative Advantage

The unconventional hydrocarbon revolution fueled economic growth, significantly expanded the room for maneuver of US diplomacy, and contributed to GHG emission reduction through a massive replacement of coal with gas in electricity generation. The United States achieved impressive reductions in CO2 emissions in the past ten years, partly owed to market forces (cheaper gas pushing out coal and increasingly competitive renewables), and partly to the implementation of progressive energy and climate policies. The actions and efforts of both the Bush and Obama administrations, from increased vehicle corporate average fuel economy (CAFE) standards to renewable tax credits and increased funding for research, have been critical steps to the right direction.

Yet more resolute action is required if the United States wants to rapidly transform its energy sector. A sustained low fossil fuel price environment risks discouraging innovation and investment into low-carbon options, thus locking the US economy into a high-carbon path. The low oil price, coupled with the abundance of natural gas, provides a strategic opportunity to put in place measures and incentives that would accelerate the decarbonization of the US economy without putting too much strain on the system from an affordability standpoint or compromising the security of supplies with a hastened transition. This wealth must therefore be leveraged strategically to accelerate the transition to a low-carbon economy.

Political leadership is critically important to ensuring that a fundamentally market-driven energy

sector transformation takes place in an expeditious and most efficient manner. The social cost of all greenhouse gas emissions—measured as the discounted monetary value of damages current and future by anthropogenic climate change, such as the costs of adverse agricultural effects, health effects, rising sea levels, and damages by extreme weather—should be the basis of action.39 On that basis, and in line with the recommendation of the Carbon Pricing Leadership Coalition that includes the International Monetary Fund, the World Bank, key national and regional governments, as well as leading private sector players and NGOs, a well-calibrated and gradually increasing national carbon fee should be introduced to discourage carbon usage.40 Experience in Europe in particular shows that, though not immune from the possibility of design flows itself, an outright carbon fee is a preferable and more transparent option than a cap-and-trade system. An across-the-board carbon fee system with no exemptions would provide a technology neutral signal that could even out the playing field, while preserving market principles and generating revenue. Close to forty nations and more than twenty-six subnational jurisdictions in North America and elsewhere adopted some form of carbon taxation with encouraging results.41

A carbon fee—covering all sectors, not just power generation as the controversial Clean Power Plan proposed—would have several major advantages. It would further boost the competitiveness of cleaner-burning natural gas vis-à-vis coal in the short term. It could propel the upgrade and modernization of fossil fuel generation capacities to cut emissions during the transition, boost the competitiveness of carbon capture and storage techniques to provide a long-term future for gas, and propel energy efficiency investments across the whole value chain. It would go a long way in helping to revive the commerciality of nuclear power to provide essential zero-carbon baseload generation capacity to address seasonal intermittency issues that are likely to prevail in the long term even with significant development in storage technologies. It would also help to preserve a robust American nuclear industry that is critical in maintaining a technological edge.

Natural gas would play an even bigger role in electricity generation with the introduction of a carbon fee.42 Yet even though natural gas replacing coal in electricity generation provides a quick short-term pathway to lower emissions, it could hinder the long-term full decarbonization goal.43 Therefore, while recognizing the importance of gas as a bridge fuel to a low-carbon future, public policy must ensure that the switch to natural gas is not permanent, but allows for the power sector to transition beyond—and see to it that gas eventually cedes a leading role to carbon-free energy sources. Thus, the carbon fee must be progressively elevated over the course of the next decade to incentivize investment in zero-carbon energy instead of gas, parallel to technological development and cost reduction in energy storage solutions in particular.

Revenues from the progressively increasing carbon fee—a modest $25 per ton carbon fee could raise over $100 billion a year—should be used to fund six major programs:44

1. Provide effective assistance to those whose livelihood is disrupted by the energy transition through early retirement schemes, education and job training programs.

2. Provide targeted subsidies to those struggling to pay their energy bills, as introduction of a carbon fee to the tune of $25 per ton would result in an increase in electricity prices across the country between 3 and 25 percent, though higher increases will occur in states where electricity prices are the lowest.45

3. Boost public funding for energy technology research and early deployment through programs such as the Advanced Research Projects Agency-Energy (ARPA-E) and the Department of Energy’s (DOE) National Laboratories with special regard to grid scale storage and carbon capture and storage technologies.

4. Boost energy efficiency across the whole of the US economy by dismantling financial and institutional obstacles and providing public support, loan guarantees, and tax credits for upfront investment costs.46 This would dramatically improve its energy efficiency, securing up to $1.2 trillion in gross energy savings by 2020.47

5. Renew the crumbling transportation infrastructure of the United States through publicprivate-partnerships.48 Special regard should be paid to urban mass transportation systems, intercity high speed rail network, and investment into bridging the gaps left by the private sector in an emerging national infrastructure catering to electric vehicles.

6. Offset some of the potential decrease from corporate tax revenues from a reduced corporate tax rate in the context of a comprehensive US tax reform.49

In the absence of a carbon fee, another more politically challenging option would be to bring the US gasoline tax level in line with that of the rest of the developed world in order to finance the proper upkeep and modernization of transport infrastructure. Lower oil prices helped by the US boom offer a great political opening to introduce a significant and long overdue tax hike.

