# Wiki Doc Round 4

## 1NC

### 1NC – States CP

#### The 50 states and relevant sub-federal entities should substantially increase prohibitions on false advertising by applying a presumption that monopolists engaging in false advertising violate antitrust law.

#### That solves

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

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

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

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

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

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

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

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

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

### 1NC – Trade DA

#### **Antitrust expansion opens the floodgates of protectionism – that ends free trade**

Murray 19 [Allison Murray, Loyola Law, Judicial Law Clerk for U.S. Bankruptcy Courts. Edited by Loyola Law Professor David Kesselman and the ILR team of editors and staff. “Given Today’s New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade’s Coffin?” 2/28/2019. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr]

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### Nuke war

Oppenheimer 21 [Dr. Michael F. Oppenheimer, Clinical Professor at the Center for Global Affairs at New York University, Senior Consulting Fellow for Scenario Planning at the International Institute for Strategic Studies, Former Executive Vice President at The Futures Group, Member of the Council on Foreign Relations, The Foreign Policy Roundtable at the Carnegie Council on Ethics and International Affairs, and The American Council on Germany, “The Turbulent Future of International Relations”, in The Future of Global Affairs: Managing Discontinuity, Disruption and Destruction, Ed. Ankersen and Sidhu, p. 23-30]

Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

### 1NC – Regs CP

#### The United States federal government should establish and enforce regulations that curtail false advertising, providing sufficient funding and market training for relevant regulating agencies and increasing damages sufficient to remedy market harm

* Increase its targeting of fraud, scamming, data privacy and security

#### Solves best

Wu 17 [Tim Wu, legal scholar and professor of law at Columbia University. Also is now official in the Biden White House with responsibility for Technology and Competition policy. “Antitrust via Rulemaking: Competition Catalysts.” 2017. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3057&context=faculty\_scholarship]

In its March 26, 2016 issue, The Economist magazine announced that “America needs a giant dose of competition.”1 Its study of industry concentration and profits suggested that, after decades of consolidation, competition had decreased across a broad range of the American economy.2 An April 2016 issue brief by the Council of Economic Advisors reached similar conclusions, stating that “competition appears to be declining” due to “increasing industry concentration, increasing rents accruing to a few firms, and lower levels of firm entry and labor market mobility.”3

The promotion of competition in the American economy is a task that has traditionally fallen to the enforcement agencies at the federal and state level, relying on the main antitrust statutes. 4 However, the challenge of declining competition has also prompted interest in the use of regulatory alternatives to antitrust to “catalyze” competition.5 The strategy involves using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws.6 Hence, “antitrust via rulemaking.”

While conducting competition policy outside of the main antitrust laws is not entirely new, it came into some prominence through an April 15, 2016 Executive Order issued by the White House.7 In that order, the President charged the executive agencies as follows:

Executive departments and agencies with authorities that could be used to enhance competition (agencies) shall, where consistent with other laws, use those authorities to promote competition, arm consumers and workers with the information they need to make informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public.

In the field of administrative law, there is a longstanding debate over the relative merits of rulemaking and adjudication.9 Beginning in the 1960s there was a decisive shift among most agencies toward rulemaking. 10 However, with exceptions (most of which are described here), the promotion of competition – the antitrust regime – remains rooted in an adjudication model, and might even be described as stuck there. More effective and widespread promotion of competition may require more widespread and effective use of pro-competitive rulemaking by a broader variety of agencies.

### 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 – Biz Con DA

#### Growth is up – assumes their answers

Mutikani 2/4 [Lucia Mutikani, Reuters. “U.S. labor market shrugs off Omicron surge, economy strong ahead of rate hikes.” 2/4/22. https://www.reuters.com/business/us-job-growth-beats-expectations-january-unemployment-rate-40-2022-02-04/]

The U.S. economy created far more jobs than expected in January but despite the disruption to consumer-facing businesses from a surge in COVID-19 cases, pointing to underlying strength that should sustain the expansion as the Federal Reserve starts to raise interest rates.

The Labor Department's closely watched employment report on Friday also showed a whopping 709,000 more jobs were added in November and December than previously estimated. Wage gains accelerated last month and the labor pool expanded.

The upbeat report ended days of anxiety among economists and White House officials who had frantically tried to prepare the nation for a disappointing payrolls number.

"This is a strong jobs report," said Chris Low, chief economist at FHN Financial in New York. "The odds of quelling inflation without a recession look better today than yesterday."

Nonfarm payrolls increased by 467,000 jobs last month, the survey of establishments showed. Economists polled by Reuters had forecast 150,000 jobs would be added in January. Estimates ranged from a decrease of 400,000 to a gain of 385,000 jobs.

Employment is 2.9 million jobs below its pre-pandemic peak.

Part of the broad increase in payrolls likely reflected low layoffs after the holiday hiring season, with 10.9 million job openings at the end of December. Though the drop in actual employment in January was in line with prior years, there were large differences at the industry level.

The government also reported that 374,000 more jobs were created in the 12 months through March 2021 than previously reported. January capped President Joe Biden's first year in office, which saw 6.6 million jobs added. Despite the strong economy, Biden's popularity is declining amid soaring inflation.

"We still have a lot of work to do," said Biden at the White House. "Making sure every American has a job, it's a great start, but it's not the finish."

The labor market resilience could alter expectations that economic growth would slow significantly in the first quarter, after consumer spending exited 2021 with a whimper. The economy grew at a 6.9% annualized rate in the fourth quarter. Growth estimates for the first quarter are below a 2% pace.

Strong employment gains, accompanied by the biggest annual increase in wages since May 2020, pave the way for the U.S. central bank to raise interest rates in March by at least 25 basis points to tame high inflation. Economists expect as many as seven rate hikes this year.

"The report is unequivocally good for the economy, but not for markets as the strength in the numbers presents another data point which supports more aggressively hawkish Fed action," said Cliff Hodge, chief investment officer at Cornerstone Wealth in Charlotte, North Carolina.

Stocks on Wall Street were higher. The dollar (.DXY) was steady versus a basket of currencies. U.S. Treasury prices fell.

LABOR POOL EXPANDS

Economists had anticipated a weak jobs report as the government surveyed businesses for payrolls in mid-January, when Omicron infections were peaking. The Labor Department said a record 3.616 million people who had a job were absent during the survey week because of illness.

Workers who are out sick or in quarantine and do not get paid during the payrolls survey period are counted as unemployed in the establishment survey even if they still have a job. Lower-paid hourly workers in industries like healthcare as well as leisure and hospitality, who typically do not have paid sick leave, bore the brunt of the winter COVID-19 wave.

According to the latest government data, paid sick leave was available to 79% of civilian workers in March 2021.

The leisure and hospitality industry added 151,000 jobs in January. Healthcare employment increased by 18,000. There were gains in retail, professional and business services employment as well as transportation and warehousing, and wholesale trade.

Manufacturing payrolls rose by 13,000, but construction employment fell 5,000, likely because of freezing temperatures. Government payrolls increased by 23,000 jobs.

Employment could increase further as coronavirus infections continue to subside. First-time applications for unemployment benefits dropped for a second straight week last week.

The United States is reporting an average of 354,399 new COVID-19 infections a day, sharply down from the more than 700,000 in mid-January, according to a Reuters analysis of official data.

The government introduced new population estimates for the household survey, from which the unemployment rate is derived. The new assumptions had a negligible effect on the unemployment rate, which rose to 4.0% from 3.9% in December.

But the labor force participation rate, or the proportion of working-age Americans who have a job or are looking for one, increased to 62.2% due to the changes in the composition of the population, from 61.9% in December.

The workforce increased by 1.393 million people. The employment-to-population ratio rose to 59.7% from 59.5% in December.

Other details of the household survey were strong. Employment increased by 1.199 million jobs. The survey counts people who have a job as employed regardless of whether they got paid during the survey week if they were temporarily absent from their jobs because of illness or other reasons.

A broader measure of unemployment, which includes people who want to work but have given up searching and those working part-time because they cannot find full-time employment, dropped to 7.1%, the lowest since February 2020, from 7.3% in December.

With some lower hourly paid workers at home, wage growth accelerated. Average hourly earnings surged 0.7%, which raised the annual increase to 5.7%, the largest gain since May 2020.

But Omicron's surge cut the average workweek to 34.5 hours, the shortest since April 2020, from 34.7 hours in December.

"All in all, the U.S. economy appears to be on a strong footing," said Noah Williams, an adjunct fellow at the Manhattan Institute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### 1NC – Politics DA

#### Congress is inching towards a funding deal—but, it’s a deliberate dance to keep them focused on funding while avoiding political complications

Romm 2/2 [Tony Romm is the congressional economic policy reporter at The Washington Post, tracking infrastructure reform, government spending and the financial impacts of federal decision-making nationwide, "Democrats, GOP inch ahead toward potential deal to fund government, avert shutdown", 2/2/22, https://www.washingtonpost.com/us-policy/2022/02/02/democrats-republicans-spending-shutdown-covid/]

Top Democrats and Republicans inched forward Wednesday in pursuit of a deal that could fund the federal government for the remainder of the fiscal year, hoping to stave off a shutdown while potentially pumping new spending into health care, education, science and defense.

The continued negotiations marked the second consecutive day of developments on Capitol Hill, as lawmakers who oversee the federal purse increasingly have come to express a measure of confidence that they can act before an upcoming Feb. 18 deadline — and overcome months of prior political disputes and delays.

Since President Biden took office, the U.S. government has operated under short-term measures that sustain key federal agencies and programs largely at their existing spending levels. The stopgaps have kept the government running, but they have also delayed Democrats from delivering on some of the White House’s top priorities, from expanding affordable housing to confronting climate change.

Republicans appeared content to continue in that vein, essentially dealing a political blow to Biden’s agenda in the process. But the two sides have come to see mutual benefit in striking a longer-term resolution, putting aside their differences at a moment when the United States continues to confront the pandemic at home and faces new diplomatic challenges abroad. The omicron variant of the coronavirus has sparked fresh discussions about the need for another round of federal aid, while the intensifying standoff between Russia and Ukraine has emboldened a Republican-led push to spend more on defense.

Both spending priorities could be appended to any new government funding measure, provided the two sides can reach a deal in the first place. In a sign of progress, Republicans on Wednesday presented a counter-offer for federal spending over the rest of the 2022 fiscal year, which Democrats are reviewing. The GOP move had the effect of temporarily delaying a planned afternoon meeting of the House and Senate’s top appropriators, but it still reflected a new seriousness among negotiators who until now hadn’t traded such proposals.

Yet new political fault lines also emerged Wednesday. Taking to the chamber floor earlier in the day, Senate Minority Leader Mitch McConnell (R-Ky.) foreshadowed what could be staunch GOP opposition to another round of pandemic relief, as he cited roughly $6 trillion in spending that has been approved since the start of the public health emergency in 2020.

“Let’s start the discussion by talking about repurposing the hundreds of billions already sitting in the pipeline,” McConnell said.

Lawmakers begin discussing government spending deal as Democrats eye virus aid, paid leave

The promises and platitudes nonetheless amounted to noteworthy progress on Capitol Hill, a place where partisan disagreements these days have come to transform all but the most basic debates into intractable conflicts.

Twice in recent months, the appropriations process has nearly brought federal agencies to a screeching halt, threatening to shut down the government and hamstring the country’s response to the pandemic. Republicans at the end of last year even held up a swift resolution to the funding fight to launch an ill-fated political campaign against Biden’s vaccination and testing mandates targeting businesses. The Supreme Court later struck down some of the administration’s policies.

This year, lawmakers from both parties have pledged to steer clear of the same brinkmanship that characterized negotiations in fights past. Instead they have aimed for a deal that covers spending through the fiscal year, which concludes at the end of September. But they already face a race against the clock to act by Feb. 18, the date by which lawmakers must adopt another short-term measure or broker the sort of compromise that has so far eluded them during Biden’s presidency.

With the clock ticking, Democrats huddled Tuesday morning to discuss their political strategy. Emerging from the gathering, House Speaker Nancy Pelosi (D-Calif.) and Senate Majority Leader Charles E. Schumer (D-N.Y.) each offered their public, formal blessings for the nascent talks around a longer-term spending deal. Schumer added that the party’s negotiators are “on the same page,” though he and Pelosi noted they had not yet received an official counteroffer from their GOP counterparts.

The leaders of the House and Senate’s top panels overseeing appropriations then gathered on their own late Tuesday to try to put pen to paper. One of the participants in the bipartisan session, Sen. Richard C. Shelby (R-Ala.), later told reporters that lawmakers are still seeking an “agreement on our principles, then the [spending] top line will follow.”

Shelby acknowledged at the time that a slew of policy gaps still separate the parties, including the balance between “social spending versus national security.” But he joined his Democratic counterparts in maintaining that “we all want to try to get to yes,” adding: “We’re not there yet.”

Democrats seek significant boosts in federal domestic spending, now that the country for the first time in a decade is not bound to strict budget caps. Writing to her caucus last month, Pelosi endorsed the need for a “strong omnibus” that would “address critical priorities for our country, including for our national security and for communities at home.”

Yet some of the Democrats’ proposed spending increases and policy tweaks have troubled Shelby and his fellow Republicans. Beginning last year, they pointed to a series of “poison pills” — from Democratic plans to enhance the IRS to the party’s effort to loosen a long-standing ban on federal funding for abortion services — that could sink any talks on a deal. GOP lawmakers also have called for parity in defense and nondefense spending, a move that historically has troubled some Democrats, who have sought greater cuts to the Pentagon than even Biden has proposed.

“We’re looking for parity. We live in a troubled world and a lot of us think national security is important for this country,” Shelby, who leads the GOP on the Senate’s appropriations panel, stressed on Tuesday.

Democrats and Republicans otherwise appeared to downplay any potential disagreements following their flurry of meetings. Sen. Patrick J. Leahy (D-Vt.), the chairman of the chamber’s appropriations panel, described himself as “always optimistic.” Rep. Rosa L. DeLauro (D-Conn.), his counterpart in the House, declined to specify any timelines or expectations for the follow-up session set for Wednesday afternoon.

“The goal is to get an agreement,” DeLauro said.

But such a deal, known in congressional parlance as an omnibus, is likely to carry additional significance this year. The compromise could pave the way for billions of dollars to flow toward projects that would improve the nation’s roads, bridges, pipes, ports and Internet connections. Lawmakers approved the money as part of a bipartisan infrastructure law finalized in 2021, but the package requires them to complete the act of writing the check, so to speak, before the real work can begin.

The must-pass spending measure also could serve as a legislative vehicle for lawmakers to advance a slew of other critical priorities. That includes new disaster aid in response to recent hurricanes and the tornadoes in and around Kentucky last year, for example, along with billions of dollars to augment the country’s efforts to combat the coronavirus.

With cases still rampant from the omicron variant, Democrats in recent weeks have renewed their calls for more federal spending to boost testing, therapeutics and vaccine access, especially abroad. Others have sought to provide additional benefits to workers, including the revival of a program that offers limited, pandemic-related paid family and medical leave. And still other Democrats have joined with a small but growing crop of Republicans who hope to give the green light to new assistance targeting restaurants, gyms, stages and other small businesses.

