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## 1NC

### 1NC – SEC CP

#### The United States Securities and Exchange Commission should:

* Prohibit Section 13(d) filers from acquiring additional shares past 1% ownership threshold unless it is a free-standing index fund that commits to being purely passive
* Prohibit activist tips during the period before filing under Section 13(d)
* Expand disclosure requirements

The United States federal government should increasing prohibitions on investors that hold shares of more than a single effective firm in an oligopoly owning more than 1% of market share unless it is a free-standing index fund that commits to being purely passive

#### That solves

Strine 20 [Leo Strine University of Pennsylvania Carey Law School; Wachtell, Lipton, Rosen & Katz, "Stewardship 2021: The Centrality of Institutional Investor Regulation to Restoring a Fair and Sustainable American Economy", 10/23/20, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3719145]

To fully address the lack of accountability and information about hedge funds and other private investment funds, however, regulatory action of the following kind must be taken:

 Close loopholes so that activist hedge funds must make a full and timely disclosure of their economic interests in the companies they seek to influence, and bring America’s regulation into line with the other major market economies.

To this end, the SEC should revise its rules governing Schedule 13D disclosure so that: (i) the definition of beneficial ownership includes ownership of any derivative instrument that provides the opportunity to profit from an increase in the value of the subject security and any contract or device that allows the person to control the voting power of the equity security; (ii) disclosures of any short interest or ownership of a derivative instrument that allows the investor to profit from a decrease in the security’s value are required; (iii) 13D filers could not acquire additional shares (or derivatives) once the investor crosses the 5% threshold (for large-cap companies) or a 10% threshold (for smaller companies) until a 13D has been filed and available to the public for 24 hours; (iv) disclosure is required of contractual or other arrangements that affect the filer’s commitment or ability to hold the subject security, including the ability of the filer’s investors, if any, to redeem or withdrawal their capital; and v) a standard form is developed that activists must use to disclose, in clear understandable terms, their net long position and keep it updated as that changes by more than one percent in any direction.

Strengthen the securities laws to make it illegal for activists to tip others during the period before they file under Section 13(d): There is abundant evidence of abnormal trading by pack members before the alpha wolf files makes public disclosure of its stake. This allows for the possibility of creeping takeovers at the expense of other stockholders and stakeholders, and is unfair to other traders in the market place. Given the power activists have to move stock prices just by their presence, they should be prohibited from leaking to other investors during this period and if they do so and trading results, they should face liability.33

 Address the investor and societal risks caused by private funds that are subject to only limited disclosure requirements. Although hedge funds and private equity funds should not be required to disclose proprietary information about their trading strategies that would inhibit their ability to conduct their unique approach to investing, it is long past time when they should be permitted to cloak their track records, their terms of investment, special deals to their favorites, and other important information because their investors should be presumed able to operate on a caveat emptor basis. The accredited investor and qualified purchaser exceptions were not intended to allow pension funds, universities, or charitable institutions to put money in risky investments not backed up by appropriate disclosures and standards of integrity. But many have been harmed by investing in private equity and hedge funds without adequate information. These losses hurt workers and society and can require taxpayers to fill the resulting holes. Pension funds and charities lack enough reliable information to prudently assess whether these investment are appropriate for their portfolio on both a risk-return basis and on a cost basis. The SEC and Congress should work together to fix this important problem.

Finally, to promote more thoughtful, rational investing by both human customers of the institutional investor community, and the institutional investors themselves, the tax policies affecting the industry should be reformed. In particular, a financial transactions tax should be adopted that would not only discourage destabilizing and risky speculative trading without economic substance, but discourage fund-hopping by mutual fund investors. Likewise, the long-standing abuse of the carried interest loophole should be shut, and capital gains for holdings of less than five years should be taxed like income earned by sweat.

By these means, the incentives for productive investing that is positive for society will be increased, and the revenues raised in this Pigouvian manner can help fund clean infrastructure to address climate change and create quality jobs, basic research to fuel long-term growth and American competitiveness, and investments in the ongoing training and education of American workers.

\* \* \*

None of these reforms will harm the institutional investment industry in the long term. Rather, they will legitimize an industry whose power has long outgrown its expected responsibilities. And done in concert with a 21st Century New Deal to focus our economy on sustainable growth, environmental responsibility, and, most of all, the fair treatment of the workers who make capitalism a success, these measures will create a more equitable and prosperous America, and by doing so, expand the class of Americans who have the means to invest with the industry for college for their kids, retirement for themselves, and enjoy genuine economic security. All that this involves is making sure that a powerful segment of our economy’s responsibilities be aligned with its power. Put another way, all that is required is that the have’s do a little for the common good. That is not much to ask.

### 1NC – FDI DA

#### FDI’s rebounding but highly competitive – policy certainty is key

Kusek 21 [Peter Kusek, Senior Economist and Global Lead, World Bank. Caroline Freund, Dean of the UC San Diego School of Global Policy and Strategy. Abhishek Saurav, Senior Economist with the Global Investment Climate Unit of the World Bank Group’s Finance, Competitiveness & Innovation Global Practice. “Foreign investors cautiously see brighter skies ahead after pandemic shock.” 5/3/21. https://blogs.worldbank.org/psd/foreign-investors-cautiously-see-brighter-skies-ahead-after-pandemic-shock]

The outlook for foreign investment is beginning to look a bit brighter after more than a year of severe shock from COVID-19. The pandemic affected output and trade, and caused global foreign direct investment (FDI) flows to fall by more than 40 percent. While global trade rebounded in the second half of 2020, FDI remained weak. But with the global economy expected to grow by 4 percent in 2021, foreign investors may be ready to plan for future expansion—with caution.

Results from the latest World Bank’s quarterly Global Pulse Survey of multinational enterprises (MNEs) in developing countries show a stabilizing investment outlook for MNEs compared with earlier rounds of the survey in 2020. Three-quarters of respondents surveyed in the fourth quarter (October-December) expected to maintain their current level of investment and very few expected to reduce investment. MNEs also reported limited plans for a significant reorganization of investment locations, business models, or supply chain structures.

Still, uncertainty over the course of the economic recovery remains. Foreign direct investment has the potential to support recovery by creating jobs and boosting productivity. To realize this potential, it is critical for countries to have in place the right FDI policies to enhance their competitiveness and give firms the confidence to invest.

Lingering pandemic effects

Despite the gradual improvement overall, the survey showed that the adverse effects of the pandemic were still felt in the fourth quarter of 2020. More than 90 percent of respondents reported being adversely affected in at least one business dimension in both the third and fourth quarters of last year.

MNEs in the manufacturing sector continued to be more negatively affected than those in services, a trend largely driven by weak demand and lingering supply chain disruptions. The sample in the service sector included mainly companies in IT, finance, professional, and logistics services. A higher share of manufacturing firms (71 percent) reported reduced output, compared to 55 percent of service sector firms.

Figure 1: Effects of the pandemic were still being felt in Q4, although the situation is improving

Stabilizing foreign direct investment

After a steep decline in FDI in 2020, investors are still largely waiting on sidelines. FDI data indicate that the pipeline for greenfield investment is limited. The value of new greenfield FDI announcements in developing countries plunged in 2020 and remained more than 50 percent below 2019 levels in the fourth quarter.

However, survey data suggested that the near-term outlook for foreign investment is stabilizing. In the previous survey round (third quarter of 2020), 39 percent of respondents indicated that their parent company planned to invest less. In the current round this share dropped to about 1 percent, suggesting MNEs’ earlier negative outlook may have been driven by short-term investment plans.

Nonetheless, few MNE affiliates are planning to expand investment in the next one to three years. Three quarters of firms reported that investment levels were expected to remain the same (up from 46 percent in the third quarter), while 17 percent expected investment to increase (up slightly from 13 percent in the third quarter).

Figure 2: Cautious optimism amid uncertainty—the investment outlook in the next 1-3 years is stabilizing

Policies, Growth, and Costs Remain Key to Competitiveness

Survey data confirm what literature has consistently shown about the importance of FDI policies in shaping the attractiveness of countries as investment destinations. Among MNE affiliates that expect their parents to invest more in the host economy in the coming years, nine out of ten identify expected or realized changes in the investment policy environment as a driver of their expansion plans.

Figure 3: New investments are driven by FDI regulations, growth markets, and low cost (n = 56)

New investments graph

With prospects of global recovery expected to be uneven, multinational companies are also significantly driven by shifts toward countries that offer larger markets or faster-growth opportunities. Four in five businesses cited this motivation. As always, cost competitiveness of host economies remains a major driver of investment plans. Three in five cited this motivation. To a lesser degree, some investment decisions could be driven by diversifying production locations and adjustments in global value chains aimed at nearshoring or reshoring.

The near-term outlook for foreign investment may be stabilizing, but it will remain highly competitive. Countries should use the crisis as an opportunity to reform trade and investment policies, boost investor confidence, so they can attract foreign investment capital needed to underpin recovery.

#### The plan decks FDI – risk aversion, information asymmetries, protectionist application

Clougherty 21 [Joseph A. Clougherty, Gies College of Business, University of Illinois at Urbana-Champaign, Nan Zhang College of Business Administration, California State University Stanislaus, "Foreign investor reactions to risk and uncertainty in antitrust: U.S. merger policy investigations and the deterrence of foreign acquirer presence", April 2021, Journal of International Business Studies, https://experts.illinois.edu/en/publications/foreign-investor-reactions-to-risk-and-uncertainty-in-antitrust-u]

The concept of risk goes back to Knight’s (1921) fundamental insights, where he considered risk to be a known probability distribution over a set of events; for example, flipping a coin involves risk, but with known odds. In moving from the concept of risk to its application in IB political risk, Kobrin (1979) observes that risk is at play when managers have knowledge regarding the possibility and probability of different political outcomes via either calculations or past experience statistics. While the relevant information is available with political risk, and observers generally agree with respect to the probabilities of different outcomes, foreign investors are often considered to be at a disadvantage as compared to domestic investors due in part to inherent information asymmetries (Gehrig, 1993; Gordon & Bovenberg, 1996; Liesch et al., 2011). As Gehrig (1993: 98) makes clear, “information may have to be interpreted in the light of the legal conventions and business culture of a particular community, which may be difficult for foreigners to assess”. Thus, domestic investors are better informed and better able to interpret the relevant probabilities as compared to foreign investors, and, as a result, foreign managers tend to overestimate the risks and underestimate the benefits involved with host-country investment activities (Liesch et al., 2011). Simply put, the lack of information, knowledge, and experience with respect to the intricacies of host-country activities accentuates the perceptions of risk when considering foreign investments. A great deal of the political risk literature accordingly focuses on the probabilistic estimates of different policy outcomes and how increased risk leads to decreased foreign investment activities. With the above as a backdrop, we consider how the policy risk involved with merger control might disproportionately affect foreign investors considering participating in the local markets for corporate control.

First, the presence of a host-country merger policy involves transaction costs that foreign investors must factor when deciding upon whether – and to what extent – to make a cross-border acquisition. Navigating the host-nation’s merger review process also involves several direct costs – e.g., legal, transaction filing, and advisory services fees – in order to clear the transaction (Hemphill, 2010). In addition, acquiring firms face internal organizational costs that require in-house legal expertise as well as managerial time and commitment due to the presence of host-nation merger policies. Importantly, the direct costs and transaction costs involved with the merger review process are particularly salient for foreign acquirers as compared to domestic acquirers. For one, foreign investors will be generally unfamiliar with the institutions, values, norms, and networks that are embedded within the host-nation’s antitrust institutional environment (Jorde & Teece, 1990). For example, General Electric exhibited unfamiliarity with European Commission (EC) regulatory procedures in offering concessions to EC officials for the proposed Honeywell acquisition that would have been more appropriate in the U.S. institutional context (Desai, Villalonga, & Veblen, 2005; The Economist, 2001). As such, acquiring firms often enter negotiations with antitrust officials in order to come to a negotiated settlement with respect to the conditions and remedial actions necessary for successful resolution of antitrust concerns (Farrell, 2003). Yet, as Grosse and Behrman (1992) highlight, multinational firms are at a distinct bargaining disadvantage when the host-country institutions are strong and when the multinational lacks salient information about the institutional environment. As a result, the policy risk involved with greater degrees of merger policy enforcement will lead to disproportionate deterrence of foreign acquirer activities as compared to domestic acquirer activities, due to foreign acquirers being more likely to incur costly and inappropriate regulatory efforts that do not ultimately deliver successful antitrust approval.

Second, foreign acquirers will tend to be more risk averse as compared to domestic acquirers when factoring the costs involved with greater degrees of merger policy risk. As George, Chattopadhyay, Sitkin, and Barden (2006) point out, risky behavior is more likely when managers perceive a sense of mastery or control over a particular domain; thus, higher degrees of merger policy risk will not be experienced by foreign investors with the same sense of control over the review process as experienced by domestic investors. In fact, Kobrin (1979) highlights that perceptions of risk are a function of the available information and previous experiences – qualities which are both less likely to characterize foreign acquirers as compared to domestic acquirers. Liesch et al. (2011: 856) summarize the above well when they state “many firms have been found to be lacking in information and knowledge about, and experience in … the practicalities of international activity” thereby accentuating perceptions of political risk. As a result, the policy risk involved with greater degrees of merger policy enforcement will lead to disproportionate deterrence of foreign acquirer activities as compared to domestic acquirer activities due to the inherent differences in risk tolerance exhibited by foreign and domestic investors.

Third, the application of merger policy might disproportionately target the acquisitions undertaken by foreign investors as compared to the acquisitions undertaken by domestic investors. Vadlamannati (2012: 115) outlines how a substantial amount of political risk derives from the fact that governments often “buckle under lobbying pressure from local firms seeking preferential treatment vis-à-vis the foreign firms”. Antitrust agencies are ostensibly independent from political influence; yet, in very few instances are such institutions fully independent of politics. In fact, a number of scholars (e.g., Coate, Higgins, & McChesney, 1990; Faith, Leavens, & Tollison, 1982; Mehta, Srinivasan, & Zhao, 2020; Neven, Papandropoulos, & Seabright, 1998) consider antitrust outcomes to be – at least partially – subject to political pressure. Yet, foreign firms suffer from a liability of foreignness when attempting to influence national authorities, as they are simply less capable and legitimate as compared to domestic firms in terms of employing the political economic mechanisms that yield privileges via corporate political strategy (Boddewyn, 1988; Grosse, 2005; Hymer, 1976 [1960]; Kindleberger, 1969; Zaheer, 1995). Accordingly, antitrust authorities face political pressure to provide some leniency that favors domestic investors (Rodriguez & Menon, 2010). In line with these priors, the Chinese (Horton, 2016; Zhang & Zhang, 2010) and EC antitrust authorities (Aktas et al., 2007; Dinc & Erel, 2013) have been reported to protect indigenous firms by treating domestic acquisitions more leniently than foreign acquisitions. As a result, the policy risk involved with greater degrees of merger policy enforcement will lead to disproportionate deterrence of foreign acquirer as compared to domestic acquirer activities due to foreign acquirers receiving greater antitrust scrutiny.

Summarizing the above, merger policy risk likely involves a larger deterrence effect with respect to foreign acquirer activities as compared to domestic acquirer activities in local M&A markets due to the presence of three mechanisms. First, merger policy involves costs that acquiring firms must incur while navigating the merger review process, and foreign investors disproportionately experience these costs due to their inherent liabilities and information asymmetries. Second, foreign investors tend to be more risk averse as compared to domestic investors which in turn generates more cautious investment behavior. Third, antitrust agencies potentially scrutinize the acquisition activities undertaken by foreign investors more than the acquisition activities undertaken by domestic investors. These three mechanisms negatively impact foreign acquisitions of indigenous firms and deter future foreign investors who refrain from cross-border acquisitions due to the presence of these realities (Dinc & Erel, 2013). Based on the above reasoning, our first theoretical prior can be formulated as follows:

#### Great power war

Bussman 10 [Margit Bussman, Professor of International Relations, University of Greifswald. “Foreign direct investment and militarized international conflict.” March 2010. https://www.jstor.org/stable/25654551]

Abstract

Liberals claim that countries avoid conflict in order not to disrupt economically beneficial exchange. The statement that economic integration reduces the likelihood of conflict is largely based on the effects of trade. A similar rationale can be applied to economic interdependence in the form of international capital exchange. A state is expected to avoid political risk, especially severe forms such as militarized disputes, in order not to deter investors. This study tests, on the dyadic and monadic levels of analyses, whether the liberal peace proposition holds when economic integration is operationalized as foreign direct investment (FDI) stocks, inflows, and outflows. The results for the years 1980-2000 indicate that inflows and stock of foreign investment reduce the risk of an outbreak of a fatal dispute, regardless of whether they are tested in a single equation or a simultaneous equation model. Thus, reverse causality does not bias the pacifying effect of foreign investment inflows and stock. The results also support the underlying notion of the commercial peace that militarized conflicts inhibit foreign investment. The onset of a fatal conflict reduces FDI inflows, and, if tested in a two-stage instrumental variable approach, FDI stock, the most complete measure of economic integration through foreign investment. Accounting for endogeneity seems particularly important when analyzing the link between the onset of fatal disputes and the outflow of FDI.

Introduction

The notion that economically integrated states are less likely to be involved in militarized disputes attracts widespread attention in the peace research community. However, the focus is on one aspect of economic integration: trade of goods. Other forms of economic exchange do not receive the same consideration. This is a shortcoming, especially with regard to the growing nature of the exchange of international production. From 1980 to 2002, foreign direct investment (FDI) stock increased tenfold, with a particularly drastic rise in developing countries in the 1990s, when the growth of FDI stock exceeded the growth of world exports (UNCTAD, 1995, 2003). As with trade, foreign investment could be an important factor in promoting peace. States might avoid violent conflict in order not to deter foreign investors.

In turn, the presence or anticipation of armed conflicts plays a potentially crucial role in disrupting not just trade flows (Long, 2008) but also foreign investment. Location decisions of investors are driven not only by the economic policy of the host country but also by the political risk involved. There are several providers that offer political risk assessments to governments and private companies, such as the Economist Intelligent Unit or the Political Risk Services Group that account, among others, for international disputes as a risk factor in the political environment. The importance of war for foreign investment decisions is also reflected in various national investment guarantee programs that insure against political risk. For example, the US government, through the Overseas Private Investment Corporation, or the German government, through PwC Deutsche Revision, permit coverage against expropriation risk, currency inconvertibility risk, and war risk (Wells, 1998). War risk includes hostile actions taken by national or international forces, civil war, revolution, insurrection, or terrorism. By avoiding conflicts and ensuring political stability, host countries can thus create an environment that is favourable to FDI. This study tests whether the liberal peace proposition holds when economic interdependence is operationalized as foreign direct investment inflows, outflows, and stock.

The results indicate that FDI inflows and stock reduce the risk of an onset of a fatal dispute. Endogeneity does not seem to bias this finding. Instead, reverse causality might impede the analysis of the effect of conflict on FDI. The finding that the onset of a fatal conflict reduces FDI inflows, outflows, and stock is significantly supported only if we estimate the relationship in a two-stage model. The results underline the importance of properly accounting for endogeneity when testing the relationship of conflict and economic integration. The endogenous character seems especially crucial for the analysis of the link between outflowing capital and conflict.

Economic interdependence and international conflict

Classical liberal theory states that the existence and spread of free trade regimes reduce the likelihood of conflict. Economically interdependent states are reluctant to become involved in militarized disputes out of fear that conflict disrupts trade and foreign investment and thus induces costs on the opponents. Suspending trade and investment would decrease the income for many industries and reduce economic growth. By creating higher interdependence among countries, mutually beneficial trade encourages states to look for peaceful solutions to conflicts. It is not in a country's interest to go to war with a state with which its private economic agents maintain an extensive exchange of goods and capital (Russett & Oneal, 2001). Hence, the cost-benefit calculations keep states from getting involved in a militarized conflict out of fear of deterring foreign investment. Companies invest in a foreign country because they want to earn higher profits. Benefits depend largely on the size of the market and its potential for development (e.g. Schneider & Frey, 1985). An additional component in the cost-benefit calculations of enterprises is the assessment of economic and political risks. Militarized disputes are such a political risk that investors take into account. If the costs associated with this risk are higher than the expected benefits, corporations might decide against the investment, unless the country is affected by conflict to a small extent so that the risk for investors is minor or non-existent.

Recent theoretical developments qualify the cost-benefit calculations of trade and introduce information as an important component in the explanation of the pacifying aspect of economic interdependence. Through trade and other forms of economic interaction, states reveal information, and thus relations become more transparent and reduce uncertainty. Increased interdependence not only raises the costs of a conflict, but also improves the information about the estimated costs a conflict might impose on its opponents and how these costs are distributed (Reed, 2003). If informational asymmetry is an important cause of conflict, methods, other than war, that reduce uncertainty by sending costly signals can promote peace (Fearon, 1995). Globalization facilitates costly signaling by making communication credible and talk costly. It becomes more difficult for leaders to act politically without considering the economic costs. Thus, global markets act as a forum to signal resolve (Gartzke & Li, 2003; Gartzke, Li & Boehmer, 2001).

### 1NC – Politics DA

#### Omnibus package will pass now absent partisan fights or stalls this weekend. That secures support fur Ukraine, ensures readiness, and reassures Eastern European allies.

Wong 3/3 [Scott Wong and Sahil Kapur, "Ukraine conflict adds urgency as Congress races to fund government", 3/3/22, https://www.nbcnews.com/politics/congress/ukraine-conflict-adds-urgency-congress-races-fund-government-rcna18643]

The deadly war in Ukraine, worsening by the day, has increased the urgency for lawmakers to strike a bipartisan deal on a massive government funding package that almost certainly would include emergency aid for the Eastern European country.

Congress faces a fast-approaching deadline — the government will shut down next week without any action — and related funding issues are quickly piling up.

The White House requested Thursday that $10 billion in emergency defense and humanitarian aid for the Ukraine conflict be linked to the larger omnibus spending bill, up from $6.4 billion in aid just a few days ago. President Joe Biden also wants another $22.4 billion in coronavirus aid to develop new testing, therapeutics and vaccines to fight future variants of the virus.

Both Democratic and Republican appropriators said Thursday that it was imperative to pass a government funding package, with emergency money for Ukraine, before the March 11 deadline.

“To kick the can down the road and pass another short-term stopgap measure, known as a continuing resolution, or CR, would be a “dereliction of duty,” said Senate Armed Services Committee Chairman Jack Reed, D-R.I., who is also on the Appropriations Committee.

Passing an omnibus package that funds federal agencies through September, he said, would give the Defense Department more certainty and better ability to respond to the crisis in Ukraine and shore up defenses at home.

“I think we need to pass the omnibus for the Defense Department, because they’re operating right now, and they need the certainty that the omnibus will give them in terms of funding levels,” Reed said. “And we have to basically deal with all the unexpected expenses that are happening in Ukraine.”

Sen. Rob Portman, R-Ohio, a former White House budget director who is a member of the Foreign Relations Committee, said he has personally heard from U.S. military commanders that “another CR will really hurt our readiness.”

"Now, in particular, we want to do everything we can do to enhance our readiness so that we can help protect not just Ukraine but also our Eastern European allies who are under such pressure,” Portman said. “So, yeah, we need to pass the omnibus.”

The $10 billion package would pay for humanitarian, security and economic assistance for Ukraine and central European allies “due to Russia’s unjustified and unprovoked invasion,” Shalanda Young, the acting White House budget director, wrote in a letter Thursday to congressional leaders.

“Given the rapidly evolving situation in Ukraine,” she wrote, “I anticipate that additional needs may arise over time.”

Shortly before the Senate wrapped up on Thursday, however, a senior GOP aide speculated that a stopgap bill may be necessary to prevent a shutdown next week.

Sen. Richard Shelby, R-Ala., the ranking member of the Appropriations Committee, said this weekend would be “crucial” in determining whether another continuing resolution is needed.

“We can’t afford to stall this weekend. If we do, we’re headed for a CR,” Shelby told reporters.