The federal excise tax has not been raised since 1993, and federal plus state and local gasoline excise taxes still only amount to an average of $0.48 per gallon for gasoline (compared to $4.19 in the Netherlands).50 A modest 50 percent gasoline tax increase (amounting to a less than 25 cents increase at the pump) would still result in lower gasoline prices than before the oil price collapse of 2014. The gasoline tax increase on such a modest scale would yield approximately $20 billion a year.51

As subsidies propel overconsumption and disincentivizes energy savings, all implicit and explicit fossil fuel subsidies should be phased out of the system.52 Parallel to the elimination of fossil fuel subsidies and the introduction of the carbon fee, the phasing out of renewable subsidies beyond 2021 should also be explored.

It is critically important to create a more conducive policy environment to the renewal of the aging US nuclear fleet and the potential expansion of nuclear power generation capacities to provide baseload electricity generation capacities in the long term to offset the effect of seasonal intermittencies of renewables. Special regard should be given to the provision of loan guarantees and the resolution of the longstanding political dispute over a permanent repository of spent nuclear fuel.

The electrification of the bulk of energy demand, with special regard to transport and heating systems, must be the priority in order to satisfy energy consumption with zero-carbon emissions. The US electricity grid will need to be completely revamped to adapt it to the requirements of a much more complex electricity system and make it more efficient and resilient against natural disasters and man-induced physical and cyber threats.

The transition will require an across-the-board decarbonization extending beyond electricity

generation and the transport sector. This must occur in industry, and in the buildings and appliances sectors in particular. Rapid and widespread consumer adoption, facilitated by government policies and incentives, is critical. The federal government will need to work with state and local authorities in charge of building codes to devise a system of stringent requirements for both new and existing buildings.

In order to create a more transparent, accountable and efficient governance system, the jurisdiction of and cooperation between key federal, regional, state, and municipal bodies responsible for energy policies and regulations must be streamlined, with special regard to the Department of Energy, the Environmental Protection Agency, the Federal Energy Regulatory Commission, and various regional, state, and local agencies.

# 1AR---Round 2---UK RR

## Innovation ADV

### Innovation Turn---1AR

#### Only neo-Schumpeterian competition ensures true innovation.

Thomas J. Horton 21, Professor of Law and Heidepriem Trial Advocacy Fellow, the University of South Dakota Knudson School of Law, "Innovation and Antitrust: An Evolutionary and Historical Perspective," Concurrences: Libor Amicorum for Prof. Herbert Hovenkamp of U. Penn School of Law, 06/03/2021, pg. 270-274.

In addition to the necessity of adapting to its physical environment, a constant part of the adaptation process for a living organism results from the day-to-day competition it faces at both the intraspecies and interspecies levels.274 Intraspecies competition is certainly the rule, rather than the exception, in the feeding ecology of almost all plants and animals.”275 Charles Darwin asserted in On the Origin of Species in 1876 that “the struggle will generally be more severe between species of the same genus, when they come into competition with each other, then between species of distinct genera.”276 More recently, confirming Darwin’s assertion, biological and ecological competition studies have shown that “where competition occurs at all, it is generally more intense within species than between species.277 As observed by myrmecologist and neuroanatomist Auguste Forel, “the greatest enemies of ants are other ants, just as the greatest enemies of men are other men.”278

One of the biggest benefits of strong head-to-head intraspecies competition is that physical and behavioral innovations are ruthlessly and remorsely tested through real-life trial-and-error experiments.279 \*\*\*FOOTNOTE BEGINS\*\*\* See e.g. Matt Ridley, How Innovation Works: And Why It Flourishes In freedom 316 (2020) (describing “trial and error” as the “golden rule of innovation”); Wilson, Origins, supra note 278, at 95 (discussing evolution as a change in a population of genes affecting the same traits, as a result of environmental pressures); Francisco J. Ayala, Molecular Evolution, in Evolution, supra note 252 at 132, 149 (discussing the strong history of biological evolution through molecular evolution); Weiner, supra note 257, at 181 (“Darwin was emphatic that all complex adaptations arise by the gradual agency of natural selection”); Matt Ridley, Genome: The Autobiography of a Species in 23 Chapters 178 (1999) (“we are descended from a common ancestor with flies which used the same way of defining the pattern of the embryo more than 350 million years ago… Indeed, even more different creatures, such as sea urchins, are known to use the same gene clusters”). \*\*\*FOOTNOTE ENDS\*\*\* “The whole spectacle of evolution is this ‘creative advance into novelty,’ as Alfred North Whitehead, the philosopher of process, put it.”280 Through the algorithms of natural selection, innovative adaptations with positive survival payoffs can be spread through a population.281

Naturally, in such an algorithmic trial-and-error process, not all innovations are ultimately adaptive, or even helpful, and some may be downright harmful.282 Others may even go extinct. We need to be cautious, however, in concluding that because we do not understand the evolutionary development or usefulness of an organ, that it “is of little or no consequence.”283 For example, studies have shown that the human appendix, which was long thought to be of little importance, actually is “closely associated with lymphoid tissue, which plays a role in supporting the immune system.”284 The key point is that evolution ensures that helpful innovations or adaptations will be selected for.285