Lawmakers begin talks on another round of coronavirus relief for businesses

Publicly, the White House has maintained in recent months that significant money remains as part of the roughly $1.9 trillion American Rescue Plan that Biden signed into law last spring. White House officials, meanwhile, have quietly started preparing a supplemental request focused on outstanding public health needs.

But the Biden administration by Tuesday afternoon had not transmitted any official request to the Capitol, Democratic leaders said. “We’re waiting for the administration to send us something. They haven’t sent us anything yet,” Schumer told reporters.

Some party aides acknowledged it had become a deliberate, delicate dance, reflecting an attempt to keep Congress focused on solidifying government funding levels without adding any other political complications.

#### 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.

#### Bipart’s key—otherwise, yearlong CR ruins defense industrial base and military modernization

Gould 1/22 [Joe Gould is senior Pentagon reporter for Defense News, “Defense industry frets as funding talks crawl”, 1/21/2022, https://www.defensenews.com/congress/budget/2022/01/21/defense-industry-frets-as-funding-talks-crawl/]

Despite repeated warnings from uniformed Pentagon leaders and lawmakers of both parties that a full-year continuing resolution will hurt national security, some defense industry advocates are still worried about an impasse.

On Thursday, both chambers of Congress left town on recess until the week of Jan. 31, after making scant progress on a deal for an omnibus federal spending package. Amid partisan divisions over funding levels and policy provisions, House Speaker Nancy Pelosi, D-N.Y., warned that a full-year CR would create a national security crisis ― in an effort to pressure Republicans.

“It is a national security issue of the highest priority, with the threats that exist out there. To go to a continuing resolution instead of a decision-making omnibus bill is to weaken our security and our stability,” Pelosi told reporters Thursday. “The Republicans should know that, so we hope we will be able to bring that legislation to the floor before [the current CR] expires.”

With fiscal 2022 spending bills four months overdue, lawmakers and the Pentagon have warned against a yearlong CR that would freeze defense spending at the level of 2021 appropriations. CRs continue funding at the previous year’s level, preventing the Pentagon from starting new acquisition programs and ramping up production quantities.

And without a 2022 spending deal to set a new baseline, the president’s budget submission is in limbo and expected to come months late, which is sowing uncertainty for the military and its vendors.

President Joe Biden signed a defense policy bill that boosts his $753 billion national defense budget request for FY22 to $778 billion, a 3% increase. But Republicans have said they want more for defense, less than the 16% increase proposed by Democrats and an agreement on some politically charged policy riders.

By the reckoning of National Defense Industrial Association Chairman Arnold Punaro, lawmakers could meet somewhere in the middle with 8% increases for both defense and nondefense, but that’s far from a certainty. Democrats have raised fears some Republicans see budget gridlock as an advantage heading into midterm elections and don’t want a deal at all.

“We’re still in budget chaos,” Punaro told Defense News this week. “China’s on the march, Russia’s on the move and North Korea’s on the advance, and yet Congress is sitting on their duff, not passing a spending bill. It’s disgraceful.”

The lack of a 2022 deal as a baseline for defense amid escalating inflation presents a huge challenge for Pentagon planners crafting the FY23 budget request, Punaro said. He worried the administration could make a flat budget request, potentially costing the Pentagon billions of dollars in buying power.

Meanwhile, a full-year CR would yield $11 billion of lost growth, while 7% inflation would mean another $50 billion in lost buying power, according to defense consultant Jim McAleese, the founder of McAleese & Associates.

Though the current CR runs out on Feb. 18., recent negotiations in Congress have sparked some optimism.

Lead appropriators in the Senate met Jan. 13 with Senate Majority Leader Chuck Schumer and Senate Minority Leader Mitch McConnell to set the guidelines for negotiations. From there, lead House and Senate appropriators met to kick off talks, and Pelosi has said she’s been in discussions with House Appropriations Committee Chairwoman Rosa DeLauro, D-Conn.

Asked Thursday whether it’s realistic to get an agreement by Feb. 18, as Congress was about to leave town Senate Appropriations Committee Vice Chairman Richard Shelby, R-Ala., said: “That’s a good question. It’d be hard to get it by the 18th, but if we can make huge progress, we can probably get done soon.”

It’s unclear whether looming international crises with Russia and Ukraine, China and Taiwan, and North Korean missile tests would add pressure to pass defense spending. When asked about Pelosi’s comments, Shelby seemed to dig in.

“She’s right on that, but to underfund defense as some people would like to do, that would be a bigger challenge,” he said.

At a House Appropriations Committee hearing Jan. 12 about the effects of a potential full-year CR, the top officers of the Army, Navy, Air Force, Marine Corps and Space Force warned such a move would sabotage the military’s efforts to compete with China by stalling new weapons like hypersonic missiles.

“CRs effectively prevent modernization at speed,” said Marine Corps Commandant Gen. David Berger. “We actually stand to be outpaced by China — not because of their speed but because of our failure to comply with our own budgetary processes.”

The president and CEO of the Aerospace Industries Association, Eric Fanning, has warned that budget unpredictability is inefficient for the defense industry, which has to idle while the Pentagon waits for its projects to be funded. Amid the Capitol Hill activity, Fanning said he is “hopeful that the momentum continues.”

“The hearing painted a concerning picture of additional and unnecessary costs, as well risks to capabilities and to the industrial base in the short and long-terms. There was bipartisan agreement on how devastating a year-long CR could be,” Fanning said in a statement Thursday. “Over the last few days, there are positive signs that the message is getting through and the top appropriators from both parties are coming to the table.”

Lead Pentagon officials have talked for years about the need to harness the innovation of small tech firms. But CRs stifle those efforts, an executive at one of those firms, Anduril Industries, wrote in an essay this week.

#### Impact’s cyber and deterrence crash

Manchester ’19, [Josh, Founder of Champion Hill and General Partner at Foundation Capital, Venture-backed Startups Will Build the Defense Technology the Free World Needs Right Now, https://medium.com/@joshmanchester/venture-backed-startups-will-build-the-defense-technology-the-free-world-needs-right-now-d2cefa2b2196]

With U.S. defense spending exceeding $700 billion per year, how could the United States be on the brink of a national security emergency? Simply put, America’s national security competitors are outflanking an Industrial-Age U.S. military machine that, like a lumbering dinosaur, is not adapting fast enough to its changing environment. The Pentagon desperately needs rapid innovation. Yet the current defense industry structure is not compatible with U.S. venture capital and high-growth technology industries for several reasons: · The U.S. military’s industrial base is centered on a few huge oligopoly suppliers known within the Beltway as “the Primes” — Lockheed Martin, Boeing, Raytheon, General Dynamics, and Northrop Grumman. These companies, ancient by tech startup standards, have optimized themselves to sustain a 20th century Industrial Age World War II-style force structure which supports the political decision-makers across the country who appropriate the funding that industrial base receives. The Primes are great at building very large platforms that cost billions of dollars and take 15–30 years to field. The Primes are also historically heavy on hardware talent and much lighter on software talent. · The Primes receive the vast majority of defense spending. Defense budgets have historically not unlocked for startups. While a defense private equity industry exists to aggregate small companies and flip them downstream to the Primes, venture capital investors, who have a much higher return threshold, know that it’s hard to have venture outcomes (in other words, to make money) when a company can’t win large market share or survive as a stand-alone business. · Venture-backed tech industries have matured as an asset class in peacetime and most mainstream U.S. venture firms in existence today do not have institutional cultures or histories that include defense innovation, apart from cybersecurity. · Major tech companies, like the FAANGs (Facebook, Apple, Amazon, Netflix, Google and Microsoft too), are generally unwilling to work on defense related projects, and sometimes must deal with employee protests when they do. · Many observers perceive this as an indicator that software engineers generally don’t want to work on defense-related innovation. · Finally, in a bizarre set of twists, some of the organizations that comprise the Limited Partners of venture capital firms (the blue chip endowments and foundations of the U.S. Eastern establishment, often founded on the fortunes of great American industrialists from decades ago, along with public pension funds throughout the country) are [sometimes accidentally funding Chinese defense technology](https://www.buzzfeednews.com/article/ryanmac/us-money-funding-facial-recognition-sensetime-megvii) while often restricting their U.S. venture managers from making defense investments. Foundations and endowments in particular often have negotiated Limited Partnership Agreements with the venture firms they finance precluding them from investing in anything that could have military usage. The irony is that these same tax-exempt pools of capital are frequently investors in Chinese venture funds which provide software to make smarter and more deadly Chinese weapons and to the advanced surveillance systems that have turned China’s Xinjiang province into a virtual Uighur prison camp and a human rights disaster. No single individual or entity has caused this state of events to transpire; it is simply the accumulation of various cultural aspects of the capital formation process of the venture industry and its portfolio companies. Fortunately, we believe that almost all these characteristics will rapidly change over the next few years. But first let’s discuss some additional background. Venture capital has come of age in a time of unprecedented peace The U.S. venture capital industry is about 100 years old. Bessemer Ventures was formed in 1911 and originally had just the family fortune of Henry Phipps Jr., a co-founder of Carnegie Steel, as its sole limited partner. Despite these deep roots, the U.S. venture industry has only institutionalized as an asset class since the mid-1990s. Until then it was extremely clubby and very small. Sequoia Capital, KPCB, Charles River Ventures, and NEA were all founded in the 1970s and Accel Partners in the 1980s. But it has really only been since the mid-1990s (Benchmark Capital was founded in 1995, as was my own former firm, Foundation Capital) that the industry has institutionalized and grown substantially, first in the desktop computing and internet boom, and second during the combination of platform shifts over the last ten years that have given us mobile computing, social media, e-commerce, cloud computing, software-as-a-service and all of their associated new business models. For a quarter of a century, the institutional, mainstream venture investing ecosystem, at the startup, venture firm and limited partner levels, developed business processes, mental models, networks, and expertise in certain technical areas and heuristics — in aggregate, an industry culture — that have created one of the most dynamic parts of the U.S. economy. The U.S. tech industry is also one of the most unique aspects of American life — and a powerful, difficult-to-replicate form of “soft power,” featuring an inclusivity for aspirational immigrant founders — a feature perhaps unequalled in human history. From a long-term U.S. historical viewpoint, it is striking that the venture industry’s maturation has occurred during a unique period in American history when the United States had no major great power competitor, either ideologically or technologically. The Cold War ended in 1991, the Soviet Union dissolved, and Russia was in disarray for the next 15 years. This period of peace was not without its own unique trials, but the security challenges associated with terrorism, counterinsurgency, and lower-intensity military activity have not required the sort of Herculean societal and political efforts that were drawn upon during the Cold War or World War II. We should all be grateful every day that this has been the reality of the last 25 years. A useful analogy might be made with gold. In 1933, President Roosevelt made it illegal for U.S. citizens to own gold. In 1934, Benjamin Graham published the first edition of Security Analysis. In January 1975 it became legal to own gold again. Graham died in 1976. It was therefore illegal to own gold during key years of the development of modern security analysis. From this gap came gold bugs — the weirdos who seemed to always talk about nothing else, and didn’t get invited to key social events. No analogies are perfect but this captures some of the similarities between venture and defense today. Cybersecurity investors understand the cybersecurity parts of U.S. defense. But most mainstream Silicon Valley venture firms do not spend time on other parts of defense due to the industry’s institutionalization during this recent period of relative peace and American dominance — which has also been a time when the lion’s share of defense spending has gone to the Primes, as discussed. Sadly, peace is ahistorical. Great power competitions are a feature of humanity, not a bug. Periods of time when a major power, or superpower, are not challenged in some profound fashion by one or more other powers, regardless of whether they are driven by fear, prestige, economic interest, or ideology — are, in short, rare when looking back on the sojourn of homo sapiens on planet earth. The period when the free world had a monopoly on power has now ended. The tech-defense status quo is inverting The only previously delineated area where we don’t expect much change is from the FAANGs. These massive companies are best viewed as small nation-states themselves with global stakeholders. For example, many of their employees are not U.S. citizens and may not want their employers engaged in U.S. defense work. We think everything else will invert. · We believe defense budgets will begin unlocking for young startups. Many key national security decision-makers in Washington are now seeking better, faster alternatives to the byzantine Pentagon acquisitions process. Thought leaders like Will Roper, in charge of the U.S. Air Force’s $40 billion annual research and acquisition budget, are [eagerly welcoming the contributions that smaller, nimble venture-capital funded entrepreneurs can make](https://federalnewsnetwork.com/dod-reporters-notebook-jared-serbu/2019/03/air-force-looks-to-build-big-idea-pipeline-to-expand-its-industrial-base/). Roper, and others in the Pentagon, are reforming their practices to make it easier for genuine innovators to compete against the legacy defense oligopoly. When recently asked at a conference what problem keeps him up at night, Roper replied, “The industrial base.” · Given the hardware roots of the Primes, they are ill-suited to provide solutions to many of the most pressing problems today. The Defense Department will increasingly allocate resources to startups solving software problems for which the Primes have no existing stock of machine learning engineers. · As this happens some venture firms will experience cultural shifts toward more defense investing. As venture capitalists see that startups are receiving large purchase orders from various Defense Department units, they will develop strategies to deploy capital toward defense innovation. A good example is [last week’s award by the Air Force of $121 million to Pivotal Software in San Francisco](https://dod.defense.gov/News/Contracts/Contract-View/Article/1861753/source/GovDelivery/). · Institutional limited partners as a group will likely slowly allocate away from any China-based manager who could be investing in Chinese military technologies. Some LPs with the freedom to do so may remove restrictions on defense investing from limited partnership agreements. · We believe it is a myth that software engineers do not want to work on defense. This is a classic case of preference falsification, the social phenomenon in which people do not speak their true minds about a given topic, though their actions often indicate otherwise. We believe that talented engineers are often very attracted to defense-related work because it often offers the hardest problems to solve. An enormous opportunity therefore exists for startups: to hire the engineers who don’t want to work for ancient and outdated Primes, and who aren’t very welcome at the FAANGS, but who wish to create the technologies that an increasingly eager democratic government needs to defend itself and its allies. Companies in our own portfolio, like [SpaceX](https://www.spacex.com/), [Rigetti Computing](https://www.rigetti.com/), [Anduril Industries](https://www.anduril.com/), and [Umbra Lab](https://umbralab.com/) are executing this strategy. The hardest technical problems today are defense-related How can data from satellites, drones, land-based radar, ships, and other sources be stitched together, in real time, to find long-range missiles on mobile transporters, hiding among the background in cities, forests, and mountains? How can friendly troops, who have separated into very small units in order to hide and survive, be connected to each other electronically, and be resupplied from historically long ranges? How and to what degree and in what conditions should an adversary’s sensor networks be spoofed? What type of false electronic picture can be painted? The aggregation of targeting data for an air wing takes 72 hours today and has a heavy human component. Can this complex optimization problem be solved autonomously, such that the targeting list for pilots is developed in 15 minutes? How does a deployed force of perhaps 50,000 personnel, with planes, ships, and land forces, continue to fight when satellite links have been knocked out, and “reachback” to the U.S., for data processing, is no longer possible? Can deep learning be used for crisis diplomacy? Put another way, since DeepMind’s AlphaZero can teach itself to move pieces forward on a board to win a game, can it learn to move them backwards, to de-escalate a crisis? These problems, and many others, are asking to be solved by entrepreneurs. Phase change There is a looming breakdown in deterrence. If the U.S. defense establishment is unable to adapt to the new great power competitive environment, then adversaries will be tempted to grab for a fait accompli, with war the result. This has been the pattern since Homer wrote The Iliad; there is no evidence to conclude human behavior is different in the 21st Century. We believe the prevention of this scenario involves rapid technical innovation. The defense environment is more favorable now for upstart firms than anytime in the past several decades. If you are a founder building technology to ensure the survival of government by consent, our firm would like to talk to you.