#### Antitrust ruins bipart—Republicans link it to other partisan disputes

Ghaffary 20 [Shirin Ghaffary, "Republicans showed why Congress won’t regulate the internet", 7/29/20, https://www.vox.com/recode/2020/7/29/21347128/big-tech-antitrust-hearing-facebook-zuckerberg-amazon-bezos-apple-cook-google-pichai]

Allegations that social media platforms have an anti-conservative bias has for years been a rallying cry of President Trump and the Republican party. And leading up to Wednesday, Republicans attacked the focus of the Democrat-run House Judiciary subcommittee hearing — calling on it to focus more on anti-conservative bias and for Twitter CEO Jack Dorsey to appear. Twitter is a small company compared to, say, Facebook, but it has recently taken measures to moderate President Trump’s posts for violating policies around misinformation and hate speech, enraging Republicans.

Democrats, meanwhile, tried to steer the conversation back to issues more directly relevant to antitrust, like if and how these companies intimidate their competition, such as when Facebook acquired its then-rival Instagram in 2012; or whether these companies exploit their users’ privacy, like how Google tracks individuals’ online browsing across the web with cookies; or if Apple is shutting out its competitors by taking an unreasonable cut of profits coming in from independent app developers in its App Store.

What really matters here is whether these companies’ business practices are ultimately harming consumers, most of whom have no choice but to use Big Tech in one way or another if they want to do basic things online like search the web, order goods, or stay in touch with their friends.

In an earlier era, Republicans and Democrats on the committee might have come together to try to focus on what’s been seen as an area of relative bipartisan agreement: protecting the free market. That didn’t happen at today’s hearing. Instead, it was a display of partisan divides.

#### Ukraine conflict will go nuclear. Only sanctions solve—imposing larger costs demonstrates resolve and deters further adventurism in the Baltics

* Not escalating means Putin will escalate faster in the next conflict
* Sanctions are the best brake on escalation

The Economist 3/5 [The Economist, "When Vladimir Putin escalates his war, the world must meet him", 3/5/22, https://www.economist.com/leaders/2022/03/05/when-vladimir-putin-escalates-his-war-the-world-must-meet-him]

If only this week’s bravery were enough to bring the fighting to an end. Alas, Russia’s president will not withdraw so easily. From the start, Mr Putin has made clear that this is a war of escalation—a hygienic word for a dirty and potentially catastrophic reality. At its most brutal, escalation means that, whatever the world does, Mr Putin threatens to be more violent and more destructive even, he growls, if that means resorting to a nuclear weapon. And so he insists that the world back off while he sharpens his knife and sets about his slaughter.

Such a retreat must not happen. Not only because to abandon Ukraine to its fate would be wrong, but also because Mr Putin will not stop there. Escalation is a narcotic. If Mr Putin prevails today, his next fix will be in Georgia, Moldova or the Baltic states. He will not stop until he is stopped.

Escalation is at the heart of this war because it is how Mr Putin tries to turn defeat into victory. The first wave of his invasion proved as rotten as the cabal who planned it—just like his earlier efforts to suborn Ukraine. Mr Putin seems to have believed his own propaganda that the territory he has invaded is not a real country. The initial assault, which led with botched helicopter strikes and raids by lightly armed units, was conceived for an adversary that would implode. Instead, Ukrainian spirits have flourished under fire. The president, Volodymyr Zelensky, has been transformed into a war leader who embodies his people’s courage and defiance.

The optimism of the warmonger made Mr Putin lazy. He was so sure Ukraine would fall rapidly that he did not prepare his people for it. Some troops have been told they are on exercises, or that they will be welcomed as liberators. Citizens are not ready for a fratricidal conflict with their fellow Slavs. Having been assured that there would be no war, much of the elite feels humiliated. They are horrified at Mr Putin’s recklessness.

And Russia’s president believed that the decadent West would always accommodate him. In fact, Ukraine’s example has inspired marches through the capital cities of Europe. Western governments, having listened, have imposed severe sanctions. Germany, which only a week ago drew the line at sending anything more lethal than helmets, is dispatching anti-tank and anti-aircraft weapons, overturning decades of policy based on taming Russia by engaging with it.

Faced with these reverses, Mr Putin is escalating. In Ukraine he is moving to besiege the main cities and calling up his heavy armour to wantonly kill their civilian inhabitants—a war crime. At home he is bringing Russians to heel by redoubling his lies and subjecting his people to the harshest state terror since Stalin. To the West he is issuing threats of nuclear war.

The world must stand up to him, and to be credible it must demonstrate that it is willing to bleed his regime of the resources that enable him to wage war and abuse his own people even if that imposes costs on Western economies. The sanctions devised after Mr Putin annexed Crimea in 2014 were riddled with loopholes and compromises. Instead of being deterred, the Kremlin concluded that it could act with impunity. By contrast, the latest sanctions, imposed on February 28th, have crumpled the rouble and promise to cripple Russia’s financial system. They are effective because they are destructive.

The danger of escalation is that this can easily become a test of who is most willing and able to go to extremes. Recent wars have been asymmetric. Al-Qaeda and Islamic State would commit any atrocity, but their power was limited. America could destroy the planet, but against foes like the Taliban in Afghanistan, nobody imagined it was willing. The invasion of Ukraine is different, because Mr Putin can charge all the way to Armageddon and he wants the world to believe he is ready to do so.

The idea of Mr Putin using a battlefield nuclear weapon is surely unlikely, but not impossible. He has, after all, just invaded his neighbour. And so the world must deter him.

Some will say there is no point in saving Ukraine only to trigger a spiral that may destroy civilisation. But that is a false choice. Mr Putin says he wants to drive nato out of the former Warsaw Pact countries and America out of Europe. If escalation serves him, the next confrontation will be even more dangerous because he will be less ready to believe that, for once, the West will stand its ground.

Others may conclude that Mr Putin is insane and deterrence is hopeless. True, his goals are abhorrent, as are his means of achieving them. Neither does he have Russia’s true interests at heart. But he nonetheless has an understanding of power and how to keep it. No doubt he is alive to the language of threats.

By contrast, still others will want to short-circuit escalation, saying that Mr Putin must be stopped before it is too late. As images of suffering emerge from the ruins of Ukraine’s cities, calls are going up for nato to do something, such as to create a no-fly zone. However, enforcing one requires shooting down Russian aircraft and destroying Russian air-defences. Instead, nato needs to preserve a clear line between attacking Russia and backing Ukraine, while leaving no doubt that it will defend its members. That is the best brake on escalation.

What, then, can it do to deter Mr Putin without courting devastation? Only Mr Zelensky and his people can decide how long to fight. But if Mr Putin causes a bloodbath, the West can tighten the screws. An oil-and-gas embargo would further ruin Russia’s economy. Ukraine’s backers can send more and better arms. nato can deploy more troops in its frontline states.

### 1NC – T Exemptions

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC – FTC DA

#### The FTC has shifted from tech mergers to gas consolidation---that solves energy concentration and hikes.

Botts ‘9/1/21 [Baker Botts is an international law firm of approximately 700 lawyers practicing throughout a network of 13 offices around the globe. Based on our experience and knowledge of our clients' industries, we are recognized as a leading firm in the technology, energy, and life sciences sectors. "FTC Chair Turns Antitrust Attention to Energy Industry." https://www.bakerbotts.com/thought-leadership/publications/2021/september/ftc-chair-turns-antitrust-attention-to-energy-industry]

For the energy sector, one silver lining of the increasingly aggressive rhetoric from antitrust regulators has been their singular focus on “big tech.” It seemed, for a time, that oil & gas had finally abdicated its long-held position as the industry most likely to be on the receiving end of heightened antitrust scrutiny. Any such hope evaporated last week, when Lina Khan, the new chair of the Federal Trade Commission, sent a letter to the White House, making clear that she has the energy industry squarely within her sights.

This renewed focus on the energy industry comes at an already sensitive time. If gas prices rise in the wake of Ida, there will be loud calls for an investigation, as was the case after Hurricanes Katrina and Rita in 2005. Similar to those storms, Ida amounted to a direct hit on the industry, barreling through the Gulf Coast and Louisiana, leaving more than 1 million without power. While it remains to be seen what will ultimately happen with fuel prices, there were already calls for an investigation after prices rose through the summer, even before the hurricane was on the horizon.

I. Ms. Khan’s Letter

The letter, sent on August 25, came in response to a request from Brian Deese, Director of the National Economic Council, for the FTC to investigate elevated gas prices. In his August 11 letter, Deese noted, “During this summer driving season, there have been divergences between oil prices and the cost of gasoline at the pump.” He asked the FTC to investigate. Khan’s response went far beyond Deese’s straightforward request, outlining a three-part enforcement plan, tightly focused on the energy industry.

First, Khan stated, she plans to “identify additional legal theories” to challenge retail fuel station mergers “where dominant players are buying up family-run businesses.” This remarkably specific initiative, possibly untethered to traditional concerns about customer impacts, could mean longer and less predictable reviews for deals involving the sale of independent gas stations.

Second, Khan indicated she would be “taking steps to deter unlawful mergers in the oil and gas industry.” While she again made clear that she is focused on retail fuel deals, she clearly left the door open for a broader industry focus. Specifically, Khan referred to a July decision to rescind a prior FTC policy that limited requirements for parties to any merger ultimately deemed unlawful to obtain prior approval from the agency for any future transactions. In her letter from last week, Khan stated: “we will impose ‘prior approval’ requirements to deter those who propose illegal mergers, including in retail gas markets.”

Finally, Khan wrote that she “will be asking our staff to investigate abuses in the franchise market.” She hypothesized that “large national chains” might be forcing their “franchisees to sell gasoline at higher prices, benefitting the chain at the expense of the franchisee’s convenience store operations.” Khan then signed off, stating, “I will continue to assess how the FTC can use its tools to police unlawful business practices in oil and gas markets.”

All of this adds up to a notably focused promise to create new hurdles for proposed transactions in the energy industry and to find new reasons to investigate a variety of conduct.

II. Pricing Investigations

Whether triggered by Hurricane Ida or by letters from concerned officials such as Mr. Deese, any FTC gas pricing investigation would bring significant discovery burdens for industry participants. The post-Katrina report, released in May 2006, explained: “Since August 2005, the Commission has expended substantial resources on this investigation, including the full-time commitment of a significant number of attorneys, economists, financial analysts, paralegals, research analysts, and other support personnel with specialized expertise in the petroleum industry.” Specifically, FTC staff conducted 65 interviews, issued 139 Civil Investigative Demands (similar to subpoenas), and 99 orders seeking profitability and tax expenditure information. Staff identified more than 105 retailers accused of price gouging.

Despite the deep dive, the Commission uncovered very little evidence of wrongdoing. While finding that seven refiners, two wholesalers, and 24 single-location retailers had higher average gasoline prices that were not substantially attributable to higher costs during the relevant period, the report ultimately concluded: “additional analysis…showed that other factors, such as regional or local market trends, appeared to explain the pricing of these firms in nearly all cases.”

This prior failure to find illegal conduct is unlikely to dissuade the current slate of enforcers from pursuing a similar investigation. Aggressive antitrust enforcement has rapidly become a central cause of the current administration. Biden’s antitrust appointees, including Khan, are clearly intent on implementing an elevated level of antitrust scrutiny.

#### The plan causes case cutting---it overburdens the agency.

Hoofnagle, et al, 19—Adjunct Professor of Information and Law, University of California, Berkeley (Chris, with Woodrow Hartzog, Professor of Law and Computer Science, Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law, George Washington University Law School, “The FTC can rise to the privacy challenge, but not without help from Congress,” <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>, dml)

Resources are the FTC’s greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, FTC attorneys make pragmatic choices in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy.

#### Extinction.

Koranyi ’16 [David; 2016; Chief Advisor of City Diplomacy for the Mayor of Budapest, former Director of the Atlantic Council's Eurasian Energy Futures Initiative; Atlantic Council Strategy Paper, “A US Strategy for Sustainable Energy Security,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/AC_SP_Energy.pdf>]

The United States should work toward a global energy system that is characterized by the reduction of excessive price volatility on global energy markets and the minimization of the impact of geopolitical upheavals. This requires the introduction of more competition, transparency, liquidity, better rules and regulations for energy trade, and the stabilization of global energy trading routes in concert with other key stakeholders. The liberalized global energy trade would be coupled with transparent and efficiently functioning global and regional markets. This necessitates energy market integration and interconnections in Europe, Asia, Africa, and Latin America alike to enhance regional synergies and create markets. This integration process should be supported by US experience and technical assistance.

It is of utmost importance to ensure that competition is not distorted, with special regard to cartelization in the regional and global gas markets. The United States should promote global principles for competition in the energy markets to reduce the risk of cartelization and price setting, cripple the disruptive ability of irresponsible players on the market, enhance security of supplies, and promote open and efficiently functioning markets.

Monitoring the implementation of global and regional climate agreements; promoting dialogue and cooperation between consumer and producer countries; introducing and enhancing dispute resolution mechanisms; increasing transparency and reducing volatility on the international energy markets; and devising international standards of physical and cyber energy infrastructure protection will be at the center of the US international energy governance agenda. Therefore, international institutions that serve US national interests need to be strengthened further with special regard to the International Energy Agency (IEA), the United Nations Sustainable Energy for All Initiative (SE4All,) the International Renewable Energy Agency (IRENA), and the Energy Charter Treaty. In particular, the IEA’s mandate, organization, and budget should be reinforced to allow the organization to conduct a global energy dialogue with all key stakeholders, and to play a robust role in facilitating the exchange of best practices in green technology deployment, energy efficiency, and other key issues in the context of the Paris Climate Agreement.

As the energy sector undergoes a fundamental transformation, new global actors emerge and play a decisive role in how to produce and consume energy and control the climate. The new ‘lateral energy regime’ vastly widens the circle of interested and invested actors and influencers.58 This new paradigm requires a fundamentally different approach to governance on all levels: local, national, and international. The United States should invest in the empowerment and inclusion of constructive new actors to co-govern the energy space, while depowering spoiler actors, such as terrorist organizations that target energy infrastructure. Designing a new model for public-private-people-partnerships (PPPP) is essential to managing the complex interplay between the traditional and new producers, transporters, and consumers of energy—municipal and regional governments and civil society actors.

Conclusion

The first of the Atlantic Council Strategy Paper Series, Dynamic Stability: US Strategy for a World in Transition, identified the protection of global commons by the United States as critically important for both material and moral reasons. It rightly argued that “it is important to include climate in the definition of global commons.”59 That paper defined ‘dynamic stability’ as the key conceptual framework to deal with a fast-changing ‘Westphalian-Plus’ world and argued for “harnessing change to preserve the liberal international order.”60

Harnessing change in the energy sector expeditiously is an existential issue for all humanity. Dynamic stability in the US energy sector would mean leveraging the unique natural bounty and technological prowess of the United States and using the very momentum created by the unconventional hydrocarbon revolution to gradually pivot away from fossil fuels. Leaving the current system unreformed and unmodernized will threaten the security and well-being of American citizens, hurt the US economy at home, and isolate the United States internationally. By compromising on market-friendly public policy measures and leveraging the low oil price environment, the United States can introduce the right incentives into the energy system to shepherd an accelerated energy transition into a more modern, low-carbon energy era that still relies heavily on natural gas—particularly during the transition—and nuclear power to provide baseload generation and counter seasonal intermittency.

### 1NC – States CP

#### The fifty states and relevant subfederal territories should increase prohibitions on investors that hold shares of more than a single effective firm in an oligopoly owning more than 1% of market share unless it is a free-standing index fund that commits to being purely passive.

#### The federal government should not preempt the above plank.

### 1NC – Torts CP

#### The United States federal government should substantially increase its prohibitions on investors that hold shares of more than a single effective firm in an oligopoly owning more than 1% of market share unless it is a free-standing index fund that commits to being purely passive as tortious interference.

#### The CP solves the case by prohibiting conduct as unlawful interference---tort liability has the same penalties, unlimited capacity for expansion, and is entirely distinct from antitrust

Christopher B. Hockett 14, Lecturer at the University of California, Berkeley Law School, Chair of the Section of Antitrust Law at the American Bar Association, JD from the University of Virginia, “The Evolving Role of Business Torts in Antitrust Litigation” in Business Torts and Unfair Comp Handbook, Third Edition, Lexis

A. Introduction

Antitrust and business tort laws cover much common territory. Both regulate the commercial conduct of marketplace participants, including manufacturers, distributors, retailers and consumers, and both establish norms for competitive relationships as well as relationships between buyers and sellers.

It is thus not surprising that antitrust and business torts are frequently involved in the same litigation. This may occur in several ways. A plaintiff may join a business tort claim with an antitrust claim, either as an alternative theory of recovery for the same wrong, as a claim based on a separate but related wrong, or as a claim based on a wrong that constitutes a part of a pattern of anticompetitive conduct. n1

Additionally, a business tort may be offered as proof of anticompetitive or exclusionary conduct in support of a claim under sections 1 or 2 of the Sherman Act. n2 Conversely, a claim of tortious interference may be based on wrongful conduct that also creates or perpetuates an unlawful restraint of trade. n3

[FOOTNOTE] n3 . See Chapter II, Part F.3; see also RESTATEMENT (SECOND) OF TORTS § 768(1)(c) cmt. f (1979) (an intent to unreasonably restrain competition can support a tortious interference claim); Caller-Times Publ'g Co. v. Triad Commc'ns, 855 S.W.2d 18, 21-22 (Tex. App. 1993) (same; citing RESTATEMENT). [END FOOTNOTE]

Although these two areas of the law are at times consistent, they have developed separately and reflect different economic and social policy concerns. Contrasting unfair competition and antitrust law, the Fifth Circuit has remarked:

[T]he purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. The law of unfair competition tends to protect a business in the monopoly over the loyalty of its employees and its customer lists, while the general purpose of the antitrust laws is to promote competition by freeing from monopoly a firm's sources of labor and markets for its products. n4

The Seventh Circuit has observed that "[c]ompetition is a ruthless process. A firm that reduces cost and expands sales injures rivals-- sometimes fatally. . . . These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds." n5 Going further, Judge Easterbrook has characterized competition as "a gale of creative destruction. . .and it is through the process of weeding out the weakest firms that the economy as a whole receives the greatest boost. Antitrust law and bankruptcy law go hand in hand." n6

The U.S. Supreme Court has long stressed that the antitrust laws are for "the protection of competition, not competitors." n7 But it is also true that there can be no competition without competitors, and a competitor often will be the market participant most likely to both recognize and have the incentive to challenge exclusionary conduct. n8 And "merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well." n9 Tortious conduct seldom can be characterized as efficiency-enhancing competition on the merits, n10 and "'[i]improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.'" n11

Business torts also may be relatively "cheap" to implement and lack any procompetitive virtues. A campaign of removing a competitor's point-of-sale displays from retail locations may be much more cost effective than, say, engaging in predatory pricing. n12 Unfair competition through false statements likewise can protect a monopoly and is unlikely to be procompetitive. For example, in United States v. Microsoft Corp., n13 the government alleged that Microsoft deceived Java developers into believing that their software would run on non-Windows platforms. The Justice Department claimed that this was part of Microsoft's plan to prevent Java from threatening its operating system monopoly. The D.C. Circuit observed:

Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers. n14

This chapter examines the role that business torts play in establishing antitrust claims as well as the use of business torts as additional claims in private antitrust litigation.

B. Historical Underpinnings: The Pick-Barth Doctrine

Antitrust law and business torts intersected in earnest in the First Circuit's 1932 decision in Albert Pick-Barth Co. v. Mitchell Woodbury Corp. n15

The plaintiff alleged a scheme by the defendants to appropriate its business by hiring away the plaintiff's employees and inducing them to take the plaintiff's customer lists, business plans and other records, and sought recovery under section 1 of the Sherman Act. n16 The First Circuit affirmed judgment for the plaintiff, reasoning that "[i]f a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition, such a conspiracy . . . is a violation of section 1 of the Sherman Act" as a matter of law. n17 In reaching this conclusion, the First Circuit characterized the business tort of unfair competition as a per se antitrust violation when conducted through collusion among competitors. n18

Unlike other per se illegality rules under the antitrust laws, Pick-Barth's focus was on "fairness" to competitors, rather than the potential effects of the defendants' conduct on competition. When the First Circuit revisited Pick-Barth almost thirty years later in Atlantic Heel Co. v. Allied Heel Co., n19 it again concluded that "the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act." n20 Evaluating conduct factually similar to the allegations in Pick-Barth, n21 and relying on the Supreme Court's intervening decision in Klor's, Inc. v. Broadway-Hale Stores, n22 which involved a conspiracy to eliminate a competitor through a "group boycott" or concerted refusal to deal, N23 the Atlantic Heel court reaffirmed that a conspiracy to destroy a rival constituted a per se violation of section 1. n24

Very few courts followed the First Circuit's Pick-Barth rationale, and the cases that did usually involved egregious misconduct. n25 For example, in C. Albert Sauter Co. v. Richard S. Sauter Co., n26 the Eastern District of Pennsylvania held that the defendants' tortious acts, which included hiring away the plaintiff's key employees, misappropriating the plaintiff's confidential business information, intentionally confusing customers by using a deceptively similar trade name, and disparaging the plaintiff's business, amounted to a per se violation of section 1 because such acts "'unreasonably' restrain[ed] competition"; the defendants' conspiracies were "accompanied with a specific intent to accomplish a forbidden result." n27

C. The Decline of Pick-Barth

Subsequent decisions questioned Pick-Barth's rationale, or specifically limited the decisions following it to their facts. n28

In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, n29 the First Circuit critically analyzed whether unfair competitive practices accompanied by an intent to hurt a competitor should qualify as per se violations of the antitrust laws. After considering the "aggregation of dirty tricks, played by those with little market power," allegedly committed by the defendants, the court concluded that, while the actions were unfair and reprehensible, they did not constitute a per se antitrust violation. n30

The Whitten court offered several reasons for refusing to apply the per se rule. On a practical level, the court noted that Pick-Barth and Atlantic Heel condemned as anticompetitive practices that were commonplace but prohibited in very few cases. Therefore, the Whitten court reasoned that Pick-Barth and Atlantic Heel provided no clear basis upon which to distinguish the "unfair" practices that would amount to an antitrust violation from those that would not. n31 Additionally, the court observed that tort law is available to deal with "garden variety" unfair competitive business practices and that extending the per se classification to competitive torts would tend to create a federal common law of unfair competition, an undertaking the federal courts have long resisted. n32

Instead, the court analyzed the defendants' conduct under "the rule of reason," which assesses the effect of the unfair practices in the relevant market. n33 Although the plaintiff may have lost some contracts due to the defendants' actions, the Whitten court observed that there was no evidence of harm to the competitive process. The number of competitors was not affected, and the market was neither fixed nor manipulated. Regardless of how offensive, the defendants' behavior simply did not amount to an antitrust violation. n34 Nevertheless, the court stopped short of formally overruling Pick-Barth. Noting that the pirating of key employees and theft of trade secrets involved in Pick-Barth and Atlantic Heel - efforts "to eliminate a competitor" - were going for the "jugular," the court concluded that the defendants' conduct in Whitten affected only "lesser arteries" - "concentrating on winning customers" - and thus rendered use of the per se rule inappropriate. n35

Later cases further eroded Pick-Barth. In Northwest Power Products v. Omark Industries, n36 the Fifth Circuit considered "unfair conduct" similar to Pick-Barth: solicitation of the plaintiff's employees, misappropriation of customer lists, and circulation of false and disparaging comments to the plaintiff's customers about its alleged financial difficulties. The effect of the defendants' actions was to diminish the plaintiff's market share while increasing that of one defendant. n37 The court discussed Pick-Barth at length and rejected it. n38 Rather than condemn the defendants' conduct as a per se violation of section 1, the court concluded that the defendants' tortious acts in fact had a positive effect on competition. By replacing the plaintiff, which had a 20 percent share of the market, with one of the defendants, which achieved an 11.5 percent share, the alleged conspiracy actually enhanced rivalry and created greater competitive possibilities. n39

The Northwest Power court gave two reasons why a defendant's market power is critical in determining whether unfair competition amounts to an antitrust violation. First, absent some market impact comparable to that prohibited by the law of mergers, antitrust interests are not implicated. Second, only when the defendant gains an increment of monopoly power through unfair competition are treble antitrust damages appropriate, as "[s]ingle damages or equivalent injunctive relief

is thought sufficient to compensate a firm for unfair competition." n40 The Northwest Power court determined that the defendant lacked the level of market power necessary to raise antitrust concerns and affirmed summary judgment for the defendants. The court concluded that the plaintiff made no showing that substitution of one distributor for another affected consumers in the relevant market. n41

Several other courts likewise have rejected Pick-Barth's application of the per se rule, concluding that the elimination of a competitor through unfair means must be evaluated under the rule of reason. n42

As a leading commentator has noted, "the cases giving rise to Pick-Barth claims have not been disputes involving naked cartel exclusion," but rather involved single-firm conduct or vertical relationships, which generally require proof of anticompetitive effects. n43 "If properly restricted, a version of the Pick-Barth rule does seem to describe a per se violation of the antitrust laws. A 'naked' agreement among two rivals to drive a third rival out of business could be a violation of § 1" of the Sherman Act. n44

Accordingly, absent conduct amounting to naked cartel exclusion, a plaintiff seeking to advance a section 1 claim cannot merely allege that its business was harmed by a competitor's inequitable and unfair practices; the plaintiff must go further and establish actual or threatened harm to competition in the marketplace.

