# 1NC

## 1

TOPICALITY:

**‘Prohibiting’ a practice requires per se illegality.**

Lee **Mendelsohn 6**, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The **first step** in any **competition law** analysis is to **define** the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The **prohibition** on the fixing of a purchase or selling price or any other trading condition is one of the so-called **"per se"** prohibitions which are included in our Competition Act. The prohibition is **automatic** and **absolute** and the fixing of prices or other trading condition **cannot be justified** on the basis of any technological, efficiency or other procompetitive **gains** that could **outweigh** the potential **anticompetitive effect** of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

**Limits---many standards, requiring distinct answers, make the topic unmanageable.**

**Ground---fringe standards dodge links and allow bidirectional permissiveness.**

## 2

#### Plan: The United States federal government should remove implied immunity from its antitrust laws for the FCC\*.

\*federal communications commission.

#### Goldilocks now for stock growth—confidence in corporate earnings are key

Jackson 11/1/21 (Anna-Louise Jackson, Benjamin Curry, Forbes Contributors “November Stock Market Outlook”, https://www.forbes.com/advisor/investing/november-2021-stock-market-outlook/)

So much for those predictions of a market correction in October. The S&P 500 finished the month at an all-time high and surged 6.9%, for its biggest monthly gain of 2021. This benchmark for the U.S. stock market is up more than 22% for the year while the Dow Jones Industrial Average, Nasdaq Composite and Russell 2000 are all up at least 16%.

Although investors are feeling more optimistic about stocks again, that doesn’t mean their reasons for caution have gone away. If anything, earnings season confirmed that the pace of growth has slowed more than economists had expected. Several Big Tech companies reported disappointing earnings results, supply chain issues persist and inflation is now at a 13-year high.

Third quarter earnings season is still underway, and earnings reports have generally been strong. More than half of the members of the S&P 500 have reported results, with 82% of them beating analyst estimates. Some of the seemingly bad news—like sluggish economic growth—could actually benefit stocks, particularly if the Federal Reserve is less aggressive with raising interest rates in 2022, notes Ernesto Ramos, chief investment officer of BMO Global Asset Management. And yet, the inflation picture could put pressure on central bankers to raise rates faster, he adds.

“There’s a whole class of contradicting or opposing forces in the market,” Ramos says, adding that time will tell “who ends up winning the contest.”

November kicks off with a key meeting for the Federal Reserve, and ends with the all-important holiday shopping season in full swing. Here’s what to watch out for in markets.

Will the Fed Begin Tapering?

Federal Reserve policymakers are scheduled to convene for their second-to-last meeting of the year on Nov. 2 and 3, and investors broadly expect that the Fed will announce plans to begin tapering bond purchases. Since mid-2020, the Fed has been purchasing $120 billion of Treasury and mortgage-backed securities each month to help support the economy amid the Covid-19 pandemic.

“Obviously, they’ve signaled and signaled and signaled and signaled that they’re going to do tapering, and this time they really mean it,” says Barry James, CEO and portfolio manager of James Investment Research. While he believes the Fed is “highly likely” to begin tapering in November, that news shouldn’t come as a surprise or cause much volatility. Back in 2013, a similar such announcement rocked markets and caused U.S. Treasury yields to surge higher in what came to be called the taper tantrum.

If the Fed begins tapering its quantitative easing (QE) program as planned, it could stop buying bonds altogether by mid-2022, Ramos notes. Even though the pace of economic growth has slowed, this type of supplementary support from the Fed is no longer necessary and has contributed to higher inflation, he adds. “If for no reason than to temper inflation, the Fed needs to remove QE,” he says.

Earnings Season as a Read on Economic Growth

The U.S. economy grew at a pace of just 2% in the third quarter, a big slowdown from the prior four quarters and less than economists were forecasting. The second estimate for third quarter gross domestic product (GDP) is scheduled for release on Nov. 24, but investors will continue monitoring corporate earnings for other clues about the pace of economic growth.

“We’re very keen on earnings releases and the guidance the companies give, and so far those have come in pretty strong,” Ramos says. James agrees that earnings season has by and large been “very strong” but adds that some commentary from company executives reinforces what that most recent GDP report showed—that the economy is growing at a much slower pace than it was earlier in the year.

And the market will get the much-watched monthly jobs report for October on Nov. 5, which could signal whether the economy is picking up some steam in the fourth quarter. “Hopefully this slowdown is transitory and growth comes back a little higher,” Ramos says. “The deceleration has been pretty dramatic.”

Even so, James points to two positive trends, particularly as the all-important holiday season approaches: The latest surge in both the number of cases and deaths related to the Covid-19 pandemic appears to be lessening, and consumers and businesses have a lot of money in accumulated savings. “The framework for the economy is in pretty good shape.”

Consumer confidence is holding steady with the pandemic average, and 53% of respondents believe the economy will recover quickly once pandemic-related restrictions are lifted, according to the Oct. 22 Ipsos-Forbes Advisor U.S. Consumer Confidence Tracker.

Meanwhile, investors actually welcomed the latest GDP report that showed a slowdown in economic growth. “It removes some pressure from the Fed to raise interest rates,” Ramos says. Traders currently see a nearly 66% probability of at least one rate hike by mid-June 2022, up from a likelihood of about 21% one month ago. The prospect of lower interest rates for longer is good for stocks, Ramos adds.

#### Securities have implied immunity now, the plan broadly overturns engaging a floodwave of litigation

Tyler 21 (Eleanor Tyler Legal Analyst With assistance from Peter Rasmussen, Legal Analyst, Bloomberg Law. “ANALYSIS: Securities Markets Face Scrutiny Under Antitrust Bill”, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-securities-markets-face-scrutiny-under-antitrust-bill)

But also tucked into CALERA are sections that would all but end a fairly obscure judicial doctrine called “implied immunity.” The doctrine currently disallows antitrust complaints about conduct that is regulated under another complex federal statutory framework. In other words, where Congress is silent on the issue of antitrust law overlapping with another statute, courts have occasionally stepped in to close off areas from antitrust scrutiny.

The defense of “implied immunity” doesn’t come up that often, and it is mostly successful in securities markets. Defendants have long argued that applying antitrust law to conduct that is legal under the securities laws infringes on the regulatory authority of the Securities and Exchange Commission and harms financial markets. Core functions of the securities market, like participating in exchanges and listing and selling stocks and options, should only be subject to one set of rules, they argue.

Right now, if the securities acts apply to conduct related to core securities market functions—and the SEC doesn’t explicitly forbid that conduct—then that conduct can be immune from antitrust claims. CALERA would greatly narrow that rule: Instead, implied immunity could only attach to conduct that other laws “explicitly require or authorize.” In short, conduct within the vast gray areas of the securities law wouldn’t qualify for implied immunity under CALERA; only conduct that the securities laws “explicitly require or authorize” would.

Furthermore, CALERA says that the antitrust laws “shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments.” That language counters a Supreme Court statement in Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP that a regulatory framework designed to deter anticompetitive harm probably doesn’t warrant the addition of antitrust scrutiny, even if Congress explicitly preserved the application of the antitrust laws to that regulatory framework.

Together, these provisions mean that courts can’t second-guess whether the antitrust laws should apply to conduct in regulated markets, or water down the antitrust laws when applying them to that conduct. Unless the regulator explicitly permits or requires the conduct, market participants can challenge it under the Sherman Act.

What Conduct Is at Risk?

In practice, few antitrust defendants have successfully pleaded implied immunity from the federal antitrust laws in court. Nevertheless, a wide variety of defendants have argued that their conduct should be immune from the antitrust laws.

Cases in which the defense was raised have included not only antitrust claims against financial market conduct, but also complaints about anticompetitive conduct in, patent infringement, horse racing, merging hospitals, and seeking FDA approval for a generic drug.

Most successful cases have been in the securities or commodities context. The current test for implied immunity comes from Credit Suisse Securities (USA) LLC v. Billing, a 2007 Supreme Court decision that dismissed claims that underwriters colluded to drive up prices for initial public offerings (IPOs). Specifically, the plaintiffs complained about underwriting contracts that required them to buy shares at prearranged escalating prices in the aftermarket in order to get access to an IPO, a practice called “laddering.” Laddering isn’t currently permitted under Regulation M (and was at best disfavored in 2007 when the Court decided Credit Suisse); however, the Supreme Court held that it can only be addressed by the SEC and not by those harmed by inflated share prices under the Sherman Act.

Other financial markets practices shielded under the doctrine have included underwriting contractual provisions prohibiting “flipping” (immediately reselling) of IPO shares, restricting trade in stock options, charging fixed commission rates for stock trades, and restricting trade in mutual funds on the secondary market.

In short, if the myriad kinds of restrictive conduct that are explicitly intended to boost prices for stocks and derivatives become subject to the antitrust laws, many practices, at all levels of the financial system, are likely to come under scrutiny. That scrutiny could include enforcement actions by federal or state regulators or private actions for treble damages under the Sherman Act.

Narrow Wedge, Big Shift

For decades, the markets around the offering and listing of stocks have been largely a walled garden, protected from pruning by the Sherman Act. There is likely a lot that would interest plaintiffs in that overgrowth. That’s an issue that investment bankers, brokers, compliance professionals, and lawyers may need to assess.

All of that depends, of course, on whether CALERA looks likely to be enacted. The key issue, therefore, is which parts of Klobuchar’s proposals have enough bipartisan support to get through the Senate.

More fundamentally, however, the implied immunity provision of CALERA expresses a belief that the antitrust laws should be at least on equal footing with other federal statutes. Aside from shining a light on financial markets, therefore, ending implied immunity would remove a tool that Klobuchar believes judges have used to de-fang the Sherman and Clayton Acts. If that sentiment survives in CALERA’s text, it could signal a new phase of antitrust enforcement.

#### Bulls market driven by exuberance is tenuous—the plan causes a crash and recession

Roberts 11/7/21 (Lance, Seeking Alpha, “Did The Fed Just Set The Stock Market Up For A Crash?”, https://seekingalpha.com/article/4466775-did-the-fed-just-set-the-stock-market-up-for-a-crash)

Market Back To Extreme Overbought As noted last week, the more significant concern remains the underlying technical condition of the market. While the rally has been impressive, rising to all-time highs, the market is now back to more extreme overbought levels.Furthermore, our "money flow buy signal" is near a peak and slightly triggered a "sell signal." However, with the MACD still positive, the signal suggests a consolidation rather than correction. However, a confirming MACD often aligns with short-term corrections at a minimum. Therefore, we will watch that signal closely. Also, this entire rally from the recent lows has been on very weak volume, which suggests a lack of commitment. Currently, the bulls control the market as we are in the middle of a "buying stampede." Historically, buying stampedes last on average between 7 and 12 days. Logically, buying stampedes always get followed by selling stampedes of similar lengths. However, there are times these stampedes can last much longer than expected. We are currently in one of those longer-term periods. As shown below, the S&P 500 has only been down in 2 of the last 18 days. How unusual is that? In the previous 20 years of the S&P 500, the number of times the market accomplished such a feat was precisely ZERO. Of course, that stampede gets driven by exuberance. Irrational Exuberance In our daily market commentary, we quoted a piece of analysis from Chartr.com. To wit: "Every week it feels like we get a new headline about financial markets doing something unusual. Just this week we've had:" A "squid game" crypto token falling 99.99% in a few minutes. Tesla adding hundreds of billions of dollars in value over a deal with Hertz that hasn't even been signed. US stock markets hitting fresh all-time highs. "All of which begs the question: are we in a bubble?" So where are we now? The latest CAPE ratio for the S&P 500 Index is 38x. That's pretty close to the all-time record, which was 44x back in 2000. For those with a short memory, that was just before the dotcom bubble burst and stock markets (particularly tech) crashed hard." As we have noted previously, valuations, by themselves, are a terrible timing metric. However, they tell us a great deal about expected future returns and current market psychology. When it comes to "irrational exuberance," there are other indicators better at revealing speculation in the markets that have preceded a stock market crash. The CNN Fear/Greed index is now at extreme greed territory. Furthermore, the demand for protection against a stock market crash (put options) fell to new lows. Historically, such periods of "speculative" activity led to a minimum of short-term stock market corrections, but a crash is not beyond the realm of possibilities. As noted above, with the market extremely overbought, speculative activity surging, and conviction weak, taking some actions to rebalance and manage risk is warranted. However, for now, investors have "no fear" as they believe the Fed will continue to remain accommodative. The Fed's Third Mandate Takes Priority My co-portfolio manager, Michael Lebowitz, made an important observation on Thursday. "Jerome Powell made it clear the Fed is in no hurry to raise interest rates. 'We don't think it's time yet to raise interest rates. There is still ground to cover to reach maximum employment, both in terms of employment and in terms of participation.' The Fed's reason is the employment picture is not back to pre-pandemic levels. In our mind, there is plenty of evidence such as the outsize quits rate, rising wages, and the record number of job openings that scream the labor market is very healthy. Does Mr. Powell disagree with our assessment, or is there more to the Fed's policy stance? We believe he answered the question at Wednesday's press conference. Per Jerome Powell: 'The Fed's policy actions have been guided by our mandate to promote maximum employment and stable prices for the American people along with our responsibilities to promote the stability of the financial system.'" The last sentence is the most important. According to the Federal Reserve's Congressional authorization, the Fed has only TWO mandates: price stability (inflation) and full employment. The third mandate is a self-imposed mandate from Ben Bernanke, who was the Fed Chairman in 2010: "This approach eased financial conditions in the past and, so far, looks to be effective again. Stock prices rose, and long-term interest rates fell when investors began to anticipate the most recent action. Easier financial conditions will promote economic growth. For example, lower mortgage rates will make housing more affordable and allow more homeowners to refinance. Lower corporate bond rates will encourage investment. And higher stock prices will boost consumer wealth and help increase confidence, which can also spur spending." Fed Opts To Keep Markets Elevated Jerome Powell ignored surging inflationary pressures and a robust job market in favor of supporting asset prices. With valuations surging, speculative activity rising, and investors heavily leveraged, the Fed faces a difficult choice. There is already a decoupling of markets from consumer confidence. A stock market crash would further devastate confidence pushing the economy into recession. That is the risk the Fed cannot afford.

#### Nuke war

Jomo Kwame Sundaram & Vladimir Popov 19. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to foment unrest, conflict, even war as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

Rising economic insecurity, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.

Thus, ethno-populist inspired chauvinistic nationalism may exacerbate tensions, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended. Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

## 3

#### The United States Congress should

#### delegate statutory authority for agencies to regulate anticompetitive conduct;

#### statutorily inaugurate “net neutrality” legislation.

#### The United States ought to substantially increase regulations of anticompetitive conduct for at least internet service providers.

#### They’re wrong when it comes to structural regulations

Weinstein 19 (Samuel, “FINANCIAL REGULATION IN THE (RECEDING) SHADOW OF ANTITRUST”, Temple Law Review, VOL. 91 NO. 3 SPRING 2019)

There are many reasons to conclude that antitrust enforcement more effectively protects and promotes competition than sector-regulator competition enforcement. But can the same be said of the comparison to structural regulation of the types discussed above? The difficulty of prevailing on the sorts of antitrust claims that arise in markets involving competitive bottlenecks suggests that structural regulation indeed may do a better job safeguarding competition than antitrust enforcers or private plaintiffs suing under the antitrust laws can do under current law. One proposed approach to the bottleneck problems clearinghouses and exchanges pose is to address them through antitrust’s essential facilities doctrine.420 Some courts have found that firms controlling a facility to which access is required to compete in a relevant market cannot unreasonably deny such access to downstream rivals.421 An oft-cited articulation of the elements of this type of claim is found in the Seventh Circuit’s decision in MCI Communications Corp. v. AT&T. 422 That court identified in the case law four elements that plaintiffs must show to prevail on an essential facilities claim: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”423 The problem with relying on the essential facilities doctrine is that it is highly disfavored among courts and commentators.424 Professor Phillip Areeda famously asserted that essential facilities is “less a doctrine than an epithet, indicating some exception to the right to keep one’s creations to oneself, but not telling us what those exceptions are.”425 Critics have argued that the doctrine can dampen dynamic efficiency by undermining incentives for firms to create competing facilities or for monopolists to improve their own facility.426 Certain of these objections apply squarely in the case of clearinghouses. If potential members believe they will be forced ultimately to offer open access to their clearinghouse, they may be unwilling to make the significant capital investments starting and maintaining a clearinghouse would require.427 Further, even when courts are willing to consider liability under the essential facilities doctrine, the four-part test is difficult for plaintiffs to satisfy.428 Essential facilities allegations are closely related to refusal-to-deal claims,429 which also are challenging for plaintiffs. Unilateral refusals to deal are rarely actionable.430 Claims asserting unlawful concerted refusals to deal are sometimes successful but still can be difficult for plaintiffs to win.431 One suggestion for addressing this problem is to apply the theory of parallel exclusion to exclusionary conduct by clearinghouse members.432 Professors C. Scott Hemphill and Tim Wu, who developed this theory, have described parallel exclusion as “self-entrenching conduct, engaged in by multiple firms, that harms competition by limiting the competitive prospects of an existing or potential rival to the excluding firms.”433 In situations where members of a clearinghouse’s risk committee “arrive independently at policies” that exclude competitors, under current antitrust case law, courts may have little recourse to prevent the conduct.434 If the decisions indeed are made independently, section 1 of the Sherman Act would not apply.435 Courts might be able to solve this problem by using Hemphill and Wu’s theory to find a section 2 “shared monopoly” violation where clearinghouse members exclude rivals in a manner that unreasonably harms competition. In the absence of such a solution, there is a risk that big banks can harm competition in the derivatives markets free from the threat of antitrust liability.436 Structural regulation of derivatives clearinghouses and exchanges avoids the problems antitrust enforcement faces in these markets. The risk that exclusionary conduct by clearinghouse members working through risk committees or otherwise might fall into gaps in the antitrust laws is much less worrisome if the big banks cannot control risk committees or other levers of power in derivatives clearinghouses and exchanges. Absent that control, the big banks will find it difficult to exclude rivals. The structural solution would not require relying on uncertain ex post regulatory enforcement to ensure competition is protected. Sufficiently strict ownership caps, governance restrictions, or other forms of structural regulation address the problem without active agency involvement. One potentially serious drawback to this structural approach was suggested in the big banks’ responses to the CFTC’s and SEC’s proposed conflicts-of-interest rules.437 It may prove difficult to convince big banks to contribute sufficient capital to clearinghouses over which they do not have ultimate control.438 Without big-bank contributions, clearinghouses may face a liquidity shortage and may not be able to serve their systemic risk function.439 It is unclear, however, how much of a problem this will pose in practice. Under the agencies’ proposed rules, for example, big banks still can own significant stakes in clearinghouses and exchanges.440 And as a group, big banks can own up to 40% or even 100% of a clearinghouse or exchange.441 True, the rules’ governance restrictions limit the big banks’ control,442 but even under the strictest of the proposed limits, they still could have a significant presence on most committees and the board of directors. There will be some profit to be made by owning part of a clearinghouse or exchange and there are other advantages to membership.443 In sum, the competition-related benefits of structural regulation are strong and the drawbacks speculative. There is another potentially compelling reason to prefer structural regulation to antitrust in this context: increased competition in derivatives trading may not always be beneficial. Contemporary antitrust enforcement typically has one goal: eliminating unlawful barriers to competition to increase output of goods and services—thereby lowering prices—and spur innovation.444 In many markets, this goal may be in harmony with, or at least not inconsistent with, other public policy objectives. Markets for toxic products are an exception. Professor Daniel Crane has studied this issue with regard to the tobacco business.445 He observed that “[o]utput maximization remains the dominant goal of antitrust enforcement in the tobacco industry” and that “[i]n general, the antitrust establishment simply ignores the harmful nature of tobacco” when considering enforcement in that sector.446 To address this problem in antitrust law, Crane identified what he termed “net-harm markets,” which he described as markets where “(1) [t]he consumption of the good at any level of output produces greater total internal and external costs than internal and external benefits; or (2) [a]t the output level determined by a competitive market, consumption of the good produces greater total costs than total benefits.”447 Crane conceded that it may be difficult to identify net-harm markets but suggested that one way to do so is to look to whether public policy, expressed through government statements and actions, evinces a consensus that output of a product is harmful.448 This is the case for tobacco products, and in Crane’s view it means that tobacco is a net-harm market, which “should be eligible for extraordinary antitrust treatment.”449 Crane advised that in “net-harm markets, the antitrust agencies and courts should apply the antitrust laws to pursue a goal of harm-reduction rather than one of output maximization” and that in cases where a public policy consensus exists to reduce consumption of a product, “the antitrust laws should not be used to increase that product’s consumption.”450 Are derivatives a net-harm market? As Crane noted, it is difficult to determine quantitatively if a market produces greater costs than benefits.451 There is persuasive evidence that the derivatives markets were responsible for a significant portion of the damage the 2008 financial crisis caused.452 That damage was enormous. The Government Accountability Office stated in 2013 that studies have shown the crisis caused between a “few trillion” and over $10 trillion in lost output and led to “large declines in employment, household wealth, and other economic indicators.”453 The derivatives markets also provide important economic benefits, however, allowing companies to hedge risks, thereby expanding the amount of available credit in the economy.454 Whether those benefits outweigh the harms derivatives already have caused and may cause in the future likely is impossible to say with mathematical certainty. To the extent Dodd-Frank represents a public policy consensus on the treatment of derivatives, it is that to reduce systemic risk the vast majority of derivatives should be traded on transparent exchanges and centrally cleared.455 Dodd-Frank accordingly is biased toward standardized swaps that can be exchange-traded and away from exotic swaps that might not qualify for exchange trading. Arguably, the Act also at least implicitly aims to reduce output of derivatives contracts. By pushing most derivatives trades to regulated exchanges and central clearinghouses, Dodd-Frank increases the chances that certain trades will not be consummated, either because regulators having seen them will bar them or because clearinghouses will reject either the derivatives trader or a specific trade.456 That being said, there is no explicit mandate in Dodd-Frank to reduce the overall output of derivatives trades similar to government pronouncements in the tobacco markets. Nonetheless, because certain derivatives may threaten systemic safety, derivatives markets potentially are net-harm markets for which antitrust, with its goal of increasing output and innovation, is an awkward fit. While tobacco products generally are considered uniformly harmful, derivatives contracts can be beneficial in many circumstances.457 The challenge is to discourage swaps that unduly increase systemic risk, while permitting or encouraging benign and beneficial swaps. Antitrust enforcers are not attuned to these distinctions and, indeed, are not concerned with them.458 Antitrust’s role is to increase output and innovation, not to pick and choose between financial products.459 Financial regulators are much better positioned to distinguish helpful and harmful swaps.460 Under Crane’s model, antitrust enforcers and courts would give the derivatives markets different antitrust treatment than non-net-harm markets.461 At least under current antitrust law and agency policy that approach seems unlikely to be implemented. The problem is avoided altogether, however, if competition issues in the derivatives markets are addressed by structural regulation with sector-regulator oversight, rather than antitrust enforcement.462 In this scheme, the structural regulations “perform[] the antitrust function” that sector regulators are unequipped for, freeing them to concentrate on their core competency—ensuring that the derivatives markets do not unduly increase systemic risk.463 In doing so, the sector regulators can judge how much competition and innovation is healthy in these markets and they can decide which swaps to promote (with the goal of increasing output and lowering price) and which to discourage. While many regulated markets likely do not raise similar concerns about toxic products, the advantages of structural regulation we see in the derivatives sector nonetheless may be broadly relevant to other regulated markets where antitrust immunity or displacement of antitrust on regulatory grounds is a risk. In the potential absence of antitrust enforcement in markets where the sector regulators are unprepared or unwilling to perform the antitrust function, structural regulation can fill the gap. Some sector regulators may be willing and competent guardians of competition; when that is the case, there is less need to consider the structural alternative. But, particularly in the financial markets, structural regulation should be considered a primary option when it is clear that the shadow of antitrust is receding.