## Innovation Adv

### 1NC – Disease D

#### No disease impact.

Barratt 17, PhD in Pure Mathematics, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute. (Owen Cotton-Barratt et al, “Existential Risk: Diplomacy and Governance”, pg. 9, <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>)

1.1.3 Engineered pandemics

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

### 1NC – Bioterror D

#### No bioterrorism---empirics and technical barriers.

Blum & Neumann 20, \*former Head of Laboratory at the Organisation for the Prohibition of Chemical Weapons. He holds a PhD in Biochemistry from the University of Frankfurt, \*\*Professor of Security Studies at King’s College London, and served as Director of its International Centre for the Study of Radicalisation from 2008-18.. (Marc-Michael & Peter, 6-22-2020, "Corona and Bioterrorism: How Serious Is the Threat?", *War on the Rocks*, https://warontherocks.com/2020/06/corona-and-bioterrorism-how-serious-is-the-threat/)

The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are teeming with talk about “biological warfare.” ISIL even called the virus “one of Allah’s soldiers” because of its devastating effect on Western countries. According to a recent memo by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks.

How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the technical challenges associated with weaponizing biological agents have proven insurmountable. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy.

A History of Failures

Biological warfare, which uses organisms and pathogens to cause disease, is nearly as old as war itself. The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat).

Among terrorists, however, the use of biological weapons has been rarer, although groups from nearly all ideological persuasions have contemplated it. Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. No one died in any of these instances.

The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to buy, steal, or develop biological agents. For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop.

Yet none of these efforts succeeded. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that none of the toxin had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose only fatality was the hamster on which it was tested. Of the tens of thousands of people that jihadists have murdered, not a single one has died from biological agents.

It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as Bruce Ivins, a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents.

Technical Challenges

Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a technical level, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be isolated and disseminated. But this is more difficult than it seems. As well as advanced training in biology or chemistry, isolating the agent requires significant experience. It also has to be done in a safe, contained environment, to stop it from spreading within the terrorist group. Contrary to what al-Qaeda said in one of its online magazines, you can’t just make a (biological) weapon “in the kitchen of your mom!”

In addition, there is the challenge of dissemination. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in perfect conditions. In the case of the bacterium anthrax, for example, only spores of a particular size are likely to be effective in certain kinds of weather. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is unlikely that terrorist groups possess the resources, stable environment, and patience to do likewise.

### 1NC – ABR D

#### No impact to ABR.

Sepkowitz 13 [Kent Sepkowitz (Professor of Medicine @ Weill Cornell Medical School, head of Memorial Sloan Ketterings’s infection control program), “Why I’m Not Worried About Dying From a Superbug, and You Shouldn’t Be, Either,” 3-8-13, <http://www.thedailybeast.com-/articles/2013/03/08/why-i-m-not-worried-about-dying-from-a-superbug-and-you-shouldn-t-be-either.html>]

There’s a scary new superbug showing up in hospitals, resistant to all but one aging antibiotic. But Dr. Kent Sepkowitz says your chances of infection are microscopic, and shouldn’t keep you from getting care you need. Pity the poor public-health official: in the midst of an epidemic, he must adopt a soothing avuncular tone of near-boredom, a “we’ve seen this, not to worry” sort of yawn to calm people who otherwise seem ready to run screaming into the streets. But on the other hand, in this day of sequestered public-health funding, he has to raise a major ruckus about some other problem that might happen, swearing that the earth may end soon if we don’t wake up now and face the music. The cavalcade of past get-ready-for-the-big-one hits includes drug-resistant TB, avian flu, swine flu, and drug-resistant gonorrhea among others, each introduced with shrill press releases and snapshots of grim faces peering through microscopes. It is no surprise, therefore, to see the CDC roll out the heavy artillery this week by proclaiming the dangers of the latest superbug. This one is ugly for sure, a resistant-to-almost-everything bacteria that preys on the hospitalized patient. Called carbapenem-resistant Enterobacteriaceae, or CRE, to denote the class of antibiotics (carbapenems) to which it is resistant, and the group of bacterial organisms—Enterobacteriaceae, bacteria that reside in the gut—to which it belongs, CRE is being seen increasingly in hospitals across the U.S. Unheard of before 2001, CRE now is in 181 (4.6 percent) U.S. acute-care hospitals, affecting hundreds of patients. In August 2012, the NIH Clinical Center had a widely reported outbreak from a CRE that killed six of 18 patients, the mortality rate seen in most series. The CDC and other public-health officials are particularly alarmed by this latest wrinkle because the carbapenem class was the last thoroughly modern group of antibiotics with predictable activity against gut bacteria. With the carbapenem hegemony now wobbling, the next (and last) antibiotic is an oldie from the 1960s, pulled from the market then because of concerns about toxicity, but now being used in many hospitals and ICUs to treat CRE infection. If and when CRE becomes resistant to this old-timer, the cupboard is truly bare. This sort of progressive resistance to antibiotics is standard operating procedure for bacteria exposed to high doses of potent antibiotics over time; resistance can and must occur according to the most basic principle of evolution: survival of the fittest. If a billion bacteria are exposed to an antibiotic and just one bacterium, because of a chance mutation, is resistant to the antibiotic while the other near-billion are not, that single organism will survive while the others will die off. The resistant organism will then have the run of the place with enough nutrition to support the billion now-absented brethren, allowing the resistant clone to take root and get in position to spread. We have been here before of course: methicillin-resistant Staphylococcus aureus (MRSA) played through the hospitals and the headlines (and even the National Football League) last decade, alarming the public and spurring new regulations to contain it as well as the application of money, sort of, to develop new weapons. Perhaps because of all the hubbub, MRSA now seems almost quaint and surely not a headline-screaming scourge: mostly contained, a nuisance, a problem, but being dealt with at the right place by the right people. In other words, it has assumed its proper proportion in the world of threats and dangers. The same likely will happen with CRE. More cases will occur, hospitals will make the necessary adjustments suggested by the CDC, specialists will learn their way around the diseases, and eventually the threat and the excitement around it will flatten out. And then the next red-hot development on some other front will emerge rendering the acronym to oblivion. The problem though is this: the mix of steady CDC concern about a real issue that requires attention, a world with infinite capacity for both news and “news,” and a perverse public enjoyment of being frightened has succeeded in little other than scaring the crap out of people who might need medical care. Indeed, hospitals seem to occupy the same imagined place as the Overlook Hotel, the cavernous inn Jack Nicholson prowled in The Shining—the last place on earth a sane person would go. Health care in general and hospitals specifically are viewed these days by just about everyone as a veritable killing field, the place where the two inevitabilities—death and taxes—meet daily as people are fleeced then killed.

### 1NC – Innovation

#### No innovation impact – they don’t solve tech, cyber, mil mod and have card zero that says they solve any of them – Cal inserts blue alt causes

Knipfer ’17 [Cody; Policy Associate at PoliSpace, M.A. Candidate in the Space Policy Institute at George Washington University; A Really Cool Blog, “On the Nature of Science and Technology Power,” <http://www.reallycoolblog.com/on-the-nature-of-science-and-technology-power/>]

Indeed, the United States’ leadership in science and technology has been a historical cornerstone of its capacity for “hard power” force application and projection and economic and societal “soft power.” It buttresses the country’s economic might, enables the modern standards of living of our citizenry, and expands our global cultural and normative reach.[ii] Equally so, the power of science and technology has been decisive in the context of national security. As President Truman noted in 1945, while urging Congress to create a Department of National Defense, “no aspect of military preparedness is more important than scientific research.” [iii] Through discoveries, technological innovation, and the capacity to develop ideas into deployable weapons, systems, and concepts, the United States has arrived at its modern-day military advantage and superiority.[iv]

To that end, science and technology may be considered key elements of the United States’ comprehensive national power – fundamentals of the country’s strength vis-à-vis competitors. Yet science and technology alone cannot ensure any country’s continued security, prosperity, or hegemony; far from operating in a vacuum, science and technology are constantly evolving to address changing domestic and international circumstances and threats. To reap advantage from science and technology, especially in their national security application, a country must continually innovate to tackle contemporary developments and anticipate future ones. This poses a considerable challenge, the solution to which extends beyond advanced engineering and research.

To explore these notions, this essay, particularly interested in the application of science and technology toward national security ends, examines the United States’ recent employment of security-related technologies. From this, it explores the attributes of science and technology power and the similarities and differences between science and technology power and other forms of national power such as the economic and diplomatic. Looking at the relative importance of science and technology in the United States today and likely significance in the coming future, it lays out a series of policy recommendations that may guide policymakers as they make decisions that impact the direction of the country’s scientific and technological course.

Employment of – and Challenges Facing – National Security-Related Technology

Recognizing the vital role that technology played in winning World War Two, along with the emerging threat of Soviet technological competitiveness, the United States established in the war’s wake an extensive infrastructure to support national security science and technology efforts. This provided foundation and catalyst for the development of military capabilities and tools needed to meet the challenges of the Cold War and the modern day: the nuclear triad, intelligence-gathering and cyber infrastructure, space-based radar and communications systems, advanced precision-guided munitions, and integrated command and control, along with myriad other assets.[v]

These technologies have seen extensive use in contemporary military conflicts. The wars in the Balkans and the Gulf saw the ever-increasing use of position, navigation, and timing assets such as GPS to provide precise and reliable information to the warfighter and direct precision-guided weaponry.[vi] Targeted airstrikes and weapons such as the long-range cruise missile have allowed for far more rapid, responsive, and accurate strikes than those of the past while substantially reducing collateral damage. Combat drones and unmanned aerial vehicles, innovations emblematic of the “War on Terror,” enable the warfighter to engage adversaries and conduct reconnaissance while safely remaining away from the front lines of the battlefield. Stealth aircraft, using a range of advanced technologies that reduce reflections and emissions, have helped pilots conduct sorties while evading detection.[vii]

Technology abets the United States’ security beyond warfighting. Advanced cyber capabilities – encryption, for example – seek to defend the networks which control the country’s power, transit, and water infrastructure from malicious hacks and crippling denial of service.[viii] Technologies capable of detecting harmful biological and chemical agents guard the country against potentially devastating attack by non-state actors.[ix] Increasingly sophisticated monitoring and surveillance technology enables the government to globally track and work to counter criminal activity, terrorist organizations, and other developments which threaten the country’s safety.[x]

Crucially, though, the United States’ contemporary application of national security systems has also demonstrated the inherent challenges of innovation and the limitations of technology. Despite advanced military hardware, principally designed to fight large-scale conventional wars against Cold War-era foes, the United States military had to “catch up” and react to unconventional tactics, such as roadside bombs and sniper attacks, employed against it in the Iraq and Afghanistan wars. Though decidedly outnumbered and outgunned, enemy combatants effectively countered the United States’ asymmetric technological advantage through guerilla warfare, propaganda, and exploiting collateral damage that advanced weapons systems created – doctrines which the United States’ technology did not anticipate and was unprepared or unsuited to counter.[xi] Likewise, despite the sophistication of the United States’ homeland security technologies, the government has struggled to prevent incidents of domestic terrorism such as mass shootings, often characterized by the use of simple, off-the-shelf equipment.[xii]

Meanwhile, in reaction to the United States’ present-day technological superiority, competitive foreign powers such as Russia and China are heavily investing in hardware and capabilities in the cyber and military realms specifically designed to counter the United States’ technological strengths and exploit its demonstrated vulnerabilities. The technological capabilities underlying the United States’ comparative military advantage are now proliferating to an increasing number of state and non-state actors, including potential adversaries, leveling the military “playing field.”[xiii]

The Attributes of National Security Science and Technology Power

From this, several key attributes and characteristics of science and technology as a form of national power can be identified. Foremost is the capacity for technology and science to be a significant, occasionally decisive, enhancer of a country’s military strength against enemies. Countries which develop innovative military technologies which effectively counter an adversary’s offenses or defensives, or against which an adversary has no means to protect itself, find themselves disproportionately advantaged on the battlefield. Indeed, technologies which upend dominant “status quo” warfighting paradigms – such as, historically, the introduction of the chariot, the tank, or nuclear weapons – are poised to significantly disrupt and reorder the geopolitical and military balance of power.[xiv]

To that end, science and technology power, particularly in the national security sphere, is developed and sustained through the adaption to, and more so through the anticipation of, revolutionary changes in military affairs, doctrine, and hardware. As Lieutenant Colonel Scott Stephenson noted in the influential “The Revolution in Military Affairs,” “those slow to adapt to military revolutions… are likely to suffer painful results. When the pace of change accelerates, the militaries that anticipate and adapt are likely to gain a massive advantage over potential enemies who are less agile.”[xv] That agility is, in large part, borne from innovations in science and the development of new technologies which lead to unanticipated, and therefore difficult to counter, doctrines.

A defining characteristic of science and technology power, then, is the continual quest for states to match, counter, and out-compete the technology of their adversaries. This continuing interplay between technology and national power, characterized by the sustained technological evolution and described often as an “offset,” has been a key focus for national security-related research and development throughout the Cold War and into the present. The United States’ deployment of nuclear weapons, for example, offset the numerical advantage held by the Soviet Union’s land forces in the early Cold War. Soviet parity in nuclear weapons catalyzed the development of guided weapon and integrated command and control as a counter, focusing on accuracy of targeted weapons systems independent of range.[xvi] The United States’ capacity to offset Soviet technology through innovative developments – and the Soviet bankruptcy borne from military expenditure that came as a corollary – was an important factor in maintaining a generally peaceful stable of power along with the country’s ultimate triumph in the Cold War. In the present-day, China and Russia’s focus on countering the systems and technologies which currently provide the United States’ military asymmetry is emblematic of this “offset” approach to science and technology power.

Paradoxically, however, national security-related technology in the present day has become as great an equalizer as it has historically been a separator of actors’ strengths. Technological superiority in the present may provide the United States’ unrivaled military strength, especially against foes (historically, state actors with large conventional forces) for which its national security technologies anticipated countering. Yet as the example of the Iraq and Afghani insurgencies amply demonstrated, technological superiority coupled with innovation focused on addressing hypothetical future battlefields may not be adequate to oppose or defeat all actors or all forms of warfare, regardless of the level of their sophistication.