D. Business Torts Under the Rule of Reason

In Associated Radio Service Co. v. Page Airways, n45 the Fifth Circuit had occasion to revisit its decision two years earlier in Northwest Power. Recalling the court's observation in the earlier case that "[t]he more modern courts examining the Pick-Barth rule have stated that it applies only when the defendant is a 'significant existing competitor,'" n46 the Associated Radio court expressed the belief that "[w]hile this requirement begins to limit Pick-Barth to Sherman Act proportions, it fails to do the job entirely." n47

Invoking the Northwest Power court's observation that "absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise," n48 the Fifth Court concluded that "Northwest Power establishes for unfair competition cases under section 1 of the Sherman Act a two-part test: (1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." n49

Applying this test to the facts before it, the Fifth Circuit noted that the relevant market was highly concentrated, there was conclusive evidence that the defendant was a potential entrant into that market, and that the plaintiff was the most significant existing competitor in that market. n50 Accordingly, under the Supreme Court's decision in FTC v. Procter & Gamble Co., n51 the defendant's attempt to acquire the plaintiff directly would have violated the merger provisions of the antitrust laws. n52 Additionally, there was evidence that the prices the defendant charged its customers as well as its profits dramatically exceeded those of the plaintiff, and that its market share had risen to 64 percent by the time of trial. n53 Based upon its finding that the defendant could not have acquired the plaintiff lawfully under the antitrust laws and the evidence that the defendant's tortious conduct, which included bribery, had the requisite anticompetitive effect, the Fifth Circuit found it unnecessary to reach the issue whether business torts, standing alone, could ever rise to the level of a section 1 violation. n54

E. The Role of Business Torts in Section 2 Claims

In addition to potentially supporting a rule of reason claim under Sherman Act section 1, business torts may, in an appropriate case, constitute exclusionary conduct actionable under Sherman Act section 2.

A leading antitrust treatise defines exclusionary conduct as acts that:

(1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and

(2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits. n55

The Supreme Court has explained that when determining whether conduct can be condemned as exclusionary in an antitrust sense, it is not enough to focus simply on its effect on the competitor plaintiff; rather, it is necessary to consider the effect on consumers, the defendant's rivals and the defendant itself. n56 The Court has further explained that if the defendant '"has been attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." n57

Just as a section 1 claim cannot be based on business torts alone, a section 2 claim requires more than proof that a dominant firm engaged in business torts that injured a smaller rival. Absent some reason to believe that the defendant's tortious acts are likely to contribute to the acquisition or maintenance of monopoly power, or to materially impair the competitive opportunities of rivals, business torts - even when committed by a dominant firm - are unlikely to qualify as "exclusionary" for section 2 purposes. n58

When it appears that a firm's use of business torts is likely to contribute to the acquisition or maintenance of a dominant position, courts have been willing to recognize an antitrust claim based on tortious conduct. n59

Examples of tortious conduct that may qualify as exclusionary include misrepresentations to buyers; deceptively influencing purchaser specifications; disparagement of rivals; compromising rival's employees; compromising rival's suppliers; industrial espionage; payments to buyer's employees; monopolist permeation of a customer with former employees; premature delivery dates and exaggerated advertising claims; sham litigation; concealment of transactions through straw parties; interference with contracts; and retaliation for privileged conduct. n60 When the defendants' tortious conduct appears unlikely to contribute to the acquisition or maintenance of a dominant position, however, the courts have been less likely to uphold a section 2 claim. n61

Associated Radio illustrates the successful use of business torts in support of a section 2 claim. In that case the plaintiff alleged a variety of tortious conduct, including bribery, the defendant's use of sham litigation to delay the payment of needed funds owed to the plaintiff, and inducement of the plaintiff's employees to disclose the plaintiff's confidential business information to the defendant. n62

Agreeing with a leading treatise that the courts should be wary of invitations to find antitrust violations from acts of unfair competition, and that a de minimus standard should be applied, the court found that the plaintiffs' evidence was probative of enough instances of exclusionary behavior to constitute more than de minimus violations of section 2. n63

A more recent case, Conwood Co., L.P. v. United States Tobacco Co., n64 which involved one of the largest civil antitrust awards ever rendered, likewise was based on business torts. In that case the plaintiff complained that the defendant had engaged in a widespread campaign of removing and destroying the plaintiff's point-of-sale displays of its moist snuff products in retail locations. The plaintiff also complained that the defendant used its position as "category manager" for moist snuff products to limit or eliminate competitive products, including lower priced products, and to give preferential position to the defendants' products at the point-of-sale. Rejecting the defendant's argument that the evidence amounted to no more than "insignificant" tortious behavior and acts of ordinary marketing services, n65 the Sixth Circuit affirmed a treble damages judgment under Sherman Act section 2 of $ 1.05 billion.

F. The Additional Requirement of "Antitrust Injury"

In addition to proof of harm to competition, a private antitrust plaintiff must establish "antitrust injury." n66

The Supreme Court articulated this principle in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., n67 a merger case under section 7 of the Clayton Act. There, the plaintiffs alleged that the defendant, one of the nation's largest bowling equipment manufacturers and bowling center operators, violated section 7 of the Clayton Act by acquiring bowling centers that had defaulted in their payments for equipment. The plaintiffs, competing bowling center operators, sought treble damages for the anticipated increase in profits the plaintiffs would have reaped had the rival bowling centers instead gone out of business. n68 Rejecting this claim, the Court emphasized that the antitrust laws are designed to protect competition, not individual competitors, and that it would be inimical to the purpose of the antitrust laws to award the plaintiffs damages for profits they would have realized had competition been reduced by elimination of the acquired assets from the market. n69 To recover antitrust damages, the Court explained, a plaintiff must prove more than that its injury was causally linked to an illegal presence in the market; rather, antitrust plaintiffs must prove "antitrust injury . . . of the type the antitrust laws were intended to prevent." n70 Such injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. n71

The antitrust injury requirement stands as one of the most significant barriers to competitor plaintiffs seeking to recover antitrust damages. n72 As the Seventh Circuit observed:

[T]here is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated. Competition means that some may be forced out of business; not a guarantee of tenure for every competitor in the marketplace. n73

G. The Assertion of Business Torts in Addition to, or in Lieu of, Antitrust Claims

In addition to constituting conduct that supports an antitrust claim, business torts can be joined with antitrust claims as additional grounds of recovery. This is often sensible in cases that involve alternative, complementary claims and overlapping evidence. Tortious conduct by a dominant firm may support both a claim of tortious interference and a claim of anticompetitive or exclusionary conduct under the Sherman Act. n74

[FOOTNOTE] n74 . This was the case in Conwood Co. v. U.S. Tobacco Co, 290 F.3d 768, 773 (6th Cir. 2002) (plaintiff asserted a claim of monopolization as well as claims for tortious interference with contract and prospective advantage; prior to trial the plaintiff dropped the tortious interference claims and proceeded only on the section 2 claim). [END FOOTNOTE]

In other cases, however, the underlying theories and principles involved may conflict, or the pursuit of multiple claims may raise problems of damages apportionment. n75 And there are situations when invocation of every conceivable claim engenders confusion and frustration. n76

Litigation strategy can involve consideration of several factors that may impact antitrust or tort theory selection, including jurisdiction and venue, conflict of laws, remedies, direct and indirect purchaser considerations, other standing rules, and the availability and scope of potential classwide relief. Judicially created obstacles to the successful maintenance of antitrust claims often make statutory and common law unfair competition and tort claims attractive alternatives for plaintiffs. n77

[FOOTNOTE] n77 . William L. Jaeger, New Tools for the Plaintiff in the 1990s, 4 ANTITRUST L.J. 4, 5 (1990) ("Consigning state claims to second class status in an antitrust case may not be the wisest move for plaintiffs, in view of the increasing hostility of the federal courts to antitrust claims, and the eagerness of some courts to dismiss antitrust claims on summary judgment motions."); Harvey I. Saferstein, The Ascendancy of Business Tort Claims in Antitrust Practice, 59 ANTITRUST L.J. 379 (1990). The Supreme Court has noted the "considerable disadvantages" of antitrust claims to private litigants. Verizon Commc'ns v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 412 (2004). [END FOOTNOTE]

## Common Ownership

### 1NC – Circ

#### Section 5 means Congress guts the FTC undermining their annual review

Marianela Lopez-Galdos 7/28/21. Global Competition Counsel at the Computer& Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/

What seems clear is that the new agency’s leader might find it hard to bring all Commissioners to an agreement with respect to what the agency can do with Section 5 of the FTC Act, and this situation, in and of itself, puts the agency in peril.

The FTC’s Rulemaking Authority

Another important policy change that may be detrimental to the FTC is its expressed willingness to expand the agency’s rulemaking authority under, e.g., Section 18 of the FTC Act. It is well known that in addition to its authority to investigate law violations by individuals and businesses, the FTC also has federal rulemaking authority to issue industry-wide regulations.

However, the agency’s rulemaking authority has been self-limited since the 80s in an effort to ensure the institution doesn’t overuse its capacity to adopt industry-wide regulations and raise concerns with those policy makers that are against the legislature deferring its core mandate to an independent agency that doesn’t represent the people.

Traditionally the legislature has the constitutional mandate to create laws affecting different sectors of the economy. Whereas it is legally accepted to design independent agencies with constrained mandates to adopt regulations, such powers are not necessarily understood to construe independent agencies as substitutes for the legislature’s powers. It is a basic tenet of administrative law, that agencies are constrained by the enabling statute that gives them authority to promulgate regulations in the first place.

Against this background, it seems risky for the new leadership to engage in broad rulemaking endeavors that might raise concerns from an institution legitimacy perspective. In the long term, it is predictable that many policymakers might not be supportive of an agency that implements its rulemaking authority in its broadest sense. As a result, some degree of political backlash against the agency might not help the agency’s lifecycle, especially if the agency is not granted with specific legislative guidance in the form of new legislation.

#### Even new laws fail—courts refuse to enforce, including SCOTUS

Newman 19 [John Newman is a University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division, "What Democratic Contenders Are Missing in the Race to Revive Antitrust", 4/1/19, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/]

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions.

But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well.

No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area.

Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades.

But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up.

Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it.

If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench.

Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power.

Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing.

And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017.

Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench.

Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system.

There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

### 1NC – Growth Turn

#### Growth and wages are up – businesses are confident

Hilsenrath 2/28 [Jon, senior writer for The Wall Street Journal, where he has written about economics and finance since 1997. “U.S. Positioned to Withstand Economic Shock From Ukraine Crisis”. 2/28/22. https://www.wsj.com/articles/u-s-positioned-to-withstand-economic-shock-from-ukraine-crisis-11646083994]

As Russian President Vladimir Putin launched a war against Ukraine, half a world away the U.S. economy appeared to be rebounding from a winter surge of Covid-19 infections.

A range of U.S. data suggests U.S. economic activity picked up in recent weeks. Many Wall Street analysts expect the Labor Department on Friday to report large job gains in February and a further decline in unemployment.

These developments suggest that the U.S. is in a position to withstand the economic shock that might emanate from battlegrounds in Ukraine. Those effects could push U.S. inflation higher from already elevated levels, but the economic expansion appears to be on solid ground.

“It looks like the U.S. has gotten through the Omicron variant and weathered that storm and the economy is growing solidly,” said Mickey Levy, chief U.S. economist at Berenberg Capital Markets LLC, the securities arm of a German bank.

Much could change in the days or weeks ahead. If fighting intensifies or spreads to other countries, or if sanctions and Russian reprisals to sanctions deepen, the effects could hit the U.S. economy harder.

But for now, Mr. Levy has been watching weekly signs of rising U.S. consumer spending and output in February. OpenTable Inc., the online restaurant reservation business, reports that U.S. restaurant seating broke 6% above pre-pandemic levels in February after slumping earlier this year.

STR LLC, a research firm that tracks hotel trends, said occupancy at U.S. lodgings hit 59% in mid-February, up from 50% early in the month and 45% during the same period a year earlier.

Meantime, the Transportation Security Administration said airport checkpoint counts hit 2.15 million in late February, compared with 1.54 million at the end of January and 1.19 million at the same time a year earlier.

Mr. Levy said these are important developments because they suggest resurging life in the services side of the economy, which has been hit hardest by pandemic-driven disruptions.

U.S. Covid-19 cases and hospitalizations dropped substantially in February and deaths have fallen in recent weeks with a lag.

In all, consumer spending in the first half of February was up 7.2% from a year earlier, compared with a 2.7% increase in the first two weeks of January, according to data from Earnest Research, which tracks credit- and debit-card purchases.

Economists at Citigroup estimate the Labor Department will report Friday that U.S. payrolls grew by more than 500,000 in February and the jobless rate fell to 3.8%. Morgan Stanley estimates payrolls grew 730,000 in February and the jobless rate dropped to 3.7%. In 2021, monthly payroll increases averaged 555,000. In the decade before the pandemic, monthly increases of around 150,000 to 200,000 were more normal.

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A powerful coalition of democracies announced it would cut off some Russian banks from the global payment system Swift. Here’s how Swift works, and how the move could ramp up pressure on Russian President Putin. Photo: Anton Vaganov/Reuters

The U.S. economy is exposed to Russia and Ukraine mostly through energy channels. Russia is a major supplier of oil and gas supplies to the globe—especially Europe—and also supplies commodities such as potash and palladium that are important components of goods including fertilizer and catalytic converters for cars. The war and the Western financial sanctions resulting from it have disrupted supplies and pushed up prices for these and other commodities, worsening global inflation.

However analysts so far aren’t forecasting a big hit to U.S. economic growth from these effects. Chris Varvares, head of U.S. economics at IHS Markit, an economic advisory firm, estimates higher oil prices will shave 0.4% percentage point from the U.S. growth rate in 2022, to 2.5% for 2022 from its prewar forecast of 2.9%, and have almost no effect in 2023 and 2024.

Moody’s Analytics, another economic advisory firm, estimates a sustained move of oil prices up to $100 a barrel would slightly sap U.S. consumer spending in other markets, but not in a highly disruptive way. It estimates a shock of this kind would shave just 0.2 percentage point off the U.S. growth rate in 2022. The firm has already lowered its growth forecast to 3.5% this year, from its forecast of 3.7% before the war, said Mark Zandi, its chief economist.

‘The impact of the Russian invasion on the U.S. economy will be on the margins.’

— Mark Zandi, chief economist of Moody’s Analytics

“The impact of the Russian invasion on the U.S. economy will be on the margins,” Mr. Zandi said in a written assessment of the impact of an oil price spike.

#### Unpredictable shifts in antitrust spill over, ruining growth.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline causes fast nuclear wars

Liu 18 [Quan Liu, M.D., Greater China, The Economist Group. “The next economic crisis could cause a global conflict. Here's why.” 11/13/18. https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why]

The response to the 2008 economic crisis has relied far too much on monetary stimulus, in the form of quantitative easing and near-zero (or even negative) interest rates, and included far too little structural reform. This means that the next crisis could come soon – and pave the way for a large-scale military conflict.

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

### 1NC – Theory Wrong

#### Managers act in the interest of noncommon shareholders.

Fox ’22 [Merritt and Menesh Patel; January 12; Arthur Levitt Professor of Law at Columbia Law School; Acting (Tenure Track) Professor of Law at UC Davis School of Law; Yale Journal on Regulation, “Common Ownership: Do Managers Really Compete Less?” forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3967733]

Moreover, as we discussed in Part III, when it comes to the output decision, the managers already desire what is in the interests of the noncommon shareholders: the level of output that maximizes solely the firm’s own residuals, that is, maximizing the difference between what it can sell its output for and the cost of producing that output. This is because it is from these residuals that managers can make room for the things that matter to them, such as compensation, perquisites, power, prestige, the pleasure of benefiting their associates in the firm, and a sense of doing social good. We could add to this list, if managers truly do prefer not to work hard, that choosing the level of production that maximizes own-firm net revenues creates the most space to indulge this taste as well without facing the loss of their jobs. Thus, the managers likely need no pressure from the firm’s shareholders to want to choose the level of output that maximizes own-firm residuals. Therefore, any reduction in pressure resulting from an increase in the proportion of common to non-common owners should not matter.

#### Empirical studies agree. Common ownership does not decrease competition.

Fox ’22 [Merritt and Menesh Patel; January 12; Arthur Levitt Professor of Law at Columbia Law School; Acting (Tenure Track) Professor of Law at UC Davis School of Law; Yale Journal on Regulation, “Common Ownership: Do Managers Really Compete Less?” forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3967733]

IV. THE IMPLICATIONS OF THE ANALYSIS FOR THE COMMON OWNERSHIP DEBATE

Our conclusion that common ownership is currently having no meaningful effect on managerial incentives to compete, and therefore on actual levels of competition, contributes in three significant ways to the larger debate over whether common ownership reduces competition. First, the analysis provides theoretical support to the empirical studies that, in contrast to the common ownership literature, find no evidence of a relationship between current levels of common ownership and competitive harm. Second, the analysis demonstrates the absence of any mechanism connecting common ownership to competitive harm not that does not involve coordination of the kinds already prohibited by antitrust law. Third, the analysis counsels against use of a concentration measure—the MHHI Delta—that is heavily relied on in the common ownership literature and in policy proposals based on that literature. We discuss these three points in turn.

A. The Analysis Supports the Empirical Studies Finding No Substantial Competitive Harm from Current Levels of Common Ownership

The common ownership literature’s central tenet that common ownership decreases competition is largely built on the empirical results that the authors say support this conclusion. Contending scholars, however, have conducted studies that find no statistically significant evidence that common ownership has meaningfully reduced competition. The analysis in the preceding parts of this Article helps resolve this empirical debate. This analysis suggests that the contending scholars found no evidence because there was no evidence to find, and that the common ownership adherents’ results were due to some other cause.

1. The common ownership literature’s empirical results. Two significant empirical papers sparked the recent academic and policy interest in common ownership. In the first paper, which we refer to as the “Airline Paper,” José Azar, Martin Schmalz, and Isabel Tecu evaluated whether common ownership was impairing competition in the airline industry.114 Using fixed-effects panel regressions, Azar, Schmalz, and Tecu found a statistically significant relationship between airline prices and a measure of common ownership discussed below, the MHHI Delta, and concluded that common ownership resulted in ticket prices being 3 to 7 percent higher on the average U.S. route than they would be without common ownership.115 The authors also conducted a series of econometric tests in order to exclude the possibility that their results were being driven by other possible factors that might tend to move both airline prices and their measure of common ownership in the same direction and hence be an alternative explanation for their results.116

In the second, which we refer to as the “Banking Paper,” José Azar, Sahil Raina, and Martin Schmalz evaluated the effects of common ownership in the banking sector.117 In their baseline results, Azar, Raina, and Schmalz find that their measure of common ownership was positively related to the amount of bank deposit fees and deposit thresholds.118 As in the Airline Paper, the authors of the Banking Paper conducted additional analysis for purposes of establishing a causal, rather than a mere correlative, connection between common ownership and competitive harm.119

The potential positive relationship between common ownership and competitive harm that the authors of these two papers suggest their results show has attracted considerable attention from legal scholars and policymakers, some of whom have called for dramatic changes in antitrust law and enforcement policy in order to intervene and correct common ownership’s perceived competitive harm.120 The two papers have also opened up an entire line of rich academic research, with scholars from disparate fields seeking to determine whether common ownership is linked to other macroeconomic or firm-level phenomenon.121

2. Critiques of the common ownership literature’s empirical claims, and studies finding no evidence that common ownership meaningfully reduces competition. The Airline and Banking Papers have not escaped criticism. One line of attack has been to critique the papers on their own merits by arguing that a variety of methodological problems cloud their empirical analysis122 and their policy implications,123 some of which we will discuss in more detail below.

At least as important, a number of scholars have conducted their own empirical studies that have yielded results failing to show evidence of a relationship between common ownership and any meaningful amount of competitive harm. In widely reported findings, for instance, Pauline Kennedy, Daniel O’Brien, Minjae Song, and Keith Waehrer used the same data as in the Airline Paper but a different empirical methodology, and found that common ownership had no statistically significant effect on airline prices.124 Subsequent empirical research by other scholars likewise found little or no competitive harm of common ownership in either airlines or banking.125 Still other studies generated empirical results indicating no statistically significant positive relationship between common ownership and competitive harm in other industries. For instance, in a recent study published in the Journal of Financial Economics, Andrew Koch, Marios Panavides, and Shawn Thomas conducted an empirical analysis that indicated that common ownership is not positively related to prices or industry profitability and is not negatively related to measures of non-price competition.126 However, there have also been some studies of industries other than banking or airlines going the other way.127

3. Evaluating the empirical literature as a whole. Although, as just discussed, much of the scholarship since the Airline and Banking papers finds no evidence that the current level of common ownership is generating meaningful competitive harm, the totality of the empirical evidence is mixed.128 This Article’s analysis aids in the resolution of this empirical impasse. All else equal, where two bodies of empirical work respectively support opposing hypotheses, but one hypothesis is the more plausible of the two, the work supporting the more plausible hypothesis is more likely to be the correct one.

Our analysis suggests that the hypothesis that common ownership at current levels reduces competition is highly implausible. The more implausible a hypothesis, again all else equal, the more likely that results in a study purporting to support the hypothesis, though consistent with the hypothesis, are in fact due to something else.129 Also, the more implausible the hypothesis, the more likely it is that the reason a study failing to find statistically significant evidence in support of the hypothesis fails to do so is that the hypothesized relationship does not exist (rather than that it does exist but the test just does not have enough power to find it). All of this helps explain why standard empirical methodology suggests that one start with a plausible hypothesis before one does a statistical study to see if one can reject with a high degree of statistical confidence the theory that the hypothesis is wrong (the null hypothesis), rather than going out to look for strong statistical relationships and then considering which null hypothesis the results might reject and which hypothesis the results support.

A final point should be noted in connection with our argument that the implausibility of the common ownership hypothesis reduces the persuasiveness of any empirical findings in its support. The hypothesis, as we have seen, rests on the assumption that common ownership leads firm managers to consider other firm profits in their output decisions. There is empirical evidence, however, that in fact that firm managers continue to pursue own-firm net revenue maximization despite the presence of common ownership.130 In other words, our analysis showing the implausibility of the common ownership literature’s hypothesis of common ownership reducing competition itself has affirmative empirical support.

### 1NC – Wages Up

#### Demographic shifts lock in long term labor power.

Irwin ’21 [Neil; June 5; senior economics correspondent; New York Times, “Workers Are Gaining Leverage Over Employers Right Before Our Eyes,” <https://www.nytimes.com/2021/06/05/upshot/jobs-rising-wages.html>; KP]

Yet in key respects, the shift builds on changes already underway in the tight labor market preceding the pandemic, when the unemployment rate was 4 percent or lower for two straight years.