Most successful innovations in nature generally come through a gradual process that builds upon previous innovations,286 although “this process need not be as gradual as Darwin imagined.”287 Through the mindless and mechanical process of testing and building upon prior innovations, evolution “is astonishingly effective at creating clever designs,”288

Many modern day antitrust economists, as disciples of Schumpeter, like to think about the evolutionary process of competitive innovations as “creative destruction.”289 Thinking about how innovations occur in nature, however, the evolutionary process might be better described as “generative dynamic innovation and adaptation,” rather than “creative destruction.”290 New innovations generally do not lead to the “creative destruction” of either the species they occur within or the predecessor innovations they are built upon.291 Rather, the endless “generative dynamic” process of trial-and-error experimentation and adaptive refinements that result frequently lead to greater environmental dynamism, diversity, and stability.292 \*\*\*FOOTNOTE BEGINS\*\*\* See e.g., Goodwin, supra note 255, at 132–33 (discussing the “generative dynamics of evolution that test the stability and resilience of innovation); id. at 157–58 (explaining how evolutionary innovative trends lead to a “progressive emergence of increased complexity and more symmetries get broken in the morphogenetic cascade”); id. at 181 (discussing how “new levels of order emerge from complex patterns of interaction and what the properties of these emergent structures are in terms of their robustness to perturbation and their capacity for self-maintenance”); id. at 182 (“Organisms are themselves of this emergent order and agents of higher levels of emergence”); Mukherjee, supra note 261, at 323 (describing the human genome as “fiercely inventive” and dynamic; arguing that “it is the ingenuity of our genome that is the secret to our complexity”; id. at 360 (explaining how the “powerful reassortment of genes during sexual reproduction increases variation. Variation, in turn, increases an organism’s fitness and survival in the face of a changing environment.”). Stephen Jay Gould, Full House: The Spread of Excellence from Plato to Darwin 112 (1996) (“Complex systems improve when the best performers play by the same rules over extended periods of time.”). \*\*\*FOOTNOTE ENDS\*\*\*

In nature, far more important than any process of “creative destruction” and resultant extinctions, is the process of adaptive radiation that results in two species where only one existed before, “Why are there so many kinds of animals? Adaptive radiation like Darwin’s finches are the essence of the answer.”293

Many antitrust attorneys and economists today are drawn to catchphrases such as “nature red in tooth and claw”294 and “creative destruction” as describing the idea of “survival of the fittest.”295 Such catchphrases employ biological metaphors to justify conservative laissez-faire economic theories. As seen, however, adaptive radiation better describes how structural and behavioral innovations in nature lead to new species and enhanced environmental stability in the real world.296 For example, “[a] modest shift in the position of a few teeth, a matter of millimeters, may have led to spectacular adaptive radiations in certain lines of carnivores.”297

Species adaptability and aggressive intraspecies competition that leads to adaptive radiation are fundamental to catalyzing and promoting innovations in nature. As a result of ongoing intraspecies competition, innovation in nature is a self-reinforcing process that pushes environmental systems toward greater stability, adaptability, and diversity. The importance of random chance through mutation, recombination, and breeding cannot be overstated.298 Ultimately, intraspecies competition and adaptive radiation help living systems “strike a balance between adaptability and stability,”299 enabling life to thrive and prosper through ongoing innovation and dazzling designs in an ever-dangerous world.300

#### No incentive to innovate.

Nate Nead 21, CEO & Managing Member of Nead, LLC, "Is Technological Progress Slowing Down?" Read Write, 02/01/2021, https://readwrite.com/2021/02/01/is-technological-progress-slowing-down/.

There’s a compelling case to be made that while technological progress is still moving forward, it’s slowing down. And if that’s true, we need to be prepared for the consequences of such a shift in momentum.

The Low-Hanging Fruit

Our first clue that tech innovation is slowing down is a change to the traditional model of tech development. In many ways, technology is all about solving problems; every new tech advancement is a solution for some long-standing issue. It makes sense that our current wave of tech advancement resembles an exponential curve because new technologies make it faster and easier to solve other, often unrelated problems.

For example, the development of the internet was revolutionary for technological development overall. People now can review massive databases of information, communicate with other like-minded professionals, share ideas, and even publish their ideas to a broader audience. These capabilities have led to new ideas and new technologies that otherwise could never have been possible.

But this trajectory is limited. In the course of tech development, we often explore new territory very quickly – but only for a limited period of time. Think of it this way. As early human beings began exploring new territory, they found themselves surrounded by an abundance of game animals, trees, and fish. But as they hunted, harvested lumber, and fished, many of those resources began to dry up. In other words, they’d taken all the low-hanging fruit, and were forced to come up with new ideas. They had to explore new territory, invent new agricultural methods, and even find new sources of nourishment.

Our current burst of technological progress could be almost exclusively focused on low-hanging fruit. We’re solving the easiest problems first, and we’re solving them in quick succession. But the hard problems – like general intelligence-level AI, efficient battery storage, and even finding a cure for cancer – show little progress even over the course of decades.