Indeed, advanced technologies may be entirely vulnerable to actors utilizing doctrines with simple technologies that nonetheless exploit their weaknesses, as was the case with sophisticated – and expensive – American vehicles being destroyed by crude, homemade IEDs. Technology itself also creates weaknesses; the United States’ progressing economic and social reliance upon interconnected networks, for example, makes the country more vulnerable to potentially crippling attack. Despite advanced American cybersecurity technologies and techniques, non-state actors have still proven themselves capable of infiltrating, attacking, and even denying use of American cyber capabilities; considering recent trends, this vulnerable seems likely to continue, if not worsen.[xvii]

It may be that an attribute of science and technology power, borne more from the focus and perceptions of the technologists, theorists, and military leadership that employ it than from science and technology itself, is that it obscures other factors which equally dictate important developments in military, international, and geopolitical affairs. Political upheaval, social change, and economic development can change warfare dramatically, for example – and have nothing to do with “offset” strategies or war-room predictions of possible enemies’ future high-tech military hardware. As a product of the military-industrial complex that emerged in the Cold War United States to sustain continued technological development, Americans tend to be acutely – perhaps overly – sensitive to technological innovation among competitors and potential rivals. Fears during the Cold War and contemporary discussions of the “Third Offset” paint pictures of emerging, potential, and fanciful enemy weapon systems – which military planning and technology development was and is oriented toward countering.[xviii] This fixation on solutions entailing engineering and technological complexity blinds the national security technology apparatus to external trends that could definitively impact the future course of war – such as the collapse of the Soviet Union leaving the United States with a high-tech military and warfighting doctrine unsuited for the military pressures and asymmetric nature of counterinsurgency; the rise of radical terrorism with ideological underpinnings that condone unconventional guerilla tactics such as suicide bombings, which had great effect against high-tech targets; or the continuing crisis where lone-wolf gunmen using off-the-shelf rifles can commit massacres despite the government’s highly complex and pervasive surveillance and monitoring technology.

Similarities and Differences to Other Forms of National Power

With these attributes in mind, a comparison can be drawn between science and technology power and other forms of power which constitute a country’s comprehensive strength, such as the economic and diplomatic. Regarding the economic, science and technology power is similar in that the development of science and technology is driven by the same forces as economic growth. Like new economic products, services, and methods of operation, science and technology power relies upon the ingenuity of human actors predicting and anticipating future trends, possibilities, and human behavior. Innovation, iteration, and competitiveness are fundamental catalysts for the continued evolution and growth of both. The rapid proliferation and subsequent use of innovative technologies across the world quickly equalizes both the national security advantage and the economic advantage they provided their inventor.

Economic power, like national security technology, is a key element of a country’s warfighting capability – industrial might, strength in quality production, and capable infrastructure are crucial facets of a country’s ability to mobilize and project force. A fundamental difference between economic power and science and technology power, however, is competition. While economies naturally compete, there is incentive for states to specialize in the economic product or service most suited for it – their comparative advantage. Competing economies are not actively incentivized to counter the economic specialization of their rivals. With science and technology power for national security use, however, states decidedly hope to actively and explicitly counter the relative advantage of their adversaries.

Like diplomatic power, science and technology has a “soft power” element; other states and their societies may be influenced or compelled to action by the might, prestige, or cultural and technological hegemony of a country in possession of highly advanced and capable technologies.[xix] Diplomatic power occasionally experiences the same issue of science and technology policy in being blinded to unpredicted or external trends in the social, cultural, and economic spheres. The power of diplomacy, for example, did not anticipate and struggled to deal with the cultural, social, and political circumstances that led to a breakdown of order in post-invasion Iraq; just as national security technology was unprepared for the guerilla warfare of the Iraqi insurgency. Diplomatic power and science and technology power differ, though, in the fields of innovation and evolution. Whereas the military regime is constantly evolving and occasionally being upended by revolutions in security technology and associated doctrine, the Westphalian diplomatic order has remained largely similar through centuries – even as it has grown gradually more complex and interconnected. States do not tend seek to outcompete each other in the diplomatic sphere through revolutionary new approaches to diplomacy; negotiations, sanctions, deals, bi- and multilateral agreements, and the like have remained consistent “doctrines” employed by states in their dealings with international friends and foes.

Science and Technology Power’s Present and Future Importance

To return to Vannevar Bush’s assertion over half a century ago, science and technology is crucially important for a states’ economic growth and prosperity, the wellbeing of its citizens, and national security. This remains absolutely the case today. Despite the challenges facing innovation in the face of unanticipated adversaries and the proliferation of advanced, equalizing technologies among adversarial states and non-state actors, science and technology provides the United States’ unrivaled levels of security and military hegemony.

With the appearance of significant global challenges – refugee crises, environmental degradation, the possible emergence of a bi- or multi-polar world characterized by states with rough or equal technological parity, to name a few – the future importance of science and technology power cutting across all aspects of national security will undoubtedly redouble. Science and technology and its application as an element of the United States’ national power will need to be directed to address these challenges. While the exact characteristics that will define domestic and foreign national security technologies of the future – not to mention the economic and social – remain uncertain, the United States cannot afford to permit its current technological advantage to slip. Indeed, as revision states such as China continue to develop their technologies to directly counter the United States’ capabilities, it will likely become an imperative for the country to more actively engage in and support the development of innovative new security technologies and doctrines – lest, as history would suggest, the international order again be upended.

### 1NC – Circ

#### 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.

## FTC Adv

### 1NC – FTC

#### Losses knock it down

McLaughlin 1/19 [David McLaughlin, Bloomberg. “FTC’s Khan Vows to Act With ‘Fierce Urgency’ on Antitrust Front.” 1/19/22. https://www.bloomberg.com/news/articles/2022-01-19/ftc-s-khan-vows-to-act-with-fierce-urgency-on-antitrust-front]

Khan said the FTC is “severely under-resourced” and the record deal-making by companies is straining the agency’s ability to review and potentially challenge transactions. That is posing “very difficult choices” about which deals to investigate, she said.

Still, the FTC can’t hold back from bringing risky cases that the agency might lose. Under Khan’s tenure, the FTC sued to block chipmaker Nvidia Corp.’s proposed $40 billion takeover of Arm Ltd. and salvaged a lawsuit that seeks to break up Meta Platforms Inc.

#### No privacy bill

Kerry 21 [Cameron F. Kerry, Ann R. and Andrew H. Tisch Distinguished Visiting Fellow - Governance Studies, Center for Technology Innovation. “One year after Schrems II, the world is still waiting for U.S. privacy legislation.” 08/16/21. https://www.brookings.edu/blog/techtank/2021/08/16/one-year-after-schrems-ii-the-world-is-still-waiting-for-u-s-privacy-legislation/]

Now the end of August is approaching, and no privacy hearings have taken place—neither in the full Senate Commerce Committee nor the Communications Subcommittee. Wicker’s SAFE DATA Act, introduced in both 2020 and 2021, demonstrates how the state of negotiations have largely frozen since the last Congress; both versions are almost identical to the Republican draft United States Consumer Data Privacy Act released in November 2019 on the heels of the Consumer Online Privacy Rights Act (COPRA) from Sen. Maria Cantwell (D-WA), now chair of the full committee. In a report last June, my Brookings colleagues and I provided a detailed analysis of the differences, large and small, between these bills, and proposed a concrete roadmap for resolving them.

#### FTC can’t solve privacy, but there isn’t a trade off in the staff

Jessica Rich, Aug 12, 2019 [Privacy consultant and former director of the Federal Trade Commission’s Bureau of Consumer Protection. <https://www.nytimes.com/2019/08/12/opinion/ftc-privacy-congress.html>]

You might think that after the Federal Trade Commission levied a $5 billion fine against Facebook for privacy violations relating to Cambridge Analytica, the agency has great power to protect our privacy on the internet.

But in fact the F.T.C. lacks both the legal authority and resources to be fully effective in this area. The reason? Congress has repeatedly declined to enact a broad-based federal privacy and data security law setting strong privacy standards, codifying penalties for wrongdoers and allocating the staff and funds necessary to enforce the law nationwide.

It’s not as if no one has thought about this issue. Since the late 1990s, consumer advocates, industry leaders and the F.T.C., among others, have at various times urged Congress to pass such a law, but to no avail. With a few exceptions, the F.T.C.’s legal authority over privacy is the same as it was before the internet was invented.

I’m all too familiar with this problem. I served as the F.T.C.’s top career privacy staff member for almost 15 years, and its director of the Bureau of Consumer Protection from 2013 to 2017. During that time, I was one of the people who repeatedly represented the F.T.C. before Congress on privacy issues.

We reviewed multiple draft privacy bills, testified on some of them, and responded to countless inquiries from individual members of Congress and their staffs. There was lots of activity, but Congress never acted.

There are many reasons for congressional inaction. Privacy cuts across multiple congressional committees, which makes it logistically difficult to draft and enact a privacy law. Most businesses, until recently, vigorously fought off new legal requirements, even while complaining that the current rules governing privacy aren’t clear. Consumer advocates haven’t always been as effective as they could be, adopting out-of-reach positions and declining to budge. And the F.T.C.’s requests for more authority have varied with each new administration, and have at times been overly cautious.

Recent events, including the Facebook debacle, passage of demanding privacy laws in Europe and California, and growing concern among the public, have altered these dynamics, giving hope to privacy proponents that we have finally reached the moment when a federal privacy law could pass.

But, despite these signs, congressional efforts appear to have stalled. Further, some of the focus has shifted to concerns about the alleged political bias of social media platforms, an entirely separate matter that has little to do with consumer privacy.

The F.T.C. has nevertheless built a strong privacy program based largely on the Federal Trade Commission Act, which was passed more than 100 years ago, long before personal computers, the internet, social media or mobile phones were invented. This general-purpose law is supplemented by a few sector-specific privacy laws, like the Children’s Online Protection Act, which give the F.T.C. stronger authority to act in specific areas of the marketplace.

The F.T.C. Act gives the agency a lot to work with. The agency can investigate fraud, deception and clearly harmful practices by a wide array of companies. It can bring enforcement actions stopping such conduct and getting back money that consumers have lost. It can study trends in the marketplace and issue studies. And it can use the bully pulpit to call out troubling practices and educate the public, just as any government agency can.

Using this authority, the F.T.C. has challenged the privacy practices of some of the biggest companies (and prominent users of consumer data) in the world, including Facebook, Google, Twitter, Equifax, Microsoft, Uber, Wyndham and many others.

But the F.T.C. Act is not enough to protect privacy. Each action against these tech companies, for example, required painstaking investigation before the agency could obtain even the most basic privacy relief for consumers. Some also prompted controversy and litigation over the parameters of the F.T.C.’s privacy authority. At times, facing the reality of the limits on its powers, the agency has had to pull its punches.

Under the F.T.C. Act, the agency can’t set normative privacy standards that all companies must follow, such as requiring them to post a privacy policy

, limit the consumer data they collect and retain, refrain from certain uses of that data or give consumers choices about how their data is used. Sure, the agency might be able to get this type of relief against a particular company following proof of specific and harmful misconduct, but it can’t set these standards on an industry-wide basis.

Also, the F.T.C. can’t generally impose penalties on privacy wrongdoers, unless they’re already under an order for previous wrongdoing — as in the case of Facebook. Yes, it can get back money that consumers have lost, or order companies to “disgorge” its profits from illegal activities. But all of this can be very difficult to calculate in privacy, and even more difficult to prove in court, as many plaintiffs have learned in privacy class actions and similar litigation. That’s why the ability to obtain penalties is so important.

The F.T.C. has limited jurisdiction over key industry sectors, like telecommunications companies, and no jurisdiction over banks or nonprofit entities. And absent clearer authority to order conduct relief and obtain penalties for privacy violations, the F.T.C. constantly faces obstacles in court, leading it to rely, more often than many would like, on the greater certainty of negotiated settlements. A strong privacy mandate from Congress could set clear limits on how consumer data can be used, and give the F.T.C. greater power to enforce these limits in litigation.

Finally, in addition to these many legal constraints, the F.T.C. is woefully understaffed in privacy, with some 40 full-time staff members (as of the spring) dedicated to protecting the privacy of more than 320 million Americans. This compares to hundreds of staff members in Britain, and almost 150 each in Ireland and Canada — all countries with far smaller populations than the United States.

### 1NC - FTC

#### Turn – Backlash –

#### Industry will persuade Congress to circumvent the plan – 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

#### Even if fiat is durable, Congress will gut the FTC undermining solvency

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.

#### Independent of Congress, courts would roll back the enforcement of the plan

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 FTC receives almost no deference with respect to cases it brings under the "unfair methods of competition" prong of the Federal Trade Commission Act. In contrast, the FTC usually receives Chevron deference 57 when it acts under the "unfair or deceptive trade [\*48] acts or practices" prong of section 5 of the FTC Act. Theories abound as to why this is so.

The most obvious theory is that the dual enforcement scheme clouds the ability of the courts to offer the FTC any deference. Unlike with the FTC's "unfair methods of competition" actions, the courts do not face a non-agency duplicate that appears in the bulk of cases before the courts regarding "unfair or deceptive trade acts or practices." 58 The FTC and DOJ both enforce the Clayton Act, and while the Sherman Act is exclusively within the confines of the DOJ, the FTC cases, to the courts, are parallel actions. 59 With an "ugly stepsister" in the midst, it is difficult for the FTC to make a claim of deference successfully. 60

One way around this issue would be for the FTC to engage in rulemaking. 61 However, there are serious risks to rulemaking, as will be discussed later. Moreover, such an action would cause the FTC to run squarely into a second theory of why it is not afforded deference; namely, that it is engaged in the creation of a pseudo "common law" that is extracted away from Article III courts. 62 At the very least, it would be "high stakes rulemaking" that would likely trigger additional scrutiny from the courts. 63

[\*49] Suffice to say for the moment that it is unlikely that even a promulgated rule would survive in courts that typically view the antitrust laws as strongly within their own domain. 64 A second way to eliminate the issue is to place the antitrust laws in the exclusive jurisdiction of the FTC. This may eliminate the redundancy, but, unfortunately, undermines the will of Congress to have multiple antitrust enforcers to serve as checks against the courts and the DOJ. The proposal discussed later seeks a middle position by establishing the FTC as the sole federal enforcement agency, excluding criminal enforcement.