That follows decades in which union power declined, unemployment was frequently high and employers made an art out of shifting work toward contract and gig arrangements that favored their interests over those of their employees. It would take years of change to undo those cumulative effects.

But the demographic picture is not becoming any more favorable for employers eager to fill positions. Population growth for Americans between ages 20 and 64 turned negative last year for the first time in the nation’s history. The Congressional Budget Office projects that the potential labor force will grow a mere 0.3 percent to 0.4 percent annually for the remainder of the 2020s; the size of the work force rose an average of 0.8 percent a year from 2000 to 2020.

An important question for the overall economy is whether employers will be able to create conditions attractive enough to coax back in some of the millions of working-age adults not currently part of the labor force. Depending on your view of the causes, the end of expanded pandemic-era jobless benefits might also have an effect. Some businesses may need to raise prices or retool how they operate; others may be forced to close entirely.

Higher wages are part of the story. The jobs report issued on Friday showed that average hourly earnings for nonmanagerial workers were 1.3 percent higher in May than two months earlier. Other than in a brief period of statistical distortions early in the pandemic, that is the strongest two-month gain since 1983.

But wages alone aren’t enough, and firms seem to be finding it in their own best interest to seek out workers across all strata of society, to the benefit of people who have missed out on opportunity in the last few decades.

“I’ve been doing this a long time and have never felt more excited and more optimistic about the level of creative investment on this issue,” said Bertina Ceccarelli, chief executive of NPower, a nonprofit aimed at helping military veterans and disadvantaged young adults start tech industry careers. “It’s an explosive moment right now.”

In effect, an entire generation of managers that came of age in an era of abundant workers is being forced to learn how to operate amid labor scarcity. That means different things for different companies and workers — and often involves strategies more elaborate than simply paying a signing bonus or a higher hourly wage.

At the high end of the labor market, that can mean workers are more emboldened to leave a job if employers are insufficiently flexible on issues like working from home.

#### Inequality’s declining.

Gramm ’21 [Phil and John Early; March 23; a former chairman of the Senate Banking Committee and a visiting scholar at the American Enterprise Institute; served twice as assistant commissioner at the Bureau of Labor Statistics; Wall Street Journal, “Incredible Shrinking Income Inequality,” <https://www.wsj.com/articles/incredible-shrinking-income-inequality-11616517284>; KP]

Twice over the past 50 years, the Census Bureau has significantly changed how it collects and records income statistics. In 1993 and 2013 the Census Bureau changed its methods in an effort to collect better information from high-income households. These changes created two major discontinuities and distorted the time-series so that the change in measured income inequality in those years was as much as 15 times the average annual change found for the entire 50-year period. At the time, the Census Bureau explained in detail what it had done. It also explained the limitations the changes imposed on the use of its income-inequality measure to look at changes over extended periods. In subsequent use of the data by the Census Bureau and others, however, those warnings have been neglected.

The simple solution would have been to isolate the distortions caused solely by the changes in data-collection techniques and adjusted the previous years’ measures to reflect the effect of the changes. We made these adjustments and they are shown in the nearby figure. The blue line is the actual reported Census Bureau measurement of income inequality. The yellow line eliminates the effects of the 1993 and 2013 discontinuities caused solely by changes in measurement technique. The black line shows income inequality when the value of all transfer payments received is counted as income, income is reduced by taxes paid, and the two technical corrections are made.

Lo and behold—income inequality is lower than it was 50 years ago.

The raging debate over income inequality in America calls to mind the old Will Rogers adage: “It ain’t what you don’t know that gets you into trouble. It is what you do know that ain’t so.” We are debating the alleged injustice of a supposedly growing social problem when—for all the reasons outlined above—that problem isn’t growing, it’s shrinking. Those who want to transform the greatest economic system in the history of the world ought to get their facts straight first.

### 1NC – Innovation Up

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

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

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

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

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

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

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

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

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

## Cartels

### 1NC – UQ

#### Cartels are down.

Alain Verbeke & Caroline Buts 21, – Professor of International Business and Strategy, McCaig Chair in Management, University of Calgary; Professor at the department of applied economics of the Vrije Universiteit Brussel, “The Not So Brilliant Future of International Cartels,” Management and Organization Review, Cambridge University Press, 8/17/2021, https://www.cambridge.org/core/journals/management-and-organization-review/article/not-so-brilliant-future-of-international-cartels/363CC718A5FD54F8BB390B9AB22150B7

A NOT SO BRILLIANT FUTURE OF INTERNATIONAL CARTELS?

As explained in the previous section, we do not dispute the possibility that international cartels could become more important in the future under carefully defined conditions. We are doubtful, however, even when accepting B&C’s broad definition of this governance mode, that international cartels will gain ground more generally, vis-à-vis other forms of governance in international business, when multinational enterprises face increased political risk.

A key element, and perhaps a surprising one, explaining our doubt about the bright future of cartels is four clear trends in cartel regulation that are now creating significant political risk for international cartel members (admittedly not covering B&C’s benevolent cartels). First, competition policy is now a priority for policy makers around the world, as reflected in the progress made in detecting, investigating, and prosecuting cartels (OECD, 2020; OECD, 2021b). Recently published data indicate that 68% of global cartels (with members from at least two different continents) have been prosecuted by multiple jurisdictions, with average cartel fines being very high at €19.3 million (OECD, 2020).

Second, the consequences of being caught as a cartel member have gradually become more severe and far-reaching, both for the orchestrating and the participating companies, and for the employees involved (Ordóñez-De-Hano, Borrell, & Jiménez, 2018). Depending on the jurisdiction, a wide array of sanctions is now being deployed, including personal fines, trade prohibitions, and prison sentences (these have increased sevenfold over a recent five-year period, OECD, 2020). After a finding of cartel-behavior from the competition authority, the legal battle usually continues in the form of lawsuits for damages whereby victims file claims and may also coordinate their actions, e.g., to recover cartel overcharges (Burke, 2019).

Third, cartel investigations have also become more sophisticated. Leniency policies – providing immunity from fines for the first player who admits to the existence of a cartel and discloses information on its functioning – are on the rise. This powerful tool serves both detection and deterrence purposes in the realm of anticompetitive behavior (Margrethe & Halvorsen, 2020; Marvão & Spagnolo, 2018; Miller, 2009). It incentivizes cartel members to become whistle blowers. Companies will be less likely to join a cartel if they know that its members may be enticed to disclose cartel operations, (Brenner, 2009; Vanhaverbeke & Buts, 2020).

A larger number of agencies than before now also have the mandate to conduct ‘dawn raids’, in order to collect evidence of cartel behavior and they can even enter private premises of employees during their search for incriminating material. In addition, sophisticated econometric analyses have become standard practice to provide evidence of coordinated conduct in industry and to calculate cartel overcharges (Parcu, Monti, & Botta, 2021).

Fourth, competition authorities have invested more in outreach, communicating competition rules through dedicated events, online campaigns, and competition networks. Compliance programs have also been on the rise with an increasing number of mainly large companies investing in compliance training to abide by competition rules (De Stefano, 2018).

The increased efforts to fight anticompetitive agreements in industry are now deterring and destabilizing cartels. Following a substantial increase in the number of cartels that have been ‘caught’, the average life span of these cartels is now going down rapidly (OECD, 2020). The fight against illegal, anticompetitive behavior will intensify further in the near future, rather than governments shifting their focus to contemplate potential benefits. At the same time, the beneficial effects have been widely acknowledged of international collaboration forms that are legally allowed by various competition policy regimes (and are therefore not considered cartels), see for instance Martínez-Noya and Narula (2018) on international R&D cooperation.

### 1NC – Chemicals

#### Digitalization solves chemicals innovation and competition

ASI 20 [Adhesives and Sealants Industry Magazine, “Digital Transformation Projected to Affect $500 Billion of the Global Chemicals and Materials Industry.” 6/19/20. https://www.adhesivesmag.com/articles/97840-digital-transformation-projected-to-affect-500-billion-of-the-global-chemicals-and-materials-industry]

The chemicals and materials industry has mostly seen only incremental innovation in recent decades, according to Lux Research, with growth coming primarily from expansion into new geographic markets. The industry is simultaneously facing additional pressure as consumers demand increased personalization, sustainability, and efficiency, which has forced the chemicals and materials industry to innovate its business practices.

“The era of business process-driven innovation is one of tight competition, and not just in the characteristics of the products themselves—chemicals and materials companies are also competing on the customer experience and their ability to keep prices low by improving their operations,” said Katrina Westerhof, director of Research at Lux. “Digital transformation can not only strengthen a company’s position in product, customer experience, and profitability but also unlock new capabilities that completely change the nature of what a chemicals company is and does.”

In a recent study, “The Digital Transformation of Chemicals and Materials,” Lux reports that more than $500 billion of the $2.8 trillion chemicals and materials market will transition to outcome-based business models over the next 20 years. Digital technologies like sensors, computer vision, analytics, and robotics will be key enablers of that transition.

“Four key areas emerge as focal points for digital transformation in the chemical industry: product development, supply chain, manufacturing, and sales or post-sales support,” said Shriram Ramanathan, Ph.D., director of Research at Lux and a key contributor to the report. “Use cases in product development include identifying innovation trends, designing new materials or synthesis pathways, and lab automation. For example, AI can be used to design new materials formulations or chemical structures that can speed up product development, or identify new synthesis pathways that enhance the sustainability of materials. Automation can streamline and speed up research, all of which adds to both top-line and bottom-line growth in this highly competitive industry.

“We predict that over the next few years, digital transformation in the materials and chemicals industries will pick up quickly, leading to a large increase in use cases. In the short term, those use cases will exist in pockets and will largely focus on improving operational efficiencies, such as via lab automation, production optimization, asset tracking, and digital sales platforms.”

### 1NC – Democracy

#### Democracy is resilient but fails (no DPT)

Renske Doorenspleet 19, Politics Professor at the University of Warwick, “Conclusion: Rethinking the Value of Democracy,” Rethinking the Value of Democracy, Springer Berlin Heidelberg, 2019, pp. p. 239-243

Key Findings: Rethinking the Value of Democracy

The value of democracy has been taken for granted until recently, but this assumption seems to be under threat now more than ever before. As was explained in Chapter 1, democracy’s claim to be valuable does not rest on just one particular merit, and scholars tend to distinguish three different types of values (Sen 1999). This book focused on the instrumental value of democracy (and hence not on the intrinsic and constructive value), and investigated the value of democracy for peace (Chapters 3 and 4), control of corruption (Chapter 5) and economic development (Chapter 6). This study was based on a search of an enormous academic database for certain keywords,6 then pruned the thousands of articles down to a few hundred articles (see Appendix) which statistically analysed the connection between the democracy and the four expected outcomes.

The frst fiding is that a reverse wave away from democracy has not happened (see Chapter 2). Not yet, at least. Democracy is not doing worse than before, at least not in comparative perspective. While it is true that there is a dramatic decline in democracy in some countries,7 a general trend downwards cannot yet be detected. It would be better to talk about ‘stagnation’, as not many dictatorships have democratized recently, while democracies have not yet collapsed.

Another fnding is that the instrumental value of democracy is very questionable. The feld has been deeply polarized between researchers who endorse a link between democracy and positive outcomes, and those who reject this optimistic idea and instead emphasize the negative effects of democracy. There has been ‘no consensus’ in the quantitative literature on whether democracy has instrumental value which leads some beneficial general outcomes. Some scholars claim there is a consensus, but they only do so by ignoring a huge amount of literature which rejects their own point of view. After undertaking a large-scale analysis of carefully selected articles published on the topic (see Appendix), this book can conclude that the connections between democracy and expected benefts are not as strong as they seem. Hence, we should not overstate the links between the phenomena.

The overall evidence is weak. Take the expected impact of democracy on peace for example. As Chapter 3 showed, the study of democracy and interstate war has been a fourishing theme in political science, particularly since the 1970s. However, there are four reasons why democracy does not cause peace between countries, and why the empirical support for the popular idea of democratic peace is quite weak. Most statistical studies have not found a strong correlation between democracy and interstate war at the dyadic level. They show that there are other—more powerful—explanations for war and peace, and even that the impact of democracy is a spurious one (caveat 1). Moreover, the theoretical foundation of the democratic peace hypothesis is weak, and the causal mechanisms are unclear (caveat 2). In addition, democracies are not necessarily more peaceful in general, and the evidence for the democratic peace hypothesis at the monadic level is inconclusive (caveat 3). Finally, the process of democratization is dangerous. Living in a democratizing country means living in a less peaceful country (caveat 4). With regard to peace between countries, we cannot defend the idea that democracy has instrumental value.

Can the (instrumental) value of democracy be found in the prevention of civil war? Or is the evidence for the opposite idea more convincing, and does democracy have a ‘dark side’ which makes civil war more likely? The findings are confusing, which is exacerbated by the fact that different aspects of civil war (prevalence, onset, duration and severity) are mixed up in some civil war studies. Moreover, defining civil war is a delicate, politically sensitive issue. Determining whether there is a civil war in a particular country is incredibly diffcult, while measurements suffer from many weaknesses (caveat 1). Moreover, there is no linear link: civil wars are just as unlikely in democracies as in dictatorships (caveat 2). Civil war is most likely in times of political change. Democratization is a very unpredictable, dangerous process, increasing the chance of civil war significantly. Hybrid systems are at risk as well: the chance of civil war is much higher compared to other political systems (caveat 3). More specifcally, both the strength and type of political institutions matter when explaining civil war. However, the type of political system (e.g. democracy or dictatorship) is not the decisive factor at all (caveat 4). Finally, democracy has only limited explanatory power (caveat 5). Economic factors are far more significant than political factors (such as having a democratic system) when explaining the onset, duration and severity of civil war. To prevent civil war, it would make more sense to make poorer countries richer, instead of promoting democracy. Helping countries to democratize would even be a very dangerous idea, as countries with changing levels of democracy are most vulnerable, making civil wars most likely. It is true that there is evidence that the chance of civil war decreases when the extent of democracy increases considerably. The problem however is that most countries do not go through big political changes but through small changes instead; those small steps—away or towards more democracy—are dangerous. Not only is the onset of civil war likely under such circumstances, but civil wars also tend to be longer, and the confict is more cruel leading to more victims, destruction and killings (see Chapter 4).

A more encouraging story can be told around the value for democracy to control corruption in a country (see Chapter 5). Fighting corruption has been high on the agenda of international organizations such as the World Bank and the IMF. Moreover, the theme of corruption has been studied thoroughly in many different academic disciplines—mainly in economics, but also in sociology, political science and law. Democracy has often been suggested as one of the remedies when fghting against high levels of continuous corruption. So far, the statistical evidence has strongly supported this idea. As Chapter 5 showed, dozens of studies with broad quantitative, cross-national and comparative research have found statistically signifcant associations between (less) democracy and (more) corruption. However, there are vast problems around conceptualization (caveat 1) and measurement (caveat 2) of ‘corruption’. Another caveat is that democratizing countries are the poorest performers with regard to controlling corruption (caveat 3). Moreover, it is not democracy in general, but particular political institutions which have an impact on the control of corruption; and a free press also helps a lot in order to limit corruptive practices in a country (caveat 4). In addition, democracies seem to be less affected by corruption than dictatorships, but at the same time, there is clear evidence that economic factors have more explanatory power (caveat 5). In conclusion, more democracy means less corruption, but we need to be modest (as other factors matter more) and cautious (as there are many caveats).

The perceived impact of democracy on development has been highly contested as well (see Chapter 6). Some scholars argue that democratic systems have a positive impact, while others argue that high levels of democracy actually reduce the levels of economic growth and development. Particularly since the 1990s, statistical studies have focused on this debate, and the empirical evidence is clear: there is no direct impact of democracy on development. Hence, both approaches cannot be supported (see caveat 1). The indirect impact via other factors is also questionable (caveat 2). Moreover, there is too much variation in levels of economic growth and development among the dictatorial systems, and there are huge regional differences (caveat 3). Adopting a one-size-ftsall approach would not be wise at all. In addition, in order to increase development, it would be better to focus on alternative factors such as improving institutional quality and good governance (caveat 4). There is not suffcient evidence to state that democracy has instrumental value, at least not with regard to economic growth. However, future research needs to include broader concepts and measurements of development in their models, as so far studies have mainly focused on explaining cross-national differences in growth of GDP (caveat 5).

Overall, the instrumental value of democracy is—at best—tentative, or—if being less mild—simply non-existent. Democracy is not necessarily better than any alternative form of government. With regard to many of the expected benefts—such as less war, less corruption and more economic development—democracy does deliver, but so do nondemocratic systems. High or low levels of democracy do not make a distinctive difference. Mid-range democracy levels do matter though. Hybrid systems can be associated with many negative outcomes, while this is also the case for democratizing countries. Moreover, other explanations—typically certain favourable economic factors in a country—are much more powerful to explain the expected benefts, at least compared to the single fact that a country is a democracy or not. The impact of democracy fades away in the powerful shadows of the economic factors.8

# 2NC

### FDI DA

#### Breakdown escalates civil conflicts that draw in Iran, Russia, and North Korea---nuclear war

David Kampf 20, Senior PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University, BA in Political Science from Bates College, Writing has Appeared in The New York Times, Washington Post, Foreign Policy, War on the Rocks, POLITICO Magazine, “How COVID-19 Could Increase the Risk of War”, World Politics Review, 6/16/2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended.

If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling.

Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing.

The Pessimists Strike Back

More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.”

Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before.

In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.”

But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will.

And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars.

The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle.

A Yugoslav Federal Army tank.

Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders.

Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control.

As Risks Increase, Deterrents Decline

To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts.

Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely.

Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

#### DA turns case first – FDI prevents escalation at every step of the ladder

Lee 12 [Hoon Lee, Department of Political Science, Texas Tech University. Sara McLaughlin Mitchell, Department of Political Science, University of Iowa. “Foreign Direct Investment and Territorial Disputes.” August 2012. https://www.jstor.org/stable/23248908]

In this article, we evaluate the relationship between monadic, bilateral, and global FDI flows and the management of geopolitical disputes, including contention over territory, cross-border rivers, and maritime areas. We identify four causal mechanisms linking FDI and interstate conflict prevalent in the international relations literature, focusing on the effect of FDI at different stages of the conflict process. In the first stage, a potential challenger decides whether to challenge the status quo over some interstate border. In the second stage, once a challenge to a land or water border has been issued, the disputing states can choose peaceful or militarized strategies to pursue their issue related goals. We identify two potential mechanisms at the first stage of the process (issue claim onset): (1) declining benefits of territorial conquest due to increased globalization and economic exchange and (2) increased foreign policy preference similarity between states with higher bilateral levels of investment flows. In the second stage of the conflict process (issue claim management), we discuss two potential mechanisms by which monadic and bilateral FDI flows might reduce the chances for militarized conflict and promote peaceful negotiations: (1) increased opportunity costs for violence in dyads characterized by high levels of monadic and bilateral FDI and (2) improved information and signaling in pairs of states with FDI, which should improve the chances for peaceful interstate agreements to be struck. We evaluate these different causal mechanisms using data from the ICOW project on territorial, maritime, and river conflicts in the Western Hemisphere, Europe, and Middle East from 1970 to 2001 and data from Huth and Allee's (2002) territorial dispute data set from 1970 to 1995.

Our empirical analyses provide strong support for the idea that there are declining benefits of territorial conquest in an economically globalized world. As world FDI levels have increased, states have become significantly less likely to make new diplomatic claims to other states' land or water territories. This reflects the sheer size of FDI globally today, which was not felt in earlier periods, as well as the increasing importance of FDI for states' GDP relative to trade, especially in the developing world. However, world FDI levels dropped sharply in 2008 and 2009. In the same period, China pressed its claims to islands and contiguous land areas in Southeast Asia more strongly. This strategy makes sense given that China's FDI is more urgently needed by states in its region, as the 2009 incident involving Vietnam illustrates. Given this systemic change in FDI flows, it will be important to analyze more recent issue claim data as it becomes available.

Second, we find evidence that monadic and bilateral FDI flows create opportunity costs for governments seeking to grab contested territory with violent strategies. Higher levels of bilateral and monadic FDI flows reduce the chances for severe militarized disputes over border issues. While conflict scholars find repeated disputes to be dangerous in terms of raising the probability of future disputes, pairs of countries who are mutually invested in each other's territories are less likely to employ militarized strategies for resolving territorial disputes. We find a similar effect for monadic FDI, which implies that governments who depend on outside financing for economic growth and development are more restricted in the coercive foreign policy strategies that they can employ. This is an important finding for the steps-to-war model, as it identifies FDI as a potential path to peace for countries embroiled in long-standing border disputes.

Third, we find that the pacifying effect of FDI works primarily as an opportunity costs causal mechanism, which makes sense when we consider that issue claim data sets allow for a broader range of diplomatic interaction over contentious issues. Less than half of all issue claims coded by the ICOW project have resulted in even a single militarized dispute. Many studies of economic interdependence and conflict treat all politically relevant dyads as the set of cases for which the effect of economic exchange on conflict is evaluated. Our research design more fully captures the mechanisms linking economic interdependence and conflict. We are able to show how FDI influences foreign policy decision making at different stages of diplomatic contention. Multinational corporations might not be able to completely avoid making investments in countries that have diplomatic territorial disputes with their home government. However, as the cases of China India, Croatia-Slovenia, and Cambodia-Thailand illustrate, multinational companies can lobby their respective governments for a peaceful resolution of the disputed issues, moves that will encourage further FDI and trade between the disputing states.

#### FDI solves the case – it is the most effective competition factor for local firms

Barrios 4 [Salvador Barrios, CORE, University Catholique de Louvain, Holger Gorg, University of Nottingham, UK, Eric Strobl, CORE, University Catholique de Louvain. “Foreign direct investment, competition, and industrial development in the host country.” May 24, 2004. https://www.sciencedirect.com/science/article/pii/S0014292104000637]

This paper examines the effect of FDI on the entry of local firms in host economies. In our theoretical framework we show that the impact of FDI on local development depends on two countervailing forces: first, a competition effect which provokes the exit of local firms; second, positive market externalities related with foreign presence which foster domestic firms’ start-up. With a continuous flow of FDI, the evolution of the number of local firms can be depicted as a u-curve where the competition effect first dominates but is gradually outweighed by positive externalities effects. Taking this as a motivating framework for our empirical analysis and applying semi-parametric regression techniques on plant level panel data for the manufacturing sector in the Republic of Ireland, we find support for such a u-shape.

Our results have important implications for economic policies pursued in host countries. This concerns questions such as incentives for resources transfer with FDI. Our model shows how FDI can be positive for local firms expansion and that positive externalities are more likely to occur the larger is the amount of capital transferred through FDI and the greater is the efficiency of local firms. We also show that local firms need to adapt to new competitors since FDI represents a greater competition factor than imports due to the factor market size limitation. FDI may provoke the exit of a given number of local firms while the remaining firms will be able to capture the positive spillovers effects related to FDI. This implies a transition period in which the competition effect dominates. In this case policy may be aimed at shortening this period and smoothing the transition process by assisting domestic firms to improve their capacities in order to be able to compete with multinationals. Thus, policy could be aimed at increasing R&D and innovative activity, as well as training of workers.

#### The plan can’t be narrowly tailored AND hammers investment.

Fox ’22 [Merritt and Menesh Patel; January 12; Arthur Levitt Professor of Law at Columbia Law School; Acting (Tenure Track) Professor of Law at UC Davis School of Law; Yale Journal on Regulation, “Common Ownership: Do Managers Really Compete Less?” forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3967733]

Finally, and perhaps most important, the Article’s analysis raises a cautionary red flag to policymakers who may be contemplating significant modifications to antitrust law or policy in response to common ownership. At current common ownership levels, such policies, while well-intentioned, would be imprudent. Existing antitrust law is well-suited to address any plausible competitive harm resulting from common ownership. Any significant retooling of antitrust law or policy for purposes of eradicating or significantly tamping down on current levels of common ownership would be an ill-advised effort to solve a non-problem. Such a reform would add to the costs of the investment vehicles of choice for tens of millions of ordinary Americans for such major life purposes as retirement and the education of their children.