## 4

#### Trinko & Credit Suisse are the ultimate preservation of Chevron deference—overturning greenlights a flood of suits that strip agency interpretation authority. CP Avoids it

Srago 3/16/21 (Josh Srago, EFF Legal Fellow, Why Can’t You Sue Your Broadband Monopoly? EFF (2021) https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly)

Where does this leave us in regards to the FCC, its oversight authority, and antitrust claims? Under the Chevron framework, unless Congress expressly spoke to a given issue in a statute discussing a regulated industry, it will be left for the agency granted oversight authority to interpret the statute. So long as they do so reasonably, the courts will defer to the agency’s interpretation and judgment. The 1996 Act provides for specific rules for telecommunications service providers. Under Trinko, and its expansion in Credit Suisse, we find that “the Supreme Court's decision prevents . . . courts from engaging in [an antitrust] inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry.”47 Telecommunications service providers must work with the FCC in order to offer the services in compliance with the 1996 Act and any other rules or regulations laid down by the FCC. As a result of telecommunications being a regulated market with agency oversight, including the ability to monitor for anticompetitive behavior and enforce penalties for such behavior, the courts will defer to the FCC’s conclusions. Howard Shelanski, former Director of the Federal Trade Commission’s (FTC’s) Bureau of Economics put it most succinctly:

By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history.48

The Court’s creation of antitrust immunity for regulated industries extends the premise that if an antitrust claim were to include conduct that has been approved by the regulating agency, any such enforcement of antitrust laws could be contrary to the enforced regulatory regime. The FTC drew upon this comparison in its amicus filing in Credit Suisse where it stated “the complaint’s allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.”49 And further that, “the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambiguous allegations that focus on immune conduct.”50 The Court agreed, stating that in order for the antitrust suit to be allowed, there must be, “a plain repugnancy between . . . antitrust claims and the federal . . . law.”51 Therefore, if the FCC establishes regulations that dictate that 1996 Act’s competition policies are no longer applicable under its regulatory structure, the Court will be required to dismiss an antitrust claim as being implicitly precluded under the telecommunications laws, as to do otherwise would violate the authorized regulatory regime.

#### Nuke war

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

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

Intellectual Property in “Interesting Times”

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

The Changes In Intellectual Property Law

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

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

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

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

Patents

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

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

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

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

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

Copyrights

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

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

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

Trademarks

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

Trade Secrets

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

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

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

Privacy Rights

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

America’s Need For Strong Intellectual Property Protection

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

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

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

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

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

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

Conclusion

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

## 5

**COVID-related enforcement is key to effective recovery---it’s a key priority**

**OECD 20** (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the **D**epartment **o**f **J**ustice (DOJ) and the U.S. **F**ederal **T**rade **C**ommission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the **role** of **competition policy** in promoting **economic recovery**. In this paper, we highlight some **key steps** that the Agencies have taken to respond to the present **COVID-19 crisis** in the United States and to help promote **a rapid** and **sustained economic recovery.**

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that **competition policy** has an important role to play in the **COVID-19 recovery** process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of **unlawful commercial activities** has long been **a key mission** of the Agencies, rendered even more **critical** by the **social** and **economic disruptions** caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, **crisis-related disruption** increases the risk that some individuals will make **unlawful windfall profits** at the expense of **public safety** and **the health** and **welfare** of their fellow citizens.2

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because **health care products** and **markets** are central in **responding to the health care crisis** and eventually to **economic resilience** and **recovery**, the Task Force focuses on **protecting** the availability of those **products** designated **essential** by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require **substantial** **investment** by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for **fraud** and **collusion** affecting government **procurement** and **grant-making**. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8

11. Given the special **impact** of COVID-19 on **medical staffing** and **employment**, the Agencies are focused on preventing **employers**, including health care staffing companies and recruiters, from engaging in **collusion** or other **anticompetitive** conduct in **labor markets**, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10

2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18

3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort

16. The FTC and DOJ also have **shared** their **competition expertise** with other international and federal agencies in order to facilitate **COVID-19 response** and **recovery** while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to **maximize** the effectiveness of the **manufacture** and **distribution** of critical healthcare resources **nationwide** to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

3.2. Doctrinal Responses

20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22

21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35

2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36

3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and

4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact **merger activity**, which is why continuing to improve the Agencies’ approach to **reviewing** and **remedying** potentially anticompetitive mergers **remains a priority.**

**Plan causes a trade-off and devastates antitrust agency effectiveness**

**Sacher & Yun 19** (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will **Strain** Competition Agency **Resources**, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how **neo-antitrust proponents** view the agencies, many of their proposals run a serious risk of **adversely** affecting competition agency **performance**.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135

First, advocates of neo-antitrust would like to see the **responsibilities** of the antitrust agencies **expanded** in a number of ways. This includes more **aggressively** enforcing existing antitrust laws, as well as the consideration of issues **beyond those currently within that purview**. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require **significantly** more active **market supervision** than is **currently the case**. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which **expanding** the antitrust agencies will have "**bureaucratic" diseconomies** of scale. Fully following the recommendations of **neo-antitrust** advocates could very well require many antitrust agencies to **expand** beyond some **critical point**, which will inevitably lead to significantly **larger bureaucracies** and **associated inefficiencies**.

Second, many of the above proposals would require not only **more staff**, but also staff with differing **expertise** from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

**Failed COVID recovery triggers multiple hotspots**

**Wright 20** (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s **perception** now of America as **inept** and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as **opportunities**.” America faces **threats** from a spectrum of **overseas adversaries**, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be **foreign actors**, all the way from **jihadists** to **state actors,** that try to **take advantage** of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “**sheer confusion**” surrounding American politics in 2020 compounds the **temptation** of foreign actors to make **moves**, either for their own gains or to diminish America, Allen said. The most obvious perils are from the **big powers**, which may calculate that the White House will **not** counter their moves elsewhere in the world during such **domestic turbulence**, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir **Putin** could dig **deeper** into Ukraine, meddle in unstable **Belarus**, or **test** the strength of the **Baltic states** to resist. From China, President **Xi** Jinping could further threaten **Taiwan**, exert its claim to islands in the **S**outh **C**hina **S**ea by deploying equipment or personnel, or take more draconian actions in **H**ong **K**ong. Both countries have moved steadily to deepen their **presence** and **influence** across Asia and deep into the **Mid**dle **East**—with its access to the **Mediterranean** and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that **foreign adversaries’** intelligence services have their collection systems turned up **high** so that they understand exactly how **disruptive** this pandemic is on our **national-security structure**,” the former C.I.A. director John Brennan said on CNN this week. **No**rth **Ko**rea and **Iran** may also try to **exploit** the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at **lower levels** through **cyber** or by **proxies**.”

## 6

#### The 50 states and all relevant sub-national actors should

#### limit implied immunity from its antitrust laws to actively administered regulations of anticompetitive conduct.

#### coordinate antitrust enforcement through the National Association of Attorneys General’s Multistate Antitrust Task Force

#### A multistate AG antitrust enforcement over state antitrust statutes solves the aff---causes federal follow-on

Artega 19 (Juan A. Arteaga is an experienced antitrust attorney and a former Deputy Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, The Role of US State Antitrust Enforcement, Global Competition Review, 11-19, <https://www.lexology.com/library/detail.aspx%3Fg%3Dd423301d-f4d1-4550-a99c-1880869e67e7+&cd=11&hl=en&ct=clnk&gl=us>, y2k)

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

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

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

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

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

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

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

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

In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general have sued to block the transaction even though the DOJ, along with seven state attorneys general, have approved the deal after securing certain structural and behavioural remedies. After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who has been leading the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’

The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees)in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.

None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support. In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.

After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’

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

Given that companies will increasingly have to engage with state attorneys general in a meaningful manner with respect to antitrust matters, this chapter discusses key issues related to state antitrust enforcement in the United States. Specifically, this chapter discusses:

the federal and state antitrust laws under which state enforcers operate;

the processes through which state enforcers coordinate with each other and their federal counterparts;

the opportunity for coordination and conflict between state enforcers and private counsel during litigation;

strategic and practical considerations when engaging with state attorneys general; and

certain noteworthy enforcement actions that state enforcers have recently prosecuted.

Statutory regime governing US state antitrust enforcement

Civil enforcement of federal antitrust laws

Enforcement actions on behalf of state governmental entities

Under the federal antitrust laws, state attorneys general have the express authority to bring civil actions on behalf of their state, municipalities, and governmental entities for harm suffered when directly purchasing goods or services. In bringing such actions, state attorneys general can seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees.

In actions seeking monetary relief, state attorneys general typically allege that the state plaintiffs were forced to pay higher prices by an unlawful horizontal conspiracy, such as a price-fixing or bid-rigging scheme, and seek to recover the overcharges. In some cases, state attorneys general have sought to recover damages arising out of anticompetitive unilateral conduct, such as overcharges paid by state governmental entities due to a defendant’s actual or attempted monopolisation of a specific market.

In seeking injunctive relief, state attorneys general often argue that such relief is proper because the business practice or transaction in question – in addition to harming the state plaintiffs – has or will cause injury to the state’s general economy. While general harm to a state’s economy can serve as a basis for injunctive relief, state attorneys cannot base their request for damages on such harm.

Parens patriae enforcement actions

A well-settled principle in the United States’ legal system is that ‘the States have a quasi sovereign interest in protecting their citizens from ongoing economic harm’. Consequently, the federal antitrust laws expressly authorise state attorneys general to file parens patriae actions in federal court that seek to redress the harm suffered by their citizens due to federal antitrust violations. In providing state attorneys general with parens patriae authority, the federal antitrust laws permit state antitrust enforcers to seek monetary (treble damages) and injunctive relief, as well as their costs and reasonable attorney’s fees. State attorneys general have been empowered to seek such broad and substantial relief on behalf of their citizens to allow them ‘to deter further economic harm and to obtain relief for the injury inflicted on their economies and their citizens’.

In exercising their parens patriae authority, state attorneys general have often sought to protect their citizens and state economies from the harm caused by anticompetitive business practices. For example, in the e-Books Litigation, 33 state attorneys general alleged that Apple, Inc and various book publishers unlawfully conspired to fix the prices of electronic books, which resulted in their citizens paying higher prices and harm to their states’ general economies. Ultimately, these state attorneys general, working alongside private class counsel, secured settlements from the defendants that provided nearly US$600 million in direct refunds to their citizens. In a pending lawsuit brought against various manufacturers of generic pharmaceuticals, 44 state attorneys general have alleged that the defendants unlawfully conspired to fix the prices for numerous generic drugs, which forced their states and citizens to pay billions of dollars in overcharges, as well as significantly harmed their states’ general economies.

State attorneys general have also invoked their parens patriae authority to protect their citizens and state economies from the harm caused by anticompetitive transactions. For instance, in their pending challenge to T-Mobile’s proposed acquisition of Sprint, nearly 20 state attorneys general have alleged that the transaction will result in their residents paying higher prices for lower quality mobile phone services as well as harm to their states’ general economies. Likewise, the state attorneys general that joined the DOJ’s successful challenges to the proposed Anthem/Cigna and Aetna/Humana mergers alleged that these mergers would have harmed their citizens and the general economies of their states by reducing the number of large health insurance providers from five to three.

There are, however, important limitations on the parens patriae authority conferred to state attorneys general under the federal antitrust laws. For instance, the monetary relief sought by state attorneys general must: (1) arise out of a Sherman Act violation; (2) have been incurred by natural persons residing in their states (i.e., the losses suffered by business organisations cannot be included in the alleged damages); (3) exclude harm suffered by indirect purchasers of the goods and/or services in question; (4) avoid the risk of multiple recoveries by excluding amounts previously awarded for the same injuries; and (5) arise out of actual financial losses rather than general harm to their state’s economy. Moreover, state attorneys general must provide their residents with adequate notice of the lawsuit and a meaningful opportunity to opt out of the litigation.

In seeking to prove the monetary harm suffered by their citizens, state attorneys general can employ many of the same methods utilised by private plaintiffs. In price-fixing cases, for example, state attorneys general can prove the claimed aggregate damages by utilising ‘statistical or sampling methods’, ‘comput[ing[ [the] illegal overcharges’, or relying on any other methodology deemed ‘reasonable’ by the court. In addition, a number of state antitrust laws authorise their state attorney general to hire private lawyers to handle parens patriae actions, which the state attorneys general challenging the T-Mobile/Sprint merger have done.

Civil enforcement of state antitrust laws

Most states have enacted state antitrust laws that are comparable to Sections 1 and 2 of the Sherman Act. In addition, some states have passed antitrust laws that are similar to Sections 3 and 7 of the Clayton Act and the Robinson-Patman Act. These state antitrust laws typically contain provisions expressly requiring that ‘they be construed in conformity with comparable [f]ederal antitrust statutes’.

State antitrust statutes typically provide state attorneys general with broad authority to investigate possible violations, including the power to ‘issue civil investigative demands compelling oral testimony, the production of documents, and responses to written interrogatories to individuals and corporations’. Like the federal antitrust laws, most state antitrust laws authorise state attorneys general to file civil lawsuits on behalf of their states and state governmental entities whenever a violation has caused them to suffer harm in their capacity as direct purchasers of goods or services, as well as parens patriae actions on behalf of their citizens.

## Turn

### 1NC – UQ

#### Of course interest rate hikes are inevitable but The fed will respond by gradually increasing rates now

Beckworth & Horan 10/12/21 (David Beckworth is a Senior Research Fellow at the Mercatus Center at George Mason University and a former international economist at the US Department of the Treasury. He is the author of Boom and Bust Banking: The Causes and Cures of the Great Recession. His research focuses on monetary policy, and his work has been cited by the Wall Street Journal, the Financial Times, the New York Times, Bloomberg Businessweek, and the Economist. He has advised congressional staffers on monetary policy and has written for Barron’s, Investor’s Business Daily, the New Republic, the Atlantic, and National Review. David is the author of the Macro Musings blog and also hosts the weekly Macro Musings podcast., Patrick Horan is the Program Manager for Monetary Policy at the Mercatus Center at George Mason University. Patrick received an MA in economics from George Mason University and a BA in economics and political science from the College of the Holy Cross. Previously, he worked as a researcher for the political news website, RealClearPolitics., “Inflation Is Painful, But the Fed Shouldn’t Overreact”, https://www.discoursemagazine.com/economics/2021/10/12/inflation-is-painful-but-the-fed-shouldnt-overreact/)

But if the present inflation is due to transitory supply shocks rather than Fed policy, then the Fed should be careful not to tighten prematurely, which could choke economic recovery. This is not a purely theoretical concern: In the summer of 2008, the Fed was hesitant to cut its target interest rate—which would have made it easier to borrow money and stimulated economic growth—out of a mistaken concern for higher inflation. But the greater threat at that time was financial instability and a contracting economy, which could have been mitigated had the Fed cut its rate sooner. Even more egregiously, the European Central Bank, fearing inflation, raised its target interest rate in 2008 and then again in 2010 and 2011 as it drove the Eurozone into crisis. In both cases, the central banks were misled by inflation caused by supply shocks and responded inappropriately.

Checking the Forecasts

When in doubt over whether inflation is driven by Fed policy or external forces, it is helpful to look at medium-term forecasts for inflation. The figure below shows one popular example: the five-year, five-year-forward inflation forecast that comes from the Survey of Professional Forecasters. This is a five-year forecast of the average inflation rate, beginning five years in the future. For example, the current forecast is for the average inflation rate from 2026 to 2031.

This horizon is useful since it allows us to see beyond the near term, where supply chain disruptions due to the pandemic are affecting inflation. Inflation forecasts this far out, in other words, should be largely reflecting the stance of monetary policy without interference from short-term changes. The figure below shows that the professional forecasters’ outlook for inflation is very close to 2%. They see the Fed keeping inflation anchored over the medium to long term.

The next figure shows another five-year, five-year-forward inflation rate. This measure comes from the bond market and is based on Treasury bonds indexed for inflation. This forecast, unlike the previous one, comes from the interaction of all bond traders around the world. These individuals have skin in the game since they are trying to be profitable in their trades. Consequently, this forecast provides a nice cross-check on the one from the Survey of Professional Forecasters. The figure below demonstrates that here too the forecast is now close to 2%, indicating that bond traders also believe the Fed is committed to keeping inflation near its target over the medium term.

Forecasts over the medium term, then, show that the Fed’s current performance is about right, but that could change depending on how events play out over the next year. If the economic recovery continues to be strong and puts additional upward pressure on inflation, then it might make sense for the Fed to pump the brakes on inflation by tightening its monetary policy. However, if other factors such as the pandemic and supply chain bottlenecks continue to stymie economic activity, then the Fed shouldn’t be too quick to raise interest rates.

For now, the Fed has signaled it will begin slowly reducing bond purchases near the end of this year. The Fed has also indicated it is likely to start incrementally raising interest rates next year if the economic recovery continues. This gradual approach to tightening monetary policy is sensible given the current state of recovery. Therefore, if lawmakers want to address the high prices caused by inflation, rather than blaming the Fed, they should work on ameliorating bottlenecks and shortages.

#### The Fed thinks that current short-term inflation will moderate over the longer term – their opinion is what matters for our link

Derby 9/13 – Michael S. Derby, Federal Reserve reporter for the Wall Street Journal, “Inflation Expectations Continue to Climb, New York Fed Survey Shows,” 9/13/21, https://www.wsj.com/articles/new-york-fed-survey-shows-inflation-expectations-at-record-highs-in-august-11631545200

The rise in price pressures has been driven largely by supply disruptions tied to the economic reopening process. Fed officials have flagged that most of the biggest gains in inflation have happened in parts of the economy most affected by the pandemic.

Central bankers, who have maintaining price stability as an official goal, still largely say they believe that price pressures will moderate over time as imbalances get resolved. “It’s going to take some time,” but the disruption causing the inflation jump should abate and “that’ll help the inflation measures move back down,” Cleveland Fed leader Loretta Mester told reporters on Friday.

Fed officials also base their confidence that inflation will moderate on what many of them see as relatively stable long-term inflation expectations. Fed officials have long believed that expectations about the future of price dynamics exert a powerful influence on where inflation stands now, but the central bankers don’t have a uniform way of measuring the issue. At the same time, data have shown that the public generally overestimates where inflation is relative to what the government data say.

In an interview last week, Federal Reserve Bank of Atlanta President Raphael Bostic said he is looking to see if “businesses and families are starting to make decisions, taking on board these higher levels of inflation as something that is potentially more permanent. If those sorts of behavioral changes start to play out, then that’s something I’ll have to take on board” when thinking about where monetary policy needs to be set.

“Fortunately we have not seen that in terms of long run inflation expectations-—there’s been a little movement in the short run side, but since that hasn’t necessarily, or to this date, bled into the longer run, I’m, I’m inclined to mainly look through it,” and retain confidence price pressures will moderate over time, Mr. Bostic said.

### 1NC – L/T

#### The aff is a double turn – causes premature hikes

#### **Concentration – increase fiscal multiplier**

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**II. THE FISCAL MULTIPLIER** The new Keynesian economics explains that, in an economy where firms have some market power but not all rents are appropriated by firms, **the fiscal policy multiplier is greater than 1**, as Keynes had argued.2 This is because, provided prices are above marginal costs, firms will always be eager to expand investment. An expansionary fiscal policy increases aggregate expenditure, which increases profits, which in turn increases investment and employment, which then further increases expenditure, and so on. More importantly, the fiscal multiplier—ie the change in aggregate demand resulting from an increase in government expending—depends on the profit margin. Under some reasonable regularity assumptions and perfect competition, the fiscal multiplier is 1/(1−α⁠), where α denotes the marginal propensity to consume in response to a change in income. In the limiting case in which all rents are appropriated by firms, that multiplier equals 1. In general, with imperfect competition, the multiplier is equal to 1/(1−αμ⁠), where μ is the price-cost markup. As the markup goes up, the fiscal multiplier goes down. **In short, fiscal policy becomes more effective as a tool to boost aggregate demand when product markets are more competitive**. This is true whether fiscal policy is instrumented via increases in government spending or reduction in taxes, or even when the increase in government spending is matched by an increase in taxes so that the government budget remains balanced. In all cases, the output expansion effect of fiscal policy is greater when the economy’s markup is lower. **III. KEYNESIAN ANTITRUST** Hitherto, we have explained that (i) the COVID-19 virus may cause a supply–demand doom loop in the absence of a strong macroeconomic response; (ii) conventional monetary policy on its own is unlikely to reverse the loop; (iii) our governments will have to adopt expansionary fiscal policies; and (iv) the success of those fiscal stimuluses will depend, among other things, on the competitiveness of their economies—ie the degree of market power in product and services markets. The problem is that several indicators point to a significant increase in markups across most Western economies. Some attribute that increase to technological factors, but others, including De Loecker, Eeckhout, and Unger, argue that the cause is the increase in market power.3 Some sustain that the deeper cause of the increase in markups (and inequality), especially in the USA, lies in the lenient nature of antitrust policy.4 Whatever the cause, the implication is that the fiscal policy initiatives adopted in response to the current crisis might be less effective than they could have been if our economies were more competitive. **This has several implications**: First, it is not a good time to relax antitrust policy, especially in highly concentrated sectors. We should also step up our efforts to detect and deter price-fixing. Secondly, we need to be very careful with mergers aimed at increasing market power (as opposed to those that may serve to address the problems of failing or flailing firms).

#### Inequality - plan pushes up term rates

Mian et al 21. Atif Mian - Atif Mian is John H. Laporte, Jr. Class of 1967 Professor of Economics, Public Policy and Finance at Princeton University, and Director of the Julis-Rabinowitz Center for Public Policy and Finance at the Princeton School of Public and International Affairs. He holds a bachelors degree in Mathematics with Computer Science and Ph.D. in Economics from MIT. Ludwig Straub is an assistant professor of economics. His research focuses on macroeconomics and international economics. Ludwig received his Ph. D. in economics from MIT in 2018 and holds undergraduate and master's degrees in mathematics and physics. Amir Sufi is the Bruce Lindsay Professor of Economics and Public Policy at the University of Chicago Booth School of Business. "What explains the decline in r ∗ ? Rising income inequality versus demographic shifts" <https://www.kansascityfed.org/documents/8337/JH_paper_Sufi_3.pdf>

r\* = interest rate

Abstract Downward pressure on the natural rate of interest (r ∗ ) is often attributed to an increase in saving. This study uses microeconomic data from the SCF+ to explore the relative importance of demographic shifts versus rising income inequality on the evolution of saving behavior in the United States from 1950 to 2019. **The evidence suggests that rising income inequality is the more important factor explaining the decline in r ∗ .** Saving rates are significantly higher for high income households within a given birth cohort relative to middle and low income households in the same birth cohort, and there has been a large rise in income shares for high income households since the 1980s. **The result has been a large rise in saving by high income earners** since the 1980s, **which is the exact same time period during which r ∗ has fallen**. Differences in saving rates across the working age distribution are smaller, and there has not been a consistent monotonic shift in income toward any given age group**. Both findings challenge the view that demographic shifts due to the aging of the baby boom generation explain the decline in r ∗ .**

### 1NC – Defense

#### BUT, they can’t solve their offense

#### Long term – their evidence is about bank concentration which requires divestment which obviously is a long term process – the window for premature hikes is one year

#### Concentration not key – duval says concentration dulls the effect of rates ie that rates may have to be hiked more but not faster

## 1st adv

### 1NC – No I/l

#### No internal link - Inequalaity doesn’t hurt democracy

Ben Ansell 15, PhD, Professor of Comparative Democratic Institutions @ Nuffield College, “Inequality and Democratic Survival”, https://ostromworkshop.indiana.edu/pdf/seriespapers/2016s\_c/Samuelspaper.pdf

In contrast, income inequality is - counterintuitively for median-voter models - not associated with democratic collapse. This is because under universal suffrage income inequality has countervailing effects on key actors’ incentives. Historically, income inequality is correlated not with poverty but with the emergence of urban groups such as a bourgeoisie and working class. These groups have no desire to pay for universalistic redistribution, but they are willing to accept taxes (on themselves and others) that pay for programs that serve their own interests - and that would not likely exist under autocracy - such as public works and education (see Ansell and Samuels (2014)). Both the fear of higher universalistic taxes and the acceptance of taxes to pay for club goods increase as income inequality increases. For this reason, as we explain below, income inequality has no clear theoretical effect on democracy’s survival. If median-voter models of democratic survival were true, both land and income inequality would have the same theoretical and empirical effect. However, we argue and demonstrate below that this is not the case. We agree that democratic survival depends on the relative strength of key political groups at different levels of development. However, aggregate country-wealth does not pick up all the useful information in this regard. A rich country with high rural inequality (a strong landed elite) is less likely to survive than a poor country with high income inequality (a strong bourgeoisie and working class). It is true that such situations are historically unlikely, because the relative economic and political power of landed and urban economic groups often move in opposite directions with the onset of economic development Kuznets (1955). Historically more common situations include poor countries with high rural inequality and low income inequality, and rich countries with low rural inequality but high income inequality. Below we show that the famous result about an income threshold beyond which democracy ‘does not die’, shown in Przeworski and Limongi (1997), obscures the fact that this threshold is in fact far lower for countries with low rural inequality.