### 1NC – Scamming D

#### No scamming impact.

Ewing 20, Citing Keir Giles, a Russia specialist with the Conflict Studies Research Centre in the United Kingdom and Tim Hwang, director of the Harvard-MIT Ethics and Governance of AI Initiative. (Philip, 5-7-2020, “Why Fake Video, Audio May Not Be As Powerful In Spreading Disinformation As Feared”, *NPR*, <https://www.npr.org/2020/05/07/851689645/why-fake-video-audio-may-not-be-as-powerful-in-spreading-disinformation-as-feare>)

Sophisticated fake media hasn't emerged as a factor in the disinformation wars in the ways once feared — and two specialists say it may have missed its moment. Deceptive video and audio recordings, often nicknamed “deepfakes,” have been the subject of sustained attention by legislators and technologists, but so far have not been employed to decisive effect, said two panelists at a video conference convened on Wednesday by NATO. One speaker borrowed Sherlock Holmes' reasoning about the significance of something that didn't happen. “We've already passed the stage at which they would have been most effective,” said Keir Giles, a Russia specialist with the Conflict Studies Research Centre in the United Kingdom. “They're the dog that never barked.” The perils of deepfakes in political interference have been discussed too often and many people have become too familiar with them, Giles said during the online discussion, hosted by NATO's Strategic Communications Centre of Excellence. Following all the reports and revelations about election interference in the West since 2016, citizens know too much to be hoodwinked in the way a fake video might once have fooled large numbers of people, he argued: “They no longer have the power to shock.” Tim Hwang, director of the Harvard-MIT Ethics and Governance of AI Initiative, agreed that deepfakes haven't proven as dangerous as once feared, although for different reasons. Hwang argued that users of “active measures” (efforts to sow misinformation and influence public opinion) can be much more effective with cheaper, simpler and just as devious types of fakes — mis-captioning a photo or turning it into a meme, for example. Influence specialists working for Russia and other governments also imitate Americans on Facebook, for another example, worming their way into real Americans' political activities to amplify disagreements or, in some cases, try to persuade people not to vote. Other researchers have suggested this work continues on social networks and has become more difficult to detect. Defense is stronger than attack Hwang also observed that the more deepfakes are made, the better machine learning becomes at detecting them. A very sophisticated, real-looking fake video might still be effective in a political context, he acknowledged — and at a cost to create of around $10,000, it would be easily within the means of a government's active measures specialists. But the risks of attempting a major disruption with such a video may outweigh an adversary's desire to use one. People may be too media literate, as Giles argued, and the technology to detect a fake may mean it can be deflated too swiftly to have an effect, as Hwang said. “I tend to be skeptical these will have a large-scale impact over time,” he said. One technology boss told NPR in an interview last year that years' worth of work on corporate fraud protection systems has given an edge to detecting fake media.” This is not a static field. Obviously, on our end we've performed all sorts of great advances over this year in advancing our technology, but these synthetic voices are advancing at a rapid pace,” said Brett Beranek, head of security business for the technology firm Nuance. “So we need to keep up.” Beranek described how systems developed to detect telephone fraudsters could be applied to verify the speech in a fake clip of video or audio. Corporate clients that rely on telephone voice systems must be wary about people attempting to pose as others with artificial or disguised voices. Beranek's company sells a product that helps to detect them, and that countermeasure also works well in detecting fake audio or video. Machines using neural networks can detect known types of synthetic voices. Nuance also says it can analyze a recording of a real, known voice — say, that of a politician — and then contrast its characteristics against a suspicious recording. Although the world of cybersecurity is often described as one in which attackers generally have an edge over defenders, Beranek said he thought the inverse was true in terms of this kind of fraud detection.

” For the technology today, the defense side is significantly ahead of the attack side,” he said. Shaping the battlefield Hwang and Giles acknowledged in the NATO video conference that deepfakes likely will proliferate and become lower in cost to create, perhaps becoming simple enough to make with a smartphone app. One prospective response is the creation of more of what Hwang called “radioactive data” — material earmarked in advance so that it might make a fake easier to detect. If images of a political figure were so tagged beforehand, they could be spotted quickly if they were incorporated by computers into a deceptive video. Also, the sheer popularity of new fakes, if that is what happens, might make them less valuable as a disinformation weapon. More people could become more familiar with them, as well as being detectable by automated systems — plus they may also have no popular medium on which to spread. Big social media platforms already have declared affirmatively that they'll take down deceptive fakes, Hwang observed. “That might make it more difficult for a scenario in which a politically charged fake video goes viral just before Election Day. “Although it might get easier and easier to create deepfakes, a lot of the places where they might spread most effectively, your Facebooks and Twitters of the world, are getting a lot more aggressive about taking them down,” Hwang said. That won't stop them, but it might mean they'll be relegated to sites with too few users to have a major effect, he said. “They'll percolate in these more shady areas.

### 1NC – Terror D

#### No nuke terror – people like Allison are hacks

* Two decades of threats haven’t panned out
* Too many things can go wrong:

Getting trusted collaborators

Stealing and transporting guarded material

Getting the top technicians in the world

No ability to test

Skilled detonation crew

All that while attracting zero attention

* Weapons have safety devices, are stored in pieces in different places
* Terrorists are like Bond villains that scheme instead of accomplishing anything
* Most attacks are bombs which don’t even work

Mueller and Stewart 10/29/18 [John Mueller is Woody Hayes Senior Research Scientist, Mershon Center for International Security Studies, and adjunct professor of Political Science, at Ohio State University. He is also a Senior Fellow at the Cato Institute in Washington. Mark G. Stewart is Professor of Civil Engineering and Director of the Centre for Infrastructure Performance and Reliability at The University of Newcastle in Australia. Terrorism and Bathtubs: Comparing and Assessing the Risks. October 29, 2018. https://www.tandfonline.com/doi/abs/10.1080/09546553.2018.1530662?journalCode=ftpv20]

However, there is of course no guarantee that things will remain that way, and the 9/11 attacks inspired the remarkable extrapolation that, because the terrorists were successful with box cutters, they might soon be able to turn out weapons of mass destruction— particularly nuclear ones—and then detonate them in an American city. For example, in his influential 2004 book, Nuclear Terrorism, Harvard’s Graham Allison relayed his “considered judgment” that “on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not.”11 Allison has had a great deal of company in his alarming pronouncements. In 2007, the distinguished physicist Richard Garwin put the likelihood of a nuclear explosion on an American or European city by terrorist or other means at 20 percent per year, which would work out to 91 percent over the eleven-year period to 2018.12

Allison’s time is up, and so is Garwin’s. These off-repeated warnings have proven to be empty. And it is important to point out that not only have terrorists failed to go nuclear, but as William Langewiesche, who has assessed the process in detail, put it in 2007, “The best information is that no one has gotten anywhere near this. I mean, if you look carefully and practically at this process, you see that it is an enormous undertaking full of risks for the would-be terrorists.”13 That process requires trusting corrupted foreign collaborators and other criminals, obtaining and transporting highly guarded material, setting up a machine shop staffed with top scientists and technicians

, and rolling the heavy, cumbersome, and untested finished product into position to be detonated by a skilled crew, all the while attracting no attention from outsiders.

Nor have terrorist groups been able to steal existing nuclear weapons—characteristically burdened with multiple safety devices and often stored in pieces at separate secure locales—from existing arsenals as was once much feared. And they certainly have not been able to cajole leaders in nuclear states to palm one off to them—though a war inflicting more death than Hiroshima and Nagasaki combined was launched against Iraq in 2003 in major part under the spell of fantasies about such a handover.14

More generally, the actual terrorist “adversaries” in the West scarcely deserve accolades for either dedication or prowess. It is true, of course, that sometimes even incompetents can get lucky, but such instances, however tragic, are rare. For the most part, terrorists in the United States are a confused, inadequate, incompetent, blundering, and gullible bunch, only occasionally able to get their act together. Most seem to be far better at frenetic and often self-deluded scheming than at actual execution. A summary assessment by RAND’s Brian Jenkins is apt: “their numbers remain small, their determination limp, and their competence poor.”15 And much the same holds for Europe and the rest of the developed world.16 Also working against terrorist success in the West is the fact that almost all are amateurs: they have never before tried to do something like this. Unlike criminals they have not been able to develop street smarts.

Except perhaps for the use of vehicles to deliver mayhem (though this idea is by no means new in the history of terrorism), there has been remarkably little innovation in terrorist weaponry or methodology since 9/11.17 Like their predecessors, they have continued to rely on bombs (many of which fail to detonate or do much damage) and bullets.18

### 1NC – Cyber D

#### No cyber impact

Lewis ’20 [James Andrew; 8/17/20; senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies; "Dismissing Cyber Catastrophe," https://www.csis.org/analysis/dismissing-cyber-catastrophe]

More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are:

Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals.

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation

in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare.

State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war.

This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.

The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability.

# 2NC

### Regs CP

#### Ev is bad, just says antitrust would have a ‘broader toolkit’ but then goes on to say regs are limited by court interpretation but the CP fiats the increase in regulations and damages which means the courts have to follow on and agree to it

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

False advertising liability alone cannot address the marketwide harms caused by deceptive behavior. This Section first addresses antitrust’s comparative advantage for marketwide harms. It then offers examples of antitrust properly targeting conduct that violates other, non-antitrust laws, demonstrating that antitrust’s treatment of false advertising is an outlier. It concludes by showing that false advertising’s remedies cannot fully protect competition on their own. 1. Antitrust’s Comparative Advantage An antitrust-based framework for false advertising claims is necessary because of the unique role that the discipline can play. When companies engaging in false advertising have monopoly power, they possess the ability to harm not only an individual competitor but also the market as a whole. The consequences can be significant, especially for nascent competitors not able to enter the market, as the deception of consumers deprives them of the opportunity to obtain lower prices, more options, or enhanced quality. One way to understand the harms of false advertising to the market as a whole is revealed by George Akerlof’s classic explanation of the market for lemons.99 As Akerlof explains, in the absence of some way to guarantee the truth of claims about products, such as a used car’s quality, consumers reasonably respond by discounting all such claims. This distrust means that producers with actually superior products cannot charge the amount consumers would pay if they believed the superiority claim, which pushes superior (but more expensive to produce) products out of the market. If truthful advertisers are not able to guarantee their claims, producers unable to compete on their product characteristics suffer. And consumers are harmed by an unattractive (and perhaps even harmful, in the case of false health or safety claims) mix of products. Meanwhile, many false advertising techniques can be readily repurposed for new uses, meaning that a false advertiser can go from success to success in the absence of false advertising liability.100 Regulation that suppresses false claims—especially where such claims are most likely to have an effect—thus does more than protect individual consumers from fraud. It allows truthful producers to compete on a level playing field. In other words, addressing false advertising protects competition, not just competitors. The Supreme Court relied on Akerlof’s insights when it endorsed the pro-competitive effects of restrictions on false advertising. In California Dental Ass’n v. FTC, the Court addressed a dental association’s attempts to restrict “false or misleading” advertising that imposed significant limits on advertising “low prices” or other general price claims.101 The Court rejected the idea that such limits were inherently anticompetitive. Especially where information is hard to evaluate, even broad restrictions with the aim of preventing false advertising can be procompetitive.102 When false advertising threatens harms to the market as a whole, antitrust liability offers advantages over false advertising law. For starters, antitrust offers a more powerful toolkit deterring this conduct. Although false advertising law allows recovery of damages (albeit not as a penalty) and disgorgement of the profits from false advertising, courts impose high barriers to disgorgement, including requiring a showing of willfulness. In addition, courts have required plaintiffs to show a robust connection to the harm suffered to receive damages or disgorgement of profits. As a result, courts have denied awards in precisely the cases of concern: where there are a small number of potential competitors and where some of the monopolist’s gains from false advertising likely came at the expense of the overall market rather than a single plaintiff, making it difficult to allocate false advertising-based damage awards.103 There are two key ways in which antitrust offers more powerful protection against monopolists’ false advertising than federal false advertising law: remedies and eligible plaintiffs. First, antitrust offers the more powerful remedies of treble damages and automatic (as opposed to the Lanham Act’s exceptional104) attorneys’ fees that promise to provide robust deterrence against companies considering this behavior. Antitrust also offers injunctive relief preventing the continuation of the conduct. While a Lanham Act false advertising injunction generally is limited to the specific false claims that have been proven, an antitrust injunction could more generally target false advertising and marketwide harm to competition.105 Antitrust offers a more expansive territorial jurisdiction.106

#### 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.

#### FTC case-by-case adjudication fails to establish behavioral changes in the market – regs are key

Wheeler 21 [Tom Wheeler, Brookings Visiting Fellow - Governance Studies, Center for Technology Innovation. “A focused federal agency is necessary to oversee Big Tech.” 2/10/21. https://www.brookings.edu/research/a-focused-federal-agency-is-necessary-to-oversee-big-tech/]

Oversight of the dominant digital platforms’ broad effects on society is not possible within the existing federal regulatory structure. Agencies such as the Federal Trade Commission (FTC) and Department of Justice (DOJ) are filled with good and dedicated professionals, yet they are constrained in what they can do. Such limitations are perversely demonstrated by the recent headline-grabbing antitrust actions by both agencies. Antitrust enforcement, while important, is targeted against specific circumstances and cannot protect against general consumer abuses. Similarly, while the FTC also has authority over unfair and deceptive acts, many abuses in the digital marketplace are harmful but not considered deceptive and unfair. The FTC is further hampered by limited power to promulgate broad rules, thus constraining most of its activities to one-off proceedings against a singular company for a specific type of abuse rather than establishing broad behavioral rules across the consumer-facing digital economy.

#### Their ev is just academic hope – it doesn’t actually work – that’s 1NC Bush *and*

Hart 21 [Kim, National Technology Correspondent at Axios. She covers the intersection of politics and innovation in Washington D.C. and around the country. “Big Tech’s Big D.C. Threat: The FTC” https://www.axios.com/ftc-biden-tech-facebook-amazon-antitrust-3b70d7cc-a20e-4e36-b2e7-d2809c7f1b29.html]

Yes, but: The FTC is a relatively small agency with limited resources.

New rulemaking is a cumbersome process, and there are chances for stakeholders to slow it down even further. Congress added some speed bumps to the FTC’s processes in the 1970s, as lawmakers believed it was overstepping its bounds with moves like trying to ban some children's TV advertising.

Rulemakings are used sparingly on relatively narrow issues or when directed by Congress.

Expanding the use of its rulemaking authority would be new ground for the FTC, and there's no guarantee it will work.

#### 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.

#### \*Even if the CP solves the case it’s distinguished from the AFF in means of application, market outcomes and scope.

Niamh Dunne 15, lecturer in Law at King’s College London, *Competition Law and Economic Regulation*, Cambridge University Press, 2015.

IV. A comparison of competition law and regulation

Having considered competition law and regulation as discrete legal instruments to address market failures – defining, as far as possible, the purposes and parameters of each – we now turn more directly to the core issue to be considered: namely, the relationship between these mechanisms. A central idea within this work is that the exact parameters of this relationship are fluid and elusive, and perhaps even impossible to delineate conclusively. Both competition law and regulation involve, to a greater or lesser extent, derogation from the presumed default position of unencumbered free markets. When viewed at an abstract level, therefore, these instruments may appear broadly similar or even equivalent, insofar as both comprise State-imposed legal mechanisms for market supervision or control, necessitated by the presence of market defects. As is implicit from the title of this work, however, and reinforced by the preceding discussion, our starting point acknowledges that distinct conceptualisations of these instruments as separate and discrete mechanisms for market supervision can nonetheless plausibly be identified. In particular, the scope and means of application of these mechanisms, as well as the market outcomes achievable, begin to distinguish one from the other. This work aims, therefore, to provide a more balanced account of the interactions between competition law and regulation that may arise, premised on the assumption that, in reality, these instruments are neither identical nor wholly distinct.