#### The policies would undoubtedly be overbroad.

Fox ’22 [Merritt and Menesh Patel; January 12; Arthur Levitt Professor of Law at Columbia Law School; Acting (Tenure Track) Professor of Law at UC Davis School of Law; Yale Journal on Regulation, “Common Ownership: Do Managers Really Compete Less?” forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3967733]

For this reason, it would be imprudent at this time for policymakers to make large-scale modifications to antitrust policies in response to common ownership, such as through wide-scale antitrust investigation of common ownership, prohibitions of common ownership, or safe harbors. As the Article’s analysis shows, these policies are not just overbroad. They could also generate significant social cost, ultimately to the detriment of the very consumers that antitrust seeks to serve.230

#### Logic would prohibit almost all investment.

Paldor ’21 [Ittai; Spring; Law Professor at Hebrew University; Loyola Law Review, “Empirical Findings in Need of a Theory—In Defense of Institutional Investors,” vol. 54]

IV. Policy Implications

Following the now widely accepted analysis according to which cross ownership of firms in oligopolistic product markets spontaneously results in supra-competitive pricing, antitrust doctrine has been called on to combat such cross ownership. The argument is that such cross ownership should be considered to run afoul of section 7 of the Clayton Act. 208To that end, interpretations and analyses of the "investment-only" exemption afforded by the HSR have been advanced, arguing that when the relevant transaction-size and firm-size thresholds are met, acquisitions of oligopolistic firms' stock by cross owning institutional investors should be subject to ex ante antitrust scrutiny. 209

The problem, however, is that application of antitrust law to passive cross ownership has a significant social cost on the one hand and is redundant in addressing the actual competitive concerns on the other. Additionally, coordination is neither alleged, nor likely, as demonstrated by Hemphill and Kahan. 211Disallowing mergers based on the new theories of competitive harm is thus an attempt to address a very rare (and possibly merely theoretical) phenomenon with a blunt tool, the costs of which far exceed its benefits.

First, it is extremely unlikely that institutional investors act as cartel ringmasters. Hemphill and Kahan review the modus operandi of institutional investors, and explain that the generation of, transmission of, and inducement to follow a cartelistic strategy is complex. 212There are several reasons for this. To begin with, the institutional investors that are identified in the literature on anti-competitive effects of common ownership are, with few exceptions, comprised of different business entities. 213Each of these institutional investors is treated in the literature as a single entity, because their holdings are reported to the SEC on a consolidated basis 214and through the same legal entity. 215However, from a business perspective, these are multi-layered structures with divergent interests. 216Their investment, recommendation, and voting operations are conducted by fund portfolio managers, analysts, and centralized voting units. 217Fund portfolio managers make investment decisions for the funds they manage, and each fund portfolio manager is incentivized to increase the value of the fund under her management. 218Fund portfolio managers care very little about the performance of other funds under different (business) management within the same institutional investor. 219As each fund's portfolio is likely to be different from other funds' portfolios, fund portfolio managers have conflicting interests with respect to competition between portfolio firms. 220A second reason for why it would be difficult for an institutional investor to orchestrate a cartel is that transmission of the strategy, even assuming one was devised, and inducing performance are also complicated and dangerous. 221Regardless of who within the institutional investor's organization interacted with portfolio firms' managers, a formidable problem in its own right, 222Hemphill and Kahan argue that discussions of specific prices and quantity are likely to draw attention. 223Institutional investors regularly focus on corporate governance and compensation structure. 224A discussion of specific quotas or prices (with more than one product-market firm) would "almost certainly raise eyebrows." 225And institutional investors are extremely sensitive to the reputational costs associated with scandals. 226The huge impact of even very slight changes in assets under management is destructive, even if it is not accompanied by criminal charges. 227Institutional investors (specifically mutual fund companies):

Have largely succeeded in staying on everybody's good side. The largest players, in particular, enjoy a squeaky-clean image. Any suggestion that an investment advisor as a whole ... had a policy of encouraging firms to pursue an anticompetitive strategy would be damaging... . And a criminal investigation, let alone an indictment, could be devastating. 228

Thus, although theoretically possible, the cartel-ringmaster scenario is an extremely unlikely one. Moreover, even regardless of the implausibility of the scenario, blocking mergers based on the new theories of competitive harm seems unjustified from a regulatory cost-benefit analysis.

On the cost side, the logic behind applying merger control for fear of explicit coordination or information-sharing applies not only to cases of significant cross ownership. It applies to any case of a shareholder owning stock in two competing firms. The implications of a rule designed to prevent such competitive harm would be that all instances of cross holding should be regulated, regardless of the share of the outstanding stock that is held in each of the firms. Any transaction meeting the transaction-size and firm-size thresholds would need to be blocked. As explained, in contrast to unilateral coordination, regular coordination - tacit or explicit - benefits both coordinating firms. If a shareholder is in a position to stabilize a cartel (and bear the associated risks), other shareholders' interests will also have been served through this coordination. The incentives to eliminate competition are ever-present, and cross ownership does not alter them in any way. Thus, coordination through a joint shareholder is simply a matter of opportunity and willingness, not of a difference in incentives. The question of whether cross ownership is significant should not matter. If explicit coordination is truly a concern (and there is little reason to think that it is), the "investment-only" exception to premerger scrutiny would be effectively abolished. In the specific context of institutional investors, a prohibition on cross ownership has unimaginable costs. A rule regulating institutional investors' ability to diversify their portfolio will impact the degree of diversification, which is an important social tool. Such a rule will increase institutional investors' (and through them, retail investors') exposure to firm-specific idiosyncratic risk. Posner et al.'s proposal to limit institutional investors' holdings in oligopolistic industries is a notable example of this risk. Posner et al. have suggested limiting institutional investors by either allowing them to own stock of only one firm in an oligopolistic industry, or by limiting the holdings in each of the firms to a total of 1 percent of the value of the industry. 229The first of these clearly results in reduced diversification. The second limits the total amount any institutional investor may invest in a specific (oligopolistic) industry, which imposes a social cost borne by both sides of the investment transaction: Institutional investors are forced to invest significantly larger portions of their portfolio in less appealing opportunities, and oligopolistic-product-market firms are denied access to capital which would otherwise have been forthcoming. Posner et al. acknowledge that their proposal has a negative impact on diversification. 230They argue that the size of the effect on diversification would be limited. 231But even if the effect on diversification is limited, it nonetheless exists. The diversification and discretion of the investors through whom the vast majority of investors are exposed to capital markets is curtailed. And this will affect trillions of dollars of investments.

On the benefit side of applying merger control to this setting, very little can be gained from such application. As cross ownership itself does not affect the incentives of management, no spontaneous anti-competitive conduct can be expected to ensue. Competition may be inhibited only through explicit coordination at the managerial level. Such coordination already violates both antitrust laws and corporate laws. As explained, each institutional investor has opposing preferences with respect to the unilaterally coordinating firm. Therefore, institutional investors would need to coordinate amongst themselves in order to agree on which firm would unilaterally coordinate. This kind of agreement would itself be an antitrust offense. Even assuming such an agreement were reached, institutional investors would then need to communicate their instructions to management, which could not know how to act until instructed. Instruction to management to prefer a course of action that benefits the cross owning shareholder (or shareholders) at the expense of the firm (and all other shareholders) is disallowed by corporate law. Managers who complied with the instructions would be intentionally inflicting harm on the corporation, 232thereby breaching their own fiduciary duties. 233

It is important to note that, in this context, corporate law would prohibit compliance with such instructions independently of antitrust laws. In other circumstances, anti-competitive conduct benefits all coordinating firms, and as a derivative, all of their shareholders. Therefore, absent an antitrust prohibition, corporate law should not only allow, but in fact encourage anti-competitive conduct and coordination. If not for antitrust law's prohibition, corporate law would applaud even the formation of cartels. It is only antitrust law's condemnation of cartels and other anti-competitive business practices that makes them problematic from a corporate-law perspective.

By contrast, in the current setting the vast majority of the unilaterally coordinating firms' stakeholders lose from the anti-competitive conduct. As mentioned, unilateral shareholding is simply a form of tunneling. With the exception of the cross owning shareholder (or shareholders), whose holdings in the unilaterally coordinating firm must be relatively small (otherwise unilateral coordination will have been unprofitable), all shareholders of the unilaterally coordinating firm lose from this unilateral coordination. Corporate law prohibits such conduct, which is an egregious breach of management's fiduciary duties, regardless of any antitrust-law prohibition.

Therefore, two independent legislative systems, antitrust law and corporate law, already prohibit the only type of conduct that cross ownership may incentivize. And each of these pieces of legislation prohibits the conduct independently of the other's prohibition. There is little value in additional pieces of legislation that may be applied to the situation.

If there were no downside to applying merger control to the situation, its application would be neither beneficial nor harmful. But given the social cost of forcing institutional investors to less lucrative investments or to undiversified (or much less diversified) portfolios, and given the unlikelihood of the cartel ringmaster scenario, the social cost is significant. And the benefit of an additional piece of legislation that may be cited to address conduct that is already prohibited seems extremely small. It is far better to steer clear from unnecessarily regulating institutional investors' strategy, diversification, and discretion.

The conclusion to be drawn from the analysis presented in this Article is, therefore, that antitrust law should not be harnessed to prohibit passive cross ownership by non-controlling institutional investors.

#### Foreign firms are more sensitive to shocks

Clougherty 21 [Joseph A. Clougherty, Gies College of Business, University of Illinois at Urbana-Champaign, Nan Zhang College of Business Administration, California State University Stanislaus, "Foreign investor reactions to risk and uncertainty in antitrust: U.S. merger policy investigations and the deterrence of foreign acquirer presence", April 2021, Journal of International Business Studies, https://experts.illinois.edu/en/publications/foreign-investor-reactions-to-risk-and-uncertainty-in-antitrust-u]

A considerable amount of IB literature has examined the impact of country-level political risk and uncertainty on inward FDI activities – see the literature reviews by Kobrin (1979), Fitzpatrick (1983) and Liesch, Welch, and Buckley (2011). The basis behind this literature is that political risks and uncertainties can “arise from the actions of national governments which interfere with or prevent business transactions” (Weston & Sorge, 1972: 60). Firms generally react to such political hurdles by reducing their willingness to make investments as the option value of delaying investment becomes higher under such risks and uncertainties (Bloom, 2014; Brouthers, Brouthers, & Werner, 2008). While political hurdles and hazards can negatively influence the investment activities of all firms, foreign firms are generally considered to be more sensitive to such shocks. For one, foreign firms might be more frequently targeted when burdensome laws, regulations and policies are implemented by national governments; e.g., Eden (1994) observes that national policies practiced in a parochial manner represent fundamental threats to multinationals. Furthermore, foreign firms often lack the local information, legitimacy and contacts which might help them properly assess and mitigate political constraints. As Werner, Brouthers, and Brouthers (1996: 572) underscore, “firms commonly find international business opportunities to be inherently more risky than domestic ones” due to the stark differences in political environments and the inherent legal uncertainties characteristic of foreign investment endeavors. It is no surprise then that a great deal of empirical literature (e.g., Delios & Henisz, 2000, 2003b; Henisz & Delios, 2001) indicates that uncertainty in the political environment substantially deters foreign investment activities. Indeed, Kobrin (1979) highlights how the response to political risk and uncertainty is frequently avoidance, as multinationals simply do not get involved in countries perceived as risky.

#### Trade D doesn’t apply – FDI’s illiquid nature makes it’s effect on war larger – data

Li 8 [Quan Li, Professor of Political Science at Texas A&M University, Fulbright U.S. Senior Scholar. “Foreign Direct Investment and Military Conflict.” Fall/Winter 2008. https://www.jstor.org/stable/24358144]

Adherents of liberalism argue that economic linkages created through free international markets make war more costly, thus reducing the incentive for war.39 Cumulative statistical evidence appears to favor the liberal notion that trade interdependence is associated with peace.40 In the context of FDI, Richard Rosecrance and Peter Thompson suggest that FDI represents a link that is costly and time consuming to break due to its illiquid nature. Thus, FDI is more likely to reduce conflict than trade.41 Looking at data on U.S. FDI and conflict with other countries between 1950 and 1992, they find that FDI reduces conflict and that two-way FDI has a stronger impact than one-way FDI.

### SEC CP

#### AFF has to change Sherman, Clayton, or FTCA

--sherman—outlaws monopolies and unreasonable restraints on trade

--clayton—prohibits M&A that substantially lessen competition or create a monopoly

--FTCA—bans unfair methods of competition and unfair or deceptive acts or practices

Kendall Kuntz 21, J.D. Candidate at The University of Maryland Francis King Carey School of Law, “Can the Courts and New Antitrust Laws Break Up Big Tech?,” 2/23/21, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

There are three core antitrust laws in effect today: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. These three antitrust laws attempt to protect market competition for the benefit of consumers. The Sherman Act outlaws monopolies and contracts that unreasonably restrain trade. The Clayton Act prohibits mergers and acquisitions that substantially lessen competition or create a monopoly. Lastly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

#### Antitrust cannot be regulation.

Babette Boliek 11, Associate Professor of Law at Pepperdine University School of Law, “FCC Regulation versus Antitrust: How Net Neutrality is Defining the Boundaries,” Boston College Law Review, Vol. 52, 2011, pg 1627-1686.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times. 2 But it is the current iteration of the FCC's "net neutrality" regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.3 For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service. 4 Net neutrality has reinvigorated what may be described as an underlying interagency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose-to protect consumers and to promote allocative efficiencies in production-the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals-i.e., low and economically efficient prices, innovation, and efficient production methods" -regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about."5 The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?6

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive marketsregulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.7 Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.8 In the vast major ity of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

#### Overly broad definitions of regulation distort literature and outcomes. Regulation and antitrust are clearly distinct.

Mariateresa Maggiolino 15, Associate Professor of Commercial Law at Bocconi University, “The regulatory breakthrough of competition law: definitions and worries,” Chapter 1 in *Competition Law as Regulation*, 2015, pages 3-26.

As a consequence, our current perception of economic regulation cannot be anything but wide and far-reaching21 – so wide and farreaching that even competition law can be soundly characterized as a piece of economic regulation. For instance, it can be deemed as a market-harnessing mechanism that, in the interest of the public, realizes a form of legal control on businesses.22 Thus, to argue that current competition law is today taking the shape of a piece of economic regulation does not make much sense. In order to talk about ‘the regulatory breakthrough’ of competition law, we need to put aside any description of what happened in the de-regulation era, as well as any resulting broad and multiform notion of economic regulation. We need to consider a narrower, more specific and detailed conceptualization

– in fact, a historically determined conceptualization – of what economic regulation is.

**[OPTINAL MARK---NO TEXT REMOVED]**

2.2 Competition Law as a Liquid Concept Notwithstanding the few US and EU provisions that directly associate competition law with anticompetitive arrangements and monopolistic conduct, our conception of what competition law is has changed over time according to the different goals that policy makers and scholars have assigned to it.23 Think, for example, of the rules applied to monopolistic conduct. During different periods, both US courts and EU antitrust institutions have interpreted and enforced them as if competition law was called to: (i) protect small businesses against the ‘dictatorship’ of big, concentrated and vertically integrated businesses; (ii) ensure fairness, justice, equity and redistribution; (iii) guarantee the process of competition; (iv) preserve economic welfare; and, in the sole case of the European Union, (v) support the creation of the Single Market.24 More generally, over the past fifty years or so antitrust scholars and practitioners have been divided between those who think that competition law can be used aggressively to achieve perfectly competitive markets and those who believe that, in practice, competition law can make only a modest contribution to the goal of protecting effective competition.25 Indeed, competition law provisions are so flexible and open-ended that they can mirror – and indeed have mirrored – the cultural insights as well as the political concerns and values of our social and political communities.26 For example, the transatlantic past preference for the welfare of small businesses (and, hence, for dominant firms’ rivals) was fed by the laissez faire alarm about bigness as such, the economic misconception that good business performances rest only with non-concentrated markets, and by the concern that economic power concentration would impair free markets and democracy.27 Likewise, the currently dominant idea according to which competition law consists of a set of legal rules that aims at preventing those business practices that may harm economic welfare – never mind whether total or consumer welfare28 – can be traced back to the neoliberal programme that the Chicago School embraced in the 1970s.29 In sum, competition law is a liquid concept. Therefore, in order to conceptualize the regulatory breakthrough of current competition law we must, first, assume that there exists a form of competition law – perhaps just a theoretical one – whose shape has nothing to do with a piece of economic regulation, and, second, verify that the shape of current competition law is taking on some regulatory contours. Further, if we want to explain the alarm that this regulatory transformation of competition law is producing, we must also show whether and how competition law loses something important when it is poured into a ‘regulatory container’3. THE POSSIBLE REGULATORY CONTOURS OF COMPETITION LAW Behavioural and social phenomena are often understood ‘in terms of a purposeful selection of facts from a far wider range of ways of looking at things’.30 Therefore, in order to grasp the terms under which competition law can become a regulatory enterprise – or a more regulatory enterprise – the following paragraphs go to the antipodes. They briefly consider and compare two extreme species of economic regulation and competition law, that is to say: (i) those sector-specific, rate-and-entry pieces of economic regulation that the US government actually ‘enforced’ in the United States until the end of the 1960s; and (ii) the notion of competition law that the Chicago School ‘theorized’ at the beginning of the 1970s. Indeed, these heterogeneous examples of economic regulation and competition law are optimal ‘sparring partners’ to reveal the possible lines along which competition law can assimilate to, or differentiate itself from, a piece of economic regulation. 3.1 Government ‘Actionism’ and Sector-Specific, Rate-and-Entry Regulations Since the second half of the 19th century and, in particular, for the period from the 1930s to the 1970s, in the United States the term ‘economic regulation’ was often used to denote what we today call command and control regimes.31 By using rigid rules backed by administrative enforcement and penal sanctions, independent governmental agencies presided over firms’ market actions in many sectors, such as trucking, airlines, telephone services, electricity, radio, television and natural gas. These agencies could prohibit certain forms of conduct, but also demand some positive actions by, say, prescribing the goods and services to be rendered, indicating the market to be served, deciding when plants needed to be built or modernized or determining how much should be invested in developing new technologies. Furthermore, those independent agencies could lay down conditions for entry into a sector, by determining which firms or individuals (or types thereof) were allowed to engage in which activities, and by controlling not only the quality of a production technique or of a service, but also the allocation of input and output, as well as the prices charged to consumers, or the profits made by enterprises. In brief, by the end of the 1960s the regulatory programmes implemented in the United States required independent authorities to act for a better future – i.e. to promote economic welfare, economic growth and the public interest – by imposing on firms what conduct to undertake and by taking in advance manifold detailed decisions on the market equilibria that these independent authorities believed were to be achieved. These programmes were made up of proscriptions as well as prescriptions, whereby public agencies were entitled to fully decide, manage and control private affairs.32 3.2 Neoliberalism and Chicagoan Conception of Competition Law At the beginning of the 1970s, the Chicagoan conception of competition law was totally defiant of government ‘actionism’. Because of its support for neoliberalism, the Chicago School called for the abolition of competition law, by endorsing full faith in the automatic free-market system it maintained that the government was the problem and not the solution. Then, if competition law was to be somehow tolerated, antitrust enforcers were to play a very residual role. They had to prohibit the sole business practices that harmed the competitive status quo, i.e. that produced a negative impact on the ‘natural functioning’ of the market.33 Further, enforcers had to identify the ‘natural functioning’ of the market by looking at the performance of total welfare, i.e. in full accordance with the main teachings of mainstream economics,34 and without pandering to political ideals or specific interests. In addition, and here, too, in order to limit government ‘actionism’, the Chicago School wanted antitrust enforcers to intervene only when there was no risk of making false positive mistakes. Therefore, they had to take their ‘hands off’ of any case, such as the monopolization cases, where the alleged harmful effects were somehow questionable and speculative. Also, just to control the negative consequences that could follow a wrong intervention, their remedies had to consist in mere cease-and-desist orders and injunctions,35 as the traditional US model of private enforcement envisaged.36 In brief, the overall conceptualization that the Chicago School made of competition law was thought to limit as much as possible the interference of public powers in private affairs. The neoliberal programme, indeed, assumed that the market mechanism made up of preferences, choices, transactions and contracts was alone capable of guaranteeing economic welfare, individuals’ self-determination and the aggregate sum of subjective value satisfactions.3 3.3 So Far, So Close In the light of the above terms of comparison, we can elicit many of the conditions under which the shape of competition law can acquire some regulatory contours. In general, the ‘regulatory metamorphosis’ of competition law happens – or starts happening – when competition law changes its goals, that is to say, when it does not limit itself to protecting total welfare, but pursues political and social aims, or even an economic goal other than the mere protection of the market’s ‘natural functioning’. For example, antitrust law may work to set the stage for better market equilibria and for higher levels of competition – it can work to maximize total and/or consumer welfare. In the latter scenario, then, antitrust law changes for another reason – because it modifies its targets. It focuses not only on those business practices that can harm total welfare, but also on the structure of the markets at stake, on the existing distribution of incentives and legal entitlements, on the spread of information and on business practices that do not maximize total and consumer welfare.38 In other words, a form of competition law that pursues different goals also puts the spotlight on different economic variables. When antitrust enforcers modify their targets, they accordingly use different tools and approaches – they impose not only bans, but also positive obligations establishing what economic agents should do in order to set the stage for better market equilibria.39 They abandon a mere ex post, backward-looking and facts-based attitude focused on the protection and the restoration of the status quo, to endorse a more ex ante, forward-looking and theory-laden position aimed at fostering market development.40 In brief, competition law may experience a regulatory breakthrough as long as it moves away from the minimalist archetype of the Chicago School – away from its goals, targets, tools and approaches. Or, at least, this is the ‘theoretical framework’ into which a regulatory transformation of competition law can be inserted. 4. THE TERMS OF THE PRESENT ‘REGULATORY METAMORPHOSIS’ OF COMPETITION LAW The above theoretical map of what might give a regulatory mould to competition law does not necessarily mean that such a transformation is actually taking place. Indeed, the mere existence of this theoretical map does not necessarily imply that this transformation has ever taken place – the Chicagoan notion of antitrust law is still influencing the US and EU practice, but it has never been fully endorsed, especially in the European Union. Therefore, one could argue that competition law has always been a sort of regulatory enterprise. However, this is not the place to make such a historic analysis. Moreover, this is not the place to discuss the many circumstances in which current US antitrust law and EU competition law look like a piece of economic regulation – the following chapters are devoted to thoughtful analysis of this twofold subject. Nevertheless, some clear facts suggest that today’s competition enforcers – and especially the EU Commission – are available to play a more active role in promoting the maximization of economic welfare (i.e. in pursuing a different goal), by affecting not only business conduct, but also market structures, the existing economic incentives, and the given legal entitlements (i.e. by targeting different variables). Hoping to set the stage for better market equilibria (i.e. endorsing a more ex ante approach), current antitrust enforcers are now more willing than they were in the past to ‘negotiate’ the content of their decisions (i.e. they are less subordinate to the results coming from the adversarial system) and to use sophisticated economic models41 to make educated guesses about future market developments (i.e. they are liable to be more theory-laden and to carry their assessment into the long run). Not by chance, indeed, do expressions such as ‘competition promotion’, ‘negotiated remedies’, ‘forward-looking decisions’, ‘market reorganization’ and ‘continuous monitoring’ belong to the vocabulary of today’s antitrust enforcers.42 For example, consider what the EU Commission does in duty-to-deal cases such as the Microsoft saga.43 In these cases, for the sake of what the Commission considers to be the public interest, it decides how to reshape property rights and distribute the incentives to compete and innovate among the players of the industries at stake. Thus, in duty-to-deal cases the Commission clearly acts as a regulator: it establishes where to drive markets on the basis of specific economic theories, such as the defensive leverage theory;44 it endorses a clear forward-looking perspective; and it imposes not only equitable relief and cease-and-desist orders, but also positive obligations impinging on structural variables. In so doing, the Commission takes into account the ‘industrial identities’ of the involved firms, that is to say, their history of meritorious competitive acts, whether they were previous state monopolists, or whether they deserve their market position or their intellectual property rights.45 In addition, consider the more frequent commitment decisions. They grant a great regulatory leeway to antitrust enforcers.46 Indeed, in issuing commitment decisions the EU Commission – not unlike the US agencies that adopt consent decrees – works as a mediator between the parties, knowing their diverse interests and facilitating the negotiation and conciliation of their opposite positions. Finally, do not forget that, according to some scholars, any antitrust agency or authority that adjudicates a case adopting the rule of reason is actually acting as a regulator that substitutes its economic evaluations for those of entrepreneurs. Namely, establishing whether a restriction is reasonable entails, inter alia, considering whether there could be a less restrictive alternative, that is to say, making an educated guess about how best to achieve a better market equilibrium: by using the option chosen by the entrepreneur or by using another option that the antitrust agency or authority envisages.47 In sum, there is room to argue that current competition law does not have the shape of the Chicago archetype. And this creates a sort of alarm. 5. THE REASSURING NATURE OF THE CHICAGO ARCHETYPE Probably, antitrust scholars are very fascinated by the Chicagoan notion of competition law because they were trained during the years of the Chicago bandwagon. Probably – and this is my personal belief – their diffidence towards a more ‘regulatory approach’ to competition law arises from the reassuring nature of Chicago antitrust, i.e. from the fact that the Chicago concept of competition law shelters – or seems to shelter – enforcers from the risk of enjoying too much discretion. Let me briefly elaborate the details of the argument. Basically, regulators enjoy a great leeway. They can establish (or interpret) what the public interest is and what rules could help to pursue it.48 Yet, information asymmetries as to present market scenarios, as well as limited knowledge as to possible and future market developments, inexorably affect regulators’ ability not only to identify what the optimal market equilibrium should be, but also to determine what changes to market structure, initial endowments and original entitlements should be continuously promoted so as to accommodate the dynamic achievement of this equilibrium. Therefore, regulators may make mistakes in defining (or interpreting) their goals and in elaborating and applying the rules that, over time, should allow these goals to be accomplished. In addition, the very same ignorance that increases the risk of making mistakes exposes regulators to another twofold risk – that of being manipulated and that of making value choices to the detriment of individuals’ self-determination. For example, technocrats themselves may try to influence the notion of public interest in order to preserve or expand their power and jurisdictional turf. In this way, they can deepen their intervention into the affairs of the regulated enterprises and control issues and firms more than necessary.49 Or, looking for better information to draw up and enforce their rules, regulators can be captured50 – they may fall under the spell of the regulatees and, thus, consider some rules to be in the public interest, although in fact these rules fulfil the interest of specific groups of firms.51 And even away from these species of manipulations, since regulators have no objective standard to establish what the public interest is and what rules could help in pursuing it, their decisions may, however, side with specific visions of the world. Their decisions are not neutral – they are value choices, at least partially. In contrast – and in a very reassuring way – the Chicago conception of competition law would have antitrust enforcers act like mere technicians who, by doing only what the economic technique tells them to do, can stay away from any form of discretion and are thus sheltered from mistakes, manipulations and conflicts of interests and values. Namely, suppose that the market is a cosmos – i.e. a ‘natural, spontaneous and necessary’ order governed by universal, unchangeable and objective rules that technicians may know and calculate.52 Assume, then, that economics is the domain of these rules – it is like a hard science that describes what the ‘natural’ functioning of the market is. In the light of these assumptions, as long as antitrust law ‘translates’ these economic rules into the legal realm – as the Chicago School wanted it to do – the risk of making mistakes is low and there is little room for manipulations, conflicts of interests and diverse political views.53 In other words, as long as antitrust enforcers pursue the protection of total welfare by forbidding the sole business practices that mainstream economics say harm it, their approach and tools are so tailored to the evil to be removed that they are little suited for anything else. True, one could argue that economics does not always supply definitive answers to be easily translated into the antitrust realm. Consider, for example, the case of antitrust decisions dealing with the duration and scope of monopolies and IPRs. Economics does not know where to strike the proper inter-temporal balance between creating and disseminating the incentives to compete and innovate. In such a situation, hence, the lack of an economic rule to be translated into the legal field could open the gate to mistakes, manipulations and value choices. To rebut this argument the Chicago School would argue that in those cases antitrust enforcers must take their hands off any negotiation or any other intrusive decision envisaging what the public interest could be. In the absence of any clear-cut economic rule to be translated into the antitrust realm, leaving things as they are, leaving markets free to polish themselves, should be the best way to limit the risks of prosecuting harmless conduct, of being at the mercy of a specific group of interests and of espousing a particular vision of the world. In brief, the less, the better. By conditioning antitrust enforcement to what mainstream economics teaches, and by supporting the ‘hands-off approach’ any time economics is not capable of formulating precise economic rules to qualify business behaviour, the Chicago archetype claims to limit as much as possible enforcers’ discretion and, as a consequence, the risks of making mistakes, of being manipulated, and of making value choices. In other words, the more competition law limits itself to replicate the most certain teachings of economics, the more it becomes a safe game – i.e. a matter of ‘truth’ – and this is something that no form of regulation, and no form of a more regulatory approach to competition law, can ever be.54 Yet, this narrative is misleading. 6. DEBUNKING THE REASSURING NATURE OF THE CHICAGO ARCHETYPE It may actually happen – as the Chicago School maintains – that some economic rules (and their layman rehashes) offer a true description of how markets work. In this case, anchoring antitrust law to economics really limits enforcers’ discretion as well as the consequences that this discretion is said to bring about in terms of mistakes, manipulations and value choices. Yet, even setting aside the case of economic rules that are too sophisticated to offer a realistic description of how competition develops,55 there are economic rules that, though correct and sound, depend so much on some detailed hypotheses that they do not offer one single applicable conclusion for the specific antitrust case at stake.56 Moreover, as seen above in the discussion about the duration and scope of monopolies and IPRs, there are cases where no economic rule can definitively establish what the ‘natural functioning’ of the market is. Hence, in these two cases, any antitrust decision translating one of those economic rules into the legal field is no longer a matter of pure technique.57 When there is no single and definitive economic rule to implement, antitrust enforcers also enjoy discretion – an amount of discretion that, notably, even the Chicagoan ‘hands-off approach’ cannot manage in a technical way. Indeed, the Chicagoan ‘hands-off approach’ shelters the system from manipulation because it does not leave any room for negotiation. Yet, it is not error-free, because if the natural course of the market is unknown, leaving things as they are can be as wrong as changing them. Moreover, the ‘hands-off approach’ is not value-free for at least two reasons. First, assuming that false positive mistakes are more serious than false negative mistakes means siding with the (neoliberal) belief that markets can refine themselves better than any government action can. Second, when dealing with a specific case, leaving things as they are may mean siding with specific interests and values – those interests and values that the particular status quo at stake reflects. For example, the choice not to impose a duty to deal on monopolists holding IPRs endorses two questionable theses – that judges and antitrust administrative authorities cannot second guess (IP) legislators’ choices, and that the overall level of innovation increases leaving the lead to dominant IP holders rather than to tiny followers. Besides, to test the neutrality claim of the Chicago School against more radical observations,58 it must be acknowledged that, as such, the ‘existing competitive status quo’ that Chicagoan competition law is intended to protect (in this case, by using the ‘hands-off approach’) is not neutral – it does reflect a mixture of value choices and political decisions. Indeed, competitive equilibrium is not simply ‘given’, like flowers and electromagnetic forces may be. Each competitive equilibrium results from the combination of many building blocks, such as individual preferences and the willingness to pay,59 which are determined in large part by the original distribution of wealth and legal entitlements that, in turn, result from many political choices, social pressures, and legal rules.60 Therefore, it cannot be neglected that markets move from, and result in, scenarios that are not value-free and neutral.61 As a consequence, if the competitive status quo is not neutral, a fortiori, the Chicagoan decision not to modify it is likewise not neutral. The latter is a political choice – to say the least, it is a conservative choice – that, as such, must submit to comparison with alternative options, i.e. with other, more progressive approaches.62 To be sure, the Chicago conception of competition law may well choose to protect the status quo without paying any attention to the possibility of changing it. In addition it may also choose – as is commonly recalled – to say nothing about the ways prosperity is used or distributed, arguing that those are matters for other pieces of law. Yet, in doing so, the Chicago notion of competition law cannot hide the political value of its choices. Notwithstanding the ostensibly neutral and technical set of principles that it uses, the foundations of the Chicago approach are politically determined. More, we cannot believe that these choices are more neutral than the ones underpinning some pieces of economic regulations. Hence, since the reassuring nature of the Chicago conception of competition law is questionable, we cannot use it to justify our alarm towards the alleged regulatory breakthrough of contemporary competition law.