### 1NC – Populism

#### Populism won’t cause great power war

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Several reasons present themselves. First, nuclear weapons have given the prospect of a global war, or any great-power war, a possibility of civilization-ending finality that it did not have in the past. Second, the security architecture created under U.S. leadership after World War II has arguably worked to reduce the likelihood of major armed conflict among the great powers. Third, the existence of a network of international institutions, both inside and outside the UN system, has pushed in the same direction. Fourth, it is very possible that, as John Mueller and Christopher Fettweis have argued, decision-makers have to come see great-power war as “subrationally unthinkable, or not even part of the option set for the great powers.”[ii] The extreme destructiveness of the twentieth century’s world wars, fueled partly by developments in technology, might well have produced long-term effects on how leaders and publics think about global or great-power war, in a way, for instance, that the Napoleonic Wars, for all their horror and bloodiness, did not. Phil Arena’s recent contribution to this series argues that if the U.S. under a Trump administration signals an unwillingness to defend its allies, then Putin might be tempted to gamble on an invasion of the Baltics or Kim Jong-Un similarly might gamble on an invasion of South Korea (and that would drag in China). Putting aside Kim Jong-Un for the moment as a special case, let’s consider Putin. As long as NATO exists – and Trump, despite his statements about the unfairness of the distribution of cost burdens, has not suggested, as far as I’m aware, that he wants to dissolve the alliance – then Putin would have to assume that an attack on the Baltics would trigger a NATO response. Even if Putin does not see great-power war as unthinkable or outside his “option set,” one would assume that for reasons of pure self-interest he would not want to risk a nuclear war. Nor, one might think, would he want to jeopardize the prospect of better (from his standpoint) relations with a U.S. administration less concerned with, among other things, his commission of war crimes in Syria or his annexation of Crimea than the Obama administration has been. For these reasons, I’m not too worried that the advent of the Trump administration will lead to a war with Russia over the Baltics. The Korean peninsula is, perhaps, a more worrisome situation. Chances are, however, that Trump, after taking office, will be prevailed upon to make reassuring noises about the U.S. commitment to South Korea, and that should suffice to deter Kim Jong-Un from doing anything too rash. The cautionary point here, admittedly, is that it’s not clear whether Kim can be counted on to behave in a minimally rational fashion. Putin, whatever one might think of him, is rational. It’s not entirely clear whether Kim is. However, if Kim is irrational then all bets are off regardless of what U.S. policy pronouncements are forthcoming. World politics is not invariably cyclical and states can learn from experience (as even Gilpin acknowledged). If one admits this and pays due attention to history, then it is plausible to think that the force of populist nationalism, as expressed in more erratic and/or less ‘internationalist’ official policy, will not, whatever its other effects may be, increase the low likelihood of a global war.

### 1NC – Democ

#### Democracy won’t mediate tensions with Russia or China.

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Whether influenced by Hollywood or Santa Monica (the California headquarters of RAND), the history of war as Freedman relates it is essentially conceptual. The end of the dominant Cold War paradigm is a case in point. The ahistorical euphoria of the supposed “end of history” misled many western experts into predicting that an age of perpetual peace would at long last come into view because, as one specialist in this period wrote, the “absence of war between democracies comes as close as anything we have to an empirical law in international relations,” thus undergirding the rise of global governance ideals of liberal internationalism. The way forward in those early years after the fall of the Iron Curtain seemed therefore not technological, but conceptual. The key to peace lay in finding ways to help this one supposedly empirical historical law to take hold. Rather than bring peace, however, the pursuit of the concept of perpetual security through democracy only produced a new idea of war. It convinced western leaders of the need to advance the speed of historical progress through carefully managed military action against a select number of dictators. As prosecuted by George W. Bush, Tony Blair, and their advisers, the new paradigm not only made it possible for great powers to consider meddling in the domestic politics of smaller states, it impelled them to do so. By making more states democratic, through the use of force if necessary, these interventions would make the world safer. The idea was at least as old as Woodrow Wilson, but the eras of the world wars and the Cold War had made it too difficult to put in practice. After 1989, with the seemingly insurmountable dominance of western military organizations, the absence of a Soviet Union to balance western intervention, and the general post-Cold War hubris of western leaders, the environment was right for it to return. The result, of course, has not been an end of history and perpetual peace, but an extension of conflict and a reawakening of older grievances. The central problem, as “The Future of War” depicts it, was an all-too-eager willingness to accept the basic principle of democratic peace theory without thinking through the limits of the theory or fully examining alternatives. One clear alternative theory had already begun to emerge from the minds of theorists like Mary Kaldor and Rupert Smith. Their works essentially argued that war as once understood no longer existed. The future belonged to the side that could best exploit the disintegration of state authority, control the messaging, and work among the people in the new megacities. Anne-Marie Slaughter saw the inevitable splintering of the “sovereign state” into sub-sovereign centers of governance power, thereby squeezing out sovereignty in favor of power exercised by non-sovereign or less-than-sovereign institutions, on the one hand, and the ascendant rule of supra-national institutions, on the other. One might argue, although Freedman does not, that Hezbollah, FARC, Hamas, al-Qaeda, the Islamic State, and others have been able to survive against much more technologically sophisticated states because they have indeed made the intellectual shift to the kind of conflict that Kaldor and Smith described. The west has struggled against such adversaries not on the technological level but on the conceptual one. The west had two models on which to draw, neither of which helped them conceptualize the central problem. The “aid to civil power” model suggested building up the capabilities of local authorities so that they could care for their own security needs and maybe even become an exporter of regional security. The second model focused on “peacekeeping,” which required armies to act impartially even when, as in Yugoslavia, such a model indirectly empowered malicious actors like Slobodan Milosevic. Both models were frustrating, but they had just enough successes to keep them viable and allow them to survive intellectual challenges like the ones posed by Kaldor and Smith.

## 2nd

### 1NC – Innovation

#### Between broad court oversight and forced sharing, the plan spills over and decks innovation – that turns the whole aff

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Big Tech platforms have indeed created infrastructure that “renders them uniquely suited to serve their customers.” But forced sharing would reduce the incentive to create those incredibly valuable platforms. In recommending that Congress overturn Trinko, the HJC Report barely recognizes how such an action would reduce incentives to create the platforms in the first place.

An antitrust duty to deal is at the outer boundary of Section 2 liability for a reason: it is extremely difficult for a court or a regulator to achieve the correct balance between ex ante incentives to innovate and ex post incentives to restrict anticompetitive behavior. In cases where conduct is ambiguous as to its anticompetitive effects, the error-cost framework cautions against imposing a duty to deal.

Reviving the much broader essential facilities doctrine and applying it to Big Tech platforms will surely reduce the incentives to build the next Amazon, Google, Facebook, or Apple. While critics believe these monopolies are unassailable without government intervention, the history of the Internet suggests this is far from true: Facebook overtook MySpace, Google overtook Yahoo, Amazon overtook Barnes & Noble and Borders, Apple’s iPhone overtook BlackBerry. Applying the essential facilities doctrine to Big Tech would reduce the incentives of new entrants to undertake the tremendous investment and risk required to create the next big thing.

Difficulty of Enforcing Remedies

Just as importantly, the Trinko Court learned from the difficult history of judicial enforcement of antitrust remedies that courts are ill-suited to act as central planners. In Terminal Railroad Association itself, the Supreme Court struggled to enforce its remedies. As disputes reached the Court three different times over the next twelve years, the Court declined to impose the dissolution remedy and left the regulation of rates and terms of service largely up to the Interstate Commerce Commission. By comparison, as the Trinko Court recognized, the remedy of extending nondiscriminatory admission to non-members to join the club was easy. The remedies for complainants that allege Big Tech platforms are essential facilities would require considerably more judicial oversight of prices, platform rules, the level of first-party competition, and many other issues courts would have a hard time assessing.

If every time the App Store or Google Play rejected a developer became grounds for a lawsuit over the “reasonableness” of the platform’s rules, or if every time Google or Facebook changed its pricing for ads it became a case about the whether the price was “fair,” the courts would be tied up with litigation over enforcement of remedies.

Conclusion

The essential facilities doctrine is a relic which has no place in modern antitrust jurisprudence. Reviving it in order to battle Big Tech platforms is a mistake. It is essential to protect the innovation of the Internet age. The essential facilities doctrine is ill-suited to that end.

### 1NC – Can’t solve Broadband

#### Aff doesn’t solve---the problem is lack of providers, not lack of competition---increased antitrust worsens digital gap

Manne 21 (Geoffrey A. Manne is the President and Founder of the International Center for Law & Economics (ICLE). Kristian Stout is ICLE’s Director of Innovation Policy. Ben Sperry is Associate Director of Legal Research with ICLE. Build Broadband Better: Focus on Competition, Not Competitors, 6-28, <https://truthonthemarket.com/2021/06/28/build-broadband-better-focus-on-competition-not-competitors/>, y2k)

In our paper, we argue that the real public policy issue for broadband isn’t curbing the pursuit of profits or adopting price controls, but making sure Americans have broadband access and encouraging adoption. In areas where it is very costly to build out broadband networks, like rural areas, there tend to be fewer firms in the market. But having only one or two ISPs available is far less of a problem than having none at all. Understanding the underlying market conditions and how subsidies can both help and hurt the availability and adoption of broadband is an important prerequisite to good policy.

The basic problem is that those who have decried the lack of competition in broadband often look at the number of ISPs in a given market to determine whether a market is competitive. But this is not how economists think of competition. Instead, economists look at competition as a dynamic process where changes in supply and demand factors are constantly pushing the market toward new equilibria.

In general, where a market is “contestable”—that is, where existing firms face potential competition from the threat of new entry—even just a single existing firm may have to act as if it faces vigorous competition. Such markets often have characteristics (e.g., price, quality, and level of innovation) similar or even identical to those with multiple existing competitors. This dynamic competition, driven by changes in technology or consumer preferences, ensures that such markets are regularly disrupted by innovative products and services—a process that does not always favor incumbents.

Proposals focused on increasing the number of firms providing broadband can actually reduce consumer welfare. Whether through overbuilding—by allowing new private entrants to free-ride on the initial investment by incumbent companies—or by going into the Internet business itself through municipal broadband, government subsidies can increase the number of firms providing broadband. But it can’t do so without costs―which include not just the cost of the subsidies themselves, which ultimately come from taxpayers, but also the reduced incentives for unsubsidized private firms to build out broadband in the first place.

If underlying supply and demand conditions in rural areas lead to a situation where only one provider can profitably exist, artificially adding another completely reliant on subsidies will likely just lead to the exit of the unsubsidized provider. Or, where a community already has municipal broadband, it is unlikely that a private ISP will want to enter and compete with a firm that doesn’t have to turn a profit.

### 1NC – US Doesn’t Solve

#### The Western model for the internet is just as illiberal---it’s not just China

Bagwandeen 21 (Mandira Bagwandeen is a Non-resident Senior Fellow in FPRI’s Africa Program, Don't blame China for the rise of digital authoritarianism in Africa, <https://www.fpri.org/article/2021/09/dont-blame-china-for-the-rise-of-digital-authoritarianism-in-africa/>, y2k)

The Chinese state is the poster child of using digital tools for domestic surveillance and censorship. But China is not the only country exporting digital technologies that can be used for authoritarian modes of governance. Reliant on importing new technologies, Africa risks becoming a passive consumer between rival Chinese and Western tech giants, each exporting their own brand of surveillance capitalism.

Digital technologies have provided governments worldwide with the tools to communicate with citizens, gauge popular sentiment, assess political risks, adjust policies and be more responsive. However, these same technologies have also provided autocratic and illiberal governments with new means of stifling dissent and blocking opposition, including greater avenues for control.

Surveillance, propaganda and disinformation are age-old strategies used by governments to stifle opposition and secure rule. But, as the digital age continues to permeate ever larger swathes of our lives, various technologies emerge that ‘make repression and control more pervasive, efficient, and subtle’.

Digital authoritarianism is challenging what has become known as digital democracy – whereby online platforms are increasing citizen participation in public life – to the extent it is often said to be ‘reshaping the power balance between democracies and autocracies’. It takes many forms such as online harassment, the dissemination of fake news, cyber-attacks, internet shutdowns and targeted surveillance through social media, artificial intelligence (AI) and facial recognition software.

Nowhere is the art of digital authoritarianism displayed in all its glory more so than in China. The Chinese state is the vanguard of using digital tools for domestic surveillance and censorship – from its Great Firewall to the use of CCTV cameras, data censorship, AI tracking and the implementation of its social credit system. Surveillance and censorship mechanisms are so omnipresent in Chinese society that it is almost invisible, making it the poster-child for a modern Orwellian state. Because of Beijing’s longstanding experience in using technology for censorship and surveillance, China is often the preferred supplier of tools and tricks for many countries in Asia, South America and, especially, Africa.

In recent years, Chinese tech firms (such as CloudWalk, Huawei, Hikvision and Yitu) have expanded their presence across Africa. At the time of writing, there are 266 Chinese technological initiatives on the African continent, ranging from 5G infrastructure to data centres, smart-cities, surveillance projects aimed at reducing crime and improving public safety, and education and skills development programmes. However, given Africa’s less than stellar track record with corruption and authoritarian rule, some regimes could use these technologies to implement extensive surveillance measures should they want to. Several African states – including Chad, Ethiopia, Zimbabwe, the Republic of Congo, Burundi, Togo, Guinea, Tanzania and Uganda – have employed digital authoritarian practices. Over the last two decades, internet shutdowns, online surveillance, social media taxes and imprisonment over anti-government posts have threatened basic freedoms and rights in many African nations, raising concerns about the future of democracy in the region. Huawei technicians helping Ugandan and Zambian forces to spy on political opponents is commonly cited as an example of how African regimes may use Chinese-exported surveillance technology for nefarious purposes.

What about the West?

Solely blaming China for the rise of digital authoritarianism in Africa is, however, somewhat foolhardy. Western nations, and particularly the US, have not hesitated to accuse China of exporting digital authoritarianism to the continent, overlooking the active role of African agency in acquiring Chinese surveillance technologies, while simultaneously failing to hold African regimes and leaders accountable.

By pointing fingers at China alone, western partisans run the ‘risk of oversimplifying a complex environment’ (Africa, after all, is not a country) and overlooking the roles of other distributors. These accusations are parochial and seem to imply that other serial offenders do not exist – offenders such as Russia and Saudi Arabia. Both these states make use of technology for repressive purposes and have influenced the use of authoritarian digital tactics and tools in Africa.

Moreover, the narrative that China is championing digital authoritarianism on the continent cannot be analysed without the miasma of hegemons waging tech wars and overarching struggles for dominance. By portraying China (and, by extension, its tech companies) as deviant actors that want to diminish digital democracy, the US places itself on higher moral ground. However, this moral edifice is one thinly lacquered – after all, they too spy on their citizens (thanks to Edward Snowden for enlightening us on extensive surveillance by US intelligence). Furthermore, countries such as France, the US, the UK, Israel and Germany also supply high-end surveillance technology, spyware, hacking software and censorship applications to fragile democracies and illiberal governments.

Let’s face it, if the US was really serious about restricting the spread of so-called ‘authoritarian technology’, then it should also impose comprehensive measures and restrictions on both democratic and autocratic producers.

Ultimately, the argument that China is bent on exporting its tech-governance model around the globe is as flawed and hypocritical as it is accusatory. Instead, like its Western counterparts, it is more likely that China, through its tech giants, is exporting aspects of its brand of surveillance capitalism. We must avoid becoming trapped by conveniently amnesiac arguments and generalisations that paint China as this digital baddy. It would be more prudent to assess African countries that import Chinese technology on a case-by-case basis to determine whether there really is a causal link (supported by evidence and data) that Chinese tech tools are being used for malignant purposes with the intent to replicate aspects of Beijing’s brand of tech-governance.

### 1NC – Internet D

#### Eagleman is a hack --- the internet will never entirely collapse because of mutual interests, there are alternative ways to prevent disease, and it empirically doesn’t solve their impacts

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

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

### 1NC – Cyber

#### No cyber impact---every scenario is empirically denied

James Andrew Lewis 18, senior vice president at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/180108_Lewis_ReconsideringCybersecurity_Web.pdf>, p. 7-11

The most dangerous and damaging attacks required resources and engineering knowledge that are beyond the capabilities of nonstate actors, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect.

State Use of Cyber Attack Is Consistent with Larger Strategic Aims

Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations.

Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the risk of retaliation—a risk they manage by avoiding actions that would provoke a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace.

The reality of cyber attack differs greatly from our fears. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents' goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be counted on one hand. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War.

Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. Terrorists do not seek to inflict economic damage. The difficulty of wreaking real harm on large, interconnected economies is usually ignored.

Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets.

The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). Russians want confusion, not physical damage. Iran and North Korea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction.

None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been limited in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but do not have a major effect on the national economy. In all of these actions, there is a line that countries have been unwilling to cross.

When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless.

It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are very unlikely to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States.

There have been thousands of incidents of cybercrime and cyber espionage, but only a handful of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. Cyber attacks are not random. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO.

There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. Only two caused tangible damage; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. In no instance were there deaths or casualties. In two decades of cyber attacks, there has never been a single casualty. This alone should give pause to the doomsayers. Nor has there been widespread collateral damage.

### 1NC – Energy D

#### No energy wars---their evidence is about a US Russia war that escalates because of effects on energy markets, not the initiation of war over energy

(for reference---harvard is blue)

Holstein ’20 [Alex; 2020; Managing Partner at Holstein-Gray, M.Sc. in Russian and Post-Soviet Studies from the London School of Economics; Geopolitical Monitor, “Invisible Warfare: NATO and the Geopolitical Storm on the Market Economy Horizon,” <https://www.geopoliticalmonitor.com/invisible-warfare-nato-and-the-geopolitical-storm-on-the-market-economy-horizon/>]

But before we even get to that very worst of the worst-case scenarios of a direct collision between a NATO ally and Russia, even the slightest escalation in the region, considering its vital energy resources, could have a devastating impact on global markets, which in itself would kick off a wave of instability and eventual warfare.

As market economies evolve and integrate by engaging commerce and leveraging technology, the blend between national security and socio-economic imperatives becomes even more prescient. This carries with it both advantages and disadvantages. Traditionally, NATO military forces have relied on critical civilian infrastructure such as communications, food and water, industrial capacity, civil transport and energy supplies to conduct operations. The additional rise of non-kinetic asymmetric threats – cyberwarfare, information warfare, EMP attack – against non-traditional targets, such as banks or major multinational corporations that comprise key components of this critical infrastructure, adds an entirely new dimension to the defense requirements of the 21st century. In addition to dealing with more conventional kinetic threats from traditional and emerging adversaries, NATO must prepare itself for this new era of invisible warfare through deeper strategic cooperation with the private sector and corporate entities.

Great Powers and non-state actors alike can now conduct non-kinetic attacks just as devastating as any nuclear, biological or chemical WMD, resulting in millions of deaths and the mass breakdown of societies, while in turn undermining the doctrine of Mutually Assured Destruction and other deterrents against nuclear war. But even contained instability within specific regions could still disrupt markets on a global scale, whether directly targeting infrastructure or as a knock-on effect of a conventional engagement, as in the case of Nargono-Karabakh and the threat to Europe’s energy supplies. A European energy crisis alone could prove the tipping point toward a wider war, or a societal breakdown, without a single shot fired.

#### It wont screw oil markets---they adapt

**Kahn 11** (Jeremy, 2/13, “Crude reality”, <http://www.boston.com/bostonglobe/ideas/articles/2011/02/13/crude_reality/>)

The idea that a sudden spike in oil prices spells economic doom has influenced America’s foreign policy since at least 1973, when Arab states, upset with Western support for Israel during the Yom Kippur War, drastically cut production and halted exports to the United States. The result was a sudden quadrupling in crude prices and a deep global recession. Many Americans still have vivid memories of gas lines stretching for blocks, and of the unemployment, inflation, and general sense of insecurity and panic that followed. Even harder hit were our allies in Europe and Japan, as well as many developing nations. Economists have a term for this disruption: an oil shock. The idea that such oil shocks will inevitably wreak havoc on the US economy has become deeply rooted in the American psyche, and in turn the United States has made ensuring the smooth flow of crude from the Middle East a central tenet of its foreign policy. Oil security is one of the primary reasons America has a long-term military presence in the region. Even aside from the Iraq and Afghan wars, we have equipment and forces positioned in Oman, Saudi Arabia, Kuwait, and Qatar; the US Navy’s Fifth Fleet is permanently stationed in Bahrain. But a growing body of economic research suggests that this conventional view of oil shocks is wrong. The US economy is far less susceptible to interruptions in the oil supply than previously assumed, according to these studies. Scholars examining the recent history of oil disruptions have found the worldwide oil market to be remarkably adaptable and surprisingly quick at compensating for shortfalls. Economists have found that much of the damage once attributed to oil shocks can more persuasively be laid at the feet of bad government policies. The US economy, meanwhile, has become less dependent on Persian Gulf oil and less sensitive to changes in crude prices overall than it was in 1973.

**No escalation to war**

**Victor 7** (David, professor of law at Stanford Law School and the director of the Program on Energy and Sustainable Development. He is also a senior fellow at the Council on Foreign Relations, Nov 14, 2007, <http://www.atimes.com/atimes/Global_Economy/IK14Dj04.html>, “What resource wars?”)