#### The CP reduces the scope of antitrust law by limiting enforcement to ex-ante administrative procedure.

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In one sense, the scope of section 5 FTCA is more restrictive than the Sherman Act: whereas the latter is enforceable by private litigants seeking damages, and by the Department of Justice as a civil and a criminal offence, section 5 FTCA is enforceable only by the FTC and only prospectively through 'cease and desist' orders. Such orders are imposed after an administrative procedure, with review to the federal courts, and only where a defendant breaches an order can fines be imposed. In this sense, enforcement of section 5 is closer to ex ante regulation than typical ex post antitrust proceedings. Private individuals-who, unfairly or otherwise, are seen as motivated by personal profit rather than the public interest of restoring competition-are excluded entirely. Section 5 thus plays a complementary role within US antitrust-the clearest types of anticompetitive conduct are subject to universal enforcement and heavy penalties, whereas more ambiguous conduct is prohibited only prospectively and by a specialist agency 176 -through 'a mix of strategies to fully optimize the trade-off between over- and under-deterrence.' 177

#### Doesn’t assume new funding, resources, and deterrence mechanism – the ev says the problem is they aren’t covering like the FCC, CP fiats that authority

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

The pharmaceutical industry has provided the setting for other examples of antitrust scrutiny of conduct that violates non-antitrust rules, particularly those relating to fraud. The Walker Process 121 line of cases holds that the fraudulent procurement of a patent or enforcement of a patent obtained by fraud can violate antitrust law. 122 Other cases involve the allegedly fraudulent [\*1869] listing of patents in the "Orange Book," 123 an annual compilation of drugs and their associated patents. 124 And courts have recognized antitrust liability when a brand company makes "repeated and allegedly false patent descriptions" to the FDA. 125

Despite these cases, one could conceivably argue that antitrust should not apply to actions that are also governed by a separate regulatory regime. In Verizon Communications v. Law Offices of Curtis V. Trinko, the Supreme Court indicated that where another regulatory regime is guaranteeing competition, there may not be a need for antitrust enforcement. 126 That case can only be fully understood, however, in relation to the industry in which it arose. The Court in the case was evaluating the Telecommunications Act, which provides the Federal Communications Commission ("FCC") with general - and effective - regulatory authority over the industry, including its competitive structure (e.g., restrictions on concentrated ownership and must-carry requirements). 127

Other settings require more robust antitrust enforcement. For example, the FDA has very specific authority over drugs and medical devices, but it does not pervasively regulate industry structure in the way that the FCC does. Instead, the FDA has concluded "that issues related to ensuring that marketplace actions are fair and do not block competition would be best addressed by the FTC, which is the Federal entity most expert in investigating and addressing anticompetitive business practices." 128 Much more similar to [\*1870] the FDA than FCC, false advertising regulation lacks the pervasive control and monitoring, including reporting requirements, of telecommunications law. 129

False advertising litigation cannot effectively stand in for the antitrust function. False advertising, unlike the FCC's jurisdiction, is broad rather than deep: it covers a wide variety of competitive situations, from mouthwash to specialized airline components, but only by barring falsity and deception rather than by pervasively dictating market structure. Of critical significance, moreover, false advertising law is itself underenforced. The FTC has substantial resource constraints. And consumers themselves are rarely able to sue for the harms they suffer. Consumer contracts typically contain mandatory arbitration provisions, making schemes like AT&T's market-shaping deception harder to fight. As a result, there is no "false advertising regime" that effectively fosters competition and negates the need for antitrust enforcement. 130

#### **No market remedies is solved by the CP’s fiat**

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

[\*1844] False advertising law allows consumers to receive some redress for the money they paid for "unlimited" data that wasn't, 5 but there's no obvious remedy for the damage AT&T caused to the market as a whole. Antitrust law has been kneecapped by the courts and thus is powerless to act. In short, the law's neglect of the injuries caused by false advertising threatens structural harm to competitive markets.

In this Essay, we address these problems. We do so by focusing on the actors most likely to harm the market: monopolists and attempted monopolists. These actors are a numerically small percentage of businesses (and of false advertising defendants), but they can do great harm. Our emphasis on monopolists and attempted monopolists addresses courts' concerns of overbroad enforcement, preventing false advertising from morphing automatically into an antitrust violation. And it carves out a critical role for antitrust while embracing - rather than neglecting - antitrust's partner in fighting unfair competition, false advertising law.

We begin by introducing the laws of antitrust and false advertising, explaining the regimes' objectives and methods. We then survey the antitrust caselaw, critiquing three approaches courts considering false advertising claims have taken. Finally, we introduce our antitrust framework for false advertising claims. At the heart of the framework is a presumption that monopolists engaging in false advertising violate antitrust law, with that presumption rebuttable if the defendant can show that the false advertising was ineffective. The framework also applies to cases of attempted monopolization by incorporating factors (falsity, materiality, and harm) inherent in false advertising law, along with competition-centered issues on targeting new market entrants and entrenching barriers to entry. To illustrate how our framework should work, we apply it to an important area: advertising for biosimilars, which are pharmaceutical products with a substantial and growing role in treating numerous diseases.

False advertising that exacerbates monopoly power has been dismissed by antitrust law for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets.

#### Data privacy and security planks solve cyber impact – their ev

Holland, 21 – Mackenzie, citing Edward Felten, professor of computer science and public affairs at Princeton and former chief technologist at the FTC. "Senators want FTC to enforce a federal data security standard," SearchSecurity, <https://searchsecurity.techtarget.com/news/252507933/Senators-want-FTC-to-enforce-a-federal-data-security-standard> -- Iowa

U.S. Senators want to empower the Federal Trade Commission to become a stronger protector and enforcer of consumer data privacy and security.

During the second in a series of hearings focused on the importance of federal standards for data privacy and security, the U.S. Senate Committee on Commerce, Science and Transportation listened to experts who recommended development of a data security standard for businesses that's enforced by the FTC. The first hearing explored the creation of a federal data privacy law as well as creation of a data privacy bureau within the FTC.

The call for federal data privacy and security standards follows attacks on critical infrastructure companies, including the 2021 attack on Colonial Pipeline. That attack, which caused fuel shortages, was cited by committee chair Sen. Maria Cantwell, D-Wash., as a reason necessitating federal standards.

Cantwell and Sen. Roger Wicker, R-Miss., have introduced two separate bills that would set U.S. privacy and security standards for businesses: the Consumer Online Privacy Rights Act and the Setting an American Framework to Ensure Data Access, Transparency and Accountability (Safe Data) Act. The legislation would also give the FTC and state attorneys general the ability to enforce the standards.

"We believe that these companies don't invest enough for the fact that they have oversight of our precious data and information," Cantwell said. "We know that a stronger FTC will help, but we need to give the FTC the resources they need to do their job."

Experts make data security standard recommendations

James Lee, chief operating officer at San Diego-based nonprofit Identity Theft Resource Center, echoed Cantwell's concern that the U.S. needs a federal data security standard and to better outline national cybersecurity best practices.

Lee said a federal data security standard should require companies to address small but preventable flaws that lead to data breaches, such as unpatched software, as well as minimize consumer data that can be collected and stored by companies. Additionally, Lee said stronger enforcement measures would be necessary for companies that fail to meet the data security standard.

"Without enforceable minimal standards, there are no broad incentives beyond trying to avoid headlines or post-breach litigation to get people to actually make broad organizational changes," Lee said.

"We need better enforcement," he said. The FTC is "best equipped to be that enforcement agency."

Indeed, Jessica Rich, counsel at law firm Kelley Drye and Warren LLP and former director of the FTC Bureau of Consumer Protection, said current law fails to set clear standards for data security or provide adequate remedies.

"Most of the FTC's data security efforts are based on the FTC Act, a law that leaves wide gaps in protection and doesn't authorize penalties for first-time violations," she said. "While there are sector-specific laws with a data security component, and half the states now have their own data security laws, it's a messy and confusing patchwork."

Rich recommended a standard that's scalable to different types and sizes of companies and the volume and sensitivity of the data they collect. Otherwise the law could impose requirements ill-suited and unattainable for small business, she said. Rich also supported data minimization incentives or requirements.

Rich said to ensure accountability and deterrence, the data security standard should authorize strong remedies such as civil penalties and redress to businesses that fail to meet the data security standard.

Edward Felten, Robert E. Kahn professor of computer science and public affairs at Princeton University and former chief technologist at the FTC, said the FTC currently doesn't have the tools it needs to address today's data security enforcement challenges.

To further empower the FTC, Felten voiced support for allowing civil penalties for first-time violations of certain statutes within the FTC Act, such as Section 5, which states that unfair or deceptive practices affecting commerce are unlawful. The lack of first-time penalties makes the FTC Act a "weak deterrent," he said.

Additionally, Felten said Congress could authorize data security rulemaking so the FTC can clarify what is expected of companies, as well as funnel additional resources to the FTC for data security and technology initiatives.

"The successful FTC of the future is one that has stronger authority, increased resources and greater technological capability," Felten said.

#### Antitrust applies to all industries, so there’s no way to limit the plan’s scope AND firms and lawyers are risk-averse and think this is true---the result is fear of liability that scales back investment.

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### The counterplan is the opposite---it resolves fears by signaling that regulated industries are the exception.

Dr. Babette E.L. Boliek 14, Ph.D. in Economics from the University of California, Davis, J.D. from the Columbia University School of Law, Professor of Law at Pepperdine University, “Antitrust, Regulation, and the "New" Rules of Sports Telecasts”, Hastings Law Journal, 65 Hastings L.J. 501, February 2014, Lexis

I. The Current Relationship of Antitrust, Regulation, and Sports Broadcast

As noted, antitrust and industry-specific regulation are two distinct means to achieve much the same social goal - to protect consumers and encourage efficiencies in production and distribution. 38 However, the two regimes are by no means interchangeable, and the choice between them is itself imbued with certain social policy preferences. 39

[FOOTNOTE] As then-Chief Judge Stephen Breyer stated, while 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." Town of Concord, Mass. v. Bos. Edison Co., 915 F.2d 17, 22 (1st. Cir. 1990). [END FOOTNOTE]

Antitrust law is an enforcement regime that preserves competition across all private industries by condemning anticompetitive conduct only after it occurs. 40 In contrast, industrial regulation is inherently a social admission that, in a given industry, market forces are too weak to produce the consumer benefits that are realized in competitive markets. 41 Therefore, regulated industries are an exception to the economy at large and are subject to preemptive, regulatory rule that may actively engineer industry conduct far beyond that permitted under antitrust law. 42

### 1

#### Enforcement and prohibition are distinct steps

Alan S. Kaplinsky & Mark J. Levin 1, Kaplinsky is the former longtime Practice Leader of the firm's Consumer Financial Services Group; Senior Counsel @ Ballard Spahr, “ANATOMY OF AN ARBITRATION CLAUSE: DRAFTING AND IMPLEMENTATION ISSUES WHICH SHOULD BE CONSIDERED BY A CONSUMER LENDER,” May 2001, ALI-ABA COURSE OF STUDY MATERIALS, Lexis

. So that there is no misunderstanding on the part of the consumer, the lender should consider expressly disclosing the unavailability of class actions in arbitration, as in the sample clause language. Some lenders go even further and include an express "waiver" by the consumer of any right to participate in or prosecute a class action. But, see, the Reporter's Notes to Section 10 of the Proposed Revisions of the Uniform Arbitration Act (February, 2000) which states: "In some cases [i.e., where the clause specifically precludes class actions], such provisions may effectively undermine consumer's rights by making the relative cost of arbitrating or securing effective legal representation cost prohibitive. In such cases, it may be appropriate for a court to refuse to enforce the term prohibiting class actions and consolidation under Section 6 of the Act." Section 6(a) of the Revised UAA provides that an arbitration agreement "is valid, enforceable, and irrevocable except upon grounds that exist in law or in equity for the revocation of any contract."

#### 1) 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.

#### Burnout and variation check.

York 14 (Ian, head of the Influenza Molecular Virology and Vaccines team in the Immunology and Pathogenesis Branch, Influenza Division at the CDC, former assistant professor in immunology/virology/molecular biology (MSU), former RA Professor in antiviral and antitumor immunity (UMass Medical School), Research Fellow (Harvard), Ph.D., Virology (McMaster), M.Sc., Immunology (Guelph), “Why Don't Diseases Completely Wipe Out Species?” 6/4, http://www.quora.com/Why-dont-diseases-completely-wipe-out-species#)

But mostly diseases don't drive species extinct. There are several reasons for that. For one, the most dangerous diseases are those that spread from one individual to another. If the disease is highly lethal, then the population drops, and it becomes less likely that individuals will contact each other during the infectious phase. Highly contagious diseases tend to burn themselves out that way. Probably the main reason is variation. Within the host and the pathogen population there will be a wide range of variants. Some hosts may be naturally resistant. Some pathogens will be less virulent. And either alone or in combination, you end up with infected individuals who survive. We see this in HIV, for example. There is a small fraction of humans who are naturally resistant or altogether immune to HIV, either because of their CCR5 allele or their MHC Class I type. And there are a handful of people who were infected with defective versions of HIV that didn't progress to disease. We can see indications of this sort of thing happening in the past, because our genomes contain many instances of pathogen resistance genes that have spread through the whole population. Those all started off as rare mutations that conferred a strong selection advantage to the carriers, meaning that the specific infectious diseases were serious threats to the species.

### 2

#### I’ll finish

Mueller and Stewart 10/29/18 [John Mueller is Woody Hayes Senior Research Scientist, Mershon Center for International Security Studies, and adjunct professor of Political Science, at Ohio State University. He is also a Senior Fellow at the Cato Institute in Washington. Mark G. Stewart is Professor of Civil Engineering and Director of the Centre for Infrastructure Performance and Reliability at The University of Newcastle in Australia. Terrorism and Bathtubs: Comparing and Assessing the Risks. October 29, 2018. https://www.tandfonline.com/doi/abs/10.1080/09546553.2018.1530662?journalCode=ftpv20]

However, there is of course no guarantee that things will remain that way, and the 9/11 attacks inspired the remarkable extrapolation that, because the terrorists were successful with box cutters, they might soon be able to turn out weapons of mass destruction— particularly nuclear ones—and then detonate them in an American city. For example, in his influential 2004 book, Nuclear Terrorism, Harvard’s Graham Allison relayed his “considered judgment” that “on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not.”11 Allison has had a great deal of company in his alarming pronouncements. In 2007, the distinguished physicist Richard Garwin put the likelihood of a nuclear explosion on an American or European city by terrorist or other means at 20 percent per year, which would work out to 91 percent over the eleven-year period to 2018.12

Allison’s time is up, and so is Garwin’s. These off-repeated warnings have proven to be empty. And it is important to point out that not only have terrorists failed to go nuclear, but as William Langewiesche, who has assessed the process in detail, put it in 2007, “The best information is that no one has gotten anywhere near this. I mean, if you look carefully and practically at this process, you see that it is an enormous undertaking full of risks for the would-be terrorists.”13 That process requires trusting corrupted foreign collaborators and other criminals, obtaining and transporting highly guarded material, setting up a machine shop staffed with top scientists and technicians

, and rolling the heavy, cumbersome, and untested finished product into position to be detonated by a skilled crew, all the while attracting no attention from outsiders.