Any futurist will tell you that all of humanity’s problems can be solved eventually. But we have to understand that our pace of innovation tends to slow down as we master all the “easy” problems and start looking at the “hard” ones.

Digital Innovation vs. Chemical Innovation

We also need to understand that most of the tech progress we’ve seen in the past 30 or 40 years has been limited to the digital world. These technologies have been astounding, accelerated by novel high-growth startups, but they’ve almost been exclusively focused on digital communication efficiency. The internet, software engineering, and AI have all taken amazing strides forward. But on the level of chemistry and physics, we’ve advanced very little.

We’re still incredibly reliant on non-renewable resources to fuel our consumption. We haven’t discovered any groundbreaking new elements, molecules, or chemical processes. And our understanding of the universe at the base level of physics hasn’t changed much, if at all, since the 1980s. We’re still struggling to reconcile major physics ideas that were first introduced nearly 100 years ago.

So what? Digital innovation may be so incredibly fast-paced that it can be the conduit through which we solve all other problems, right?

That may not be the case. For the majority of the digital age, we’ve depended on the momentum of Moore’s law. Moore’s law is an informal observation that the number of transistors that we can fit on a dense integrated circuit tends to double every two years. In other words, our computing power can double every two years, leading to major breakthroughs in a number of different technologies.

However, it appears that the age of Moore’s law may be nearing its end. There’s an absolute physical limit to the amount of space on a transistor chip. With exponential growth since the 1960s, we’ve gone from integrated circuits with 10 transistors to ICs with something like 10 billion transistors. How much further can we really go without breaking the laws of physics?

We may be able to push things even further, but to do so, we’ll need to invest in high-end chipmaking equipment and innovate entirely new manufacturing methods. Doing so will sharply increase the cost of chip production, ultimately negating the cost-effectiveness benefits.

Of course, there’s a solid counterargument here. It holds that digital innovation may continue at the same rate of exponential growth even if we’re unable to maintain the consistency of Moore’s law; even if the number of transistors on a chip remains more or less stagnant, we can find new ways to use the chips we already have.

Consumer Products and Perceptions

We see an endless conveyor belt of new gadgets and new consumer-facing technologies emerging on a constant basis. But how innovative are all these products, really?

Apple introduced the iPhone, a game-changing new type of technology, back in 2007. It combined several existing technologies into one, comprehensive unit, and changed the way we think about mobile tech forever. In the past 14 years, how much innovation have we truly seen in this space? We’ve seen a flock of competitors coming out with smartphone options of their own. And of course, we’ve seen Apple unveil a new model of iPhone nearly every year.

But these new, “innovative” smartphones only make marginal improvements to the original formula. Their cameras are sharper. Their processing power is beefier. Their storage capacity and battery life are more robust. But they can hardly be considered new technology, at least not at the same groundbreaking level of their predecessor.

#### Revitalizing corporate labs AND averting further outsourcing is superior due to structural advantages.

Ashish Arora et al. 20, Senior Associate Dean for Strategy. Rex D. Adams Professor of Business Administration, Fuqua School of Business, Duke University; Sharon Belenzon, Professor, Strategy, Fuqua School of Business, Duke University. Research Associate, National Bureau of Economic Research; Andrea Patacconi, Professor, Strategy, Norwich Business School; Jungkyu Suh, PhD, Business, Duke University, "The Changing Structure of American Innovation: Some Cautionary Remarks for Economic Growth," Innovation Policy and the Economy, Vol. 20, 2020, NBER.

In this chapter, we suggest that this division of innovative labor has not, perhaps, lived up to its promise. The translation of scientific knowledge generated in universities to productivity-enhancing technical progress has proved to be more difficult to accomplish in practice than expected. Spin-offs, start-ups, and university licensing offices have not fully filled the gap left by the decline of the corporate lab. Corporate research has a number of characteristics that make it very valuable for science-based innovation and growth. Large corporations have access to significant resources, can more easily integrate multiple knowledge streams, and direct their research toward solving specific practical problems, which makes it more likely for them to produce commercial applications. University research has tended to be curiosity-driven rather than mission-focused. It has favored insight rather than solutions to specific problems and, partly as a consequence, university research has required additional integration and transformation to become economically useful. This is not to deny the important contributions that universities and small firms make to American innovation. Rather, our point is that large corporate labs may have distinct capabilities that have proved to be difficult to replace.

Large corporate labs, however, are unlikely to regain the importance they once enjoyed. Research in corporations is difficult to manage profitably. Research projects have long horizons and few intermediate milestones that are meaningful to nonexperts. As a result, research inside companies can only survive if insulated from the short-term performance requirements of business divisions. However, insulating research from business also has perils. Managers, haunted by the specter of Xerox PARC and DuPont’s “Purity Hall,” fear creating research organizations disconnected from the main business of the company. Walking this tightrope has been extremely difficult. Greater product market competition, shorter technology life cycles, and more demanding investors have added to this challenge. Companies have increasingly concluded that they can do better by sourcing knowledge from outside rather than betting on making game-changing discoveries in-house.