Rising energy prices and mounting concerns about environmental depletion have animated fears that the world may be headed for a spate of "resource wars" - hot conflicts triggered by a struggle to grab valuable resources. Such fears come in many stripes, but the threat industry has sounded the alarm bells especially loudly in three areas. First is the rise of China, which is poorly endowed with many of the resources it needs - such as oil, gas, timber and most minerals - and has already "gone out" to the world with the goal of securing what it wants. Violent conflicts may follow as the country shunts others aside. A second potential path down the road to resource wars starts with all the money now flowing into poorly governed but resource-rich countries. Money can fund civil wars and other hostilities, even leaking into the hands of terrorists. And third is global climate change, which could multiply stresses on natural resources and trigger water wars, catalyze the spread of disease or bring about mass migrations. Most of this is bunk, and nearly all of it has focused on the wrong lessons for policy. Classic resource wars are good material for Hollywood screenwriters. They rarely occur in the real world. To be sure, resource money can magnify and prolong some conflicts, but the root causes of those hostilities usually lie elsewhere. Fixing them requires focusing on the underlying institutions that govern how resources are used and largely determine whether stress explodes into violence. When conflicts do arise, the weak link isn't a dearth in resources but a dearth in governance. Feeding the dragon Resource wars are largely back in vogue within the US threat industry because of China's spectacular rise. Brazil, India, Malaysia and many others that used to sit on the periphery of the world economy are also arcing upward. This growth is fueling a surge in world demand for raw materials. Inevitably, these countries have looked overseas for what they need, which has animated fears of a coming clash with China and other growing powers over access to natural resources. Within the next three years, China will be the world's largest consumer of energy. Yet, it's not just oil wells that are working harder to fuel China, so too are chainsaws. Chinese net imports of timber nearly doubled from 2000 to 2005. The country also uses about one-third of the world's steel (around 360 million tons), or three times its 2000 consumption. Even in coal resources, in which China is famously well-endowed, China became a net importer in 2007. Across the board, the combination of low efficiency, rapid growth and an emphasis on heavy industry - typical in the early stages of industrial growth - have combined to make the country a voracious consumer and polluter of natural resources. America, England and nearly every other industrialized country went through a similar pattern, though with a human population that was much smaller than today's resource-hungry developing world. Among the needed resources, oil has been most visible. Indeed, Chinese state-owned oil companies are dotting Africa, Central Asia and the Persian Gulf with projects aimed to export oil back home. The overseas arm of India's state oil company has followed a similar strategy - unable to compete head-to-head with the major Western companies, it focuses instead on areas where human-rights abuses and bad governance keep the major oil companies at bay and where India's foreign policy can open doors. To a lesser extent, Malaysia engages in the same behavior. The American threat industry rarely sounds the alarm over Indian and Malaysian efforts, though, in part because those firms have less capital to splash around and mainly because their stories just don't compare with fear of the rising dragon. These efforts to lock up resources by going out fit well with the standard narrative for resource wars - a zero-sum struggle for vital supplies. But will a struggle over resources actually lead to war and conflict? To be sure, the struggle over resources has yielded a wide array of commercial conflicts as companies duel for contracts and ownership. State-owned China National Offshore Oil Corporation's (CNOOC) failed bid to acquire US-based Unocal - and with it Unocal's valuable oil and gas supplies in Asia - is a recent example. But that is hardly unique to resources - similar conflicts with tinges of national security arise in the control over ports, aircraft engines, databases laden with private information and a growing array of advanced technologies for which civilian and military functions are hard to distinguish. These disputes win and lose some friendships and contracts, but they do not unleash violence.Most importantly, China's going-out strategy is unlikely to spur resource wars because it simply does not work, a lesson the Chinese are learning. Oil is a fungible commodity, and when it is sourced far from China it is better to sell (and buy) the oil on the world market. The best estimates suggest that only about one-tenth of the oil produced overseas by Chinese investments (so-called "equity oil") actually makes it back to the country. So, thus far, the largest beneficiaries of China's strategy are the rest of the world's oil consumers - first and foremost the United States - who gain because China subsidizes production. Until recently, the strategy of going out for oil looked like a good bet for China's interests. But, despite threat-industry fear-mongering, we need not worry that it will continue over the long term because Chinese enterprises are already poised to follow a new strategy that is less likely to engender conflict. The past strategy rested on a trifecta of passing fads. One fad was the special access that Chinese state enterprises had to cheap capital from the government and by retaining their earnings. The ability to direct that spigot to political projects is diminishing as China engages in reforms that expose state enterprises to the real cost of capital and as the Chinese state and its enterprises look for better commercial returns on the money they invest. Second, nearly all the equity-oil investments overseas have occurred since the late 1990s, as prices have been rising. Each has looked much smarter than the last because of the surging value of oil in the ground. But that trend is slowing in many places because the cost of discovering and developing oil resources is rising. And the third passing fad in China's going-out strategy is the fiction that China can cut special deals - such as by channeling development assistance to pliable host governments - to confer a durable advantage for Chinese companies. While there is no question that the special deals are rampant - by some measures, most of China's foreign assistance is actually tied to natural-resources projects - the Chinese government and its overseas enterprises are learning that it is best to avoid these places for the long haul. Among the special havens where Chinese companies toil are Sudan, Nigeria, Chad, Iran and Zimbabwe - all countries where even Chinese firms find it hard to assure adequate stability to reliably extract natural resources. As China grapples with these hard truths about going out, the strategy will come unstuck. It won't happen overnight, but evidence in this direction is encouraging. China already pursues the opposite strategy - seeking reliable hosts, multiple commercial partners and market-oriented contracts - when it secures natural resources that require technical sophistication. China's first supplies of imported natural gas, which started last year at a liquefied natural gas terminal in Shenzhen, came from blue-chip investments in Australia, governed by contracts and investments with major Western companies. With time, China will shift to such arrangements and away from the armpits of governance. At best, badly governed countries are mediocre hosts for projects that export bulk commodities, such as iron ore and raw crude oil. These projects, however, are least likely to engender zero-sum conflicts over resources because it is particularly difficult to corner the market for widely traded commodities, as China has learned with its equity-oil projects. Resources that require technical sophistication to develop tend to favor integration and stability, rather than a zero-sum struggle. Pernicious tents The second surge in thinking about resource wars comes from all the money that is pulsing into resource-rich countries. There is no question that the revenues are huge. OPEC cashed US$650 billion for 11.7 billion barrels of the oil it sold in 2006, compared with $110 billion in 1998, when it sold a similar quantity of oil at much lower prices. Russia's Central Bank reports that the country earned more than $300 billion selling oil and gas in 2006, about four times its annual haul in the late 1990s. But will this flood in rents cause conflict and war? There is no question that large revenues - regardless of the source - can fund a lot of mischievous behavior. Iran is building a nuclear-weapons program with the revenues from its oil exports. Russia has funded trouble in Chechnya, Georgia and other places with oil and gas rents. Hugo Chavez opened Venezuela's bulging checkbook to help populists in Bolivia and to poke America in ways that could rekindle smoldering conflicts. Islamic terrorists also have benefited, in part, from oil revenues that leak out of oil-rich societies or are channeled directly from sympathetic governments. But resource-related conflicts are multi-causal. In no case would simply cutting the resources avoid or halt conflict, even if the presence of natural resources can shift the odds. Certainly, oil revenues have advanced Iran's nuclear program, which is a potential source of hot conflict and could make future conflicts a lot more dangerous. But a steep decline in oil probably wouldn't strangle the program on its own. Indeed, while Iran still struggles to make a bomb, resource-poor North Korea has already arrived at that goal by starving itself and getting help from friends. Venezuela's checkbook allows Chavez to be a bigger thorn in the sides of those he dislikes, but there are other thorns that poke without oil money. As we see, what matters is not just money but how it is used. While al-Qaeda conjures images of an oil-funded network - because it hails from the resource-rich Middle East and its seed capital has oily origins - other lethal terror networks, such as Sri Lanka's Tamil Tigers and Ireland's Republican Army, arose with funding from diasporas rather than oil or other natural resources. Unlike modern state armies that require huge infusions of capital, terror networks are usually organized to make the most of scant funds. During the run-up in oil and gas prices, analysts have often claimed that these revenues will go to fund terror networks; yet it is sobering to remember that al-Qaeda came out in the late 1990s, when oil earnings were at their lowest in recent history. Most of the tiny sums of money needed for the September 11 attacks came from that period. Al-Qaeda's daring attacks against the US embassies in Kenya and Tanzania occurred when oil-rich patrons were fretting about the inability to make ends meet at home because revenues were so low. Ideology and organization trump money as driving forces for terrorism. Most thinking about resource-lubed conflict has concentrated on the ways that windfalls from resources cause violence by empowering belligerent states or sub-state actors. But the chains of cause and effect are more varied. For states with weak governance and resources that are easy to grab, resources tend to make weak states even weaker and raise the odds of hot conflict. This was true for Angola’s diamonds and Nigeria’s oil, which in both cases have helped finance civil war. For states with stable authoritarian governments - such as Kuwait, Saudi Arabia, most of the rest in the western Gulf, and perhaps also Russia and Venezuela - the problem may be the opposite. A sharp decline in resource revenues can create dangerous vacuums where expectations are high and paltry distributions discredit the established authorities. On balance, the windfall in oil revenues over recent years is probably breeding more conflict than would a crash in prices. However, while a few conflicts partly trace themselves to resources, it is the other pernicious effects of resource windfalls, such as the undermining of democratic transitions and the failure of most resource-reliant societies to organize their economies around investment and productivity, that matter much, much more. At best, resources have indirect and mixed effects on conflict. Climate dangers The third avenue for concern about coming resource wars is through the dangers of global climate change. The litany is now familiar. Sea levels will rise, perhaps a lot; storms will probably become more intense; dry areas are prone to parch further and wet zones are likely to soak longer. And on top of those probable effects, unchecked climate change raises the odds of suffering nasty surprises if the world's climate and ecosystems respond in abrupt ways. Adding all that together, the scenarios are truly disturbing. Meaningful action to stem the dangers is long overdue. In the United States over the last year, the traditional security community has become engaged on these issues. Politically, that conversion has been touted as good news because the odds of meaningful policy are higher if hawks also favor action. Their concerns are seen through the lens of resource wars, with fears such as: water shortages that amplify grievances and trigger conflict; migrations of "climate refugees", which could stress border controls and also cause strife if the displaced don't fit well in their new societies; and diseases such as malaria that could be harder to contain if tropical conditions are more prevalent, which in turn could stress health-care systems and lead to hot wars. While there are many reasons to fear global warming, the risk that such dangers could cause violent conflict ranks extremely low on the list because it is highly unlikely to materialize. Despite decades of warnings about water wars, what is striking is that water wars don't happen - usually because countries that share water resources have a lot more at stake and armed conflict rarely fixes the problem. Some analysts have pointed to conflicts over resources, including water and valuable land, as a cause in the Rwandan genocide, for example. Recently, the UN secretary-general suggested that climate change was already exacerbating the conflicts in Sudan. But none of these supposed causal chains stay linked under close scrutiny - the conflicts over resources are usually symptomatic of deeper failures in governance and other primal forces for conflicts, such as ethnic tensions, income inequalities and other unsettled grievances. Climate is just one of many factors that contribute to tension. The same is true for scenarios of climate refugees, where the moniker "climate" conveniently obscures the deeper causal forces. The dangers of disease have caused particular alarm in the advanced industrialized world, partly because microbial threats are good fodder for the imagination. But none of these scenarios hold up because the scope of all climate-sensitive diseases is mainly determined by the prevalence of institutions to prevent and contain them rather than the raw climatic factors that determine where a disease might theoretically exist. For example, the threat industry has flagged the idea that a growing fraction of the United States will be malarial with the higher temperatures and increased moisture that are likely to come with global climate change. Yet much of the American South is already climatically inviting for malaria, and malaria was a serious problem as far north as Chicago until treatment and eradication programs started in the 19th century licked the disease. Today, malaria is rare in the industrialized world, regardless of climate, and whether it spreads again will hinge on whether governments stay vigilant, not so much on patterns in climate. If Western countries really cared about the spread of tropical diseases and the stresses they put on already fragile societies in the developing world, they would redouble their efforts to tame the diseases directly (as some are now doing) rather than imagining that efforts to lessen global warming will do the job. Eradication usually depends mainly on strong and responsive governments, not the bugs and their physical climate. Rethinking policy If resource wars are actually rare - and when they do exist, they are part of a complex of causal factors - then much of the conventional wisdom about resource policies needs fresh scrutiny. A full-blown new strategy is beyond this modest essay, but here in the United States, at least three lines of new thinking are needed. First, the United States needs to think differently about the demands that countries with exploding growth are making on the world's resources. It must keep their rise in perspective, as their need for resources is still, on a per capita basis, much smaller than typical Western appetites. And what matters most is that the United States must focus on how to accommodate these countries' peaceful rise and their inevitable need for resources. Applied to China, this means getting the Chinese government to view efficient markets as the best way to obtain resources - not only because such an approach leads to correct pricing (which encourages energy efficiency as resources become more dear), but also because it transforms all essential resources into commodities, which makes their particular physical location less important than the overall functioning of the commodity market. All that will, in turn, make resource wars even less likely because it will create common interests among all the countries with the greatest demand for resources. It will transform the resource problem from a zero-sum struggle to the common task of managing markets. Most policymakers agree with such general statements, but the actual practice of US policy has largely undercut this goal. Saber-rattling about CNOOC's attempt to buy Unocal - along with similar fear-mongering around foreign control of ports and new rules that seem designed to trigger reviews by the Committee on Foreign Investment in the United States when foreigners try to buy American-owned assets - sends the signal that going out will also be the American approach, rather than letting markets function freely. Likewise, one of the most important actions in the oil market is to engage China and other emerging countries fully in the International Energy Agency - which is the world's only institution for managing the oil commodity markets in times of crisis - yet despite wide bipartisan consensus on that goal, nearly nothing is ever done to execute such a policy. Getting China to source commodities through markets rather than mercantilism will be relatively easy because Chinese policymakers, as well as the leadership of state enterprises that invest in natural resource projects, already increasingly think that way. The sweep of history points against classic resource wars. Whereas colonialism created long, oppressive and often war-prone supply chains for resources such as oil and rubber, most resources today are fungible commodities. That means it is almost always cheaper and more reliable to buy them in markets. At the same time, much higher expectations must be placed on China to tame the pernicious effects of its recent efforts to secure special access to natural resources. Sudan, Chad and Zimbabwe are three particularly acute examples where Chinese (and in Sudan's case, Indian) government investments, sheltered under a foreign-policy umbrella, have caused harm by rewarding abusive governments. That list will grow the more insecure China feels about its ability to source vital energy and mineral supplies. Some of what is needed is patience because these troubles will abate as China itself realizes that going out is an expensive strategy that buys little in security. Chinese state oil companies are generally well-run organizations; as they are forced to pay the real costs of capital and to compete in the marketplace, they won't engage in these strategies. The best analog is Brazil's experience, where its state-controlled oil company has become ever smarter - and more market oriented - as the Brazilian government has forced it to operate at arm's length without special favors. That has not only allowed Petrobras to perform better, but it has also made Brazil's energy markets function better and with higher security. Beyond patience, the West can help by focusing the spotlight on dangerous practices - clearly branding them the problem. There's some evidence that the shaming already underway is having an effect - evident, for example, in China's recent decision to no longer use its veto in the UN Security Council to shield Sudan's government. At the same time, the West can work with its own companies to make payments to governments (and officials) much more transparent and to close havens for money siphoned from governments. Despite many initiatives in this area, such as the Extractive Industries Transparency Initiative and the now-stalled attempt by some oil companies to "Publish What You Pay", little has been accomplished. Actual support for such policies by the most influential governments is strikingly rare. America is notably quiet on this front. With regard to the flow of resources to terrorists - who in turn cause conflicts and are often seen as a circuitous route to resource wars - policymakers must realize that this channel for oil money is good for speeches but perhaps the least important reason to stem the outflow of money for buying imported hydrocarbons. Much more consequential is that the US call on world oil resources is not sustainable because a host of factors - such as nationalization of oil resources and insecurity in many oil-producing regions - make it hard for supply to keep pace with demand. This yields tight and jittery markets and still-higher prices. These problems will just get worse unless the United States and other big consumers temper their demand. The goal should not be "independence" from international markets but a sustainable path of consumption. When the left-leaning wings in American politics and the industry-centered National Petroleum Council both issue this same warning about energy supplies - as they have over the last year - then there is an urgent need for the United States to change course. Yet Congress and the administration have done little to alter the fundamental policy incentives for efficiency. At this writing, the House and Senate are attempting to reconcile two versions of energy bills, neither of which, strikingly, will cause much fundamental change to the situation. Cutting the flow of revenues to resource-rich governments and societies can be a good policy goal, but success will require American policymakers to pursue strategies that they will find politically toxic at home. One is to get serious about taxation. The only durable way to rigorously cut the flow of resources is to keep prices high (and thus encourage efficiency as well as changes in behavior that reduce dependence on oil) while channeling the revenues into the US government treasury rather than overseas. In short, that means a tax on imported oil and a complementary tax on all fuels sold in the United States so that a fuel import tax doesn't simply hand a windfall to domestic producers. And if the United States (and other resource consumers) made a serious effort to contain financial windfalls to natural-resources exporters, it would need - at the same time - to confront a more politically poisonous task: propping up regimes or easing the transition to new systems of governance in places where vacuums are worse than incumbents. Given all the practical troubles for the midwives of regime change, serious policy in this area would need to deal with many voids. Finally, serious thinking about climate change must recognize that the "hard" security threats that are supposedly lurking are mostly a ruse. They are good for the threat industry - which needs danger for survival - and they are good for the greens who find it easier to build a coalition for policy when hawks are supportive. Building a policy on this house of cards is no way to muster support for a problem that requires several decades of sustained effort. One of the greatest hurdles in the climate debate - one that is just now being cleared, but will reappear if policy advocates seize on false dangers - has been to contain the entrepreneurial skeptics who have sown public doubt about the integrity of the science on causes and effects of climate change. The false logic now runs in both directions. Not only will climate change multiply threats by putting stress on societies, but a flood of articles warns of new territorial conflicts as warming opens the formerly ice-bound Arctic for exploration. Russia recently planted a flag on the seabed at the North Pole. In fact, the underlying causes of this exploration rush are ambiguous property rights and advances in undersea drilling that are unrelated to climate change. A similar pattern unfolded in the 1950s in Antarctica, which led to a standoff of territorial claims and no real harm to the region, no production of usable minerals and no resource wars. The real dangers lie in the growing risk that climate change could be a lot worse than the likely scenarios, which could create severe and direct harm to societies that is much more worrisome than the indirect and remote risk of climate-induced resource wars. Yet politicians give more attention to imagined insecurities from climate change and rarely talk about climate as a game of odds and risk management. They talk even less about the resource war that nobody should want to win - mankind's domination of nature. For the real losers in unchecked climate change will be natural ecosystems unable, unlike humans, to look ahead and adapt.

# 2NC

## Rates Advantage

#### Not coming now, reflective of overall Fed thinking

DiCamillo 11/10/21 (Nick, covers economics for Quartz. He previously wrote about crypto banking and economics for CoinDesk and financial technology for American Banker in New York., Citing Claudia Sahm, a former Fed economist, “What Powell learned from past Fed mistakes on guiding the US out of a recession”, https://qz.com/2087194/what-fed-chair-powell-learned-from-past-tapering-mistakes/)

Jerome Powell faced his toughest test yet—and he passed it.

Last week, the head of the US Federal Reserve had the sensitive task of announcing the central bank is rolling back its bond-purchasing program, a key prong of its pandemic stimulus. Back in 2013, in the wake of the Great Recession, then Fed chair Ben Bernanke triggered a bond sell-off and a surge in yields by just floating the idea of tapering its bond buying, an incident dubbed as the “taper tantrum.”

This time around though, Treasury yields didn’t blink when Powell informed markets the central bank is reducing its $120 billion in monthly bond purchases at a pace of $15 billion each month.

That’s in large part because Powell (with the help of other members of the Federal Open Markets Committee) started communicating about tapering months ago. And when the moment to announce the decision came, he was clear on how the central bank intends to balance its continued support of the economy with rising inflation, calming market jitters about its ability to successfully do both.

“An increasing number of inflation hawks, economists, and former Fed officials are saying that the Fed is behind the curve,” said Claudia Sahm, a former Fed economist. “Powell patiently explained why the Fed’s policy is appropriate now, despite temporarily high inflation, and that it is nowhere near raising interest rates.”

Fed chair Powell’s Great Recession lesson

Powell wasn’t always this dovish about inflation. In 2013, during his first full year on the board of governors, he sided with hawks who argued for tapering at a time when most economists now agree was too early, a move that likely contributed to the drawn-out recovery.

“Powell looked at the fact that unemployment fell much lower than Fed researchers told him it was going to fall and realized we actually should have been more expansionary back then,” said Scott Sumner, a monetary economist at the Mercatus Center at George Mason University. “Like there was a lot more room to grow than we thought.”

And it’s not just Powell. The change in tack reflects the evolution in the Fed’s overall approach to monetary policy, and a shift in its understanding of the US economy.

Given what we know now about the Fed’s mistakes, Sumner thinks Bernanke would have done the same thing as Powell. “Bernanke after he left the Fed advocated for a policy pretty similar to what the Fed is doing now,” Sumner said.

Delinking Fed’s taper from interest rate hikes

Powell also seems to have taken in the lesson that a key step to avoid a rise in bond yields (the “tantrum” part of the taper tantrum) is making sure the market doesn’t try to guess when interest rates will be hiked after tapering.

Bernanke addressed interest rates a month after he first brought up scaling back bond purchases, saying the rollback did not mean an interest rate increase was about to happen. But the negative shock was already working its way through markets and hurting foreign investors in emerging economies who were dependent on capital flows from the US.

Last week, Powell “could not have been clearer” on this point, Sahm said. The Fed chair said raising interest rates was not even a topic of discussion during the latest FOMC meeting. The test for raising rates is “different and more stringent,” he added.

#### The fed has multiple levers of monetary policy. Bond purchases are a response to taper inflation BUT interest rates don’t happen unless some big macro indicators change

Rugaber 10/13/21 (Christopher, AP, “Fed officials: Bond purchases could end by middle of 2022”, https://apnews.com/article/business-inflation-economy-3137e678ed459364dd3e1bc3a909920a)

“If the economy continues to progress broadly in line with expectations,” Powell said, “I think we can easily move ahead at the next meeting.” Earlier Wednesday, the government said consumer prices rose 5.4% in September compared with a year ago, matching a 13-year high that was also reached in June and July. The ongoing price gains have raised pressure on the Fed to dial-back its low-interest rate policies. According to the minutes, Fed policymakers said that the delta wave of COVID-19 cases around the world “were exacerbating or prolonging” the supply chain bottlenecks that have forced many auto plants to shut down and pushed up prices for furniture, televisions, shoes, and other imported goods. Several policymakers, which include the presidents of the Fed’s 12 regional banks, said businesses in their districts “generally did not expect these bottlenecks to be fully resolved until sometime next year or even later.” Powell has long described the jump in inflation this year as transitory, though some Fed officials are backing away from the term as price increases have persisted. Powell has said that by transitory, he means that price gains this year are mostly one-time responses to the disruptions of the pandemic, and don’t mark the start of an upward spiral in inflation. The minutes said that Fed policymakers “assessed that supply constraints in product and labor markets were larger and likely to be longer lasting than previously anticipated.” Hiring has also slowed sharply in the past two months, with the government reporting Friday that just 194,000 jobs were added in September, far below the roughly 1 million gained in both June and July. Still, Powell said at the September news conference that he wouldn’t need to see a “super great” jobs report that month to support tapering at the November meeting. He said that the cumulative progress that has been made — with more than 17 million of the 22 million jobs lost to the pandemic having been recovered — would likely be enough. Fed officials also emphasized that the beginning of the tapering of its bond purchases would be a separate decision from that of raising its short-term interest rate, which would require “a different, and more stringent, test.” Powell has said that the goals of maximum employment and inflation at 2% over time would actually have to be met before rate hikes would be warranted.