7. CONCLUSION

As often happens when we are confronted with complex social phenomena, the boundaries of the definitions that we use to address those phenomena are blurred. Therefore, in order to understand what we really mean when we talk about the ‘regulatory breakthrough’ of present competition law, we need to clarify the exact meaning of the terms ‘economic regulation’ and ‘competition law’. This chapter has explored the scope of these two labels and, using two specific forms of economic regulation and competition law as benchmarks, developed two theses. First: we do not err if we argue that competition law acquires ‘regulatory contours’ whenever its goals, targets, tools and approaches distance themselves from those of the Chicago archetype. Second: the main concerns about this ‘regulatory breakthrough’ are rooted in a fallacy – that, in contrast with economic regulation and any sort of regulatory conception of competition law, only the Chicago archetype guarantees neutrality. In fact, the chapter has shown that the Chicagoan theorization of competition law as well as the Chicagoan recipes to support it are value-laden, just as are any other kind of competition law and any example of economic regulation.

#### The CP encourages efficiency in any industry.

Kristelia A. García 14, Associate Professor, University of Colorado Law School, “Penalty Default Licenses: A Case for Uncertainty,” NYU Law Review, Vol. 89, No. 4, October 2014, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1071&context=articles

Companies, like individuals, are risk averse. The existence of a fallback option, even a poor one, allows them to take a chance on private negotiation. This is the case because the parties know they have an alternative should the deal not work out. Moreover, the fallback allows them the freedom of dabbling in individual deals with only one partner or a handful of them, affording valuable feedback on which terms work and which ones do not without committing the time and effort required to negotiate individually with all comers. If the private terms prove functional and an industry norm begins to take shape-as in the case of the Clear Channel-Big Machine deal-it can then be extended to the larger, more comprehensive partners and eventually reflected in the underlying legal regime.

CONCLUSION

When coupled with a penalty default, uncertainty can bring greater efficiency to the marketplace by encouraging private ordering, which allows for tailored terms and responsiveness to rapid technological change. This is great news in the music sampling context, where for years scholars, legislators, and industry players have been debating a statutory license. 271 This Article suggests that a penalty default license for samples, coupled with existing uncertainty about the future state of protections for derivative works, might alleviate efficiency concerns by encouraging more and better private negotiation. 272

This prescription is particularly timely given the imminent rewrite of "the next great copyright act," 273 and may find application outside the United States as well. In the European Union, for example, there has been a recent push for single-market licensing of intellectual property rights. 274 Copyright territoriality has largely thwarted this initiative, 275 whereas private ordering has resolved it. In November 2012, for example, Google accomplished something the European Union has thus far been unable to: The company struck a private, multiterritory agreement with thirty-five European countries. 276

Acknowledgment of the role uncertainty and penalty defaults play in increasing effectiveness in the market for statutory licensing and in copyright enforcement is only the beginning. A better understanding of uncertainty as a tool for efficiency has application in any industry facing change as a result of rapid technological growth, evolving consumer preferences, or ambiguity about the future state of the law.

### Common Ownership Adv

#### DELAY---even if enforcement orders are ultimately entered, each case takes too long to prosecute---that means remedies come too late to create competition.

Alison Jones & William E. Kovacic 20, Jones is a professor at King’s College London; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

In the discussion above, we have been addressing the types of remedies that are imposed at the conclusion of a lawsuit. A problem in highly dynamic markets, however, is that the lag between the initiation of a case and a final order on relief may be so great that market circumstances have changed dramatically or the victim of allegedly improper exclusion may have left the market or otherwise lost its opportunity to expand and contest the position of the incumbent dominant firm. In this context, the antitrust cure arrives far too late to protect competition. The relatively slow pace of antitrust investigations and litigation (with appeals that follow an initial decision) has led some observers to doubt the efficacy of antitrust cases as effective policy-making tools in dynamic commercial sectors.

#### 2) DETERRENCE---firms will flout if they believe detection and litigation are unlikely

William Rogerson 20, the Charles E. and Emma H. Morrison Professor of Economics at Northwestern University; and Howard Shelanski, Professor of Law at Georgetown University, June 2020, “Antitrust Enforcement, Regulation, and Digital Platforms,” Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century.33 The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates.34 Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases,35 then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

### Cartels Adv

#### Cartels solve themselves quickly

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University, “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

Generally cartels contain seeds of their own destruction... cartel members are reducing their output below their existing potential production capacity, and once the market price increases, each member of the cartel has the capacity to raise output relatively easily. The tendency is for cartel members to ‘cheat’ on their quota, increasing supply to meet market demand and lowering their price.

Most cartels agreements are unstable at the slightest incentive they will quickly disband, and returning the market to competitive conditions… Cartels appeared most strongly in those industries defined by scale and scope economies and with high fixed costs… Therefore, they are more common in wealthy countries with big businesses. Cartels also tended to appear among domestic firms first, before going international (except, for example; early– zinc, rail, shipping… cartels)…

#### Prices take years on average to stabilize – time distinction between disbandment and successful enforcement is negligible

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University; **internally citing John Connor, Professor of industrial-organization economics at Purdue University, specializes in empirical research in antitrust policy, PhD University of Wisconsin**; “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

In the study ‘Cartels and Antitrust Portrayed: Private International Cartels’ by John Connor; calculates the range of cartel price overcharge to be between 17% and 21%… it’s important to note that the research may under-estimate the true extent of the higher price from cartels… Also, the study shows that prices don’t fall very quickly to market levels after a demise of a cartel. Rather, prices fall gradually over a period of time– few months, even few years, e.g., after the ‘construction concrete products industry’ cartel was dissolved, prices were still falling three years later…

#### Chemical industry is resilient

Outlook ‘12; Economic world economic review, “Economic Outlook — Economic Outlook No.2-2012” <http://www.mydigitalpublication.com/display_article.php?id=1058343>

Rebound in the US **Benefiting from the impact of the last two massive public budget support plans for industry**, **the American chemical industry was also helped in 2011 by favourable dollar/**euro **exchange rate and by the restored health of the Auto sector**, one of **its leading user industries**.While **construction**, the chemical industry’s second major customer, has not yet genuinely recovered, its **decline has** at least **halted, stabilising demand** at levels which are manageable in the end for its chemical suppliers. **The willingness of American politicians to support a forced march to US economic growth offers a reassuring outlook for activity in the sector in 2012**. **Additional factors include relatively stable oil prices,** the **good health of the inorganic chemical sector** – notably fertilisers – **and the improved financial structure of actors in the industry after their restructuring efforts implemented during the** 2008- 2009 **crisis**. On top of this, **there are the prospects of the juicy but more distant benefits of innovations in green chemistry**.

#### Economic peace entirely accounts for the democratic correlation - best data

**Mousseau 13**

Michael Mousseau, Associate Professor of Poli Sci at University of Central Florida, PhD from Binghamton, International Studies Quarterly, 2013, "The Democratic Peace Unraveled: It’s the Economy", 57, Wiley Library

Model 2 presents new knowledge by adding the control for economic type. To capture the dyadic expectation of peace among contract-intensive nations, the variable Contract-intensive EconomyL (CIEL) indicates the value of impersonal contracts in force per capita of the state with the lower level of CIE in the dyad; a high value of this measure indicates both states have contract-intensive economies. As can be seen, the coefficient for CIEL ()0.80) is negative and highly significant. This corroborates that impersonal economy is a highly robust force for peace. **The coefficient for Democracy**L **is** now at **zero**. There are no other differences between Models 1 and 2, whose samples are identical, and no prior study corroborating the democratic peace has considered contract-intensive economy. Therefore, the standard econometric inference to be drawn from Model 2 is the nontrivial result that **all prior reports of democracy as a force for peace are** probably **spurious**, **since this result is predicted and fully accounted for by economic norms theory.** CIEL and DemocracyL correlate only in the moderate range of 0.47 (Pearson’s r), so the insignificance of democracy is not likely to be a statistical artifact of multicollinearity. This is corroborated by the variance inflation factor for DemocracyL in Model 2 of 1.85, which is well below the usual rule-of-thumb indicator of multicollinearity of 10 or more. Nor should readers assume most economies: While almost all nations with contract-intensive economies (as indicated with the binary measure for CIE) are democratic (Polity2 > 6) (Singapore is the only long-term exception), more than half—55%—of all democratic nation-years have contract-poor economies. At the dyadic level in this sample, this translates to 80% of democratic dyads (all dyads where DemocracyBinary6 = 1) that have at least one state with a contract-poor economy. In other words, not only does Model 2 show no evidence of causation from democracy to peace (as reported in Mousseau 2009), but **it** also illustrates that **this absence of democratic peace includes the vast majority**

—80%—**of democratic dyad-years over the sample period**. Nor is it likely that the causal arrow is reversed—with democracy being the ultimate cause of contract-intensive economy and peace. This is because correlations among independent variables are not calculated in the results of multivariate regressions: Coefficients show only the effect of each variable after the potential effects of the others are kept constant at their mean levels. If it was democracy that caused both impersonal economy and peace, then there would be some variance in DemocracyL remaining, after its partial correlation with CIEL is excluded, that links it directly with peace. The positive direction of the coefficient for DemocracyL informs us that no such direct effect exists (Blalock 1979:473–474). Model 3 tests for the effect of DemocracyL if a control is added for mixed-polity dyads, as suggested by Russett (2010:201). As discussed above, to avoid problems of mathematical endogeneity, I adopt the solution used by Mousseau, Orsun and Ungerer (2013) and measure regime difference as proposed by Werner (2000), drawing on the subcomponents of the Polity2 regime measure. As can be seen, the coefficient for Political Distance (1.00) is positive and significant, corroborating that regime mixed dyads do indeed have more militarized conflict than others. Yet, the inclusion of this term has no effect on the results that concern us here: CIEL ()0.85) is now even more robust, and the coefficient for DemocracyL (0.03) is above zero.7 Model 4 replaces the continuous democracy measure with the standard binary one (Polity2 > 6), as suggested by Russett (2010:201), citing Bayer and Bernhard (2010). As can be observed, the coefficient for CIEL ()0.83) remains negative and highly significant, while DemocracyBinary6 (0.63) is in the positive (wrong) direction. As discussed above, analyses of fatal dispute onsets with the far stricter binary measure for democracy (Polity = 10), put forward by Dafoe (2011) in response to Mousseau (2009), yields perfect prediction (as does the prior binary measure Both States CIE), causing quasi-complete separation and inconclusive results. Therefore, Model 5 reports the results with DemocracyBinary10 in analyses of all militarized conflicts, not just fatal ones. As can be seen, the coefficient for DemocracyBinary10 ()0.41), while negative, is not significant. Model 6 reports the results in analyses of fatal disputes with DemocracyL squared (after adding 10), which implies that the likelihood of conflict decreases more quickly toward the high values of DemocracyL. As can be seen, the coefficient for DemocracyL 2 is at zero, further corroborating that **even very high levels of democracy do not appear to cause peace in analyses of fatal disputes, once consideration is given to contractintensive economy**. Models 3, 4, and 6, which include Political Distance, were repeated (but unreported to save space) with analyses of all militarized interstate disputes, with the democracy coefficients close to zero in every case. Therefore, the conclusions reached by Mousseau (2009) are corroborated even with the most stringent measures of democracy, consideration of institutional distance, and across all specifications: **The democratic peace appears spurious, with contract-intensive economy being the more likely explanation for both democracy and the democratic peace.**

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### Biz Con DA

#### Expanding Section 5 enforcement decks business confidence across the board

Phillips 21 [Noah Joshua Phillips, FTC Commissioner. Christine S. Wilson, FTC Commissioner. “Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act.” 7/9/21. https://www.ftc.gov/system/files/documents/public\_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf]

Rescinding the Bipartisan 2015 UMC Statement removes clarity for honest businesses that seek to follow the law. That statement was based on legal precedent that established modest limits on the use of Section 5.2 In particular, the Bipartisan 2015 UMC Statement provides that (1) the Commission will be guided by the public policy of promoting consumer welfare; (2) conduct will be evaluated under a framework similar to the rule of reason, considering both likely harm to competition and procompetitive justifications; and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts.

The principles embodied in the Bipartisan 2015 UMC Statement have long provided a solid foundation for sound antitrust enforcement. Businesses had guidance about future challenges to conduct under Section 5 of the FTC Act. Today, they are left to wonder, because the Commission failed to enunciate new principles regarding its interpretation of “unfair methods of competition.” The 2021 UMC Statement does not describe the principles or parameters that will guide the Commission going forward. While the majority criticize the Bipartisan 2015 UMC Statement for the absence of clear enforcement principles, the 2021 UMC Statement offers even less.

That silence speaks volumes. The majority could have waited to rescind the Bipartisan 2015 UMC Statement until they had something with which to replace it – and the public could then evaluate their view against the text, structure, and history of the FTC Act – but it appears they prefer unbridled authority to condemn business practices. That is not what Congress intended.4 The majority deride the Bipartisan 2015 UMC Statement as an “abrogat[ion]” of “the Commission’s congressionally mandated duty to use its expertise[.]”5 It did no such thing, nor do they cite any sound basis to support their apparent proposition that Congress intended to give a few unelected commissioners of a federal agency limitless authority to enjoin business practices.

Nor did Congress vest the Commission with broad authority to regulate the economy without an intelligible principle.6 The majority have repeatedly stated their desire to step outside the Commission’s congressional mandate to bring and adjudicate cases and instead fashion antitrust regulations.

In addition to being legally dubious,8 this is a bad idea.9 The 2021 UMC Statement portends Section 5 rulemaking that prohibits conduct that courts currently find legal under the rule of reason, which demands a consideration of business justifications and procompetitive benefits and analyzes effects. Rulemaking should not prohibit procompetitive, efficient conduct that benefits consumers. Neither should rulemaking prohibit conduct that does not cause anticompetitive harm. Regulation should address market failures. To claim authority to fashion regulations while explicitly ignoring the good things they would prevent – looking only at the purported benefits of regulation, and not the costs – is perverse, not to mention inconsistent with American administrative law and sound public policy.

The majority try to assuage the public’s concerns of unchecked regulatory power by pointing out the Commission’s lack of criminal jurisdiction and the ability to collect treble damages.10 These observations are red herrings. If they promulgate regulations, the Commission will have the authority to impose massive civil penalties for violations. Threatening precisely those sanctions, the Commission offers no guidance whatsoever on legality, but instead encourages the public to “trust us.” That is not good enough.

III. The Bipartisan 2015 UMC Statement is Consistent with Section 5

The Bipartisan 2015 UMC Statement is consistent with Section 5. By its terms, Section 5 concerns “unfair methods of competition” (emphasis added). Interpreting those words in light of how the courts have analyzed competition – including in Section 5 cases – takes the text seriously. Providing flexibility – which Section 5 does – is not the same as letting the FTC do whatever it wants

The 2021 UMC Statement incorrectly claims that the Bipartisan 2015 UMC Statement “negates the Commission’s core legislative mandate[.]” The majority spill much ink to make a simple point: Section 5 reaches beyond the Sherman Act and the Clayton Act.11 On this, there is no disagreement between us and the majority; or, for that matter, between the majority and the Bipartisan 2015 UMC Statement. That statement clearly says that “Section 5’s ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act, but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act.”12 Thus, when the majority fault the Bipartisan 2015 UMC Statement for “tethering Section 5 to the Sherman and Clayton Acts[,]” they are attacking a strawman.13 The question, which the majority fail to answer, is not whether Section 5 reaches beyond Sherman and Clayton Acts, but how far beyond.