The way forward, therefore, probably involves improving the efficiency of the existing division of innovative labor because science remains a vital input into invention. Arora et al. (2018) find that the decline of scientific research in corporate R&D after 1980 was mirrored by a drop in the implied value of scientific capability as measured by stock market valuation and acquisition price. As they also stress, however, whereas the private value of investing in scientific research in-house declined, there is no evidence that the social value of science declined. Patents continue to build upon scientific knowledge (as measured by citations) and, if anything, the relevant science is more likely to be new rather than old science. In other words, not only is science relevant for invention but also advances in science continue to be useful. This is especially true of corporate research. When company research is significantly advantageous because of complements such as specialized equipment or proprietary data, companies will continue to invest in research, especially if they can appropriate enough of the benefits by restricting spillovers to rivals.5

## Antitrust PIC

## FTC Tradeoff DA

### AT: Impact

#### No oil wars

Dr. Emily Meierding 16, Assistant Professor at the Naval Postgraduate School in Monterey, Calif., 5/19/2016, "Oil wars: Why nations Aren’t Battling Over Resources," Washington Post, https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/19/oil-wars-why-nations-arent-battling-over-petroleum-resources/?utm\_term=.b334c10dbcbd

The confrontation died down, but a critical question remains: Do countries fight over oil resources? The question isn’t just pertinent to the South China Sea. The Arctic, Caspian, East China Sea and eastern Mediterranean have all been identified as potential “hot spots” for international oil conflicts. Numerous conflicts, including Iraq’s invasion of Kuwait, Japan’s invasion of the Dutch East Indies in World War II, Germany’s attacks against the Russian Caucasus in the same war, the Iran-Iraq War, the Chaco War between Bolivia and Paraguay, and even the Falklands War, have been described as international “oil wars.” However, contrary to the conventional wisdom, the risk of international oil wars is slim. Although oil is an exceptionally valuable strategic and economic resource, fighting for it does not pay. The belief that countries fight for oil rests on a flawed foundational assumption: Countries reap the same benefits from foreign oil resources as from domestic oil resources. In reality, profiting from oil wars is hard. Countries face at least four sets of obstacles that discourage them from fighting for oil: invasion costs, occupation costs, international costs and investment costs. Invasion costs are the damage that wars inflict on oil fields and infrastructure. Occupation costs arise from local resistance to foreign occupation, which can target oil industry infrastructure and personnel. International costs are imposed by the international community, which can respond to oil grabs with economic sanctions and military interventions. Investment costs are the challenges of attracting foreign capital and technical expertise to occupied oil fields. Collectively, these four sets of costs dramatically reduce the payoffs of fighting for oil and the appeal of oil wars. When the many other costs of war, including manpower and materiel, are taken into account, fighting for oil becomes even less attractive. From a purely rational standpoint, countries shouldn’t launch oil wars. But, countries don’t always act rationally. To test the oil war hypothesis, we have to take another look at historical so-called oil wars. Closer examination shows that oil has not been the fundamental cause of any international wars. The Falklands War in 1982 was triggered by national pride and Argentine officials’ fear that their window of opportunity for retaking the islands was closing. Rather than fight over oil, Britain and Argentina tried to use it as a catalyst for cooperation. In the 1970s and 1990s, they tried to jointly develop the Falklands’ oil resources. The Iran-Iraq War, from 1980 to 1988, was also not an oil war. Iraq initially aimed only to gain control over the Shatt al-Arab waterway and 130 square miles of contested territory. In the early stages of the war, Iraq repeatedly offered to withdraw from Iran, if Tehran would accept those demands. However, Iranian officials accused the Iraqis of fighting for oil in order to discredit them internationally. The Chaco War, from 1932 to 1935, was also launched for other reasons. Bolivia and Paraguay knew that oil discoveries in the Chaco region were unlikely. They fought because of national pride and to avoid further territorial dismemberment, after major losses in the 19th century. The oil explanation didn’t appear until the war bogged down, when leaders tried to transfer responsibility for the devastating conflict onto international oil companies. On three occasions, countries have launched major military campaigns targeting oil resources. However, these were fundamentally wars for survival, not for oil. In World War II, Japan invaded the Dutch East Indies and Germany attacked the Russian Caucasus because leaders realized that, without more oil, their regimes would collapse. Japan would have to withdraw from China, which was “tantamount to telling us to commit suicide,” as Japanese Foreign Minister Togo Shigenori put it. Hitler was even more succinct: “Unless we get the Baku oil,” he stated, “the war is lost.” Iraq’s invasion of Kuwait in 1990 was a war for survival. Contrary to popular beliefs, Saddam Hussein was not attempting to greedily grab more oil resources. Instead, he was afraid that the United States was trying to overthrow his regime. The United States had supported the Kurds’ rebellion in the 1970s, perpetrated the Iran-Contra scandal in the 1980s, and by 1990, seemed to be squeezing Iraq economically. According to Hussein, the United States was driving down oil prices by directing Kuwait to exceed its OPEC production quota. Hussein believed that seizing Kuwait offered the only means of eluding the United States’ hostile designs. By controlling his neighbor, Hussein could raise oil prices, escape his economic crisis and regain domestic support. He knew that the maneuver was a long shot. Regime records show that Hussein expected the United States would try to force him out of Kuwait. Still, it was either that or regime collapse. As Hussein’s deputy, Tariq Aziz, said after the war, “You will either be hit inside your house and destroyed, economically and militarily. Or you go outside and attack…” Japanese, German and Iraqi leaders believed that they were fighting wars for survival. Participants in other so-called oil wars were fighting for additional reasons, like national pride. None of the conflicts were driven by oil ambitions. This is good news for contemporary international relations. Oil competition in areas like the South China Sea is not a serious threat to international security. Countries may engage in minor oil spats, like China and Vietnam’s rig confrontation, to reinforce their resource claims. However, these incidents will not escalate into international wars. There is also little risk of oil imperialism. Countries like China will not satisfy their oil needs by seizing foreign oil fields. Historically, leaders have only initiated oil grabs when they believed that their survival depended on it. This condition is exceedingly rare, even in wartime. And, it’s unrelated to the price of oil. The United States considered grabbing Middle Eastern oil in 1975, after the first energy crisis drove up prices. However, the Ford administration refrained, because the costs of aggression were too high. Lastly, oil won’t inspire great power wars. The United States and China may eventually come to blows. Some of their military campaigns may target oil resources, if controlling them seems necessary for regime survival. However, oil will not be the fundamental cause of a Sino-American conflict. It’s not worth fighting for.