#### Dependent on recovery

Beckworth & Horan 10/12/21 (David Beckworth is a Senior Research Fellow at the Mercatus Center at George Mason University and a former international economist at the US Department of the Treasury. He is the author of Boom and Bust Banking: The Causes and Cures of the Great Recession. His research focuses on monetary policy, and his work has been cited by the Wall Street Journal, the Financial Times, the New York Times, Bloomberg Businessweek, and the Economist. He has advised congressional staffers on monetary policy and has written for Barron’s, Investor’s Business Daily, the New Republic, the Atlantic, and National Review. David is the author of the Macro Musings blog and also hosts the weekly Macro Musings podcast., Patrick Horan is the Program Manager for Monetary Policy at the Mercatus Center at George Mason University. Patrick received an MA in economics from George Mason University and a BA in economics and political science from the College of the Holy Cross. Previously, he worked as a researcher for the political news website, RealClearPolitics., “Inflation Is Painful, But the Fed Shouldn’t Overreact”, https://www.discoursemagazine.com/economics/2021/10/12/inflation-is-painful-but-the-fed-shouldnt-overreact/)

Inflation Indices

Unfortunately, it’s very difficult to distinguish between the two phenomena in real time, and different inflation measures can send different signals. There are two major inflation indices, the Consumer Price Index (CPI) and the Personal Consumption Expenditures (PCE) Price Index. Each index has two ways of looking at inflation—“headline” inflation, which includes volatile food and energy prices, and “core inflation,” which does not include those categories. Economists tend to prefer the core measures because food and energy are frequently affected by short-term supply-side factors such as shortages. The Fed prefers to use core PCE in assessing whether monetary policy needs to be loosened or tightened to achieve its target of 2% inflation on average over time.

The latest month for which we have inflation data is August. Year-over-year headline and core CPI rose 5.3% and 4.0%, respectively. However, both numbers were lower than the numbers for the previous month. Year-over-year headline and core PCE rose 4.3% and 3.6%, respectively. Headline PCE increased slightly more than the previous month, while the rate of inflation for core PCE remained the same. Even if inflation may be showing signs of slowing, Harvard professor and former Obama administration economist Jason Furman observes that prices are now well above their pre-pandemic trend line.

Does this mean it’s time to tighten monetary policy? The Fed recently gave hints that the answer is yes. In September, Chair Jerome Powell announced that the Fed is prepared to taper or scale back its long-term bond purchases later this year and possibly raise its target interest rate as early as next year, assuming the economy continues to recover.

#### Fiscal multipler link

Singer and Steinbaum 20. Hal Singer - Hal Singer is a managing director of Econ One and an adjunct professor at Georgetown’s McDonough School of Business. Marshall Steinbaum - Marshall Steinbaum is an Assistant Professor of Economics at the University of Utah and Senior Fellow in Higher Education Finance at the Jain Family Institute.. "Antitrust as Economic Stimulus" <https://promarket.org/2020/10/19/antitrust-as-economic-stimulus-competition-help-workers/>

When the economy is contracting, as it is doing sharply now, the tendency of competition authorities, including the trustbusters in FDR’s early days, is to take the foot off the pedal of antitrust enforcement. The purported logic is that antitrust, like any regulation, serves as a constraint on business activity, and thus acts as a drag on economic activity when demand is weak. But what if this logic is backwards? Consider the following experiment: Under the current antitrust regime, which places coordination rights in the hands of corporations and punishes atomistic suppliers from coordinating in their dealings against dominant platforms, Uber captures about a third of the revenues from each ride in the form of commissions. Suppose a policy intervention—whether a reform to antitrust, labor, or some other law—altered the workplace power imbalance, such that drivers captured an additional 10 percentage points of the fares, reducing Uber’s commissions from 33 to 23 percent. New research on the stimulus checks from the 2020 CARES Act shows lower-income households spent a greater share of the checks than did middle-income households. To the extent that lower-income drivers would spend a greater portion of every incremental dollar than do Uber’s higher-income shareholders, this redistribution of fares towards drivers would mean a greater multiplier effect for the economy every time a passenger takes a ride. This thought experiment could explain the anemic growth of the US economy, even before the pandemic struck. The labor share of the US economy—the part of the national income allocated to wages—declined by about ten percentage points from the late 1950s (around 66 percent) to the 2010s (around 56 percent), with the biggest drop off occurring in the aughts. Several economists have traced the cause of a declining labor share back to lax antitrust enforcement and the hollowing out of unions; in Europe, those factors have not moved against workers as much and the labor share has held steady. Firms that acquire monopolies in product markets, thanks to lax enforcement of merger law, can wield that same power in their role as buyers of labor. **As income shifts away from workers** and towards capital, **each dollar of revenue** generated at a firm **is attached to a lower multiplier effect**. Hence, slow growth. Antitrust, at least in its original conception, is not just a tool that disperses economic power from owners to labor, but also from monopoly behemoths to smaller firms. Rather than having one tech giant controlling social media and the associated advertising, imagine we had ten firms instead: Assuming the same revenues, it is not a stretch to conclude industry-wide spending on R&D and labor under the decentralized configuration would be larger. Indeed, the colossal tech giants have been faulted for having a low propensity to hire workers and spend money on other firms, relative to their valuations. As described in Thomas Philippon’s The Great Reversal, the market value-to-employment ratio of superstar firms began to rise sharply in the 1990s, revealing a declining labor footprint; today’s superstars also contribute less to productivity growth than their counterparts in previous decades. The analog to shifting income from low-income workers to high-income shareholders is that firms enjoying a dominant or monopoly position have no need to invest to stay on the technological cutting edge, as documented by Germán Gutiérrez and Philippon, and instead paying money out to creditors who then sit on it, or to the politicians and think tanks that exist to keep the monopoly intact. This isn’t to say that antitrust should be the primary tool to stimulate the economy back to health. We have short-run macroeconomic stabilization tools for that, and subsidized loans for ailing businesses alongside generous unemployment benefits for laid-off workers are crucial components of the macroeconomic toolkit. But what antitrust can do is re-engineer the economy by redistributing income downward to smaller, less powerful economic agents who are more inclined to spend, so that we don’t keep having these severe recessions and glacially slow recoveries Pre-Distribution Antitrust There is a good policy basis to act before an industry tips towards monopoly, as it has in e-commerce, internet search, and social media. We call this “pre-distribution antitrust,” as it suggests a role for competition policy before a market has become monopolized, at which point the winner has greater incentives to win the game against other economic stakeholders. In particular, government agencies, which are major conduits for recovery-related outlays, should look more consciously for opportunities to spend money to promote entry in concentrated sectors of the economy, or in data-driven industries where incumbents enjoy a massive head-start advantage. For example, Tesla appears to be running away with the electric vehicle segment. In addition to its nationwide network of supercharging stations and its significantly longer battery life compared to entrants, Tesla enjoys an incumbency advantage due to its superior database that relates tweaks to battery design to driving range and overheating. To overcome these entry barriers, Congress should appropriate funding to build a national network of supercharging stations so that Tesla’s nascent rivals can compete more effectively in the short run. Once built by the government, the network could be operated by private entities such as gas stations or convenience stores, so long as they are not affiliated with any electric vehicle maker. Congress should also encourage interoperable charging standards, data sharing, and battery design among electric vehicle entrants, even if that means some coordination in their dealings over these narrow issues. Intervening after a data-driven industry has tipped towards monopoly has proven to be more difficult. To ensure that society gets the best possible benefits from public recovery expenditures, antitrust agencies should be vigilant in preventing any types of conspiracies among funding recipients against consumers. If we permit recipients of state aid to combine or coordinate and deprive consumers of fruits of competition, then the aid will have been wasted. It was disturbing to witness American Airlines and Jet Blue form a marketing alliance in the wake of the first stimulus. Based on new research by professors José Azar, Martin Schmalz, and Isabel Tecu, concentration in the airline industry is already high, and when you account for common ownership via a modified HHI (MHHI), concentration is off the charts and growing. Agencies should be able to claw back funding as soon as a recipient acts in an anticompetitive way. Although an across-the-board merger prohibition was considered extreme, tapping the breaks on acquisitions by dominant platforms makes sense; for example, by making any such acquisition presumptively anticompetitive and shifting the burden of proof onto the dominant platform, as proposed by the House Subcommittee on Antitrust last week. Professor Herbert Hovenkamp has a clever idea of only permitting a dominant platform to acquire nonexclusive rights to the acquired technology. The pandemic makes already vulnerable acquisition targets even more vulnerable. When combined with the threat that dominant platforms hang over targets, including appropriation of the target’s business, we could get payments to targets well below fair market value. Another potential role for antitrust agencies is to serve as advocates for competitive outcomes in front of legislatures and courts. Although workable in theory, a practical concern is that agencies could become captured by entrenched incumbents that oppose any coordination rights for smaller and less powerful actors. We have experienced this firsthand in the Trump Antitrust Division, with Assistant Attorney General Makan Delrahim weighing in via amicus briefs against atomistic suppliers—against drivers in support of Uber and against writers in support of talent agencies—and on behalf of former clients (Qualcomm). One solution could entail winding down the amicus program entirely. There is a temptation in Washington to call for studies when action is needed. We likely don’t need a study on how the pandemic is affecting the competitive environment in the US—Covid simply accelerated the movement to online in general, and to Amazon in particular. Rather than a study, we need to think about how to keep local retailers alive, and how to prevent Amazon from dominating and controlling them. Empty storefronts and barren malls are the hallmarks of a failed town. A New Competition Agenda The next heads of the Federal Trade Commission and of the DOJ Antitrust Division should outline a competition policy agenda to promote a recovery that encourages more competition. There is a tendency to pull back from antitrust enforcement when producers are suffering. But that would wrongheaded. Why should employers, for example, be permitted to engage in a market-allocation scheme for workers simply because the economy is contracting? To stop these abuses, agency heads should redirect the focus of antitrust enforcement towards worker welfare. Policing non-competes and no-poach agreements and protecting worker mobility should be a priority. Agencies should also focus on adverse worker effects from mergers. DOJ’s open support of the merger between T-Mobile and Sprint, a four-to-three wireless merger that decimated employment in the sector, clearly shows that worker welfare played no role in the analysis. The Chicago School revolution in antitrust has made worker welfare subservient to consumer welfare, but workers are the ones who spend the money that keeps local economies humming. Thus, **worker welfare should be central to any recovery program**. And just like low-income households, independent retailers would be more inclined to spend and thereby stimulate the economy than would a monopoly platform. A new competitive landscape, in which workers and smaller merchants achieved more power, would bring about a faster recovery.

#### Tech dynamism -Increasing tech economy dynamism massively stimulates demand

Manyika & Spence 21 (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.)

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 growt

h 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. 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.

#### We’re still missing 4.2 million jobs

<https://fred.stlouisfed.org/series/UNRATE>

![Chart, line chart

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#### This fed cares about employment not inflation

Howard Schneider 21 "Analysis: Inflation vs jobs hole: A tradeoff the Fed still hopes to skirt" <https://www.reuters.com/business/inflation-vs-jobs-hole-tradeoff-fed-still-hopes-skirt-2021-08-25/>

WASHINGTON, Aug 25 (Reuters) - **The Federal Reserve's year-old promise to drive U.S. employment to new heigh**ts came at a wrenching moment last August, with 12 million jobs still missing due to the pandemic, inflation cratering to half the central bank's target, and no clear endgame for the worst health crisis in a century. Then came three vaccines, a steady jobs recovery, trillions more dollars in fiscal stimulus, the fastest economic growth in 40 years - and surging prices. **A steady shift in Fed rhetoric since inflation** jumped in the spring has now triggered debate about how deep the Fed's new commitment to jobs truly runs, and how long it will tolerate high inflation as it waits for a "broad and inclusive" rebound in employment. No decisions have been made. The Fed is actively talking about when to reduce its $120 billion per month emergency bond purchases, and Fed Chair Jerome Powell may discuss that in Friday remarks to a virtual iteration of its annual Jackson Hole research conference. The more consequential call over when to raise interest rates from near zero remains, in all likelihood, far down the road. Sponsored by discountmugs.com Promotional Screen Printed Sweatshirts with Custom Logo Personalize Everything See more Report ad But with each successive report showing inflation above the Fed's 2% target, the tone has shifted. Fed officials now readily acknowledge inflation may be more persistent than they thought. Moreover, some are lowering expectations of a full rebound to the pre-pandemic level of jobs or labor force participation. The debate won't be resolved soon. But the suddenly two-sided nature of the discussion has, to some, cast the value of the Fed's new approach into doubt. "I think they have lost their nerve," said Adam Posen, president of the Peterson Institute for International Economics and a former member of the Bank of England's Monetary Policy Committee. In recent comments, "they have not reinforced their commitment to broad and inclusive gains" in the labor market. Richard Clarida, the Fed's influential chair, would disagree. At a recent presentation to the Peterson Institute, **he said his outlook is for inflation above 2% for three years running, for unemployment so low by the end of 2022 that gains would be broadly felt and jobs returned to the pre-pandemic level, and a rate increase in 2023 "entirely consistent" with the Fed's new approach.** INFLATION VS JOBS **Arguably the last few inflation readings, the latest being almost twice the targeted 2% level, would have been confronted more aggressively by previous Feds.**

#### If r\* is higher, means fed has a higher interst rate to return t post receission so they have to hike rates not only faster but higher

https://fred.stlouisfed.org/series/FEDFUNDS

![Chart, line chart

Description automatically generated]()

“Fortunately we have not seen that in terms of long run inflation expectations-—there’s been a little movement in the short run side, but since that hasn’t necessarily, or to this date, bled into the longer run, I’m, I’m inclined to mainly look through it,” and retain confidence price pressures will moderate over time, Mr. Bostic said.

#### Reforms are effective at curtailing moral hazard

Lantgon 4-1 (James Langton, Investment Executive (IE) Journalist, “Too big to fail” reforms have succeeded, FSB finds, <https://www.investmentexecutive.com/writer/james-langton/>, y2k)

Efforts to reduce the hazards posed by banks deemed “too big to fail” have improved the resilience of the financial system. Yet, a review by the Financial Stability Board (FSB) finds that there’s still room for improvement.

The FSB has published an evaluation of the reforms that were adopted in response to the global financial crisis — in an effort to prevent future taxpayer bailouts of large, systemically-important banks that are considered too large, or too important, to be allowed to fail.

The new report found that the world’s big banks have been made more resilient, and also more easily resolvable, as a result of post-crisis reforms. Those included higher capital demands and tougher supervisory requirements for big banks, and measures to make it easier to wind up a failing bank.

“Indicators of systemic risk and moral hazard moved in the right direction, suggesting that market participants view these reforms as credible,” the FSB said, adding that bank resilience has been tested by the Covid-19 pandemic, too.

#### Small banks aren’t any better and moral hazard is fake

Grunwald 15 (Michael Grunwald, a senior writer for Politico Magazine, Don’t break up the megabanks, 5-27, <https://www.politico.com/agenda/story/2015/05/sanders-dont-break-up-the-big-banks-000054/>, y2k)

By the same token, smallness is no guarantee of stability. It was a flurry of relatively small bank failures that launched the Great Depression. Before the recent crisis, many of the flounder and carp of Sherman’s analogy were even more reliant on sketchy real estate loans than Wall Street’s sharks were. And while mega-rescues for mega-banks dominated the headlines, over 900 community banks and regional banks received bailouts through the Troubled Asset Relief Program as well. The government also guaranteed unsecured bank debt, money market funds, and deposits of up to $250,000, which amounted to a

#### \*\*MARKED\*\*

n even more generous bailout of Main Street banks. If moral hazard is a problem, it’s not just a problem of bigness. It’s not even clear how pervasive a problem it was before the crisis; the government had never provided aid to an investment bank before 2008, so Bear and Lehman had no reasonable expectations of bailouts when they were getting into their messes.

## Inequality Advantage

#### Inequality doesn’t cause war

Elise Must 16, PhD student at LSE, this was her PhD thesis, “When and how does inequality cause conflict? Group dynamics, perceptions and natural resources”, http://etheses.lse.ac.uk/3438/1/Must\_When\_and\_how\_does\_inequality.pdf

Does economic inequality lead to conflict? This question has attracted the attention of prominent scholars at least since the time of Aristotle (Nagel 1974). The frequent assumption that unequal distribution somehow fuels rebellion has resulted in a vast amount of theoretical as well as empirical work. For long, results remained mixed. Despite countless qualitative studies asserting that inequality is a major reason for conflict outbreak, quantitative studies struggled to establish a firm relationship between the two (Blattman and Miguel 2010, Cramer 2005, Lichbach 1989). These quantitative studies, including the most influential ones by Collier and Hoeffler (2004) and Fearon and Laitin (2003), rely on analysis of individual measures of inequality. However, as most prominently set forth by Frances Stewart, it is minority groups or collectives of individuals who rebel, not the whole population, nor individuals (Stewart 2002). Stewart’s theoretical development has given rise to several quantitative studies which uniformly support the role of economic group inequality in inducing conflict (Buhaug, Cederman, and Gleditsch 2014, Cederman, Weidmann, and Bormann 2015, Cederman, Weidmann, and Gleditsch 2011, Deiwiks, Cederman, and Gleditsch 2012, Østby 2008a, b, Østby, Nordås, and Rød 2009). Hence, there is an emerging consensus in the literature that inequality causes civil conflict when it overlaps with relevant group identities. Promising as these studies are, they nevertheless neglect a potential crucial part of the inequality-conflict causal chain. Seemingly all studies of inequality and conflict, including those measuring group inequalities, are based on objective inequalities. Yet, as Stewart (2010, 14) herself notes, ‘People take action because of perceived injustices rather than because of measured statistical inequalities of which they might not be aware’. Economic inequality measured by the Gini coefficient, o

r by local GDP data, is most commonly used as proxies, leaving completely aside how economic inequality is actually interpreted and perceived by both groups and individuals (ref. Zimmermann 1983). It remains obvious, however, that in order for people to take action to address inequalities, the first step is to recognize them and to consider them unjust (Han et al. 2012). The use then, of objective measures in current empirical studies, is based on the assumption that both objective and perceived horizontal inequalities essentially amount to the same thing. Put another way it is assumed that all objective inequalities are actually perceived as inequalities by relevant groups, and conversely all perceived inequalities have an objective basis. These are strong claims that are so far largely untested. Existing studies of the link between objective and perceived horizontal inequalities range from concluding that there is no such link (Langer and Smedts 2013) to documenting imperfect correlations – ranging from 0.27 to 0.30 depending on indicators and datasets (Holmqvist 2012). While cross-country analyses of conflict have neglected perceptions of inequality, the case study literature does offer some examples demonstrating their importance. Interviewing Muslim immigrants in London and Madrid, Gest (2010, 178) finds that what distinguishes democratic activists from those who engage in anti-system behavior, is the nature of their individual expectations and perceptions about shared economic realities. Moving on to larger conflicts, a recent World Bank report concludes that the so called ‘Arab Spring’ was driven by a decrease in popular subjective satisfaction, while the objective economic situation actually improved in the years before the widespread mobilization (Ianchovichina, Mottaghi, and Shantayanan 2015). The report also points to the importance of inter-group inequality as opposed to individual inequality. My main argument is that in order to better capture the role of inequality in inducing civil conflict, measures have to account for relevant groups as well as for the perception of inequality in these groups. In addition, my analyses fill two other gaps in the literature. While Stewart emphasizes how groups can mobilize around different identities, current studies have almost exclusively focused on ethnic groups. However, a regional identity might be just as relevant (ref. Posner 2004). I will therefor look at the effect of regional economic inequality on civil war. And finally, most of the studies, and all of those with a global scope, rely on time invariant measures of economic horizontal inequality. This is commonly defended by referring to the demonstrated ‘stickiness’ of horizontal inequalities (see e.g. Stewart and Langer 2008, Tilly 1999). Still, a recent study covering 1992 to 2013 demonstrates a global decline of ethnic inequality (Bormann et al. 2016), while Kanbur and Venables (2005) compare case studies of 26 developing countries and conclude that regional inequalities are rising. The data used in this analysis also show that horizontal inequalities change quite substantially over time. Using inequality data from one particular year to analyze decades of conflict incidents is therefore questionable. Hence, my study represents the first time-variant analyses of the effect of both objective and perceived regional inequality on civil war covering developed and developing countries in all world regions14 . Analysing data for the period 1989 to 2014 from the World Values Survey (WVS), I find that countries with a high level of perceived regional economic inequality have an elevated risk of civil war outbreak. On the other hand, mere objective regional economic inequalities do not have any significant effect. The group aspect remains essential, as neither objective nor perceived individual inequality is linked to increased civil conflict risk.

#### No impact---populist governments aren’t sustainable

Denis **MacShane 17**, Former UK minister for Europe, 4-26-2017, "Judy Asks: Is Populism on the Run?," Carnegie Europe, http://carnegieeurope.eu/strategiceurope/68775?lang=en

Populism is the most overused word in today’s political lexicon. The most populist parties after 1945 were the Communists, then the Greens. The EU and immigration are targets of choice for populist parties, as are globalization and the Bilderberg Group of transatlantic elites. Populist movements of the Left like Spain’s Podemos or Greece’s Syriza have been as strong as those of the Right like the Alternative for Germany (AfD) or the UK Independence Party (UKIP). Populists announce they represent the true interests of the people against the elite establishment and its ruling parties. Populists promise much but deliver little. The problem for populism is that when it succeeds, it becomes part of the establishment and the target for the next anti-elite populist demagogue. In most cases, existing parties adopt populist ideas—many parties have become green, and the British Tories have adopted UKIP’s anti-European rhetoric. Extreme populism as embodied in Britain’s vote to leave the EU and the election of U.S. President Donald Trump can win. Then comes a backlash. The military-judicial state in America is exerting counterpressure against Trump’s populism. The electoral wins for pro-EU forces in Austria, the Netherlands, and France followed the triumph of Brexit populism, which is mainly confined to England outside London. When she wins her populist election on June 8, UK Prime Minister Theresa May will have to swap populism for realism unless she wants to do lasting damage to Britain.

#### No Russia OR China wars---even if revisionist.

Bruce **Jones 19**. Jones is vice president and director of the Foreign Policy program at Brookings Institution, Washington, DC, USA, a senior fellow in the Institution’s Project on International Order and Strategy, and a consulting professor at the Freeman Spogli Institute at Stanford University. 2019. “A Not Quite Multipolar World.” Think Tanks, Foreign Policy and the Emerging Powers, edited by James G. McGann, Springer International Publishing, pp. 61–78. Crossref, doi:10.1007/978-3-319-60312-4\_3.