Nor have terrorist groups been able to steal existing nuclear weapons—characteristically burdened with multiple safety devices and often stored in pieces at separate secure locales—from existing arsenals as was once much feared. And they certainly have not been able to cajole leaders in nuclear states to palm one off to them—though a war inflicting more death than Hiroshima and Nagasaki combined was launched against Iraq in 2003 in major part under the spell of fantasies about such a handover.14

More generally, the actual terrorist “adversaries” in the West scarcely deserve accolades for either dedication or prowess. It is true, of course, that sometimes even incompetents can get lucky, but such instances, however tragic, are rare. For the most part, terrorists in the United States are a confused, inadequate, incompetent, blundering, and gullible bunch, only occasionally able to get their act together. Most seem to be far better at frenetic and often self-deluded scheming than at actual execution. A summary assessment by RAND’s Brian Jenkins is apt: “their numbers remain small, their determination limp, and their competence poor.”15 And much the same holds for Europe and the rest of the developed world.16 Also working against terrorist success in the West is the fact that almost all are amateurs: they have never before tried to do something like this. Unlike criminals they have not been able to develop street smarts.

Except perhaps for the use of vehicles to deliver mayhem (though this idea is by no means new in the history of terrorism), there has been remarkably little innovation in terrorist weaponry or methodology since 9/11.17 Like their predecessors, they have continued to rely on bombs (many of which fail to detonate or do much damage) and bullets.18

#### It’s not a viable threat – no evidence a single group can do it

* Experts and officials agree there’s no risk
* No evidence a single group can do it – from Unal, research fellow in nuclear policy
* It’s hard for states, let alone terrorists
* Too hard to access or create enriched uranium, but it degrades naturally, and they can’t maintain it
* Majority of attacks are conventional like knives and cars

Ward 18 [Antonia Ward is an analyst on the Defence, Security, and Infrastructure team at RAND Europe. s the Threat of Nuclear Terrorism Distracting Attention from More Realistic Threats? July 27, 2018. https://www.rand.org/blog/2018/07/is-the-threat-of-nuclear-terrorism-distracting-attention.html]

Despite Obama's remarks in 2016 and these two incidents, experts and officials contest the viability of the nuclear terrorism threat. Dr Beyza Unal, a research fellow in nuclear policy at think tank Chatham House, argued there is currently no evidence that terrorist groups could build a nuclear weapon. Similarly, a report by the Council on Foreign Relations in 2006 emphasized how building a nuclear bomb is a difficult task for states, let alone terrorists. This is because of the issues involved in accessing uranium and creating and maintaining it at the correct grade (enriched uranium).

While nuclear terrorism is a concern, the majority of terrorist attacks are conducted with conventional explosives. The 2017 Europol Terrorism Situation and Trend Report states that 40 percent of terrorist attacks used explosives. These explosives originate from a wide variety of countries across the world. According to a study by Conflict Armament Research, large quantities of explosive precursor chemicals used to make bombs as seen in the 7/7 attack in London in 2005 and the 2017 Manchester Arena attack, have been linked to supply chains in the United States, Europe, and Asia via Turkey. The threat from the spread of chemical precursors prompted the EU to begin looking at ways to tighten the regulations of these chemicals (PDF).

A nuclear terrorist attack would have grave consequences, but it is currently not a realistic or viable threat given that it would require a level of sophistication from terrorists that has not yet been witnessed. The recent focus of terrorist groups has been on simplistic strikes, such as knife and vehicular attacks. If countries are concerned about nuclear terrorism, the best way to mitigate this risk could be to tighten security at civilian and government nuclear sites. But governments would be better off focusing their efforts on combatting the spread and use of conventional weapons.

#### Attribution solves resiliency.

Lynch ’19 [Justin; 2/8/19; Associate Editor at Fifth Domain, contributor to the New Yorker, Foreign Policy, the Atlantic; "The struggle behind predicting a cyberattack," https://www.fifthdomain.com/industry/2019/02/08/the-struggle-behind-predicting-a-cyberattack/]

The idea that public data can point to future cyberattacks has been embraced by several government agencies.

The intelligence community’s research arm, the Intelligence Advanced Research Projects Activity, is researching how data can help forecast a cyberattack by using sensors that predict when a target is vulnerable to hackers. BAE Systems, Charles River Analytics, Leidos, and the University of Southern California are the prime contractors on the project.

There is a “significant link between hackers use of social media platforms, especially Twitter and Facebook, and the volume of web defacement attack,” according to 2017 research backed by the Office of the Director of National Intelligence and IARPA.

But experts have had mixed results with predicting cyberattacks with machine learning and open data.

By analyzing conversations of known criminals on the dark web, researchers from the University of California also tried to create an early warning system for incoming cyberattacks in 2017. That approach was 84 percent effective at predicting current or imminent cyberattacks.

Also in 2017, three researchers used historical attack count data to predict future cyberattacks to some success. It was 14 percent more effective than other models.

However, others believe the future of predicting cyberattacks through artificial intelligence will combine both humans and computers.

Researchers from the Massachusetts Institute of Technology created a computer system in 2016 that continuously incorporated information from human experts with a success rate of 85 percent while also decreasing false positives by a significant factor.

“The more attacks the system detects, the more analyst feedback it receives, which, in turn, improves the accuracy of future predictions,” said Kalyan Veeramachaneni, a research scientist at MIT in a release. “That human-machine interaction creates a beautiful, cascading effect.”

# 1NR

### Politics DA

#### Thumper doesn’t expand the scope – its one merger block that only impacts defense perceptions because it doesn’t change legal standards – cal inserts yellow

Gould 2/2/22, Joe, senior Pentagon reporter for Defense News, covering the intersection of national security policy, politics and the defense industry“Why the FTC’s lawsuit could chill the market for defense deals” https://www.defensenews.com/industry/2022/02/02/why-the-ftcs-lawsuit-could-chill-the-market-for-defense-deals/

WASHINGTON ― The federal government’s move to block Lockheed Martin’s planned $4.4 billion purchase of Aerojet Rocketdyne could have a chilling effect on future mergers and acquisitions among large defense firms, according to experts. With the Federal Trade Commission’s lawsuit last week to stop the deal, it rejected a proposed behavioral remedy that would require Aerojet continue to supply missile components to Lockheed’s competitors. That’s being interpreted as a sign regulators will more heavily scrutinize vertical acquisitions, in which a company acquires a supplier. “Anybody doing a sizable vertical deal has to look at this precedent and recognize, if there’s a real vertical issue, the [FTC’s] predilection may be not to do a remedy, which means it’s an up or down decision,” said Jeff Bialos, an antitrust attorney and former deputy undersecretary of defense for industrial affairs. In its announcement of its opposition, the FTC argued that if the acquisition between Lockheed, “the world’s largest defense contractor,” and Aerojet, the “last independent U.S. missile propulsion provider” were to take place, “Lockheed will use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense.” Some view the FTC’s tough language as a clear signal to the defense industry. “It’s hard not to read the complaint any way other than that big vertical transactions will be viewed very skeptically by the FTC, and it seems like it’s pretty clear,” said Jerry McGinn, a Pentagon manufacturing and industrial base policy official in the Obama and Trump administrations. Brett Lambert, who served as a deputy assistant secretary of defense for manufacturing and industrial base policy in the Obama administration, predicted the decision would reverberate through the board rooms of every prime contractor in the defense sector. Lambert was Northrop Grumman’s vice president for corporate strategy when the company made a similar acquisition. “Their position is quite clear, and how industry reacts and whether that’s in the best interest of the warfighter and the taxpayer is still unclear,” said Lambert, now the managing director of the Densmore Group, a national security and intelligence consultancy. An administrative law judge will decide the case in a trial that is scheduled to begin on June 22. In the meantime, the FTC filed the complaint in the U.S. District Court for the District of Columbia to seek a preliminary injunction to stop the deal pending the administrative trial.

### Trade DA

#### Trade turns and solves the case---foreign competition is better than antitrust

Anu Bradford 19, Henry L. Moses Professor of Law and International Organization at Columbia Law School, LLM from Harvard Law School, Master of Laws from University of Helsinki, JD from Harvard Law School, and Dr. Adam S. Chilton, University of Chicago, Professor of Law and the Walter Mander Research Scholar at the University of Chicago Law School, MA in Political Science from Yale University, JD and PhD in Political Science from Harvard University, “Trade Openness and Antitrust Law”, Journal of Law & Economics, Volume 62, Number 1, 62 J. Law & Econ. 29, February 2019, Lexis

2.1. Trade and Antitrust Law as Substitutes

Many scholars suggest that trade liberalization may make adopting an anti trust regime unnecessary (Bhagwati 1968; Helpman and Krugman 1989; Blackhurst 1991; Neven and Seabright 1997; Melitz and Ottaviano 2008). According to this view, free trade is an effective way to ensure that markets remain competitive because facilitating entry checks market power (Baumol, Panzar, and Willig 1982). For example, when an economy is open to trade, monopolists refrain from abusing their market power because low external barriers ensure that competitors can enter the market and contest any such abusive practices. In this way, trade liberalization renders an anti trust intervention into monopolistic practices superfluous. Exports fueled by trade liberalization should also enhance market competition. New opportunities in export markets ensure that more firms can reach an efficient scale of production, which further spurs competition and reduces the need for an anti trust regime (Bartók and Miroudot 2008).

Relying on trade liberalization to safeguard market competition could have several advantages. First, foreign producers must incur certain fixed costs and variable trade costs to enter a new market that domestic producers do not incur. If foreign firms are able to enter and effectively compete even after incurring those costs, they are presumably more efficient and hence may act as an even more effective discipline on the market than domestic firms (Bartók and Miroudot 2008). Second, choosing free trade over anti trust regulation eliminates the need to rely on government bureaucracies. Many who remain skeptical of governmental intervention favor free trade and thus prefer to have imports discipline [\*33] anticompetitive behavior. This argument may gain all the more force today considering the complexities associated with antitrust regulators from over 130 countries all applying different rules in an effort to regulate the global marketplace. Finally, although trade openness may "act as an effective antitrust policy" (Pomfret 1992, p. 11), an effective antitrust policy does not act as an effective trade policy. For example, if the United States were to impose a 30 percent tariff on foreign producers today, foreign firms would likely not enter no matter how competitive the markets are behind the border. Domestic antitrust laws thus may do little to facilitate market entry in the presence of highly protectionist trade policy.

#### Trade is surging

Broom 12/7 [Douglas Broom, Weforum Senior Writer, Formative Content. “Globalization and world trade bounce back from the impact of COVID-19: report.” 12/7/21. https://www.weforum.org/agenda/2021/12/globalization-world-trade-bounce-back-from-covid-19/]

COVID-19 has not undermined globalization as much as some had predicted. Although travel and tourism have been hard hit, international trade has surged during the pandemic, according to a new study of global connectedness.

Trade, capital flows and global internet traffic are back at, or even above, pre-pandemic levels. COVID-19 also caused a temporary ceasefire in international trade wars, with the United States and China, for example, trading more during the pandemic than before.

These are some of the findings of the DHL Global Connectedness 2021 Index Update, co-authored by Dr Steven A. Altman and Caroline R. Bastian, both research scholars at New York University’s Stern School of Business. The study uses 3.5 million data points to plot the health of globalization by measuring international flows of trade, capital, information and people.

The data so far suggests COVID-19 has had a much smaller impact on globalization than the 2008-09 global financial crisis, with rates of connectedness set to reach an all-time high in 2021, says the report.

“As 2021 draws to a close, globalization looks far stronger than it did in the early stages of the COVID-19 crisis,” says Dr Altman.

“The swift recoveries of trade and other flows highlight how international connections expand our capacity to overcome challenges,” he adds.

“Most flows plummeted as the pandemic shocked the world, but many have also roared back to play crucial roles in the fight against the virus and in the economic recovery.”

A surge in trade

In particular, trade in goods has surged above pre-pandemic levels as the recovery has gathered pace. This is in spite of supply chain problems caused by a shortage of containers and the ships to carry them and ongoing international tensions, the report says.

Some experts predicted the pandemic would lead companies to source from within their local region rather than globally. But, according to the report, the international flow of goods is growing faster than flows within regions.

Capital flows have also defied expectations. Based on UN Conference on Trade and Development (UNCTAD) data, the report says the rate of foreign direct investment is on track to reach pre-pandemic levels in 2021.

#### Trade rebounded

Torry 1/6 [Harriet Torry, WSJ. “Consumer Demand for Goods Drove U.S. Import Surge During Holidays.” 1/6/22. https://www.wsj.com/articles/consumer-demand-for-goods-likely-drove-u-s-import-surge-during-holidays-11641465001]

After collapsing during the pandemic, global trade has roared back, pushing the U.S. trade deficit to record levels as the pandemic continues. High demand coupled with transportation and delivery challenges, such as shortages of port and warehouse workers, have crimped goods trade in recent months. But signs are mounting that supply-chain disruptions are beginning to dissipate.

#### Trade’s projected to increase in 2022

Brodzicki 1/12 [Tomasz Brodzicki, Ph.D., "Global Trade Outlook 2022. High global trade volume growth in 2021 and significant moderation in 2022. Supply chains disruption is likely to continue in the first half of 2022", 1/12/22, IHS Markit, https://ihsmarkit.com/research-analysis/Global-Trade-Outlook-2022.html]

The Q4 2021 release of the GTAS Forecasting model accommodated the most recent macroeconomic estimates from IHS Markit Global Link Model, Q2 data for 2021 from the Global Trade Atlas (GTA) for monthly reporting states, and updated COVID-19-response factors.

The model predicts the real value of global trade to go up to USD 20,175 billion in 2021 and USD 21,038 billion in 2022. Therefore, IHS Markit anticipates a year-on-year increase in the real value of global trade by 12.6% in 2021 (prior, it was +8.5%) and by 4.3% in 2022.

It accommodates both the recovery in global GDP already in the second half of 2020 and a robust growth impulse in Q2 of 2021. The recovery peak was reached in Q2021 and then moderated in Q3 and Q4 2021 and will gradually continue in the forthcoming quarters of 2022.

#### The aff is selectively enforced

Murray 19 [Allison Murray, Loyola Law, Judicial Law Clerk for U.S. Bankruptcy Courts. Edited by Loyola Law Professor David Kesselman and the ILR team of editors and staff. “Given Today’s New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade’s Coffin?” 2/28/2019. https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr]

Although the U.S. appears to be quick to make these allegations, it is not immune from being on the receiving end of similar charges.161 The U.S. has also attempted to preserve its own “economically important industries which are threatened by import competition” through protectionism on many occasions, though perhaps with more subtlety than China.162 Some academics observe that the U.S. appears to be “less keen to go after its own monopolies, although [the U.S.] appears to have no problem going after foreign ones.”