### Turn---1AR

#### Acquisitions build further resiliency

Collin Eaton 21, Journalist covering Oil and Gas for The Wall Street Journal, “Fracking Companies Continue Consolidation as Cabot, Cimarex Form $14 Billion Firm”, The Wall Street Journal, 5/24/21, https://www.wsj.com/articles/fracking-companies-continue-consolidation-as-cabot-cimarex-form-14-billion-firm-11621866404

The combination of Cimarex, an operator in Texas, Oklahoma and New Mexico primarily focused on oil, and Cabot, a natural-gas producer in the Northeastern U.S., brings together two firms operating in different regions and extracting different commodities.

It follows a string of tie-ups between American fracking companies as the energy industry emerges from the Covid-19 pandemic. Recent deals have mostly paired up rivals in the same or similar regions. Having a mix of assets in oil, gas and natural-gas liquids should protect the company against price swings in any single commodity, a particular benefit for shareholders that have sharpened their demands for better investment returns in recent years, said Thomas Jorden, chief executive officer of Cimarex.

“It’s a better way to ride through the cycles in our business,” Mr. Jorden said. “The demands of our sector, in terms of returning free cash flow to our owners, [tell us that] these swings in our cash flow are poison, and this is just a wonderful antidote to volatility.”

Recent U.S. shale deals have included the all-stock combination of Colorado’s Bonanza Creek Energy Inc. and Extraction Oil & Gas Inc. earlier this month, and Pioneer Natural Resources Co. ’s purchases in recent months of smaller rivals in the Permian Basin of West Texas and New Mexico.

Mr. Jorden will become CEO of the combined company. Cabot’s CEO, Dan Dinges, will serve as its executive chairman. Its board will have five directors from Cabot, and five from Cimarex, including Mr. Jorden.

Last year’s sharp drop in energy prices illustrated the need to manage oil-and-gas companies around market volatility, and in recent months, the industry’s emergence from that downturn has enabled Cimarex and Cabot to better plan how it will deliver investment returns, Mr. Dinges said.

### No Spillover---1AR

#### Budgets only trade-off within bureaus

US Code 21 – “Text Of The Labor, Health And Human Services, Education, Agriculture, Rural Development, Energy And Water Development, Financial Services And General Government, Interior, Environment, Military Construction, Veterans Affairs, Transportation, And Housing And Urban Development Appropriations Act, 2022”, Rules Committee Print 117-12, https://docs.house.gov/billsthisweek/20210726/BILLS-117-RCP117-12.xml

Sec. 101. Appropriations made in this title shall be available for expenditure or transfer (within each bureau or office), with the approval of the Secretary of the Interior, for the emergency reconstruction, replacement, or repair of aircraft, buildings, utilities, or other facilities or equipment damaged or destroyed by fire, flood, storm, or other unavoidable causes: Provided, That no funds shall be made available under this authority until funds specifically made available to the Department of the Interior for emergencies shall have been exhausted: Provided further, That all funds used pursuant to this section must be replenished by a supplemental appropriation, which must be requested as promptly as possible.

#### They each have their own internal budgets

William E. Kovacic 16\* and David A. Hyman\*\*, Global Competition Professor of Law and Policy, George Washington University Law School and Non-Executive Director, United Kingdom Competition and Markets Authority, and \*\* H. Ross and Helen Workman Chair in Law and Professor of Medicine, University of Illinois, “Consume or Invest: What Do/Should Agency Leaders Maximize?”, Washington Law Review, 91 Wash. L. Rev. 295, March 2016, Lexis

The first investment domain is hiring personnel. The agency must find, hire, and retain skilled professionals and other personnel. And, once the personnel are hired, they must be organized into teams. For example, the FTC has separate Bureaus for Competition, Consumer Protection, and Economics. The Bureau of Competition and the Bureau of Consumer Protection are staffed by lawyers; the Bureau of Economics is staffed by economists. 12 As we have noted elsewhere, "the [\*300] government is already thickly planted with bureaus, agencies, and inter-agency working groups, departments and commissions" - and each has its own internal organization designed to effectuate the statutory mission. 13