The Rising Powers: Reformers, Not Revolutionaries With the notion that the BRICS are a unified force capable of challenging the United States shown to be more fiction than fact, it becomes clear that the rising non-Western powers are better positioned to shape the global order, gaining greater influence from acting within the international system rather than overthrowing it.32 The larger rising powers, such as India and Brazil, as well as traditional US allies like Korea and Turkey, have repeatedly demonstrated that they do not seek to break the international order, but rather to profit from it while their own power continues to grow. For these nations, a collapse of the international order would only result in unprofitable chaos, offering little incentive for rising powers to reject the US-led system for anarchy. Certainly, in this changing environment, the emerging powers will press for a greater role at the global high table, rather than merely accept Western edicts. Yet, in pursuing their own independent agendas, the emerging powers face a dilemma. They may have an impulse to rivalry and some interest in restraining US influence, but they also hold fundamental stakes in a stable global economy, and in protecting the sea and air routes through which global trade and energy flow. This is particularly true of China, which needs to maintain very rapid growth both to sustain its domestic stability and to project international influence—but this requires energy imports, the flow of which largely depends on the security maintained by American military might.33 In the end, these states will not forget that their very rise came about through integration into the established global economic system, not by rebelling against it. Select actors, like China and Russia, will continue efforts to curtail US leadership in certain domains. However, even these revisionist powers are likely to elect to cooperate with Washington and its allies in some fields, namely counter-terror and nuclear non-proliferation, the latter illustrated by the investment by Russia and China in the recently successful nuclear negotiations with Iran by the P5+1 (the five permanent members of the United Nations [UN] Security Council, China, France, Russia, the United Kingdom, and the United States, plus Germany). Their own need for continued economic growth constrains these would-be revolutionaries. On its own, neither Moscow nor Beijing is strong enough to completely topple the US-led system—they can only challenge American leadership if others follow, and so far they have found fe

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w takers. The rising middle-income nations should provide these missing followers; yet they are absent. The fundamental reality is that, for most of these states, their stories mirror that of the majority of the BRICS: the allure of remaining in the US-led system is greater than the potential benefits of working against it. As with India and Brazil, the second-tier powers have grievances with the current international order. However, these aspects point them towards reform, not revolt. Emerging potential middle powers from Nigeria to Indonesia have experienced tremendous economic growth under the Western-organized order, growth that their leaders know cannot be guaranteed if the global economic system were to collapse.34 Similarly, they appreciate the greater danger inherent in a more anarchic world. While the Western order cannot fully prevent conflict, the US-backed post-1945 norm against interstate aggression has contributed to a decline in interstate warfare since the mid-twentieth century.35 The second-tier nations have benefited significantly from this fact. For governments seeking to maintain economic growth, not having to dedicate vast resources to territorial defense is a large boon. What is more, many of these emerging middle-income countries are in Asia, and there they cast a wary eye on a growing and increasingly assertive China, clearly preferring the continuation of the existing order to what would amount to an international free-for-all. Moreover, the middle-income states paradoxically benefit most from a halfhearted BRICS challenge to the global order. In pressing the West for revisions to the international order, the BRICS shoulder the burden of opening the door for a conversation on reforming the international system. However, this push lacks the momentum to successfully create a new order. Instead, it leaves an opening for the second-tier states to put forward their own demands. Furthermore, as the BRICS economies stumble and the group’s cohesion frays, this opening only expands, enabling these middle powers to punch above their weight. Thus, these second-tier nations are likely to engage in a strategy akin to the geopolitical balance of power theory, except in economic terms. Alternating support for Western-backed institutions, such as the World Bank and IMF, will be matched with endorsements of BRICS alternatives as the middle powers effectively hedge against either group gaining concrete dominance over the international economic order. Within this framework of support for the general tenets of the international order, the emerging powers possess a strong impulse towards rivalry with the United States. At a minimum these countries have a strong impulse towards autonomy, grounded in what I call the “psychology of rise,” in which rising powers seek to undo the humiliation done unto them in their first encounters with a globalizing West and in their resulting positions within the post-war order. The psychology of rise is most evident in China’s assertive stance in defense of its interests and influence in East Asia, but it is equally present in India’s defense of its interests in the evolving climate change regime, and in Brazil’s aspiration for a bigger role in global security affairs. And, despite some economic constraints and challenges, the emerging powers have the tools to advance their aims, and even, at times, to reshape portions of the international order. China is on track to augment its regional sway through the economic diplomacy of the nascent Asian Infrastructure Investment Bank (AIIB), which has successfully drawn in US allies and partners from across the globe. Though Delhi appears to be flirting with increased use of its hard power, India enjoys a wide range of soft-power assets to draw upon.36 It boasts, as Peter Martin notes, “Bollywood, Yoga, Buddhism, and a rich philosophical tradition. It has a world-class cadre of global public intellectuals from Amartya Sen to Salman Rushdie. It also has an extensive, wealthy, and increasingly politically engaged diaspora spread across the political and economic capitals of the world.”37 While the permanent members of the UN Security Council rejected the 2010 Turkish-Brazilian diplomatic foray to broker a nuclear deal with Iran, the initiative itself, as well as global reaction, reflected Brasilia’s increasing weight in the international arena. Thus, while the rising powers will strive for autonomy, this struggle is unlikely to entirely overcome the incentives for restraint towards, and even cooperation with, the current international order and the United States. This balance between the impulse to rivalry and the incentives for restraint is the most important dynamic in contemporary international affairs; and for the moment, the balance tips towards restraint.

## Internet Advantage

#### Overall competition in the broadband market is healthy

Manne 21 (Geoffrey A. Manne is the President and Founder of the International Center for Law & Economics (ICLE). Kristian Stout is ICLE’s Director of Innovation Policy. Ben Sperry is Associate Director of Legal Research with ICLE. Build Broadband Better: Focus on Competition, Not Competitors, 6-28, <https://truthonthemarket.com/2021/06/28/build-broadband-better-focus-on-competition-not-competitors/>, y2k)

The data show that the state of competition in broadband is generally healthy. ISPs routinely invest billions of dollars per year in building, maintaining, and upgrading their networks to be faster, more reliable, and more available to consumers. FCC data show that average speeds available to consumers, as well as the number of competitors providing higher-speed tiers, have increased each year. And prices for broadband, as measured by price-per-Mbps, have fallen precipitously, dropping 98% over the last 20 years. None of this makes sense if the facile narrative about the absence of competition were true.

#### Broadband antitrust is difficult even if the plan facilitates right of action

Srago 21 (Josh Srago – EFF Legal Fellow, JD from Santa Clara University in 2021. <KEN> “Why Can’t You Sue Your Broadband Monopoly?” *Electronic Frontier Foundation*. March 2021. <https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly>)

A Private Right of Action Is Not A Guarantee

The key action that can be taken to enact swift change and return a private right of action for people and municipalities to file claims against their broadband service providers under antitrust laws would be for Congress to write a law that would overturn the decisions in Trinko and Credit Suisse. This law could stand on its own and be a sweeping reform of regulatory authority, or it could be narrowly tailored and applicable to each regulated industry under the relevant act. In 2004, Representative James Sensenbrenner (R-WI) introduced a bill68that would narrowly amend the Clayton Act in order to close the gap created by the Trinko decision. The determination as to whether it is better to pursue all-encompassing or narrow legislation has far-reaching implications that need to be considered and would require examining a much broader body of law than is examined here. The existing savings clause of the 1996 Act69statestheprotectionsshould not “modify, impair, or supersede” the applicability of the antitrust laws. An express provision granting a private right of action would retract the Trinko decision, as the Court based its decision not on the availability of an antitrust claim, but rather on the fact that the actions taking place were also regulated by the 1996 Act. The Trinko decision binds the judiciary to defer to the regulators.70If Congress were to expressly grant the authority of a private right of action, the FCC and the Courts would be required to enforce it.

Merely providing a private right of action does not actually mean that there would be sweeping change in broadband services. In fact, an antitrust claim was brought post-Trinko to seek redress to supposed anticompetitive behavior in Bell Atlantic Corp. v. Twombly.71In that case, telephone and high-speed internet customers brought a claim alleging that Bell Atlantic

conspired to restrain trade by inflating charges for the services by engaging in parallel conduct to inhibit growth of CLECs attempting to compete in the market using unfair agreements, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relationship with theircustomers.72T wombly’s result established the requirements that must be met regarding the initial pleading in a case. “The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.”73 Specifically, in regards to a Sherman Act Section 1 claim,74 there must be enough factual assertions, taken as true by the court, to show that an agreement was made, or, stated otherwise, that there must be enough facts to give rise to a reasonable expectation that evidence of an illegal agreement will be found at the point of discovery.75 Demonstrating enough facts to show such an agreement exists without the benefit of discovery can be exceedingly difficult. The threshold to show a Sherman Act Section 2 claim may also be very difficult to meet, as it requires demonstrating that monopoly power exists and that the monopolist took improper action to maintain that power. As stated in Trinko, merely charging monopoly prices while having the advantage of monopoly power is not an unlawful act.

#### No cyberwar---it is a inneffective weapon.

Jeremy **Rabkin &** John **Yoo 17**. Rabkin is a Professor of Law at the Antonin Scalia Law School, George Mason University; Yoo is currently the Emanuel S. Heller Professor of Law at the University of California, Berkeley. 09/12/2017. “CHAPTER 6 Cyber Weapons.” Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War, Encounter Books.

It is possible for a “virus” to disable the hardware elements of a network, as happened in the Shamoon attack. The effects of such an attack are costly, especially if they crash electric power supplies or delete important government data. But those well-known costs will encourage governments and corporations to back up valuable data in several places and build redundancies into vital control systems. Such safeguards would mean cyber attacks cause temporary inconvenience, but are not likely to cause widespread, permanent damage. If an attacker wants to turn off the lights everywhere, there are easier ways than cyber-based attacks. Alarms over shutting down computer networks overlook their resiliency. Computers are immensely complicated and hence inherently temperamental. Designers of computer systems have always known that. At any one time, some computers in commercial networks may be experiencing technical difficulties—as air travelers know from experience trying to acquire boarding passes from “self-help” kiosks. Network designers build their systems to work even when significant portions of the hardware 42 and software go offline. Such resiliency would pose a serious obstacle to the success of a cyber attack. As new risks become known, network engineers will build in more robust defenses. Finally, even if nations could build cyber weapons that could shut down networks on a large scale, they may never use them. Such a weapon could be equally dangerous for the attacker as for the defender if its effects spread beyond the target system. The more networked an attacker’s economy and military, the more exp

osed it will be to such harms. Even if the attacker could deploy a prophylactic defense for its own computers, it would still need those computers to communicate with external networks in other countries. A world paralyzed by computer problems would prevent the attacking nation from reaping the benefits of the Internet. Unless it were prepared to isolate itself from the world economy for a lengthy period of time, a nation would not likely deploy an all-destructive cyber weapon. To think of cyber as a weapon of mass destruction is like noticing that a laptop computer is light enough to swing, while also encased in unyielding metal, and then to conclude that a laptop computer is well suited to deploy as a war club. That conclusion is not demonstrably false. But it misses the main point. The most attractive aspect of cyber operations from a tactical standpoint is that they can be customized, allowing attacks to be highly focused and ratcheted up or dialed back, according to circumstances. Their most effective use is when they are used for espionage and covert action goals, rather than strategic strikes. Their military value will come as an aid to other forms of hostilities, such as diplomatic and economic pressure or kinetic attacks. Cyber weapons have far more value as a more precisely tuned means of coercion between nations, rather than as a weapon of mass destruction.

#### No energy wars---their evidence is about a US Russia war that escalates because of effects on energy markets, not the initiation of war over energy

(for reference---harvard is blue)

Holstein ’20 [Alex; 2020; Managing Partner at Holstein-Gray, M.Sc. in Russian and Post-Soviet Studies from the London School of Economics; Geopolitical Monitor, “Invisible Warfare: NATO and the Geopolitical Storm on the Market Economy Horizon,” <https://www.geopoliticalmonitor.com/invisible-warfare-nato-and-the-geopolitical-storm-on-the-market-economy-horizon/>]

But before we even get to that very worst of the worst-case scenarios of a direct collision between a NATO ally and Russia, even the slightest escalation in the region, considering its vital energy resources, could have a devastating impact on global markets, which in itself would kick off a wave of instability and eventual warfare.

As market economies evolve and integrate by engaging commerce and leveraging technology, the blend between national security and socio-economic imperatives becomes even more prescient. This carries with it both advantages and disadvantages. Traditionally, NATO military forces have relied on critical civilian infrastructure such as communications, food and water, industrial capacity, civil transport and energy supplies to conduct operations. The additional rise of non-kinetic asymmetric threats – cyberwarfare, information warfare, EMP attack – against non-traditional targets, such as banks or major multinational corporations that comprise key components of this critical infrastructure, adds an entirely new dimension to the defense requirements of the 21st century. In addition to dealing with more conventional kinetic threats from traditional and emerging adversaries, NATO must prepare itself for this new era of invisible warfare through deeper strategic cooperation with the private sector and corporate entities.

Great Powers and non-state actors alike can now conduct non-kinetic attacks just as devastating as any nuclear, biological or chemical WMD, resulting in millions of deaths and the mass breakdown of societies, while in turn undermining the doctrine of Mutually Assured Destruction and other deterrents against nuclear war. But even contained instability within specific regions could still disrupt markets on a global scale, whether directly targeting infrastructure or as a knock-on effect of a conventional engagement, as in the case of Nargono-Karabakh and the threat to Europe’s energy supplies. A European energy crisis alone could prove the tipping point toward a wider war, or a societal breakdown, without a single shot fired.

#### Oil volatility’s inevitable but no impact

Kemp 18 – Reuters market analyst

(John, 4/25. “COLUMN-Oil prices, or how I learned to stop worrying and embrace the cycle: Kemp.”

The oil industry has been characterised by deep and prolonged boom-bust cycles since the first modern well was drilled in 1859.

Deep cycles are the natural condition of the oil industry and there is no reason to think the future will be any different.

DEEP CYCLES

Cyclical behaviour is the oil market’s most distinctive characteristic and deeply rooted in the industry’s structure rather than mistakes by its leaders.

Price cycles stem from the low price-elasticity of supply and demand, the prevalence of backward-looking expectations and behaviour, and the lumpiness of new discoveries and investments.

They also stem from the prevalence of positive and negative feedback mechanisms, which alternately amplify and dampen the initial impact of price changes.

The oil market is really multiple sub-markets for crude, fuels, refining, services, engineering, construction, drilling, skilled labour, steel, raw materials etc.

Each market is subject to its own feedback mechanisms, operating at different speeds and timescales, with constantly changing supply and demand.

Balancing “the oil market” would mean balancing all these sub-markets simultaneously.

In practice, the sub-markets are never simultaneously balanced or in a state of equilibrium except accidentally and never for very long.

STABILISATION?

Economist Paul Frankel’s “Essentials of Petroleum”, published in 1946, remains the best explanation of the oil industry’s boom-bust cycle.

Frankel noted the basic features of the oil industry made for “continuous crises” with hectic prosperity followed all too swiftly by complete collapse.

Frankel concluded the oil industry was not self-adjusting and had an inherent tendency towards extreme crisis.

As a result, he was sympathetic to the need for “leading interests” and “planners” to act as “eveners” and “stabilizers”.

Frankel urged a form of managed competition, in which oil producers would recognise their common interests and coordinate their policies at strategic level while remaining competitors at tactical level.

(I’m not sure how this distinction would work in practice. Frankel did not explain it in detail and seems to have been unsure himself).

At different times, Frankel argued that the role of adjusters and eveners had been played by monopolies such as Standard Oil, the major international oil firms, and governments, sometimes in combination.

But this was the least convincing part of Frankel’s argument. There is no evidence that any monopoly or combination of interests has ever managed to stabilise the market for long.

Even the long period of apparent stability during the 1950s and 1960s came to a dramatic end with the oil shock of 1973 (which was rooted in the long period of low prices during the previous two decades).

The price cycle cannot be tamed. Oil-producing companies and countries have to learn to ride with the volatility.

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#### Brand X deference was essential to FCC de-regulation, plan changes it

Srago 3/16/21 (Josh Srago, EFF Legal Fellow, Why Can’t You Sue Your Broadband Monopoly? EFF (2021) https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly)

Telecommunications and Modern Regulation – The 1996 Act and Classification

The 1996 Act has not only been the key law in ensuring that the telecommunications market is competitive, it has also been at the center of a great deal of debate when it comes to regulating the networks. In particular, the classification of broadband services as either a Title I or a Title II service is the underlying issue regarding the amount of authority available to the FCC to regulate broadband services. These designations stemmed from the Computer II Order that established the concept of basic or enhanced services. “[B]asic service [was] limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combine[d] basic service with computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.”6 Basic services, or the parallel term telecommunications services,7 were those subject to common carrier, or Title II regulations,8 while enhanced services were services subject to Title I.

The crucial determination as to whether broadband services are subject to Title I or Title II regulations establishes the ability of the FCC to promulgate rules over those services If the FCC determines that broadband is a Title I service, such services are exempted from the FCC’s Title II authority under the 1996 Act to pass rules and regulations.9 If the FCC determines that broadband is better classified as a Title II service, then it has greater rulemaking and oversight authority to ensure that the providers of broadband services are providing equal access to the networks for both content providers and consumers of the service, and could even go so far as to enact control over pricing of the services. Under Title II, the FCC can also forbear from enforcing its rules.10

When Congress passed the 1996 Act, regardless of whether a consumer accessed the internet via a telecommunications service or a cable internet service, the services were treated as Title II services. That changed under the Supreme Court’s Brand X decision when the Court deferred to the FCC’s determination that cable internet services should be designated as a Title I service while maintaining DSL (Digital Subscriber Line) services as Title II due to the changing market conditions.11 In 2015, the FCC passed the Open Internet Order (2015 OIO)12 which reclassified all broadband services under Title II of the 1996 Act along with the net neutrality rules. The FCC’s basis for passing the rules was to “enact strong, sustainable rules grounded in multiple sources of legal authority to protect the Open Internet and ensure that Americans reap the economic, social, and civic benefits of an Open Internet today and into the future.”13 The authority to enact those rules stemmed from Title II of the 1996 Act:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.14

The FCC’s premise for the reclassification was “prevent[ing] specific practices we know are harmful to Internet openness – blocking, throttling, or paid prioritization – as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.”15 The FCC had attempted to enforce more stringent rules without reclassification, but the United States Court of Appeals found that it lacked the authority to do so under Title I.16

The FCC recognized that as the infrastructure became faster and more advanced, the providers of services utilizing that infrastructure would also innovate. Even the broadband providers suing to prevent the FCC from enacting such regulation agreed that the end goal was to promote the “virtuous cycle of innovation and growth between that ecosystem and the underlying infrastructure—the infrastructure enabling the development and dissemination of Internet-based services and applications, with the demand and use of those services...driving improvements in the infrastructure which, in turn, support further innovations in services and applications.”17

The Title II reclassification would be short-lived, as just two years later the FCC returned to a deregulated services model by retracting the 2015 OIO and returning broadband to a Title I classification. This light-touch oversight of broadband services has been generally favored by FCC Chairman Ajit Pai. When the FCC promulgated the Restoring Internet Freedom Order (RIFO)18 in 2017 he touted that, “by returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers.” 19 The key argument Chairman Pai made is that if broadband services are not heavily regulated, there will be increased competition and therefore avoiding regulation is in the public interest.

#### There’s two links directly to the aff – implied immunity is necessary for broad agency interpretation – specific to the aff, Brand X interpretation is necessary to 1. Circuit splits 2. Dealing with private litigation

* Circuit splits, address serial litigation, appeal disfavored interpretations

Sze 16 (Wesley, J.D., Stanford Law School, “Did X Mark the Spot?: Brand X and the Scope of Agency Overrides of Judicial Decisions,” January 2016, Stanford Law Review)

IV. Typologies of Agency Overrides

Against this empirical backdrop, this Part shifts to a normative discussion of Brand X overrides. One way of understanding the empirical findings is that even post-Brand X, agencies continue to demonstrate deference, thoughtfulness, and respect for the judiciary. Even when agencies ultimately do decide to depart from judicial precedent, they have done so in ways that are consistent with the unique institutional competencies that make their interpretive choices desirable. That is, at least in practice, Brand X reinforces— and does not subvert—appropriate exercises of agency power that are consistent with the rationales underlying the Chevron ideal.

To this end, I offer three typologies of agency overrides to help crystalize key instances where the Brand X rule comports with appropriate and normatively desirable agency action. Rooted in the data, these typologies offer a framework for thinking about why agencies may choose to depart from judicial precedent: to resolve court splits, to efficiently address serial litigation, and to appeal a disfavored judicial interpretation of law.

1. Resolving Court Splits

In the absence of a binding interpretation from the Supreme Court, lower courts may adopt differing interpretations of the same federal law.140 But it is often desirable to have a unified interpretation of law for all jurisdictions.141 Before Brand X, agencies could address court splits only by either adopting a policy of intercircuit nonacquiescence, or by petitioning for review from the Supreme Court. Brand X offers a superior alternative to both.

Under intercircuit nonacquiescence, agencies adopt separate and parallel policies that apply different interpretations to different jurisdictions in order to avoid any conflict with a particular circuit’s precedent.142 However, this practice is suboptimal because it preserves—rather than resolves—the underlying split in the courts. Thus intercircuit nonacquiescence still requires an agency to enforce a patchwork of different interpretations based on what is supposedly a unified national scheme.

Alternatively, agencies can also resolve interpretive issues by escalating the question to a higher court, ultimately culminating in a binding Supreme Court decision. While such a decision would resolve a court split, the problem is that it takes the interpretive decision out of the hands of the agency and puts it into the hands of the courts. Before Brand X, the Supreme Court had yet to rule on whether agencies had the authority to resolve court splits. In fact, some agencies even considered inconsistency in the courts as a factor counseling against promulgation of a unified agency rule.143 But if we accept Chevron’s notion that Congress intends agencies to be the final interpreters of ambiguous statutes, then it would be entirely appropriate for agencies to assume the role of a higher court to resolve interpretive splits.144

Brand X provides a more elegant solution to the problem of court splits by giving agencies a mechanism to establish their own authoritative interpretations of law. Unlike intercircuit nonacquiescence, Brand X allows for an agency to “overrule” deviating judicial interpretations in order to establish a national standard. And unlike a Supreme Court appeal, Brand X takes Chevron seriously by vesting ultimate interpretive authority in the agency itself. Indeed, in this Note’s dataset, agencies identified a court split in 35.4% of the instances in which they engaged in a Brand X-type override.145 In many of these cases, agencies identified the inconsistent interpretations rendered by federal courts as a motivating reason for its rulemaking.146 As one agency put it, “[u]niformity is needed”147 for a national scheme to function effectively. This hypothesis is further supported by the court precedents overruled by the agency actions in the dataset: as discussed above in Figure 3, more than ninety percent of Brand X overrides deal with adverse precedent from lower courts where there is, by definition, no nationally binding interpretation from the Supreme Court. Moreover, where different courts have reached different conclusions with respect to a law’s meaning, the law is likely to be ambiguous as a matter of Chevron Step One.148 Thus, these are situations in which it is especially sound for the agency’s view to prevail and override preexisting, conflicting judicial decisions. As the EPA explained in a 2008 rule, “it is completely appropriate for an agency to issue a rule that has the effect of resolving a split in the circuit courts, so long as the agency’s interpretation of the statute is permissible.”149 Viewed in this way, Brand X did not herald a new doctrine inasmuch as it was merely an extension of longstanding agency policies of nonacquiescence.

For example, the Department of Justice’s Executive Office for Immigration Review adopted this very position in a rule concerning the publication of precedential decisions by the Board of Immigration Appeals (BIA). The rule explicitly encouraged the publication of BIA opinions where “there is a need to . . . restore . . . uniformity of interpretation [of immigration laws] pursuant to interpretive authority recognized by the Supreme Court in Brand X.”150

But despite Brand X and its potential to resolve court splits, many agencies are still wary of contradicting circuit precedent through rulemaking, and instead continue to adopt strategies of intercircuit nonacquiescence.151 One notable example of this practice is the Social Security Administration’s acquiescence rulings, where the agency formally states that it will comply with a circuit court precedent within that circuit, even though it disagrees with the court’s finding.152 The continuing viability of such intercircuit nonacquiescence policies underscores agencies’ restrained approach to Brand X.

1. Addressing Serial Litigation

Agencies have also used Brand X-type overrides to resolve large-scale, complicated, and recurring litigations. Meazell has termed these sprawling and protracted families of litigation “serial litigation” and has studied this growing phenomenon in administrative law.153 Serial litigation often involves highly contentious issues and can produce multiple, overlapping lawsuits that span decades. Indeed, in 40.2% of the rules identified in this study, more than one adverse judicial precedent was cited by the agency, suggesting the rule involved an issue challenged in multiple litigations.