The 2021 UMC Statement provides a blinkered history lesson based largely on snippets of legislative history that paint an incomplete – and, as legislative history often does, unreliable – picture. While the majority get some things right – e.g., that Congress intended Section 5’s prohibition of “unfair methods of competition” to go beyond the Sherman Act as interpreted in 1914 – they ignore those parts of the legislative debate that discuss the law’s limits.14 Faced with a standard as vague and potentially unbounded as “unfairness,” Democrat and Republican lawmakers alike were rightfully concerned about giving the FTC too much power. For example, one senator warned that the term “unfair competition” could give the FTC “the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition[.]”15 Another questioned the constitutionality of the proposed law, as it provided no “guide of law” to determine unfairness and “substitute[d] for a government of law the government of a board of five men.”16 Lawmakers also worried that the FTC would apply Section 5 to protect some competitors from their more efficient rivals, to the detriment of consumers.

Section 5’s defenders responded with reassurances that fairness was about protecting competition and the public, not competitors. Senator Cummins, cited by the majority, stated that Section 5 is concerned “not merely with unfairness to the rival or competitor”, but with “unfairness to the public”; and “[n]o sane, sensible man ever suggested that mere underselling constitutes unfair competition.”18 As at least one commentator has argued, this back-and-forth indicates that Section 5’s proscription of “unfair methods of competition” should reach only those methods that are likely to exclude equally or more efficient competitors from a market.19 By failing to grapple with – indeed, by completely ignoring – this inconvenient part of the legislative history, the 2021 UMC Statement presents a distorted view of what Congress envisioned for Section 5.

IV. Withdrawing the Bipartisan 2015 UMC Statement Is Contrary to Sound Competition Law and Policy

Although broader in scope than the Sherman and Clayton Acts, Section 5’s prohibition of unfair methods of competition is no different from the other antitrust laws in its singular focus: competition.20 Turning away from established mechanisms, like the rule of reason, for evaluating competition is the wrong move, and it will hurt consumers.

Applying a framework similar to the rule of reason, as the Bipartisan 2015 UMC Statement did, means that the Commission will look carefully at the facts to determine the effect of a company’s conduct. Despite the majority’s description of the rule of reason as “unwieldy” and “unadministrable,”21 that has been the law for over a century.22 Justice Louis Brandeis endorsed it in 1918 in his famed decision in Chicago Board of Trade, 23 and a unanimous Supreme Court reiterated it just days ago when it handed deserving college athletes a victory in Nat’l Collegiate Athletic Ass’n v. Alston. 2

We are concerned that the majority’s hostility to the rule of reason signals a desire to exclude consideration of business justifications and efficiencies when assessing the legality of scrutinized conduct. Failing to take into account the benefits of conduct to consumers (and denying businesses the opportunity to defend themselves) opens the door to condemning procompetitive conduct to the detriment of everyday Americans. Were that the law, the FTC would be free to condemn a better product or lower price that hurts no one but competitors—the very essence of competition.25 Divorcing “unfair methods of competition” from the need to examine the facts regarding the conduct at issue is a dangerous step in the direction of potentially subjecting all conduct not captured by the Sherman or Clayton Acts, but disliked by a majority of commissioners, to per se illegality.

Rejecting the Bipartisan 2015 UMC Statement’s embrace of the consumer welfare standard and decades of antitrust jurisprudence is likewise misguided.26 The consumer welfare standard has long been the lodestar of our antitrust laws, embraced and explained by courts and the antitrust enforcement agencies alike.27 And for good reason: it is administrable and promotes predictable outcomes that seek to permit procompetitive (and condemn anticompetitive) conduct.28

Some argue that antitrust should jettison the consumer welfare standard so that it can promote other interests like protecting competitors and jobs, or reducing income inequality.29 To some extent, this critique is simply misplaced, based on a caricature of consumer welfare as based wholly on price. In reality, the standard is not narrowly focused on price to the exclusion of other factors that benefit consumers. Antitrust enforcement based on consumer welfare considers product quality, product variety, service, and innovation.

But leaving that aside, just as the Commission today declines to explain precisely its view of the standards for Section 5, critics of the consumer welfare standard offer no guidance on the full array of competing interests they believe antitrust should vindicate, or how to weigh those interests. Their vision is a farrago of vague and competing values that will undermine the law’s predictability, credibility, and administrability, while facilitating politicized outcomes. Agencies and courts alike will serve (at least) two masters, and thus none. Worst of all, consumers will be denied the benefits of competition.31 But even though we (and the public) remain in the dark, we have little doubt that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions.

The 2021 UMC Statement hints at an original meaning of “unfair methods of competition” that it fails to describe, but suggests is a law without limit. We are not so sure. First, while early Sherman Act decisions like Standard Oil surely animated Congress in adopting the FTC Act, as one of the articles cited in the 2021 UMC Statement notes, Section 5 has played a small role in developing competition policy in the U.S. precisely because “the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.”32 Interpretations from the judiciary, including multiple Supreme Court cases, “suggested that the Sherman Act would reach an especially wide range of business behavior.”33 Over 100 years later, “the courts recognize the Sherman Act’s expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties.”34 In our tenure, for example, the FTC has brought a substantial number of monopolization cases in industries ranging from gene sequencing and pharmaceuticals to high technology.

Second, unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles. (Another reason still that removing guidance while failing to replace it is a bad idea.) Since the Supreme Court last articulated the scope of Section 5, the Commission has failed successfully to litigate a standalone Section 5 case.36 As Bill Kovacic and Marc Winerman explain, a successful use of Section 5 “ha[s] not been for lack of trying. In the 1970s the Commission premised several cases on distinctive Section 5 theories. Three of these matters – Boise Cascade, 37 Official Airline Guides, 38 and Ethyl39 – resulted in court of appeals decisions. All were adverse to the agency.”40 The FTC also brought the Abbott Laboratories case in the 1990s, but again lost, this time before the district court.41 When discussing the Commission’s track record, Kovacic and Winerman observe, “[i]n each instance, the tribunal recognized that Section 5 allows the FTC to challenge behavior beyond the reach of the other antitrust laws. In each instance, the court found that the Commission had failed to make a compelling case for condemning the conduct in question.”42 The 2021 UMC Statement laments that the FTC has used Section 5 only once since the Bipartisan 2015 UMC Statement was issued.43 Tellingly, the majority fail to note that in the one case involving a standalone Section 5 claim issued following the Bipartisan 2015 UMC Statement, Qualcomm Inc. v. FTC, the Commission lost on appeal.

Today, we lament the majority’s rejection of longstanding antitrust foundations that have provided the basis for administrable, predictable, and credible enforcement, including the rule of reason and the consumer welfare standard. Going forward, we fear a rash of cases and rulemakings untethered from sound law and economics and hostile to procompetitive conduct. Consumers will lose the benefits of competition, and honest businesses will lose clarity regarding the boundaries of lawful conduct. The only winners of the Commission’s rescission of the Bipartisan 2015 UMC Statement are inefficient rivals and those who seek to politicize antitrust.

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#### the plan creates the fear of future unrelated AND politicized amendments

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

New Merger Guidelines

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

### FTC DA

#### Market collusion shocks domestic energy production

**Gray 20** [Mr. Gray has served as White House counsel, U.S. ambassador to the European Union, and as U.S. special envoy to Europe for Eurasian energy, “Banks' Energy Boycott Is an Antitrust Problem,” 15 July 2020, The Wall Street Journal, Factiva]

America's largest financial institutions are picking winners and losers in the energy sector for political reasons -- even while the Covid-19 crisis has reduced global oil demand and a price war between Russia and Saudi Arabia has flooded global markets with crude. Under pressure from environmental activists, banks are withholding desperately needed capital from oil and gas companies. In doing so, they put millions of jobs at risk and may even be violating federal antitrust law.

To protect consumers, antitrust laws prohibit unreasonable agreements in restraint of trade. Anticompetitive conduct enriches the few -- members of the cartel -- at the expense of everyone else, especially the consumers who end up paying higher prices. Agreements among competitors to fix prices, divide markets or engage in certain forms of group boycott prevent competition and are therefore illegal.

Normally, banks compete to lend to corporate customers. That competition ensures that worthwhile projects can gain access to capital and use it to bring products to consumers at affordable prices. But Citibank, Goldman Sachs, JPMorgan Chase, Morgan Stanley and Wells Fargo have started moving in parallel to cut off liquidity and capital to America's energy sector. More specifically, these ostensible competitors have announced promises to stop lending money in support of Arctic oil drilling and coal mining.

BlackRock, the world's largest investment firm, announced in January that it would divest from companies deriving more than 25% of their revenue from thermal coal and has joined a pact called "Climate Action 100+" with more than 450 global investors. "Banks are increasingly using environmental, social and governance factors when underwriting corporate borrowing," Barron's reports, such that according to one survey, "half the lending assets covered by 182 banks" were screened for ESG risks.

These announcements look a lot like invitations to collude on a boycott of a critical segment of the U.S. economy. The Federal Trade Commission has maintained that such invitations -- even if they go unheeded -- can violate federal antitrust law. As the FTC and the Department of Justice reiterated in April, "Even absent a collusive agreement," antitrust enforcers may "pursue a civil enforcement action against companies and individuals that invite others to collude." If made with an intent to invite or signal competitors to join a group boycott, these announcements could violate the law.

Federal antitrust law also prohibits boycott agreements instigated by a third party to prod firms that compete with each other into unreasonably restraining market competition. In these "hub and spoke" conspiracies, competitors may violate the law without communicating with each other, and even though the relevant agreements they make are with a third party, not a competitor.

Pressure campaigns by activist groups (possible hubs) -- followed by the pattern of announcements and parallel conduct by banks (possible spokes) -- present more evidence of potential conspiracies. For example, Green America proclaims it "is pressuring banks world-wide to stop funding fossil fuels" as part of the "Fossil Banks, No Thanks" campaign, which aims "to stop large commercial banks from financing the fossil fuel industry." The Sierra Club shares the same goal and even reports that it has "met with representatives from major banks to discuss . . . why action by the financial industry is necessary." As a result, five of the six largest banks in the United States will no longer finance oil and gas drilling in the Arctic National Wildlife Refuge. Bank of America is the lone holdout.

Activist investors have also joined the pressure campaign, encouraged by business leaders' embrace of "stakeholders" over shareholders. Any of this third-party activity could be the hub for tacit collusion between the spokes -- i.e., banks collectively boycotting certain energy projects.

The U.S. does a lot for its banks, which have long been heavily subsidized and backed by government interventions. The Federal Deposit Insurance Corp. guarantees deposits, and other programs have been set up whenever banks face a crisis. The Covid-19 pandemic is no exception: Congress routed its Cares Act relief efforts to businesses through banks, which are rewarded with fat fees. Meanwhile, bank executives are turning their backs on the very companies that keep the lights on.

When America's financial industry starves the energy sector of capital, that isn't fair, free-market competition. It's a subsidized industry barreling toward collusion at the invitation of radical third-party intermediaries -- and inviting billions of dollars in antitrust liability.

#### That causes leadership decline and hot wars

**Lippold 16** [Kirk S. Lippold, President of Lippold Strategies, LLC, a consulting firm that specializes in leadership, crisis management, and national security policy, spent 26 years in the Navy, where he was a Surface Warfare Officer serving on five different ships, including guided missile cruisers and destroyers to protect U.S. national security interests across the globe, “Re: Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018,” July 11, 2016, U.S. Environmental Protection Agency Attention Docket ID No. EPA-HQ-OAR-2016-0004 EPA Docket Center]

Since 2010, the U.S. has undergone a significant energy renaissance in which U.S. production of oil and gas has skyrocketed. Such a rapid rise in natural gas and oil production from shale and other tight oil resources has been brought about by the maturation of hydraulic fracturing, improved detection capabilities, and horizontal extraction technology, as well as newfound access to previously unavailable oil reserves. As a result, the U.S. has become and will continue to be a net exporter of oil. This new reality has altered the fundamental justification for hasty investment in costly and unproven fuels as originally envisioned with the creation of the RFS. In light of this reality, the U.S. should carefully consider whether the RFS should continue to be hailed as a keystone American energy policy. While the RFS had good intentions at its inception, with the current energy production status in the U.S., serious consideration to terminate the program must be considered if it no longer confers the intended national security benefits to the American consumers or our economy.

The U.S. is already the world's largest producer of oil and natural gas combined and is on track to become the world's top oil producer by 2020. The effects of America's renaissance have been to decrease demand for foreign oil, reduce trade imbalances and contribute a whopping 8 percent to the total U.S. GDP. The true scope of growth in American energy resources cannot be overstated. Notably, the non-partisan Congressional Budget Office (CBO) explains that the U.S. now produces approximately 3.5 million barrels of tight oil per day and about 9.5 trillion cubic feet of shale gas per year. It too expects that there will be increasing levels of production - with attendant profound market and economic effects - in the years to come. In April 2015, U.S. oil production reached its highest level in 45 years, hitting 9.7 million barrels per day. Large production volumes are being generated by new oil and gas discoveries in Texas, North and South Dakota and Pennsylvania. Against this new economic backdrop, no longer are costly fuels needed to effectively secure American energy independence. The U.S. would instead benefit from consolidating and building upon the energy resurgence in its efforts to preserve and stabilize the international order.

Such a consolidation allows the U.S. to share our newfound wealth of resources with other nations, thereby allowing the U.S. to exert greater influence on the world stage. No longer must the U.S. be fully subject to the whims of unstable or hostile international actors, but it can credibly marshal and exert energy diplomacy in a manner that directly contributes to greater global security. The U.S. can also indirectly gain influence at the expense of our competitors by 'offsetting' their oil exports with our own.

#### US energy dominance solves Russia, China and Middle East war

**Ladislaw 19** [Sarah Ladislaw is senior vice president and director and senior fellow of the Energy Security and Climate Change Program, where she leads CSIS’s work in energy policy, market, and technology analysis, Nikos Tsafos is a senior fellow with the Energy Security and Climate Change Program at the Center for Strategic and International Studies, “Energy Spheres of Influence,” September 13, 2019, <https://www.csis.org/analysis/energy-spheres-influence#:~:text=Influence%20is%20a%20multifaceted%20and,because%20we%20assume%20it%20does>]

For several decades, energy security has been defined and pursued in a multilateral world with relatively open markets and technology transfer, where energy relations have become increasingly commodified. But that world may soon disappear—energy relationships might become more political, open trade might give way to friction, and great powers might leverage energy relations or energy technology to gain an edge over each other. For decades the United States has promoted a rules-based, multilateral order, supported by shared gains from free trade and deeper economic and political integration within and among countries. Energy security, the ability to secure affordable and reliable supplies of energy, has been widely recognized as common good promoted by this system. As the world’s largest consumer and importer of energy, it was squarely in the United States’ national interest to support this approach through domestic and international energy policy as well as foreign policy. Today, this multilateral order is being challenged. The world is experiencing a new era of competition for greater geographic and economic power driven by the shifting center of gravity of the global economy, the realignment of relationships between and among countries, and rapid technological change. Energy is poised to play an important role in this upheaval and will be affected by these changes. The United States is no longer the largest consumer or importer of energy. Instead, it is now the largest producer of oil and natural gas and will soon be a net exporter of energy. The energy world also is changing rapidly, with renewable energy resources like solar and wind making up the fastest growing and largest source of new supplies and global imperatives like climate change challenging the role of status quo fuels. These changes have heralded a reexamination of the United States’ national interest regarding energy in this changing global system. The United States has important decisions to make about its position in this new environment. Can energy play an influential role in achieving U.S. foreign policy objectives in various regions of renewed geopolitical competition? Is any country or group of countries poised to dominate a given energy market or fuel and might that negatively affect U.S. national security interests? How does this changing global dynamic in which countries are vying for greater geographic and economic spheres of influence affect our approach to global energy security? Will the energy sector become fundamentally more mercantilist, and will the United States be competitive if it does? Greater insight about each of these questions is a prerequisite to the formulation of U.S. foreign and energy policy. So far, the United States has grappled with these questions by pursuing “energy dominance,” a strategy in which energy represents (1) a tool for gaining geopolitical influence in a given region and (2) an area of competitive and strategic economic advantage for the United States. But other global powers, like China and Russia, pose strong competition for this U.S. strategy. Energy features prominently in the economic, foreign, and national security strategies of all three countries but in different ways. And although all three recognize the importance of maintaining affordable and reliable energy supplies for the good of the global economy as well as their own economic well-being, they also recognize the influence of energy in the execution of foreign policy at the global and regional level. The issue for the international energy community is whether the multilateral approach to shared energy security, supported by the promotion of free and integrated markets, is breaking down into regional and economic spheres of influence more mercantile in nature—and if so, how the United States should respond. Shifting Balance of Power Power structures within and among nation-states are shifting. A decade ago, Zbigniew Brzezinski foreshadowed the upheaval as the result of a “global political awakening” in which “for the first time in history almost all of humanity is politically activated, politically conscious and politically interactive” and the result is a “quest for cultural respect and economic opportunity in a world scarred by memories of colonial or imperial domination.”1 Much of this awakening is enabled by technology, which has connected and informed society in ways previously not possible. Today, this struggle is playing out at multiple levels, including the great power politics of nation-states. In 2016, Henry Kissinger spoke about the nature of the changing world order, saying that for the first time in decades: “Practically all the actors in the Middle East, China, Russia, and to a certain extent Europe are facing major strategic decisions. . . . to settle some fundamental directions of their policies. China, about the nature of its place in the world. Russia, about the goals of its confrontations. Europe, about its purpose, through a series of elections. America, about giving a meaning to its current turmoil in the aftermath of the election.”2 The balance of power is shifting, the global order is being renegotiated. The culmination of both has led to an era of intense competition. Within countries, political competition has brought new parties to power. Widespread displeasure over inequality and an unlevel playing field threaten to disrupt the global trading regime and have led to intensified economic competition among firms and strategic economic competition among states. The advent of new technological horizons and the rise of developing countries have sparked new frontiers of competition. Against this backdrop, great powers are looking to expand their reach and refresh their strategies to achieve geostrategic gains. As countries look to expand their spheres of influence, energy can play a role as both a target and tool of that expansion. Although much of the world’s energy development and trade occurs in the sphere of normal commerce, energy infrastructure, investment, and control over resources can also play a role in establishing or challenging the relationships between and among countries. For the first time since the end of the Cold War, there is genuine strategic rivalry among the world’s great powers. China’s rise has created a web of economic and political relationships in all continents. Russia is reasserting itself in places from which it had retreated. The United States is aggressively renegotiating its existing relationships with allies and adversaries. New areas of strategic competition have opened up in resource-rich areas like the Arctic and the emerging economies of Africa.

#### Courts block expansions.

Andrew Goudsward 1/31/22, reporter based in Washington covering the Justice Department and regulatory affairs at the National Law Journal, “DOJ Criticizes Apple, Facebook Rulings that Could Undercut Its Antitrust Strategy,” Law.com, https://www.law.com/nationallawjournal/2022/01/31/doj-criticizes-apple-facebook-rulings-that-could-undercut-its-antitrust-strategy/

The U.S. Justice Department’s antitrust division took issue in recent days with court rulings in two high-profile cases challenging the market dominance of major technology companies that did not directly involve DOJ.

The Justice Department filed amicus briefs supporting appeals of lower court rulings that favored tech giants Apple and Facebook. The first case, which is now before the U.S. Court Appeals for the Ninth Circuit, was brought by the video game company Epic Games challenging Apple’s App Store policies. The second brief supported an appeal by state attorneys general contesting Facebook’s alleged social networking monopoly.

In both cases, DOJ argued that lower courts conducted flawed legal analyses, wrongly constraining the country’s landmark anti-monopoly law, the Sherman Act, in ways that could hamper antitrust enforcement in other cases. The move comes as the antitrust division, under its new leader Jonathan Kanter, seeks to modernize DOJ’s enforcement regime and more aggressively counter alleged anti-competitive behavior.

“When I look at the current state of antitrust law, the most charitable explanation is that we are stuck fighting the last generation’s war, with precedent that bears little or no resemblance to today or the future,” Kanter said last week in a speech to the New York State Bar Association’s antitrust section.

In the Apple case, DOJ criticized U.S. District Judge Yvonne Gonzalez Rogers’ decision last year that dismissed all federal antitrust claims brought by Epic Games, the maker of the hit game Fortnite. Epic accused Apple of monopolizing the market for mobile apps by requiring all apps on its iOS system to be purchased through the Apple App Store. Gonzalez Rogers, of the Northern District of California, did find Apple violated state law by requiring that all in-app purchases be conducted through its own system.

Epic is appealing the decision to the U.S. Court of Appeals for the Ninth Circuit.

“The district court committed several legal errors that could imperil effective antitrust enforcement, especially in the digital economy,” DOJ’s amicus brief read. “The court read Sections 1 and 2 of the Sherman Act narrowly and wrongly, in ways that would leave many anticompetitive agreements and practices outside their protections.”

DOJ took issue with Gonzalez Rogers’ finding that Apple’s written agreements with app developers are not “contracts” under the meaning of the statute because developers must accept their terms. The amicus brief also argued that Gonzalez Rogers did not appropriately balance the benefits and harms of Apple’s policies to determine their overall competitive effect.

The Justice Department also backed an appeal by state attorneys general to the D.C. Circuit, challenging a lower court decision to toss out their antitrust complaint against Facebook.

In that case, DOJ said U.S. District Judge James Boasberg “fundamentally misapplied” section 2 of the Sherman Act when he dismissed the states’ claims against Facebook before the suit reached the discovery phase. Boasberg also initially tossed out a companion lawsuit brought by the Federal Trade Commission, but he gave the FTC the opportunity to refile and has allowed much of the commission’s amended complaint to move forward.

The brief objected to Boasberg’s decision to break up the states’ two central claims: that Facebook had acquired a monopoly by buying up nascent rivals and had prevented its platforms from interacting with apps that had the potential to challenge its dominance.

“Whereas, the law calls for evaluating the course of conduct alleged in the monopolization claim as a whole, the court disaggregated the claim into parts that it never reassembled,” the brief states. “Meanwhile, the court erroneously treated Facebook’s alleged use of anticompetitive conditions in deals with app developers as unconditional, unilateral refusals to deal. The court then compounded these errors by applying a rigid checklist for unilateral refusal to-deal liability that departs from established precedent and takes no account of the market realities of Facebook’s platform, which generates value by encouraging participation from developers and users.”

Both cases illustrated the challenges facing antitrust enforcers as they confront a judiciary that generally subscribes to a conservative view of antitrust law that has prevailed for decades.

#### Merger enforcement’s based on existing authority AND isn’t being perceived as out of pocket

Stefania Palma & Kiran Stacey 1/18, “US to overhaul merger rules in crackdown on ‘unlawful’ deals,” Financial Times, 1-18-2022, https://www.ft.com/content/a8893550-fc6c-4301-879d-209aa9323f5b

Even with the enhanced regulatory scrutiny, however, many companies appeared willing to pursue large deals. Just hours before the FTC and justice department announcement, Microsoft announced it had agreed to buy Activision Blizzard, the video game maker, for about $75bn, including net cash, in what is set to be the company’s biggest-ever purchase.

#### FTC is focused on energy now – White House push

French 2/15 [David French and Laura Sanicola, Reuters. “EXCLUSIVE U.S. oil producer EP Energy seeks to save deal from regulator -sources.” 2/15/22. https://www.reuters.com/business/energy/exclusive-us-oil-producer-ep-energy-seeks-save-deal-regulator-sources-2022-02-15/]

The White House has already irked the oil and gas industry by making climate change a priority in its administrative agenda. It temporarily halted issuing new leases for drilling on federal land and proposed ending some fossil fuel subsidies. Energy companies argue these moves will increase energy costs. read more

The last major oil and gas producer merger challenged by the FTC was BP Plc's $27 billion acquisition of Atlantic Richfield Co in 2000.

The FTC sued to block the deal and only agreed to drop its objections after BP offered to divest oil production acreage in Alaska.

The White House has been vocal in its requests for the FTC to act as the reopening of economies in the aftermath of the COVID-19 pandemic drives up energy consumption. Brian Deese, director of the National Economic Council, wrote to FTC Chair Lina Khan in August asking her to investigate soaring energy prices.