#### Lobbying – it guarantees protectionism

Bradford 12 [Anu Bradford, Henry L. Moses Distinguished Professor of Law and International Organization at the Columbia Law School, expert in international trade law, the author of The Brussels Effect: How the European Union Rules the World. “Antitrust Law in Global Markets.” 2012. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2977&context=faculty\_scholarship]

Antitrust laws rarely plainly favor local firms at the expense of their foreign counterparts. But even facially neutral antitrust laws can lead to discrimination if those unbiased laws are enforced selectively. Antitrust agencies are often vested with substantial discretion. Organized domestic interest groups could exploit that discretion by seeking protection from antitrust enforcement or by urging the domestic authorities to take on cases against their foreign competitors. This could lead to deliberate underenforcement of the anticompetitive conduct of domestic corporations, or to deliberate overenforcement of the anticompetitive conduct of foreign corporations.149

#### They’re successful because it offsets increased antitrust enforcement against them

Ismael Beltrán Prado 20, J.D. from the Javeriana University, LL.M from Columbia University, Master’s in Applied Economics Candidate at the Andes University, Commercial and Antitrust Lawyer and Coordinator of the Public Procurement Collusion Task Force, at the Colombian Competition Authority, Pursuing a Master’s in Applied Economics at the Andes University, “Competition Policy After COVID-19”, Competition Policy International, 4/26/2020, https://www.competitionpolicyinternational.com/competition-policy-after-covid-19/

Thirdly, and closely related to the two previous concerns, domestic corporations will have strong incentives to lobby for softer enforcement of competition law and might request additional protectionist measures as compensation for corporate generosity and flexibility during the pandemic. If some protectionist measures are arguably acceptable for some time, they should not be at the expense of strict enforcement of competition law in domestic markets.

In such a context, my concern is that competition policy might become excessively lenient. This would be a questionable policy choice. If protectionism was winning supporters before the pandemic, a post-COVID-19 world will tolerate more protectionism in order to back domestic industries and businesses.

#### Trump’s court packing guarantees the link

Root 19 [Danielle Root, director of voting rights and access to justice on the Democracy and Government Reform team at the Center for American Progress. Sam Berger, vice president of Democracy and Government Reform at the Center for American Progress. “Structural Reforms to the Federal Judiciary.” 5/8/2019. https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/]

Discussions of the federal judiciary often focus on the substance of decisions made—which side wins and which side loses—and rightly so. These individual opinions are frequently of incredible importance, not just to the parties involved but in shaping the law more broadly. Yet this focus on substantive decisions has obscured deeper structural factors at play in the nation’s federal judiciary. Structural problems—such as lack of judicial diversity, ideologue judges, and lack of judicial accountability—undercut the courts’ legitimacy and have tangible negative effects on judicial decision-making. Instead of protecting everyday Americans by serving as a check on abuses of power, too often the federal courts have become a tool for carrying out the agendas of special interests and corporations.

Structural problems with the judiciary have always existed to varying degrees. But they have been exacerbated in recent years due to an ongoing campaign by conservatives to take control of the federal courts, often through procedural changes that have significant effects but garner little public attention. The problem has now reached a crisis point. Conservatives have shown a willingness to abandon any and all norms to undermine the judicial nominations process and pack the courts with judges who will help them realize political goals they cannot achieve through the political process. These judges have proven more than willing to carry out the task, supporting the most specious of legal claims in order to skew the system in favor of conservative interests and even prevent many Americans from accessing the courts at all.

#### Private claims – Increasing prohibitions skyrockets them

LW 21 [Latham & Watkins Antitrust and Competition Practice. "US Senate Bill Would Reshape Antitrust Enforcement and Litigation." 2/18/21. https://www.lw.com/thoughtLeadership/US-Senate-Bill-Would-Reshape-Antitrust-Enforcement-and-Litigation]

CALERA would increase antitrust enforcement and private actions

Widen scope of anticompetitive conduct

In addition to broadening the definition of market power and lowering the standard for prohibited mergers, CALERA would add a new prohibition on “exclusionary conduct that presents an appreciable risk of harming competition.” “Exclusionary conduct” is defined by CALERA as conduct that “materially disadvantages one or more actual or potential competitors,” or “tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete.” This prohibition would lead to an increase in claims, and novel allegations of anticompetitive conduct, as litigants would likely try to take advantage of these broad and undefined terms and shape the precedent.

### Biz Con DA

#### The link alone turns case---alternative frameworks are unenforceable and vague, but breadth produces false positives that distort marketplace effects.

Newman ’19 [John; 2019; Assistant Professor at the University of Memphis Cecil C. Humphreys School of Law; Indiana Law Journal, “Procompetitive Justifications in Antitrust Law,” vol. 94]

B. Competitive Process

The competitive-process approach purports to distinguish between pro-and anticompetitive restraints via their effects not on welfare or efficiency, but on "competition itself' or on the "competitive process." In other words, if a challenged restraint somehow benefits the competitive process, the defendant may avoid antitrust liability. Multiple antitrust scholars argue that "competitive process" is the prevailing and appropriate approach. 97 Others, while conceding that it has fallen out of favor, nonetheless call for its resurrection. 98

Footnote 97:

97. E.g., Werden, supra note 9; see also Barak Orbach, How Antitrust Lost Its Goal, 81 FORDHAM L. REv. 2253, 2256 (2013). Here and elsewhere, Orbach offers a convincing argument to the effect that the "consumer welfare" standard does not offer as much clarity as its proponents generally assume. While that may be so, it does not follow that the "competitive process" (or "competition") standard fares any better. In fact, the latter standard appears to offer even less clarity—unless it means simply that defendants always lose, in which case it offers a great deal of clarity but also (likely) an overly high likelihood of false positives. Orbach's historical account concludes that "competition" was the sole standard for the roughly seven decades between the passage of the Sherman Act and the release of Bork's The Antitrust Paradox. Orbach, supra, at 2277. This account does not, however, discuss Chicago Board of Trade.

End of Footnote 97.

But the actual content of the competitive-process approach remains mercurial, a cipher. The scholarly arguments in favor of it never seem to identify what, exactly, constitutes the "competitive process." More than a half-century has passed since the Court first clearly invoked the competitive process approach to condemn a restraint of trade, yet terms like "competition" and "competitive process" are still "wonderfully ill-defined." 99

Whatever the competitive process may be, it apparently can be harmed. A plaintiff carries its initial burden by showing such harm.100 If (or, perhaps more accurately, when) the plaintiff succeeds, the burden then shifts to the defendant to demonstrate some offsetting benefit.1 " 101 If it is unclear what constitutes harm to the competitive process, it is even less clear what might qualify as a benefit. But, at least in theory, a defendant who succeeds in proving such a benefit may escape liability. 102

A permissible reading of the relevant precedent suggests that the overriding concern does not lie with marketplace effects, placing this approach at loggerheads with the rest of modem antitrust law. 103 Instead, the competitive-process approach derives from a group of rather vaguely defined rights. These include, but are not limited to, the right of a "single merchant" to compel a "group of powerful businessmen" to supply him with "the goods he needs to compete effectively," 10 4 the "right" of traders to be "free" from various nonstandard contractual provisions,105 and a more general right of "freedom of action."106

Given the lack of clarity in the area, one is left free (or, less charitably, forced) to speculate as to the source and content of these rights. Perhaps they derive from Lochnerian freedom of contract. Certain early U.S. Supreme Court antitrust decisions-which happen to lie squarely in the heart of the Lochner Era-do speak of antitrust-related "rights." Thus, for example, the Court in 1914 identified a single retailer's "unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself."10 But by 1945, after the end of the Lochner Era,10 8 the Court was retreating from that hardline stance, referring to it as "true" only "in a very general sense." 109

**Turns leadership – destroys alliances.**

Ronald O'Rourke 20, Specialist in Naval Affairs, **and** Kathleen J. **McInnis**, Specialist in International Security, **12-30**-20, “COVID-19: Potential Implications for International Security Environment— Overview of Issues and Further Reading for Congress”  https://www.everycrsreport.com/files/2020-12-30\_R46336\_68ae591edfaede65543751d6a841cc97e9761ef8.pdf

World Economy, Globalization, and U.S. Trade Policy

Some observers have focused on the possibility that the COVID-19 pandemic could lead to significant and potentially long-lasting changes to the world economy that in turn could reshape the international security environment. Among other things, observers have focused on the possibility that the COVID-19 situation **could** be leading the world economy into a **significant recession**—an effect that could **contribute to the societal tensions** mentioned in the previous point. Noting that the COVID-19 pandemic has reduced world trade volumes and disrupted global supply chains, they have focused on the question of whether economic globalization will as a result be **slowed**, **halted**, or **reversed**. Observers are monitoring how such effects could influence or be **influenced by U.S. trade policy.**

Allied Defense Spending and U.S. Alliances

The so-called **burden-sharing** issue—that is, the question of whether U.S. allies are shouldering a sufficient share of the **collective allied defense burden**—has long been a point of contention between the United States and its allies around the globe, and it has been a matter of particular emphasis for the Trump Administration. Some observers have focused on the possibility that the costs that U.S. allies are incurring to support their economies during stay-at-home/lockdown periods will lead to **offsetting reductions in their defense expenditures**. Some observers argue that the **NATO allies in Europe** in particular may experience contractions in their defense budgets for this reason. More generally, some observers argue that if the COVID-19 pandemic causes a global recession, **allied defense budgets could be further reduced**—**a potential impact that could affect not only NATO allies in Europe, but those in Asia as well.**

#### 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 rulemaking would kill the economy.

Abbott ’21 [Alden; August 9; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Truth on the Market, “FTC Antitrust Enforcement and the Rule of Law,” https://truthonthemarket.com/2021/08/09/ftc-antitrust-enforcement-and-the-rule-of-law/]

Proposed FTC Competition Rulemakings

The new FTC leadership is strongly considering competition rulemakings. As I explained in a recent Truth on the Market post, such rulemakings would fail a cost-benefit test. They raise serious legal risks for the commission and could impose wasted resource costs on the FTC and on private parties. More significantly, they would raise two very serious economic policy concerns:

First, competition rules would generate higher error costs than adjudications. Adjudications cabin error costs by allowing for case-specific analysis of likely competitive harms and procompetitive benefits. In contrast, competition rules inherently would be overbroad and would suffer from a very high rate of false positives. By characterizing certain practices as inherently anticompetitive without allowing for consideration of case-specific facts bearing on actual competitive effects, findings of rule violations inevitably would condemn some (perhaps many) efficient arrangements.

Second, competition rules would undermine the rule of law and thereby reduce economic welfare. FTC-only competition rules could lead to disparate legal treatment of a firm’s business practices, depending upon whether the FTC or the U.S. Justice Department was the investigating agency. Also, economic efficiency gains could be lost due to the chilling of aggressive efficiency-seeking business arrangements in those sectors subject to rules. [Emphasis added.]

In short, common law antitrust adjudication, focused on the consumer welfare standard, has done a good job of promoting a vibrant competitive economy in an efficient fashion. FTC competition rulemaking would not.

#### Restrictive rules and the courts have blocked antitrust action

DeGeurin 1/18 – Mack DeGeurin, reporter at Gizmodo, “Following Record Year for Mergers, the FTC Wants to Know How You'd Fix Antitrust,” 1/18/22, https://gizmodo.com/following-record-year-for-mergers-the-ftc-wants-to-kno-1848378299

The first few months of Joe Biden’s presidency were marked by the recruiting of what some called an “Antitrust All-Star Team.” Spearheaded by dogged Amazon critic Lina Khan, antitrust scribe Tim Wu, and longtime Google annoyance Jonathan Kanter, that dream team has little to show for itself, so far. Despite plenty of anti-monopolistic, pro-worker blustering, company mergers and acquisitions reached a record pace in 2021, with over 1,047 deals struck worth at least $100 million each. Now, nearly one year after Biden assumed office, two of his top competition enforcement agencies are vying to reevaluate—and potentially rewrite—merger and acquisition guidelines in ways they argue could give them a fighting chance against a growing tidal wave of economic consolidation

In a press conference on Tuesday, the Federal Trade Commission and Department of Justice announced they are jointly launching a public inquiry to revise and strengthen their merger and acquisition guidelines to better detect and prevent anti-competitive corporate business practices. Though both agencies were tight-lipped on their specific policy preferences, they said the public comment process is intended to ensure the agencies’ rules and guidelines are up to the task of handling a modern economy currently undergoing a radical digital transformation.

“The supply chain no longer follows a simple upstream or downstream path,” DOJ Assistant Attorney General Jonathan Kanter said during the press conference. “It’s interconnected in complex and evolving ways.” Kanter went on to say digital technologies have revolutionized not just the goods and services everyday consumers use but, “the nature of industry, at its core.”

While the public inquiry will look broadly at the agencies’ guidelines, FTC chair Lina Khan outlined three areas of most importance. First, the agencies want to find out whether or not the current guidelines are “attentive to the range of business strategies and incentives that might drive acquisition.” Second, Khan said the agencies are interested in knowing if the current guidelines adequately assess whether mergers are harming workers. (Seemingly included in this question is scrutiny of the consumer harm principle, which up until now has allowed for mergers so long as they do not result in increased prices). But as any Amazon warehouse worker or breached Facebook user will attest, prices may only tell part of the story with modern tech business practices. Finally, the agencies want to know if the current guidelines are “unduly limited in their focus on particular types of evidence.”

Though neither Khan nor Kanter advocated for any particular type of reform, it was clear they weren’t exactly pleased with the current merger onslaught. According to Khan, the FTC and DOJ last year received more than double the number of merger filings than in any of the past five years. “We need to ensure our tools of today allow us to understand the markets of today,” Kanter said.

“Illegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency,” Khan said in a statement. “This inquiry launched by the FTC and DOJ is designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals.”

The agencies’ call to action came literally hours after Microsoft announced its intention to acquire video game publishing giant Activision for a gargantuan price tag just short of $69 billion. Representatives from both the FTC and the DOJ declined to comment specifically on the Microsoft acquisition during the press conference, but both acknowledged that the recent rise in acquisitions across the board has strained their resources thin.

The public inquiry also comes about six months after President Biden signed a wide-ranging executive order directing the FTC and DOJ to rein in monopolistic corporate practices. That order contained 72 separate initiatives with a particular focus on adding enforcement mechanisms to target Big Tech business practices. So far though, the order has proven mostly symbolic.

Despite an apparent appetite for more aggressive anti-monopolistic enforcement mechanisms, federal agencies have found themselves subject to restrictive rules and lengthy court battles that limit their efficacy. A review process could alter the former, but representatives declined to comment on what, if any, effect those revamped guidelines would have on the seemingly inevitable tussle with courts.

#### That provides uniqueness for biz con – losses in court increase business confidence and make the FTC look weak

McLaughlin 21 – David McLaughlin, economics and antitrust reporter for Bloomberg, “Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts,” 6/23/21, https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda?sref=iKB6XOvf

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

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

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

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

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

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

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

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

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

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

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

“If you want to change the world, at some point it goes to the courts or it goes to the legislature,” Kovacic says. “But you can’t do it by yourself.”