#### Budgets are allocated to each bureau and then spent

Matthew Barish 18, Associate Editor, Cardozo Arts & Ent. L.J. Vol. 36, Benjamin N. Cardozo School of Law (2018); J.D. Candidate, 2018, Benjamin N. Cardozo School of Law; B.S., Business Management and Finance, Brooklyn College, “Reaching for the Stars: A Proposal to the FTC to Help Deter Astroturfing and Fake Reviews”, Cardozo Arts & Entertainment Law Journal, 36 Cardozo Arts & Ent LJ 827, Lexis

First, it has been proposed that the FTC needs to increase its enforcement against companies that engage in deceptive commerce practices. 204 The FTC is arguably the largest consumer protection organization in the United States, yet only brings a handful of unfair and deceptive acts claims in the context of fake online reviews each year. 205 In order to increase and effectuate the number of enforcement actions the agency brings each year, the FTC needs to respond to and investigate more complaints. This requires a proportional increase in funding and staffing of the FTC and the allocation of those funds and resources to the specific bureaus within the Commission that are responsible for regulating deceptive or unfair business practices, conducted on the Internet. According to the FTC's 2017 Congressional Budget Justification (the "2017 CBJ"), 206 the Commission requested a program level of $ 342,000,000 and 1,211 full-time equivalent (FTE) positions. 207 But this is merely a $ 35,100,000 budget increase from the prior year - one that includes only a small addition of 20 new FTE [\*856] positions. 208 This budget increase is meager for an agency that is responsible for protecting consumers and promoting competition within the entire United States landscape, and more specifically, a landscape that continues to increase its use of e-commerce. 209

#### Budgets are separate AND don’t spill over

Bob Ulin 12, Reporter for the Federal Times, “Tight Budgets Could Bring Era Of Interagency Cooperation”, Federal Times, 6-17, http://www.federaltimes.com/article/20120617/ADOP06/306170004/Tight-budgets-could-bring-era-interagency-cooperation

The word “interagency” is an elusive concept of voluntary associations of federal departments and agencies, each having its own procedures, jargon and rules. Each federal department has its own leader, budget, mission, career progression and congressional oversight committee. As such, there is little incentive to cooperate. While one might think that temporary service outside of one’s own agency would be seen as broadening, that is rarely the case because there is no incentive for it.

### UQ---1AR

#### The FTC is overburdened now---Court decisions have eroded efficient enforcement which forces more resource use for less payoff AND takes resources from other priorities---that’s Kades.

#### If they aren’t, that proves our no spillover argument---they are super good at management.

#### FTC overload now

Henry Burke 21, and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### It’s overwhelmed and uncredible

Tara Lachapelle 21, staff writer at Bloomberg, “Wall Street Is Ready to Put Lina Khan’s FTC to the Test,” Bloomberg, 8-25-2021, https://www.bloomberg.com/opinion/articles/2021-08-25/wall-street-is-ready-to-put-lina-khan-s-ftc-to-the-test

An overburdened U.S. Federal Trade Commission is warning acquirers that if they get impatient and close any deals without the agency’s permission, it just might slap them with a lawsuit. Dealmakers won’t hold their breath.

As President Joe Biden pushes for more aggressive antitrust enforcement — an effort spearheaded by legal scholar Lina Khan, his controversial pick to lead the FTC — the agency is running up against practical limitations. It’s working with very limited resources for a very large number of deals. How large? So far this year, nearly 10,000 U.S. companies agreed to be acquired for a combined deal value of $1.25 trillion, data compiled by Bloomberg show. That’s already surpassed last year’s sum and may even be on track for a record. Not all of those tie-ups will require regulatory approval but in July alone, 343 transactions filed premerger notifications and are awaiting review, compared with 112 in July 2020, according to the FTC.

Chart, bar chart, histogram

Description automatically generated

These filings start a 30-day clock for regulators to decide whether to further investigate a deal. If that waiting period expires without any action, a company would typically take that to mean that it’s free to complete the transaction. But now the FTC says it can’t get to its backlog fast enough and that inaction on its part doesn’t signal permission to proceed. In warning letters sent to filers this month, the agency said companies that go ahead anyway do so at their own risk because the FTC might later decide a deal violates antitrust laws and sue to undo it — and what a mess that would create for buyers and sellers. And yet, if the agency thought such an aggressive move might discourage mergers, it was wrong.

“To my mind, it is a completely hollow threat and makes the agency look weak,” Joel Mitnick, a partner in the antitrust and global litigation groups at law firm Cadwalader, Wickersham & Taft LLP, said in a phone interview. “They’re saying they’re going to ignore the statutory time limits on them whenever they feel like it and continue to investigate transactions until they’re satisfied. But it’s very difficult for the agency to sue to unwind the transaction once the eggs are scrambled.”

Merger reviews traditionally involve some give and take. Companies will often give regulators more time if they think it will increase the odds of winning approval. If that cooperative attitude is being tossed out the window, though, dealmakers are ready to reassess and embrace a more adversarial process.