Rather than litigating each case through the courts, agency rulemaking provides an efficient vehicle for agencies to address serial litigation involving the interpretation of statutory language. Brand X permits agencies to establish the final meaning of a statute, without having to navigate through a complicated, time-consuming, and haphazard system of litigation.154 Allowing agencies to promulgate regulations that entirely sidestep this process can be immensely more expedient and resource efficient

It could be argued that these hotly debated, recurring legal questions are exactly the sort where agency overrides are most concerning. But in actuality, these complex and often highly technical and policy-based issues are exactly those that we want to have agencies, and not courts, decide. For example, Brand X arose from litigation that preceded the net neutrality debates, determining the threshold legal question of whether the FCC had statutory authority to regulate Internet service providers.155 Other families of cases in which agencies have invoked Brand X overrides include litigation over key issues concerning the protection of endangered species (the Defenders of Wildlife litigations),156 the regulation of air quality in clean air areas (the Alabama Power litigations),157 and the implementation of the federal Medicare plan (the Medicare litigations).158 Given these highly contested areas involving significant public policy choices, there is little reason to think that civil litigation through the courts would achieve the most desirable policy outcome. Rather, agencies are better equipped with the expertise, technical know-how, and flexibility needed to handle these quasi-legislative decisions.159

Finally, agency action through rulemaking is a more democratic and transparent means of establishing law. Section 553 notice-and-comment rulemaking, by design, gives an opportunity for the public’s views to be incorporated into the rulemaking process—“the most transparent and participatory decision-making process used in any branch of the federal government.”160 Though some critics have suggested that meaningful public participation remains low in most agency rulemakings,161 the process is still more transparent and participatory than private civil litigation, for which participation is closed off from members of the public (save for a small number of powerful interest groups that can be represented as amici). What is more, agency heads are democratically accountable in ways that life-tenured judges are not.

C. Alternative to Direct Appeal

Lastly, agencies may also use rulemaking as a superior alternative to directly appealing adverse judicial decisions. Instead of congressional lobbying or judicial appeal, some agencies have used rulemaking (as legitimized by Brand X1) to “cancel[] out any on-the-ground impact” of an adverse judicial decision.162 For instance, the Federal Election Commission pursued two parallel strategies after losing a case in the D.C. Circuit concerning the interpretation of the words “solicit” and “direct” in the Federal Election Campaign Act.163 The Commission simultaneously sought a rehearing en banc of the adverse decision, as well as initiated an informal rulemaking to promulgate its own interpretation of the Act, explaining that it would terminate the rulemaking proceedings if it prevailed on the rehearing.164

#### First is circuit split – remember that the aff is maximal clarification by lower courts in the aff – that’s 2AC cx – circuit court ambiguity is good. Even if the aff resolves one area, the question is the application of Brand X now that the existing precedent is overturned.

#### Aff only gets upheld bc of chevron

Srago 3/16/21 (Josh Srago, EFF Legal Fellow, Why Can’t You Sue Your Broadband Monopoly? EFF (2021) https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly)

This antitrust enforcement reasoning is in direct conflict with the reasoning of the FCC in the retraction of net neutrality rules when they enacted RIFO. The FCC heavily leaned on the logic that the “antitrust and consumer protection laws would provide means for consumers to take remedial action if an Internet Service Provider (ISP) engages in behavior inconsistent with an open Internet.”52 However, RIFO is an express regulation dictating that broadband service providers must merely disclose their network management practices, performance, and commercial terms of service. The FCC’s decision to determine which express regulation should be upheld would be subject to the Chevron deference. So long as the statute was ambiguous and the FCC’s interpretation is reasonable, the Courts must defer to the FCC’s judgment. Additionally, the FCC has jurisdiction over the matters defined in the 1996 Act, as was determined in Trinko, and under Credit Suisse the Court must imply an antitrust preclusion when there is a plain repugnancy with the federal law.

As such, the weight the FCC gave to antitrust being the better mechanism for consumer protection under the RIFO 53 is irrelevant, because the FCC has expressly decided to not regulate. That would mean that all conduct that falls outside of the transparency requirements would be protected conduct as part of the regulatory regime and prevent a claim under antitrust laws.

Collectively, this creates a significant barrier because a private actor, be it a person or municipality acting on behalf of its residents, has lost the private right of action to file a lawsuit under antitrust laws and seek legal recourse under the Sherman Act against a broadband service provider. They do have the option to file a complaint with the FCC to seek redress using the agency’s procedures, however, any possible remedy would be available only through the FCC, pursuant to its granted authority and interpretation of the 1996 Act and any subsequent rulemaking it established. This includes refraining from acting based on its reasonable interpretation of the 1996 Act.

#### Brand X streamlines resolution of circuit splits through agency interpretation – plan results in geographic uncertainty in other areas – through inconsistent interpretations.

Hemel 16 (Daniel, “The Tenth Circuit vs. Brand X,” August 24, 2016, Notice & Comment in the Yale Journal on Regulation, http://yalejreg.com/nc/the-tenth-circuit-vs-brand-x/)

4) The panel’s opinion will lead to legal disarray across the circuits on a wide range of issues. One advantage of Brand X is that when the courts of appeals are split on the interpretation of a statute that an agency administers, the agency can resolve the split by promulgating a rule warranting Chevron deference. This takes some of the burden off the Supreme Court to resolve each and every split that arises. But the panel’s opinion means that if the agency’s interpretation differs from the interpretation previously adopted by the Tenth Circuit, disuniformity will persist until the Tenth Circuit gets around to “approving” the agency’s view. Expect quite a bit of forum-shopping in the meantime.

— (5) And what of cases in which a district court has said that the best reading of the statute is A and the agency then adopts interpretation B in a rule or order entitled to Chevron deference? Will the district court’s prior decision prevent the agency from enforcing interpretation B? (Or not—because the district court’s decision is only persuasive, not binding, authority?) Similarly, how does the panel’s riff on Brand X apply to cases in which the earlier (or later) Tenth Circuit opinion is unpublished, and thus nonprecedential? (Can the Tenth Circuit delay the effective date of the agency’s new interpretation indefinitely by declining to publish its decision in each case where the issue arises?)

Perhaps the biggest strike against the Tenth Circuit panel’s view, however, is that it is plainly inconsistent with Brand X. Brand X says that “a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative,” because “the agency remains the authoritative interpreter . . . of such statutes.” Brand X, 545 U.S. at 983. The Tenth Circuit panel makes mincemeat of that holding. According to the panel, a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is authoritative, and the agency only becomes the authoritative interpreter of such statutes when the court grants its “approval.” Even if that rule made sense (and I don’t think it does), it’s not a call that the Tenth Circuit gets to make now that Brand X called the shot the other way.

**Lower courts action can’t solve clarity---vote neg on presumption**

**Valdes 15** (RONNY VALDES, Executive Editor, American University Business Law Review, Volume 4; American University Washington College of Law, J.D. Candidate 2015, STARE INDECISIS: THE FEDERAL CIRCUIT'S EN BANC BATTLE AGAINST ITSELF AND BUSINESS IN LIGHTING BALLAST CONTROL, LLC V. PHILIPS ELECTRONICS NORTH AMERICA CORP., 4 Am. U. Bus. L. Rev. 63, y2k)

[\*91] D. Stare Indecisis From the Courtroom to the Boardroom: Negative Effects on Business

If the **Federal Circuit** is permitted to continually **reconsider** en banc decisions with other **en banc** decisions **absent intervention**, the uncertainty can create **great risks** for business. 210 Businesses have become very **hesitant** to enter into **patent litigation** because of its **exorbitant costs**, and the costs could **increase** if the Federal Circuit can **change the standard** for claim construction **at will**. 211 Business planning and strategy is typically done by **lawyers** and executives far **ahead of time** and is based on finding patterns and trends that are certain and can be easily applied. 212 For example, if the Federal Circuit were to shift a standard twice over a 10-year period, businesses will undoubtedly find themselves constantly re-planning to accommodate the ever-shifting patent claim construction standards. The uncertainty in the patent law is also likely to drive up costs when patent litigation is already costing between five hundred thousand and three million dollars per suit. 213

Furthermore, businesses may be enticed to **give up** on patent litigation **all together** and instead focus on **avoiding** long litigation through **settlement**. 214 The threat of multiple **en banc courts** reconsidering the **same issues** undoubtedly creates **confusion** regarding the **true meaning of the law**, which, in turn, creates **confusion** for businesses because lawyers must have **consistent standards** to advise clients on litigation matters. 215 The logical question that follows is: if the law is not broken, why would the court reconsider it? NPEs may thrive in this scenario because businesses will not be enticed to challenge these small non-practicing patent holders with appeals to the Federal Circuit when no prediction can be made as to how the court may rule since the law over time will become extremely muddled over time. 216 [\*92] With patents steadily becoming a bigger and bigger part of corporate portfolios, inconsistent applications of law or uncertainty acts contrary to business objectives and may reduce interest in patents over time. 217

Finally, businesses facing inconsistency or uncertainty in patent law are exactly what Congress attempted to avoid when it created the Federal Circuit. 218 Congress understood the growing role of patents in the American economy and sought to make patent litigation easier because patent law would be uniform and centralized. 219 Businesses **prefer predictability** because it reduces **volatility** and **risk** both of which are important strategic considerations. 220 Congress recognized the importance of strong business strategies and the negative effects of inconsistent patent law. 221 That being said, with threats to the **uniformity** of patent law, neither the Supreme Court nor Congress have stepped up, and the confusion and uncertainty have lingered long enough.

III. STEPPING TO THE PLATE: ADDRESSING THE CONTROVERSY BEFORE IT HAS A CHANCE TO BEGIN.

The issue of the Federal Circuit reconsidering en banc standards with new en banc cases needs to be addressed before it can become a major issue. Two possible solutions exist: (1) the Supreme Court makes a determination as to when the Federal Circuit may reconsider en banc precedents when the Supreme Court has not intervened and (2) Congress intervenes to clarify whether its intent for the Federal Circuit included de novo review.

The Federal Circuit had an opportunity in Lighting Ballast to clarify its position on reconsidering established en banc standards. While stare decisis ultimately carried the day in the Lighting Ballast case, the Federal Circuit maintained its ability to review established en banc standards en banc without explanation. The Federal Circuit placed great emphasis on stare decisis in its reasoning for adhering to Cybor but did not explain why it reconsidered Cybor in Lighting Ballast en banc in the first place. The panel decision in Lighting Ballast was sufficient to support Cybor under stare decisis and the proper avenue was to appeal directly to the Supreme Court.

[\*93] Regardless of its actual actions, the potential of allowing the Federal Circuit to clarify its own reach in reconsidering the established en banc standard is troublesome because an issue of law is not truly decided until the highest authorities intervene. If the Federal Circuit decided in Lighting Ballast or decides later that it can reconsider and overrule en banc decisions with other en banc decisions at whim, a great amount of power would vest in that court. However, there is no need to let the Federal Circuit enter that quagmire. If the Supreme Court decides the question of the reach of the Federal Circuit first, the issue will finally be laid to rest.

As the court of last resort in this country, it is the Supreme Court's duty to resolve splits in the law. Even though the Federal Circuit did not overrule Cybor in Lighting Ballast, the Supreme Court should consider the question of whether the Federal Circuit has the ability to continually reconsider established precedent in order to protect the principle of stare decisis. The Supreme Court has consistently supported the application of precedent by the lower courts and by itself. The Federal Circuit's attempt to act contrary to that principle is an affront to the Supreme Court's history of supporting strong precedent. The issue will not be truly resolved unless the Supreme Court definitively states how far an en banc Federal Circuit can go in reconsidering its previous en banc decisions absent intervention from the Court or Congress. The Supreme Court should focus narrowly on the Federal Circuit since it is the only appeals court in the unique situation where the higher authorities have not intervened in over fifteen years. The Supreme Court already gave up an opportunity to consider this important issue fully in Lighting Ballast by granting, vacating, and remanding the Federal Circuit's decision, which essentially determines it will not consider the case fully.

The Supreme Court's choice to take the very narrow route of simply choosing a side on the patent claim construction standard of review debate in the Teva case did not go far enought. The benefits of this approach were twofold: it eliminated the confusion with regard to patent claim construction and it temporarily eliminated the threat of acting contrary to the principles of stare decisis. The primary problem with this approach is that the relief to the stare decisis problem is not definitive. The claim construction issues was solved, yet, the overarching issue of the Federal Circuit reconsidering established en banc decisions absent intervention remains.

Certainly en banc standards that stand for more than fifteen years without intervention are rare; however, that does not mean contention over established standards cannot occur again. Businesses will benefit from a clear statement of the claim construction standard of review because uniformity and consistency would be restored. However, businesses may also suffer in the end should the Federal Circuit later assert an authority to overrule en banc standards with other en banc decisions in the absence of Supreme Court intervention in future cases.

Either way, the legal system would benefit from **clarity**. Clarity with a final decision on the proper patent claim construction standard of review is helpful but not definitive. **True clarity comes from the Supreme Court** accepting its responsibility as [\*94] the bastion of the American legal system by making a determination on the Federal Circuit's use of **stare decisis**. The benefits to stare decisis, patent law, uniformity principles, and the role of the courts will all be met with **a clear pronouncement** on how **courts** should operate.

**Chevron won’t be overturned now but it’s possible---plan guts it**

**Nachmany 8-9** (Eli Nachmany, Editor-in-Chief of the Harvard Journal of Law & Public Policy. Prior to law school, Nachmany worked in the White House Office of American Innovation as a domestic policy aide and as the Speechwriter to the U.S. Secretary of the Interior, SCOTUS Faces a Chevron Decision Tree in American Hospital Association v. Becerra, <https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/>, y2k)

Chevron has become the **target of intense criticism** over the years. Some argue that deferring to an agency’s interpretation of a statute that it is charged with administering scrambles the separation of powers. Others point out that Chevron runs counter to the Administrative Procedure Act, which instructs courts to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” And still others urge that Chevron offends due process, given the systemic advantage it confers upon the government in regulatory litigation.

But is American Hospital Association the proper vehicle for overturning Chevron? Three **main obstacles** block the way toward the **overturning** of Chevron in the case. The first is the Court’s resolution of an additional question that it asked the parties to brief, concerning the reviewability of HHS’s interpretation. The second is the Court’s potential interest in a sort of Chevron exceptionalism for interpretations about appropriations provisions. And the third is the possibility that the Court itself is just **not ready** to overturn Chevron, instead preferring **an alternate path** even if it reaches the question.

For starters, the Court could stop short of the Chevron question altogether if it finds that the agency action at issue in the case is unreviewable. The Court has long held that administrative action embodies a presumption of reviewability. Essentially, the Court assumes that a given agency action is reviewable unless a statute precludes judicial review or the court has “no law to apply” in evaluating the agency’s action. The presumption of reviewability may also be a check against broad agency discretion; some judges find such discretion—as the recent revival of interest in the nondelegation doctrine evinces—constitutionally dubious.

But Professor Nicholas Bagley has called the presumption of reviewability itself into question. In a recent Harvard Law Review article, Professor Bagley argued that the presumption has no basis in history, positive law, the Constitution, or sound policy considerations. Professor Chris Walker has made the point that because of the longstanding nature of the presumption, the Court is unlikely to shift gears in American Hospital Association. Still, the Court has asked the parties for briefing on the question whether HHS’s action is reviewable. This presents the Court with the opportunity to (1) find that the statute at issue in this case falls into one of the clearly established exceptions to the presumption of reviewability, (2) cabin the presumption somewhat, or (3) draw on Professor Bagley’s work to eschew the presumption altogether. Any of these three options would allow the Court to resolve the case on non-Chevron grounds.

Next, the Court might decline to apply Chevron deference for a reason that is particular to the facts of this case. While jurists and commentators often speak of Chevron in general terms, some have posited that certain areas of public administration should obtain a sort of Chevron exceptionalism. As it pertains to American Hospital Association, Professor Matthew Lawrence has written that “[c]ourts should adopt a bifurcated approach to the application of Chevron for appropriations that disfavors deference for permanent appropriations provisions, but not for annual appropriations provisions.” Because Medicare payment flows from a permanent appropriation of federal money, the argument goes, Chevron deference would be especially inappropriate for HHS’s interpretation of a Medicare appropriations provision. This is because, according to Professor Lawrence, deferring to agency interpretations of permanent appropriations provisions may do significant violence to the separation of powers and seriously encroach on Congress’s domain. The Court could resolve the case on these grounds, or even take a slightly broader view and find that Chevron is inapplicable in the appropriations realm as a general matter. Either way, such a result would likely produce a narrow holding applicable only to a subset of administrative action.

Finally, the Court could squarely answer the Chevron question and still refuse to overrule its precedent. The Court might (1) declare that the statute is clear and, therefore, Chevron deference does not apply; (2) issue a Kisor-esque decision that cabins Chevron’s general applicability but keeps the precedent on life support; or (3) simply reaffirm Chevron on stare decisis grounds and apply it to the present case. There is some overlap among these three doctrinal paths.

Beginning with the first option, Chevron itself set forth a two-step approach. At the first step, if Congress’s intent is clear, the Court must give effect to the clear statutory text. This part of Chevron is uncontroversial—if, for example, a statute commands that an agency “shall” do something, that agency’s interpretation that it “may” (and, by corollary, may not) do the thing would not be entitled to deference, because it conflicts with the clear language of the law. As such, if the Court finds the provision at issue unambiguous, it could answer the question presented in the negative without wading into the deference debate.

The second option laid out above uses the term “Kisor-esque” to refer to the Court’s recent decision in Kisor v. Wilkie. There, the Court was faced with the question whether to overturn Auer v. Robbins, which stands for the principle that courts must defer to agencies’ interpretations of their own ambiguous regulations. In Kisor, the Court upheld Auer, but significantly cabined its application. Writing for the Court, Justice Kagan explained that Auer deference is only proper when a regulation is “genuinely ambiguous,” determined after rigorous deployment of the full set of the canons of statutory interpretation. Moreover, the Court delineated a set of situations in which Auer deference would not come into play, even if the regulation was genuinely ambiguous—these include interpretations that create unfair surprise to regulated parties, interpretations that do not implicate the agency’s substantive expertise, and interpretations that do not reflect fair and considered agency judgment.

In a concurrence, Chief Justice Roberts supplied the key fifth vote for the Kisor majority. To be sure, he wrote that “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress,” citing Chevron. But in recent years, the Court has narrowed the set of situations in which Chevron applies, establishing what Professor Cass Sunstein once termed a “Chevron step zero.” Given what the Court did in Kisor, it would not be unheard of for the Court to come out a similar way in American Hospital Association, summarizing the step zero doctrine and declining to apply Chevron deference for any one of a host of reasons (perhaps because of the permanent appropriations issue, as described above), while leaving Chevron on the books.

Proceeding to the third option, it is entirely possible (if implausible) that the Court simply upholds Chevron on stare decisis grounds. Whatever its faults, Chevron is a **landmark precedent** that has been on the books for nearly 40 years. Still, Justice Thomas has raised the possibility that Chevron is not entitled to stare decisis effect because it is merely a canon of statutory interpretation. Moreover, it is **unclear** whether five Justices on the **current** Court would join an opinion that simply upholds Chevron in its current form.

**A reckoning with Chevron may be forthcoming at the Court**, and not a moment too soon for those who would like to see Chevron banished to the anti-canon of administrative law. In fact, such a reckoning may come as soon as this term. But to overturn Chevron in American Hospital Association, the Court would need to clear a few hurdles. First, the Court would have to find that the statute at issue in the case is reviewable. Second, the Court would need to resist the temptation to merely carve out interpretations relating to permanent appropriations (or appropriations generally) from Chevron, without doing more. Third, the Court would be required to pass on a number of other possible Chevron outcomes, including a Kisor-esque restatement of Court-imposed limitations on Chevron that keeps the precedent intact.

If five or more Justices avoid these various **off-ramps**, **Chevron may be on the chopping block.**

**It’s on the brink**

**Feldman 10-3** (Noah Feldman, Bloomberg, Column: Neil Gorsuch is channeling the ghost of Scalia, https://www.yakimaherald.com/opinion/column-neil-gorsuch-is-channeling-the-ghost-of-scalia/article\_036e7bda-3502-55a1-81f4-6a6ae3210d30.html)

The **Chevron** Doctrine

Logical consistency often clashes with judicial precedent, and **Gorsuch** has long made his disrespect for precedent clear. He has argued for **dismantling** the administrative state, which has evolved into a kind of fourth branch of government that was not contemplated by the Constitution’s framers. Even Scalia, who was a teacher of administrative law before becoming a judge, never went that far. He famously defended one of the bulwarks of administrative law, the principle that judges should not intercede when government agencies interpret ambiguous statutes reasonably. Gorsuch wants to **overturn** that principle, notwithstanding that it is embodied in a well-established 1984 precedent, Chevron v. NRDC.

Given the short shrift that Gorsuch affords to precedent, not to mention his natural-law inclinations and his argument against euthanasia and assisted suicide, Gorsuch will almost surely vote to overturn the 1973 abortion-rights precedent Roe v. Wade. That vote will rehabilitate him with hard-line conservatives, whether the court ultimately joins him or not.

**But** there will be other issues where Gorsuch’s commitment to **consistency** may lead him into surprising **philosophical neighborhoods**, as in the Bostock case. Gorsuch’s activism means he is **open** to future arguments for consistency that **liberals** will doubtless direct toward him.

Whether **Gorsuch’s ambition** to achieve conservative leadership succeeds **depends** a lot on whether **other conservatives** prefer his insistence on consistency to deference to **conservative outcomes**. Justice Barrett seems to be less consistency-obsessed than Gorsuch. She is also a credible, competing heir to Scalia, having clerked for him and written several academic articles about his legacy.

In lawyer’s terms, Barrett is a more subtle doctrinalist than Gorsuch. That means she can put herself into a complex area of legal doctrine and craft a creative solution from existing legal materials. (She has already hinted as much in an important religious-liberty opinion that sought a more subtle approach than that advocated by Gorsuch.) In short, Barrett is a lawyer’s lawyer.

Gorsuch, by contrast, wants to tear down the doctrinal edifice and replace it with something new and logically consistent. In this sense he is a good son of Reagan-era conservatism, which talked the talk of revolution.

**It remains to be seen** whether today’s young conservative legal intellectuals, who will be the ultimate king or queen makers, prefer **Gorsuch’s boldness** and open ambition or **Barrett’s more lawyerly command** of what has become a generation-old conservative legal tradition.

Scalia himself had elements of both Gorsuch and Barrett in him. He was never the perfectly consistent ideologue depicted by critics and supporters alike. The coming debate between Gorsuch and Barrett about Scalia’s legacy will shape the **future of conservative jurisprudence**. And so long as conservatives control the court, that means it will determine the direction of constitutional law itself.