Khan responded that the FTC will scrutinize consolidation among gas station operators, but also look at energy industry dealmaking more broadly. read more

Last year, the FTC extended the approval process for at least five oil and gas mergers and acquisitions, including EP Energy-EnCap, Reuters has reported. read more

The FTC has been flexing its antitrust muscle across many sectors since Biden became president last year. Among the deals it has sued to block in recent weeks are U.S. defense contractor Lockheed Martin's (LMT.N) $4.4 billion agreement to buy rocket engine maker Aerojet Rocketdyne Holdings Inc (AJRD.N) and U.S. chip supplier Nvidia Corp's (NVDA.O) $40 billion acquisition of semiconductor design provider Arm Ltd.

#### No link turn - Congress shreds the FTC post plan

Speegle 12 [Adam Speegle, Antitrust Division Attorney, U.S. Department of Justice 2012-2019, J.D. Candidate, Michigan Law Review, 2012. “Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process.” March 2012. <https://www-jstor-org.libproxy.berkeley.edu/stable/pdf/23216802.pdf?refreqid=excelsior%3Ac4717284c56854c5b5e9d43c6e0f6f7c>]

Another concern regards the political implications of the FTC invoking its antitrust rulemaking authority. One of the benefits often cited by proponents of rulemaking is that the rulemaking process, through notice and comment procedures, often brings important topics to Congress's attention.159 There is, however, a corresponding risk that Congress may grow concerned about the FTC's increasing intervention in the technology sector. In the 1970s and 1980s, the FTC experienced backlash from Congress due to its activism in the consumer protection arena.160 As a result, the FTC's authority and resources were curtailed, and procedures for promulgating rules under the consumer protection prong of Section 5 became so burdensome that they rendered FTC-initiated consumer protection rulemaking an impractical and rarely used tool.161 With an approach based on the "unfair methods of competition" prong, there may be a concern that FTC intervention in the technology sector could trigger a similar response from Congress.

#### Enforcement – its expensive and time-consuming – the aff is a massive resource drain

Galston & Hendrickson 18 [William, Senior Fellow at the Brookings Institute, served from 1993 to 1995 as Deputy Assistant to President Clinton for Domestic Policy, Saul Stern Professor and Acting Dean at the School of Public Policy, University of Maryland, and Clara, researcher at the Brookings Institution in Washington, D.C. and a freelance reporter for national and local outlets, does PolitiFact fact checking at the Detroit Free Press. “A policy at peace with itself: Antitrust remedies for our concentrated, uncompetitive economy” https://www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy/]

Reduce the costs of antitrust enforcement

Enforcing antitrust laws is typically slow and expensive. Individual cases, such as the Justice Department’s Microsoft and AT&T investigations, can last for a decade and consume an outsize share of an agency’s resources. In these circumstances, the government is understandably reluctant to initiate actions against large firms with deep pockets.

Prior to 1974, the rules allowed automatic appeals of district courts’ antitrust decisions to the Supreme Court, bypassing an entire level of appellate review. In light of the enforcement experience since this rule was repealed in 1974, the case for legislation that reinstates this rule is strong. This is particularly true for anti-monopoly cases arising under Section 2 of the Sherman Act. The longer monopoly abuses are allowed to persist, the more entrenched offenders become, and the more unlawful rents they can extract from consumers. Forcing firms to disgorge these ill-gotten gains after the fact is difficult at best, and there is no way of compensating potential entrepreneurs whom monopolistic firms deterred from starting new businesses.[42]

#### Litigation alone is expensive and trades off with other initiatives

Skadden 21 [international law firm with a focus on antitrust, tax, and financial litigation. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement” <https://www.skadden.com/-/media/files/publications/2021/06/linakhansappointmentasftcchairreflectsbidenadminis.pdf>]

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### Industry backlash will persuade Congress to fight the aff – legislators have multiple mechanisms at their disposal to do so

Darren Bush Fall, 2016 [Leonard B. Rosenberg College Professor of Law, University of Houston Law Center “Out Of The DOJ Ashes Rises The FTC Phoenix: How To Enhance Antitrust Enforcement By Eliminating An Antitrust Enforcement Agency” Willamette Law Review, 53, 33. <https://advance-lexis-com.libproxy.berkeley.edu/api/document?collection=analytical-materials&id=urn:contentItem:5NSX-DKH0-00CV-B14S-00000-00&context=1516831>]

The largest threats to the FTC come from outside its walls. While courts have not significantly limited the authority of the FTC, particularly with respect to investigations, they do serve as a limitation on the ultimate ability of the FTC to successfully adjudicate matters that result from an investigation. To successfully swing the pendulum back in favor of court deference to FTC outcomes, the agency must be fully unchained. The following subsections describe both appropriate and inappropriate chaining of the FTC.

Constitutionally, Congress is an appropriate constraint upon agency power. It was an act of Congress that gave the agency life, and certainly that power could be used to terminate an agency acting beyond the will of Congress. Within that delegation of authority from Congress is the ability of the agency to use the twin weapons of rulemaking and adjudication, backed with its expertise. However, such appropriate Congressional oversight can be misused to constrain an agency, particularly when a large and power corporation or industry perceives itself as being unfairly under FTC scrutiny.

First, aggrieved industries or corporations could seek express immunity for the antitrust laws. Numerous industries already enjoy immunity from section 5 of the FTC Act, including "banks, savings and loan institutions … federal credit unions … common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act … ." 70 More broadly, statutory immunity from the antitrust laws is all too common. Congress has enacted at least twenty-nine statutory immunities that completely immunize industries or conduct from the antitrust laws, or at least limit the scope of antitrust within those realms. 71

[\*54] The FTC itself has been the impetus of several of these statutory immunities. For example, Congress passed the Soft Drink Interbrand Competition Act in reaction to the FTC's strong position against non-price vertical restraints. 72 The FTC had challenged the industry's distribution system following a controversial Supreme Court decision in United States v. Arnold, Schwinn & Co. 73 Soft drink bottlers lobbied for and won immunity designed to protect local bottlers from the vertical integration of syrup manufacturers. 74

Alternatively, Congress may create a modified standard with respect to a particular type of conduct, as it did with the Standards Development Organization Advancement Act. 75 The SDOAA requires that the rule of reason analysis to standard setting bodies and limits the ability of private plaintiffs to obtain attorneys' fees. Registered standard development organizations are also protected from treble damages. This legislation too is a response to FTC antitrust enforcement. The FTC had investigated Dell's, 76 Rambus's, 77 and Unocal's 78 participation and conduct within particular standard-setting organizations. While members of the standard-setting body still face liability, there is somewhat of a shield effect arising from the standard development organization's immunity. This threat is particularly poignant when a single party controls both Houses of Congress, or when there is a veto-proof majority. On the bright side, this type of immunity applies equally to both the FTC and the DOJ, so in theory it is immaterial whether or not there is a single antitrust enforcement agency or two. The result would be the same: the antitrust laws would be limited in those instances.

Beyond outright barring investigation and enforcement of the antitrust laws in a particular industry, Congress can severely hamstring the agency. For example, rather than passage of an unpopular statutory immunity, it might be easier for Congress to curtail directly the FTC's authority to enforce or even investigate anticompetitive conduct within an industry by directly barring FTC authority within its organic statute. Congress has done so numerous times. For example, Congress limited the FTC's power to engage in rulemaking for the purpose of consumer protection when it passed the Federal Trade Commission Improvements Act of 1980. 79 This limitation arose from industry backlash after the FTC engaged in rulemaking concerning children's advertising. 80 The amendments also make the FTC an adversary in its own rulemaking proceedings by importing adjudicatory norms. For example, the provisions call for a presiding officer with independence from staff influence, protected by ex parte communications. 81 The 1980 amendments thus severely impede the agency to engage in any effective rulemaking.

Another method Congress has employed to curtail the FTC's authority is to evaluate the anticompetitive effects of particular conduct. In 1994, Congress sought to confine the Agency's interpretation of unfair methods of competition by requiring what is essentially a rule of reason plus criteria. In particular, the amendment bars the FTC from declaring unlawful any act or practice the FTC determines to be unfair, unless the "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 82 It is equally plausible for Congress to deploy other requirements into the Agency's calculus of unfair methods of competition.

Even if an industry or company is unable to convince Congress that it should receive a coveted immunity, Congress still has other means at its disposal to "check" the FTC. In particularly, public posturing by companies and Congressional allies might be sufficient to heel the FTC.

Nor is Congress immune from attempting to influence agency decisions. Often times Congress holds hearings regarding particular agency investigations and actions. As a recent example, take the [\*56] DOJ's one hundred eighty degree reversal in U.S. v. American Airlines. The DOJ had originally challenged the merger of American Airlines. The complaint alleged in sweeping terms harm to nonstop competition, competition in connect markets, and competition across networks. Then, just as quickly, the bold complaint was no more, as the DOJ and the parties settled. According to a ProPublica piece, 83 a full-on blitz was in play to convince the DOJ to change its mind. While internal deliberations within the DOJ are barred from sunlight, there was a stark "before and after" picture of the effects of such a lobby.

It could be argued that the FTC would be more immune from such a lobbying campaign due to its independence from the Executive Branch, but that does not preclude intervention by Congress. As a former Chair of the FTC has pointed out, "Congress intended the FTC to be largely independent from the Executive Branch in its day-to-day operations, despite the provision authorizing the President to direct the agency to undertake specific investigations. But Congress intended far less independence from itself." 84

As an example, when the DOJ and the FTC agreed to a different clearance process between the agencies in 2002, Congress balked. One of the first threats Congress made was reducing agency funding, 85 apart from calling for the hide of Chairman Tim Muris. It was not the first time Congress (or a member of Congress) had threatened an antitrust enforcement agency via the budget. The DOJ received backlash as a result of its antitrust challenge against Microsoft. Because of this antitrust challenge, Microsoft started to engage in political activity, making campaign contributions to both parties and targeting state Attorneys General who had joined the suit. When the DOJ brought its antitrust challenge against Microsoft in a series of cases, 86 it received backlash once Microsoft awoke from its [\*57] slumber and started to engage in political activity, 87 making campaign contributions to both parties 88 as well as targeting state Attorneys General who had joined the suit. 89

#### They’re principally responsible for antitrust enforcement---AND involved even if review is done by the DOJ.

Hayes ’21 [Adam; July 16; Assistant Professor of Sociology and Anthropology of the Hebrew University of Jerusalem, Ph.D. from the University of Wisconsin-Madison, M.A. in Economics from the New School for Social Research; Investopedia, “Federal Trade Commission (FTC),” <https://www.investopedia.com/terms/f/ftc.asp>]

What Is the Federal Trade Commission (FTC)?

The Federal Trade Commission (FTC) is an independent agency of the U.S. government tasked with protecting consumers and ensuring a strong competitive market.

Its principal purpose is to enforce non-criminal [antitrust laws](https://www.investopedia.com/terms/a/antitrust.asp) in the United States, preventing and eliminating anticompetitive business practices, including coercive monopolies. The FTC also seeks to protect consumers from predatory or misleading business practices.

Key Takeaways

* The Federal Trade Commission (FTC) is a federal agency that enforces antitrust laws and protects consumers.
* It was signed into law by President Woodrow Wilson in 1914 as part of the administration's trust-busting efforts.
* FTC activities include investigating fraud or false advertising, congressional inquiries, and pre-merger notification.
* The FTC also handles scams and unfair or predatory business practices.
* The FTC discourages anticompetitive behavior through the Bureau of Competition, which reviews proposed mergers with the Department of Justice.

Understanding the Federal Trade Commission (FTC)

The Federal Trade Commission (FTC) was [established in 1914](https://www.investopedia.com/articles/financial-theory/10/the-us-federal-trade-commission.asp) by the Federal Trade Commission Act, as part of the Wilson administration's trust-busting efforts—trust-busting being a significant concern at the time.1 It was tasked with enforcing the Clayton Act, which banned monopolistic practices.

Before the birth of the FTC, there was the Bureau of Corporations, created by the Roosevelt administration in February 1903. Part of the Department of Commerce and Labor, the Bureau of Corporations was tasked with making sure businesses acted in the best interest of the public. The success of the Bureau of Corporations led to the creation of the FTC.

The FTC continues to discourage anticompetitive behavior through the Bureau of Competition, which reviews proposed [mergers](https://www.investopedia.com/terms/m/merger.asp) together with the Department of Justice (DOJ). As the years have passed, the FTC has been tasked with enforcing additional business regulations, as codified in Title 16 of the Code of Federal Regulations.

Fast Fact

Under the premerger notification program, parties of larger mergers must submit a premerger notification to the FTC and Department of Justice (DOJ).2

#### FTC enforcement solves energy cartelization

Carroll 12/16 [John D. Carroll, partner in the Sheppard, Mullin, Richter & Hampton LLP Antitrust & Competition Practice Group in the Washington, D.C. office. Thomas Dillickrath, Katie Daw, Sheppard, Mullin, Richter & Hampton LLP, Antitrust Law Blog. “Antitrust Scrutiny Heating Up in Oil and Gas Industries.” 12/16/21. https://www.natlawreview.com/article/antitrust-scrutiny-heating-oil-and-gas-industries]

President Biden recently wrote a letter to FTC Chair Lina Khan urging the Commission to immediately investigate potential anticompetitive behavior in the oil and gas sector. The President noted that gas prices have been rising, while the costs faced by oil and gas companies themselves have decreased. Concerned that the two largest oil and gas companies in the country are set to double their net income over 2019 while the gap between the price of unfinished gasoline and the price at the pump is increasing, he called on the FTC to “bring all of the Commission’s tools to bear if you uncover any wrongdoing.”

Steps Already Taken

The Biden administration has made a previous attempt to direct the FTC’s focus towards the oil and gas industries. At President Biden’s behest, the Director of the National Economic Council, Brian Deese, wrote to Chair Khan on August 11, citing “divergences between oil prices and the cost of gasoline at the pump” and urging the FTC to investigate. Chair Khan responded with a letter of her own, outlining a three point plan to address the administration’s concerns about the cost of gas. First, the FTC would identify additional legal theories to challenge fuel station mergers that involve dominant players in the market acquiring family-run businesses. Second, the FTC “would tak[e] steps to deter unlawful mergers in the oil and gas industry.” The Chair specifically referred to the imposition of prior approval requirements to deter illegal mergers in sectors including retail gas markets. Third, Chair Khan indicated that she would direct staff to investigate abuses in the franchise market, noting that the sale of gasoline at high prices may benefit chains at the expense of franchisee store operations.

President Biden expressed in his November 17th letter that he appreciated the plans to “strengthen oversight of mergers in the oil and gas sector” but that further inquiry is required.

Potential Avenues for Enforcement and Investigation

Given the President’s explicit requests to investigate, participants in the oil and gas industry can expect the FTC to increase scrutiny and enforcement. The FTC may pursue several avenues to execute the President’s agenda.

Investigative Powers: Subpoenas and 6(b) Studies

In the wake of Hurricane Katrina, the FTC expended significant resources under its statutory authority to investigate accusations of price gouging in the gasoline market. The Commission issued subpoenas, also known as “Civil Investigative Demands” (CIDs) to petroleum industry firms and issued requests to retailers under Section 6(b) of the FTC Act. The FTC ultimately concluded in May of 2006 that the pricing was explained by normal market trends.

The FTC may employ similar methods to investigate oil and gas industries now by issuing CIDs and 6(b) orders. Orders issued under 6(b) of the FTC Act function similarly to CIDs and require the recipient to provide information to the FTC in writing, subject to court-ordered compliance. Both can require an organization to turn over company information. 6(b) authority also enables the Commission to conduct wide-ranging studies that do not have specific law enforcement purposes. For example, utilizing its 6(b) power and without an underlying specific law enforcement purpose, the FTC recently launched an inquiry into supply chain disruptions and its impacts on consumers.

Wholesalers, refiners, single-location retailers, pipeline owners and operators, terminal owners, and petroleum marketers could all be issued CIDs or 6(b) requests for information if the FTC seeks to gain a deeper understanding of the gasoline cost problem. This possibility seems more likely given the FTC’s recent willingness to utilize Section 6(b) in other industries, including the investigation into the supply chain shortage. However, 6(b) studies are incredibly exhaustive and time consuming to deploy. The costliness of a 6(b) study could be a barrier.

Increased Merger Scrutiny

The FTC may also increase scrutiny on oil and gas companies by ramping up its focus on mergers within the industry, as Chair Khan indicated it would in her letter to Director Brian Deese. This methodology of increasing merger scrutiny also fits within the FTC’s larger trend of increased merger enforcement across a variety of industries under Chair Khan’s leadership.

There is evidence that increased attention on mergers in the gas and oil sector is already taking place—regulators extended the approval process for at least five oil and gas mergers and acquisitions in the third quarter of 2021 alone. This sort of scrutiny has been rare in the oil and gas sector, in which mergers have, up until recently, largely sailed through the regulatory process. The FTC has not blocked a major oil merger in two decades. It brought only four energy related actions in all of 2020, while the DOJ did not file any merger enforcement actions in the energy sector last year. If the FTC’s enforcements behaviors as of late 2021 continues, we may very well see not only more extended approval processes and issuances of second requests, but perhaps more merger challenges, as well.

Takeaways

Participants in the oil and gas market have enjoyed several decades of flying relatively beneath the notice the antitrust regulatory bodies. Increased antitrust scrutiny of the industry from both the DOJ and FTC has been occurring and likely will increase, with President Biden’s request being just a recent example. As clients consider potential transactions, they would be well-served by seeking advice from experienced antitrust counsel.

#### It’s key

Miller 21 [Evan Miller, Vinson & Elkins Antitrust Sr. Associate, David Smith, Darren Tucker, Lincoln Wesley, Vinson & Elkins. “FTC Letter Signals Increased Scrutiny of Oil & Gas M&A Activity.” 9/7/21. https://www.jdsupra.com/legalnews/ftc-letter-signals-increased-scrutiny-2957307/]

In a recent exchange of letters with the White House, the chair of the Federal Trade Commission (“FTC”) signaled her intent to ramp up antitrust enforcement in the oil and gas industry. The move comes as part of a broader shift in priorities at the FTC in evaluating mergers and is in line with the Biden administration’s recent efforts to increase antitrust enforcement across industries (about which V&E has previously written). While calls for FTC action to combat high gas prices are fairly common from new administrations and Congress, the agency’s recent response includes specific action items that suggest deviations from past policy. These changes could have significant effects on the regulatory environment for energy companies, especially for the retail fuels sector. Indeed, practitioners who regularly represent oil and gas companies before the FTC have noted that they are already receiving inquiries in line with the chair’s letter.

Background

On August 11, 2021, White House National Economic Council Director Brian Deese, who is also head of the new White House Competition Council, issued a letter to the FTC raising concerns about “divergences between oil prices and the cost of gasoline at the pump” during this past summer season. The letter did not provide any support for this assertion but urged the FTC to use “all of its available tools to monitor the U.S. gasoline market and address any illegal conduct that might be contributing to price increases for consumers at the pump.”

On August 25, 2021, the FTC’s new chair, Lina Khan, responded in a two-page letter that echoed the White House’s concerns and also expressed concern that the FTC’s “approach to merger review in recent years has enabled significant consolidation.” The letter claims that the FTC’s prior approach to retail fuel outlet mergers may have created “conditions ripe for price coordination and other collusive practices.”

New FTC Oil & Gas Initiatives

To address these concerns, the chair’s letter outlines several specific actions the agency plans to take.

First, the FTC will seek to “identify additional legal theories to challenge retail fuel station mergers where dominant players are buying up family-run businesses.” The letter does not provide any additional detail on this potentially significant shift in enforcement policy, the basis for this concern, or how this concern relates to protecting competition.

Second, the FTC will re-examine its approach to merger divestitures, to ensure that they do not encourage further consolidation or enable dominant firms or groups of firms to exercise market power. Khan states that she is “especially interested in ways that large national chains may ‘restore’ higher prices through collusive practices.” This reference to the industry-specific term of price “restorations” suggests that the agency’s leadership is more engaged than previously on the details of retail fuel station transactions.

Third, the FTC will “tak[e] steps to deter unlawful mergers in the oil and gas industry,” including by imposing “prior approval” requirements to deter companies from proposing “illegal mergers” in the first place. The FTC recently voted 3-2 to rescind its 1995 policy against the use of “prior approval” requirements in merger consent decrees.

Fourth, the FTC will ask staff to “investigate abuses in the franchise market,” with a specific focus on determining “whether the power imbalance favoring large national chains allows them to force their franchisees to sell gasoline at higher prices, benefitting the chain at the expense of the franchisee’s convenience store operations.” As with the first action item, how these concerns fit within the antitrust laws, and the basis for these concerns, are unclear at this point.

Expect Increased Scrutiny of M&A Activity

While the FTC regularly monitors oil and gasoline prices to identify unusual price activity that may signal potentially anticompetitive conduct in the industry and has brought numerous merger and non-merger enforcement actions over the years, oil and gas has not recently been a focus for the agency in public statements (unlike, for example, pharmaceuticals or technology companies). The letter suggests that the FTC leadership may be more focused on enforcement in the energy industry and that they may be particularly skeptical of transactions involving the acquisition of smaller local fuel retailers by larger national chains.

#### FTC solves

Deese 21 [Brian Deese, National Economic Council Director. “Letter to Chair Khan Federal Trade Commission.” 8/11/21. <https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Chair-Khan-Federal-Trade-Commision.pdf>]

With its suite of tools to monitor industry prices, review merger-and-acquisition activity, conduct market studies, and investigate market manipulation and anti-competitive practices, the FTC is well placed to lead the effort to evaluate the U.S. gasoline market and take any necessary steps to address illegal conduct and anti-competitive practices. For example, the FTC could examine the asymmetrical phenomenon in oil and gas markets in which gas prices tend to rise more quickly to adjust to spikes in oil prices then they fall when the price of oil declines.

#### War rolls back antitrust reform AND enforcement

Dr. Bruce A. Khula 3, Juris Doctor Candidate at Notre Dame Law School, Ph.D. and MA from The Ohio State University, “Antitrust at the Water's Edge: National Security and Antitrust Enforcement”, Notre Dame Law Review, 78 Notre Dame L. Rev. 629, January 2003, Lexis

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work. [\*632] Besides, other scholars have already written quite excellent ones. Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful - indeed, in a great many cases, inexorable - influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture. The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law - and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

[\*633]

I. Antitrust Law: History and Development

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it is the history of words. And such a history - even an amateurish history, like that which follows - may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people call a thing can provide insight into the nature of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the Oxford English Dictionary (OED) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival." The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office … entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them." Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth." The OED affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust." Because of its descriptive nature, Bryce's passage is worth quoting in full:

Those anomalous giants called Trusts - groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.

[\*634] Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice. The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and The Federalist to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades. Facilitated by the advent and spread of the telegraph and railroad, big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations. Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic order." [\*635] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors." The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization, encouraged mass immigration from Southern and Eastern Europe, established new classes of industrial laborers and middle-class managers, and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption. Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century - namely, the labor movement, agrarian Populism, and Progressivism - all originated in the dislocations brought by the rise of big business. By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans not blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by [\*636] watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law. In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence." As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process. This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states. As Hans Thorelli notes, neither in England nor the [\*637] United States did common law competition policy accomplish very much. Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably. The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade. These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable. Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'" Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note. It suffices to note that deeply felt public sentiment - drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal - animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly [\*638] political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation - ostensibly the "antitrust movement" of which Hofstadter writes - dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues. Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act). In essence, literalists wanted the jurisprudence of United States v. Trans-Missouri Freight Ass'n to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in United States v. Addyston Pipe & Steel Co. This debate, it must be emphasized, was by no means strictly - or even principally - judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers. The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in Standard Oil Co. v. United States and the contemporaneous case, United States v. American Tobacco Co.

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War,

and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed. Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large. Hooverian politics and "cooperative competition" managed to survive the early dark days [\*639] of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).

In the years after the U.S. Supreme Court scuttled NIRA, however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action. Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action." As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail. But this born-again antitrust zeal would not survive the coming of yet another global war.