For M&A lawyers, it’s a disturbance to an equilibrium that existed under other administrations, and they fear a reversion to the merger-hostile environment of the 1960s. Of course, folks in Khan’s camp would say it wasn’t an equilibrium at all, but rather an often overly cozy relationship between regulators and companies that were given too much leeway in recent years.

In any case, businesses are understandably frustrated by what would seem to be an unreasonable ask. Waiting indefinitely to close a deal is costly and full of risks. At least one acquirer isn’t having it. Last week, Illumina Inc. finalized an $8 billion purchase of cancer-testing startup Grail even though U.S. and European authorities haven’t completed their probes. Even as the FTC began this week its attempt to unwind the deal, other dealmakers may decide they like their chances, too.

The FTC “better be ready to litigate,” said David Wales, a partner in the antitrust and competition group at law firm Skadden, Arps, Slate, Meagher & Flom LLP and former acting director of the agency’s Bureau of Competition. “I’ve seen first-hand the resource constraints at the FTC,” he said. “They can’t sue everybody. They can’t block every deal. They will have to be strategic about it.”

Already, regulators have two major cases sucking up resources. The FTC last week refiled its monopoly lawsuit against Facebook Inc., alleging its takeovers of Instagram and WhatsApp violated antitrust laws. (Its deal last year for Giphy also employed a sneaky maneuver to avoid showing up on regulators’ radars, and now they’re looking to close that loophole.) The Justice Department is pursuing its own case against Google. And what was initially seen as a narrow effort to reel in dominant technology companies has since expanded to other industries in light of a sweeping executive order from President Biden. Even more obscure areas such as ocean shipping are facing new scrutiny.

M&A reviews had already become more of a slog in recent years. Dechert LLP’s Antitrust Merger Investigation Timing Tracker — aptly nicknamed the DAMITT report — shows how investigations that once took an average of eight months now stretch into a year or longer:

Graphical user interface, chart

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Just because the FTC threatens a drawn-out legal process doesn’t mean a court will take its side in the end. Even as some politicians and antitrust officials look to toughen up M&A laws, judges still rely on precedent, which can be favorable to merging companies (it was for AT&T Inc. in its giant takeover of Time Warner, for instance). An ambitious agenda without the financial resources to match it will also be of less service to consumers than if regulators pick their battles.

As it stands now, Khan’s FTC looks like it’s biting off more than it can chew, and its threats aren’t having the intended effect.

#### Court losses are inevitable and make the FTC ineffective.

David McLaughlin 21, reporter for Bloomberg News, “Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts,” Bloomberg, 6-23-2021, https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda

Instead, hours after the Senate confirmed her, Biden put the 32-year-old Khan—one of the most prominent antagonists of big business—in charge of the agency, where she’ll be responsible for challenging mergers and taking on companies when they use their market muscle to snuff out competition.

Now comes the hard part: putting her agenda into action. The biggest hurdle, say antitrust experts, is a judiciary that has made it very difficult for competition watchdogs to win ambitious cases. And to make any change of consequence, whether breaking up a monopoly or stopping a takeover, enforcers must prevail in court.

“None of that is easy, and it’s particularly not easy when courts are very conservative, as they are today,” says Stephen Calkins, a law professor at Wayne State University and a former general counsel at the FTC. “She’s certainly talked about breaking up companies but, my golly, that’s incredibly hard to do.”

Khan made her mark in 2017, with a law review article she wrote while still a student at Yale Law School. Titled “Amazon’s Antitrust Paradox,” it traced how the online retailer came to control key infrastructure of the digital economy and how traditional antitrust analysis fails to consider the danger to competition the company poses. The paper was widely talked about in antitrust circles and was read by senior enforcement officials.

U.S. tech titans are at the center of the antitrust debate in Washington. They are ever more powerful, with Apple Inc., Amazon.com Inc., Alphabet Inc., and Facebook Inc. among the top 10 largest companies in the world, by market value. A House of Representatives investigation last year accused the companies of abusing their dominance to thwart competition, and lawmakers are considering a raft of bills to impose new rules on how the companies operate. Federal antitrust enforcers and state attorneys general have sued Google and Facebook for what authorities say are monopoly abuses.

Khan, who was counsel to the House antitrust committee during its probe, was one of the main authors of the House report. It recommended a series of reforms to antitrust laws that she and anti-monopoly activists have long championed, like restricting which markets the companies can operate in and requiring them to treat other businesses on their platforms fairly and without favoritism.

Khan’s work helped revolutionize competition-policy debates and shift support for a more forceful approach that abandoned the playbook inspired decades ago by Robert Bork, the conservative legal scholar and judge. That framework came to be known as the consumer welfare standard and relies on price effects as the measure of competitive harm. Khan argued in her paper for a new approach, focused on the competitive process and the structure of markets, that she said would more fully capture harms that the consumer welfare standard misses.

Once considered on the fringes of antitrust thinking, Khan and her acolytes—often dubbed the New Brandeis School, after Supreme Court Justice Louis Brandeis—are now firmly mainstream with Khan’s appointment as FTC chairwoman.

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker Qualcomm. In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.