#### Deference is necessary for patent policy and innovation

Wasserman, ‘13 (Melissa F., B.S. in chemical engineering, Ph.D. in chemical engineering from Princeton. She received her J.D. magna cum laude from New York University School of Law. “The Changing Guard of Patent Law: Chevron Deference for the PTO”, 54 Wm. & Mary L. Rev. 1959 (2013), http://scholarship.law.wm.edu/wmlr/vol54/iss6/5)

A. Expertise∂ Scholars generally accept that the standards of patentability are∂ fundamentally policy questions that need to be decided on the basis of sound economic and technological insight.205 For example,∂ consider patentable subject matter, which delineates the types of∂ inventions that may be subject to patent protection. Section 101 of∂ the Patent Act is quite broad, setting forth the subject matter that∂ can be patented as “process[es], machine[s], manufacture[s], or∂ composition[s] of matter.”206 Early on, the Supreme Court carved out∂ abstract ideas, natural phenomena, and laws of nature from patent∂ eligible subject matter. As the Supreme Court explained, these∂ principles represent “the basic tools of scientific and technological∂ work,”207 and they are “part of the storehouse of knowledge of all∂ men[,] ... free to all men and reserved exclusively to none.”208 Thus,∂ decisions on whether new inventions, such as genes, which may or∂ may not fall within an exception, should be patent eligible are∂ largely being driven by policy concerns of whether social welfare is∂ enhanced or decreased by extending patents to these inventions.∂ As a result, there is near-universal agreement that the institution∂ charged with creating sound patent policy needs access both to∂ economic and to technological data, as well as sufficient expertise to∂ analyze and interpret this information.209 Although one of the hallmarks∂ of the comparative institutional literature is that agencies∂ possess superior information-gathering procedures and technical∂ expertise than courts,210 the specialization of the Federal Circuit∂ casts doubt on whether this norm should extend to the patent∂ system. In fact, a number of scholars have argued that the Federal∂ Circuit is the best institution to develop patent policy, in part∂ because of the court’s expertise.211 Even taking into consideration∂ the Federal Circuit’s specialization, this Section concludes that the∂ PTO is more likely than the appellate court to possess the prerequisite characteristics necessary to adjust the patentability standards∂ towards an optimal innovation level.∂ To begin, the PTO, in general, enjoys superior mechanisms of∂ gathering information necessary to make informed patent policy∂ decisions. The agency conducts hearings,212 partakes in research∂ studies,213 and works closely with other expert federal agencies.214∂ The PTO also engages in rule-making procedures, even when it is∂ not legally obligated to do so, that are specifically designed to∂ encourage interested parties to communicate relevant viewpoints∂ and information to the Agency.215 The PTO could expand this host∂ of information-gathering techniques and rely upon them more heavily∂ to collect the technological and economic data necessary to craft∂ substantive patent law standards that promote innovation.∂ By contrast, like all appellate courts, the Federal Circuit is largely∂ confined to the record developed by interested parties.216 While it∂ is true that litigants present expert witnesses that provide courts∂ with scientific and technical information that may be critical to their∂ decisional process, it is generally thought that these witnesses are∂ biased towards their retaining party. The result is that in almost∂ every case, the decision maker sees a “battle of the experts,” which∂ likely diminishes the value of information garnered from such∂ witnesses.217 Moreover, it seems unlikely that individual parties, with arguably narrow interests in upholding or invalidating a∂ patent, will even provide the court with the type of information∂ necessary to make informed policy decisions, such as data on how∂ broader or narrower patentability standards affect social welfare.218∂ Although courts have some ad hoc mechanisms to increase their∂ access to information, these approaches are poor substitutes for the∂ information-gathering powers of agencies.219 For example, while the∂ Federal Circuit routinely considers amicus curiae briefs, the appellate∂ court is still dependent on the amici submitting the right information∂ necessary to adjust the standards of patentability to promote∂ innovation. If such information is not submitted, the Federal Circuit∂ cannot, unlike the PTO, order its own fact findings to make up for∂ the deficiency.220∂ However, even assuming that the Federal Circuit had the same∂ access to technological and economic data as the PTO, little reason∂ exists to believe its ability to analyze and understand this information∂ is superior to that of the PTO. Only a handful of the Federal∂ Circuit judges hold scientific degrees.221 Even considering that the∂ majority of law clerks have a scientific background, the court’s technical∂ expertise is still quite limited. By contrast, the PTO employs∂ close to 7000 patent examiners, all of whom have been scientifically∂ trained.222 In fact, many of the patent examiners hold advanced∂ scientific degrees in the precise areas in which they work.223∂ Although patent examiners may not on a day-to-day basis partici pate in the development of guidelines or other documents that∂ represent the PTO’s viewpoint on patent policy, they are at the∂ disposal of the Agency when needed.224∂ The Federal Circuit fares even worse when its economic proficiency∂ is considered. None of the Federal Circuit judges or their∂ technical personnel are trained in economics.225 Thus, even if economic∂ data was provided to the court through some means, the∂ judges are highly unlikely to be able to evaluate the merits of such∂ studies. They will not, for example, be able to determine methodological∂ shortcomings of the empirical investigations, such as selection∂ effects or data-gathering bias. Nor are they likely to be able to∂ fully appreciate the limitations on the conclusions that can be made∂ from these studies—that is, whether the study demonstrates only∂ a correlation or whether casual inferences may be drawn.∂ Further, even though the court’s jurisprudence has been routinely∂ criticized for being formalistic and failing to consider policy,226 the∂ court has shown little interest in developing an innovation policy∂ expertise.227 The appellate court’s hesitancy to embrace an∂ explicit policy-making function is, in some ways, understandable.∂ Unequivocal policy pronouncements are somewhat antithetical to∂ judicial decision-making norms. Yet, at the same time, it is difficult∂ to understand the court’s role, especially when deciding the meaning∂ of an ambiguous term of the Patent Act, as not involving a policy∂ determination. As noted earlier, the heart of the gene-patent debate∂ is whether society would be better off with or without patents on∂ genes.∂ Notably, in contrast to courts, agencies are expressly charged∂ with making policy and weighing the costs and benefits of compet ing outcomes. Such explicit authority enables agencies to more fully∂ embrace a policy-making role of making discretionary judgments∂ based on a range of competing options. Even with such intellectual∂ freedom, the PTO has historically lacked robust economic expertise∂ that is needed to make informed policy decisions.228 Unlike other∂ agencies that specialize in technological innovation, the PTO has∂ never employed a large number of policy-oriented thinkers or economists.∂ Importantly, the Agency has recently made strides to rectify∂ this shortcoming. In 2010 the PTO created an Office of the Chief∂ Economist.229 This Office had an immediate impact on the Agency’s∂ decision making.230 Although ample room still exists to improve the∂ PTO’s personnel and infrastructure so that the Agency can make∂ sound economic judgments, the creation of the Office of the Chief∂ Economist represents an important victory—a recognition by the∂ PTO and the executive branch of the import of expertise in innovation∂ policy in patent law decision making.∂ Moreover, the enactment of the AIA makes future reforms to the∂ PTO considerably more likely.231 Perhaps most significantly, the∂ AIA granted the PTO fee-setting authority, which enables the∂ chronically underfunded Agency to raise revenue to support a robust∂ innovation policy group.232 Thus, although the PTO’s current structure∂ is not optimal for promoting innovation policy by tailoring∂ patentability standards, the Agency has the potential to change into∂ one that does. In contrast, little hope exists that the Federal Circuit∂ will ever possess the requisite expertise or institutional design∂ needed to achieve the underlying goals of the patent system. B. Capture and Institutional Bias∂ Even though expertise may give rise to distinctive advantages∂ with respect to institutional competence, specialization has an∂ associated drawback—the potential of “capture.” An institution’s∂ repeated interaction with particular groups holding narrow interests∂ may result in at least two pathologies. First, an institution may∂ develop “tunnel vision,” pursuing its own technocratic worldview∂ without sufficient regard for larger normative concerns.233 Second,∂ a narrow set of rights holders may directly capture an institution’s∂ viewpoints. The latter concern stems from the logic that concentrated,∂ well-financed groups are more likely than diffuse, less organized∂ entities to influence decision makers.234 The result in either∂ situation is that the institution will systematically make decisions∂ that favor the interest of a narrow set of constituencies over those∂ of the general public.∂ The concerns associated with capture theory are most frequently∂ attributed to agencies that have repeated interactions with their∂ regulatory constituents that could lead to distortions in agency∂ decision making. More recently, scholars astutely observed that the∂ adjudicative process is also susceptible to the influence of interest∂ groups and expanded the applications of the theory to the judiciary∂ as well.235 Of course, beyond capture concerns, other institutional∂ structures may exist that also systematically bias the organization’s∂ decision making. Although these influences may not be directly∂ related to expertise, any bias in an institution’s decisional process∂ is concerning—whether the institution is a court or an agency.∂ Like many agencies, the PTO is not immune from charges of∂ capture or institutional bias. The Agency has traditionally been structured to favor patent grants. My previous work has shown that∂ the PTO’s historical fee structure likely biased the PTO towards∂ issuing patents because the Agency garnered over half of its patent∂ operating budget through fees it could collect only if it granted patents.236∂ Moreover, widespread agreement among scholars exists that∂ the historical examiner compensation system favored allowance.237∂ Notably, all that is being asked of the PTO is to grant patents. The∂ patent prosecution process occurs ex parte; no third party is present∂ to argue that a patent should not be issued. These constant one-way∂ demands to issue patents raise concerns that the Agency may∂ develop tunnel vision. In fact, the Agency’s past rhetoric that its∂ mission includes “help[ing] customers get patents” reveals a culture∂ that appears to be unduly influenced by the interests of patentees.238∂ However, the PTO has made strides to overcome this pathology.∂ The Agency recently revamped its examiner compensation system,∂ among other things, to diminish incentives to grant patents.239∂ Recent empirical work by Mark Lemley and Bhaven Sampat finds∂ a correlation between the length of patent examiner experience and∂ an examiner’s propensity to grant a patent, and suggests that the∂ incentives facing examiners are much more complicated than they∂ were typically perceived.240∂ The passage of the AIA should further help alleviate some concerns∂ of capture or bias. Because Congress granted the PTO feesetting∂ authority, the Agency has taken steps, at least to some∂ extent, to decrease its reliance on patent issuance fees.241 The enactment of robust postgrant review proceedings should broaden∂ the Agency’s perspective, as the PTO will now routinely interact∂ with constituents that are arguing to narrow the scope of patent∂ law. Additionally, the low-cost design of the postgrant review proceedings∂ will hopefully enable substantial participation from public∂ interest groups, whose primary focus is the protection of the public∂ domain.242 The result should be increased awareness, promoting∂ innovation not only by granting patent but also by protecting the∂ public domain. Nevertheless, like all agencies, capture remains a∂ point of concern with the PTO.∂ Agency capture, however, represents a substantial objection to∂ extending Chevron deference to the PTO only to the extent that the∂ judicial alternative is superior. The specialization of the Federal∂ Circuit has led some commentators to suggest that the appellate∂ court is prone to the same institutional pathologies of tunnel vision∂ and bias of which they have accused the PTO.243 The Federal Circuit∂ hears disproportionately from the patent bar and has increasingly∂ begun to draw its technical staff—most notably its clerks—from∂ patent law firms.244 Although intellectual property law firms represent∂ both plaintiffs and defendants in patent litigation, they are∂ generally likely to benefit from broad patent rights, especially with∂ respect to patentable subject matter.245 As Arti Rai recently noted,∂ empirical data on amicus briefs supports this contention: patent bar∂ associations file amicus briefs in favor of patentees at a significantly higher rate than the government or high-tech companies.246 More∂ directly, the court’s patent law jurisprudence has exhibited some∂ symptoms that are consistent with bias. Several commentators have∂ noted that Federal Circuit precedent has trended towards strengthening∂ patent rights.247 Empirical evidence also suggests that the∂ Federal Circuit has propatentee tendencies.248 The Supreme Court’s∂ renewed interest in the development of substantive patent law and∂ its repeated reversal of Federal Circuit jurisprudence is also∂ suggestive of tunnel vision.249 Definitively proving capture of an∂ agency or a court is difficult, if not impossible. Some scholars have∂ certainly taken issue with the notion that the patent bar has∂ captured the Federal Circuit.250 Nevertheless, the possibility that∂ the Federal Circuit’s decision-making process is unduly influenced∂ by factions, at the very least, gives pause to dismissing the concept∂ of the PTO playing a larger role in patent policy based on agency∂ capture alone.251 Beyond concerns of capture or of an institutional bias to allow∂ patents, granting the PTO primary interpretive authority over the∂ core patentability standards may give rise to a fear that the∂ Agency’s policy decisions will be overly influenced by its production∂ function—that is, its growing backlog of unreviewed patent applications.252∂ Michael Abramowicz and John Duffy have noted that∂ “PTO officials might become too focused on the agency’s own workload∂ problems” to fully account for the nuances of the policy issues∂ at stake.253 As a result, Abramowicz and Duffy conclude that the∂ Agency may favor bright line rules that can be quickly applied in an∂ effort to speed up the processing of patent applications but may also∂ prevent the fine tuning needed to optimize innovation policy.254∂ Again, however, a concern that the PTO may be overly concerned∂ with the administration of substantive patent law represents a significant∂ opposition to extending Chevron deference to the Agency∂ only to the extent this pathology is absent in Federal Circuit decision∂ making. The appellate court, however, has also been charged∂ with favoring bright line, formulistic rules that may be oversimplifying∂ the policy interests at stake in the development of substantive∂ patent law. Numerous scholars have noted the Federal Circuit’s∂ penchant for easy-to-apply rules.255 Moreover, the Supreme Court’s∂ pattern of repeatedly overturning the Federal Circuit’s bright line∂ rules, while concurrently emphasizing the need for more flexible∂ standards, provides further evidence that the appellate court may∂ be giving too much weight to the administration of its pronouncements.256∂ Thus, concerns that the Agency’s substantive law determi nations may be influenced by its production function alone do not∂ appear to represent a significant obstacle to granting the PTO∂ Chevron deference.∂ In sum, the PTO possesses superior pathways to acquire technological∂ and economic data, as well as the expertise to evaluate and∂ analyze this information to craft substantive patent law standards∂ to promote innovation. Even though neither the Federal Circuit nor∂ the PTO has historically shown strength in policy making, the PTO∂ has recently made significant strides to correct this deficiency.∂ Moreover, although agencies in general are more likely to be captured∂ by organized interests, the fact that the Federal Circuit has∂ exhibited symptoms consistent with tunnel vision at times suggests∂ that this concern is not significant enough to outweigh the PTO’s∂ associated benefits of expertise. Thus, this Section ultimately∂ concludes that both expertise and the avoidance of capture support∂ the Federal Circuit granting Chevron deference to the PTO.

#### Chevron is key to patent review and PTO credibility – incentivizes precise litigation

Chen, ‘8, (Thomas, Law Clerk to Alvin A. Schall, United States Court of Appeals for the Federal Circuit, J.D. University of Virginia Law School, “PATENT CLAIM CONSTRUCTION: AN APPEAL FOR CHEVRON DEFERENCE,” Virginia Law Review, Vol. 94, No. 5 (Sep., 2008), pp. 1165-1212)

Patent claim construction would greatly benefit from a Chevron∂ based system of deferential review, since many of the theoretical∂ and practical justifications for Chevron deference apply with equal∂ force in the claim construction context. First, observers have com∂ mented that Chevron deference best captures agencies' "certain∂ well-recognized advantages" and superior experience with inter∂ preting their own statutes.71 Likewise, Judge Rader has observed∂ that trial judges enjoy a similar advantage over appellate courts in∂ claim construction:∂ [T]he trial judge enjoys a potentially superior position to engage∂ in claim interpretation.... Trial judges can spend hundreds of∂ hours reading and rereading all kinds of source material, receiv∂ ing tutorials on technology from leading scientists, formally ques∂ tioning technical experts and testing their understanding against∂ that of various experts, examining on site the operation of the∂ principles of the claimed invention, and deliberating over the meaning of the claim language. If district judges are not satisfied∂ with the proofs proffered by the parties, they are not bound to a∂ prepared record but may compel additional presentations or∂ even employ their own court-appointed expert.∂ An appellate court has none of these advantages?2∂ Thus, just as Chevron deference to an agency's statutory interpretation is proper because of that agency's repeated contact with the∂ same statute, deference to a district court's claim construction is∂ justified by virtue of that court's greater familiarity with evaluating∂ evidence.∂ A second justification for Chevron is that it maintains separation∂ of powers between the judiciary and the executive branch, by pre∂ venting courts from intruding upon administrative agencies' policymaking responsibilities.73 Similarly, applying Chevron deference∂ to claim construction would reinforce the fundamental allocation∂ of responsibility between the trial and appellate courts, thereby∂ improving the legitimacy of claim construction appeals. As the Su∂ preme Court intimated in Markman II, claim construction is a∂ "mongrel practice"74 with "evidentiary underpinnings"75 that render∂ it "somewhere between a pristine legal standard and a simple his∂ torical fact."76 Appellate review, based on briefs and fifteen min∂ utes of oral argument per side, is not suited for de novo findings of∂ disputed technological factual questions.77 Applying Chevron def∂ erence to claim construction appeals would prevent the Federal∂ Circuit from disregarding or repeating the trial court's previous∂ fact-finding efforts, thus improving the legitimacy of appellate re∂ view and preserving the time-honored fundamental allocation of∂ factual versus legal questions between trial and appellate judges.∂ Third, Chevron deference is thought to improve the quality of agency proceedings, by giving the agencies "more interpretive authority" and thus incentives "to take more responsibility for interpreting" relevant statutes.78 Similarly, the quality of arguments by∂ litigants before the agencies should also improve because deferential review increases the incentive to litigate "clearly and aggressively[] before the agency rather than waiting for the main event at∂ the courthouse."79 Federal Circuit judges have in fact remarked∂ upon these arguments in the claim construction context, noting∂ that they provide a compelling justification for applying Chevron∂ deference to patent claims. For instance, Judge Moore has sug∂ gested that greater deference would potentially result in "more∂ thoughtful claim construction by district court judges" by encour∂ aging them "to invest more time in the process, resulting in better∂ decisions."80 Likewise, Judge Rader has lamented that Cybor is re∂ sponsible for excessive claim construction appeals which reduce∂ the trial court to a mere "ticket to the real center stage, the Court∂ of Appeals for the Federal Circuit."81 In his view, granting defer∂ ence would wisely "restore the trial court's prominence in the∂ claim interpretation function."82∂ The final justification for Chevron deference, and the most im∂ portant for purposes of improving claim construction, is that deferential review encourages clearer draftsmanship. Like patent claims,∂ many statutes are intentionally drafted with imprecision and ambi∂ guity.83 Chevron deference improves legislative drafting by inform∂ ing Congress that any ambiguities "will be resolved [only] within∂ the bounds of permissible interpretation,"84 providing an incentive∂ to limit agency discretion by drafting clearer, more specific stat∂ utes.85 This preference for clarity over vagueness applies with equal∂ if not greater force to patent claim language. Chevron deference∂ would provide a powerful incentive for patentees to draft their∂ claims with greater precision, or face the risk of an unfavorable in terpretation that need only be reasonable to be affirmed by the∂ Federal Circuit.∂ Thus, the theoretical and practical justifications for Chevron∂ deference to agency statutory interpretations are equally relevant∂ to patent claim interpretations. Examining the precise nature of∂ claim construction in various contexts reveals important insights as∂ to the proper reach and limits of Chevron deference.

# 2NR

## Rates adv

#### Powell won’t do it—he’s the only one that matters & the distance between tapering and interest rate hikes are key to the global markets

Irwin 11/3/21 (Neil, senior economics correspondent for The New York Times, “What Jerome Powell Didn’t Do: Lay the Groundwork for Higher Rates”, https://www.nytimes.com/2021/11/03/upshot/powell-fed-rates-inflation.html)

The thing that Mr. Powell didn’t do was give any hint that persistently high inflation in recent months was leading him to rethink his patient approach to raising the Fed’s interest rate target. Rather, he repeated his longstanding belief that high inflation was mostly caused by disruptions in global supply networks and other ripple effects of the pandemic — problems that the Fed can’t do much about.

It is a delicate moment. President Biden must decide whether to reappoint Mr. Powell to a second term leading the Fed. High inflation is causing economic discontent for Americans, according to surveys, and helping to drag down the president’s approval ratings. Global bond markets have been gyrating amid uncertainty about whether the era of ultralow interest rates may be coming to an end.

\*\*MARKED\*\*

On interest rates, Mr. Powell rejected the thinking of leaders at several other leading central banks and of a handful of his own colleagues. They think that excess demand in the economy is a big part of the inflation problem and that rate increases would help address it — and that current high inflation could become ingrained in economic decision-making, with long-lasting consequences.

If he had expressed more alarm about those inflationary pressures, it would have been a signal that the Fed might act to raise rates more abruptly than it once planned. The Bank of Canada, the Reserve Bank of Australia and the Bank of England have recently done just that. Several Eastern European central banks are going a step further, aggressively raising rates to try to combat inflation (including a 0.75-percentage-point rate increase by the Polish central bank on Wednesday).

Mr. Powell himself has essentially conceded in recent appearances that surging prices due to supply disruptions are on track to last longer than he expected. He said in late September that it was frustrating that supply chain bottlenecks weren’t improving and might be getting worse, and said this would hold inflation higher for longer than the Fed had thought.

But he was steadfast on Wednesday in not suggesting that those developments were a reason to accelerate the Fed’s interest rate hike plans. He suggested those would need to wait until the tapering of bond purchases was complete and until Fed officials concluded the economy had achieved maximum employment.

“We understand the difficulties that high inflation poses for individuals and families,” Mr. Powell said Wednesday. But he continued: “Our tools cannot ease supply constraints. Like most forecasters, we continue to believe that our dynamic economy will adjust to the supply and demand imbalances, and that, as it does, inflation will decline to levels much closer to our 2 percent longer-run goal.”

With language like that, he was declining to embrace the use of “open-mouth policy,” or of essentially trying to assuage inflation fears by using more specific language to suggest the Fed had a hair-trigger readiness to take immediate action to head off higher prices.

He appeared to be applying the lessons of the 2010s labor market in setting the central bank’s course. Over that decade, unemployment kept falling lower, with participation in the work force rising higher than many analysts had thought plausible. With hindsight, the Fed may have erred by raising interest rates prematurely, slowing that process of labor market improvement.

In a 2021 context, that means allowing more post-pandemic healing of the labor market before assuming, for example, that many of the Americans who currently say they are not in the labor force will return as public health conditions improve.

“There’s room for a whole lot of humility here as we try to think about what maximum employment would be,” Mr. Powell said. The last economic cycle, he said, showed that “over time you can get to places that didn’t look possible.”

He also appeared to be deploying another lesson from the 2010s — namely those learned in the 2013 “taper tantrum” when global markets went haywire as Chair Ben S. Bernanke moved to taper the Fed’s bond purchases.

A key lesson of that era is that tapering needs to be telegraphed far in advance, and separated as much as possible from the decision to raise interest rates. In that episode, markets experienced a double-whammy as they envisioned both a winding down of the Fed’s bond buying and rapidly raising rates.

With his assurances Wednesday that the Fed wasn’t in a hurry to raise rates, Mr. Powell was essentially trying to avoid that problem.

#### No moral hazard

Degryse 21 (Professor of Finance at the Department of Accountancy, Finance and Insurance of the KU Leuven, The effects of ‘global systemically important bank’ designation on corporate lending, 1-29, <https://voxeu.org/article/effects-global-systemically-important-bank-designation-corporate-lending>, y2k)

Conclusion

We exploit the first global systemically important bank designation on 4 November 2011, as well as the publication of a preliminary designation list by the Financial Times, to examine how designated institutions adjust their lending behaviour and whether this adjustment has any effect on the real economy. Overall, we find that designation causes an economically relevant decrease in corporate lending in the syndicated loan market at the intensive margin, and that it induces designated institutions to stop lending to some borrowers at the extensive margin. The lending cut seems to occur across industries but is concentrated among risky corporate borrowers. This implies a lower risk profile under the FSB framework, resulting primarily from stricter supervision. Our findings therefore suggest a decrease of designated institutions’ risk-taking in the corporate loan market, which is in line with the intended effects of the policy – namely, to reduce ex ante moral hazard among systemically important banks.