# 1NC

### OFF

T-Per Se

#### ‘Prohibiting’ a practice requires per se illegality – they defend the rule of reason

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

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

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

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

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

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

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

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

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

#### Vote neg for limits and ground – infinite standards make the topic unmanageable and fringe standards dodge links and allow bidirectional permissiveness.

### OFF

T Courts

#### Courts cannot create “antitrust law” or “increase prohibitions”.

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

#### Vote neg for limits and ground – multiplies the # of affs by 2, removes any generic check on small affs, and circumvents any backlash.

### OFF

Sua Sponte CP

#### The United States Congress should prohibit anticompetitive settlements related to pharmaceutical patents.

#### Ruling sua sponte undermines the judicial process.

Poor & Goldschmidt 15 [E. King & James E; DRI member and partner in Quarles & Brady LLP’s Chicago office, chair of the firm’s appellate practice, member of the board of directors of the Appellate Lawyers Association, author of two petitions for certiorari granted by the Supreme Court, 25 years of law experience; commercial litigation attorney, associate in Quarles & Brady LLP’s Milwaukee office; October 2015; “Sua Sponte Decisions on Appeal”; https://www.quarles.com/content/uploads/2015/10/FTD-1510-Poor-Goldschmidt.pdf; For the Defense, Appellate Advocacy; accessed 4/3/18; TV] \*Edited for reading clarity.

But these permissive exceptions are not consistently applied, and there remain ample examples of courts adhering to the principle of party presentation. See Hartmann v. Prudential Life Ins. Co. of America, 9 F.3d 1207 (7th Cir. 1993) (applying the appellate waiver rule, due to an error by counsel, against orphans whose step- mother killed their father after bribing an insurance agent to defraud the orphans). Commentators agree that such exceptions, together with balancing tests specific to various federal circuits, are susceptible to outcome-oriented application and may just be so many manifestations of the gorilla rule. Miller, supra, at 1279. “No General Rule” This patchwork of rules and exceptions leaves sua sponte decision making without any widely-accepted body of authority that is consistently applied, let alone any controlling authority on this question. As the Supreme Court summed up in Singleton v. Wulff, 428 U.S. 106, 121 (1976), “[t]he matter of what questions may be taken and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule.” If the general rule is really that there is “no general rule,” then where does that leave us? One place to begin is to ask, what happens to our adversary system and the values underlying it when a court resolves a case without hearing from the parties involved? Undermining the Adversarial Process When a court raises an issue on its own and decides it without hearing from the parties involved, it chips away at our adversary system. When a court chooses to treat a case as a vehicle to decide an issue that the court believes is an overlooked, dispositive issue, rather than one addressed by the parties, then the court has ventured away from its role as a neutral decision maker into a subjective realm. In doing so, the court concludes on its own that a particular new question will dispose of the case. It then returns to being a neutral decision maker to decide the very issue which it has selected as dis- positive. A. Milani & M. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245, 277–78 (2002). But when a court itself selects new issues—without party participation—and then decides those very same issues, the values underlying our adversary system are compromised. The parties are far more likely than the reviewing court to explore the peculiarities and nuances of the case; after all, they have every incentive to do so. On the other hand, considerations of effciency may cause courts to be more likely to reach conclusions on issues that they them- selves have already identified as resolving the case more directly. Id. Moreover, even if identifying new issues does not actually undermine a court’s impartiality, it may still create that impression: “When [the court] a decision maker becomes an active questioner or otherwise participates in a case, she is likely to be perceived as partisan rather than neutral.” Id. at 280. Decisions reached under a court’s own initiative do not “promote respect either for the Court’s adjudicatory process or for the stability of its decisions,” and other commentators have described such decisions as “unseemly,” “not likely to be regarded favorably,” a breach of the parties’ trust, and a sacrifice of the court’s function as an adjudicator. Id. at 280–81 (quoting Justice Harlan’s dissent in Mapp v. Ohio, 367 U.S. 643, 677 (1960)). Such perceptions work against both litigants’ and society’s acceptance of judicial decisions. Id. at 284. As explained elsewhere, “If the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant... the adjudicative process has become a sham, for the parties’ participation in the decision has lost all meaning.” Id. at 285 (quoting L. Fuller, e Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 388 (1978)).

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson 17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard.

A. Failure to Provide Due Process

Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it:

When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court.

The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking:

[I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6

The situation is even harder to defend when there is no hearing at all. 9

B. Undermining Respect for the Legal System

The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o

This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2

Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next:

The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved.

This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis & Morse 18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication

We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).

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Cap K

#### The aff promotes a neoliberal project of enforced competition that normalizes inequality in the social and markets in the political.

Davies 18 [William Davies, Professor in Political Economy, Goldsmiths, University of London, “The SAGE Handbook of Neoliberalism | The Neoliberal State: Power Against ‘Politics,’” 2018, SAGE, pp. 273-277]

The state is a central instrument for the advancement of a neoliberal agenda. Commitment to a strong state, capable of rebuffing political and ideological challenges to capitalist competition, is a defining feature of neoliberalism, both as a system of thought and of applied political strategy. There is scant evidence of neoliberal reforms ever leading to a ‘smaller’ or ‘weaker’ state in any meaningful sense, even if certain functions have been removed from the state via policies of privatization and outsourcing. However, the state is also an object of considerable critical scrutiny and resentment under neoliberalism. As Jamie Peck argues, ‘neoliberalism’s curse has been that it can live neither with, nor without, the state’ (Peck, 2008: 39). The suspicion that the state and its agents are wasteful, self-serving, irrational, ~~blind~~ to the merits of competition, excessively ‘intellectual’ and resistant to change is an abiding feature of neoliberal critique. The paradoxical status of the state under neoliberalism, being simultaneously the key instigator of reform and main obstacle to it, means that this anxiety can never be entirely allayed.

In the face of this ambivalence, neoliberal critique focuses on seeking to rationalize the state using techniques drawn from the world of business or to actively involve business in the running of public sectors. Reforms known as ‘new public management’ took off from the 1980s onwards, seeking to re-model state bureaucracies on private sector enterprise, using target-setting and audit to disrupt allegedly slow and wasteful public sector administrations (Hood, 1995). Outsourcing and public-private partnerships have produced a new institutional sphere between market and state conventionally understood, that can be analyzed in terms of networks of ‘governance’ or ‘governmentality’ that redistribute state functions into various new administrative units (Rhodes, 1996; Rose and Miller, 2013). Neoliberalism often involves the determined pursuit of state agendas, but in ways that bypass inconvenient, ‘political’ or supposedly inefficient instruments of government.

This chapter explores the neoliberal state in three different ways. First, it discusses the idea of the neoliberal state, as it exists in neoliberal thought between the 1920s and the 1970s. I will show how neoliberals such as Friedrich Hayek consciously distanced themselves from the Victorian vision of laissez-faire, and committed to an active state agenda. This is something that Michel Foucault highlighted in his renowned lectures on neoliberalism (Foucault, 2008). Second, I will specify key features of the ‘actually existing’ neoliberal state, including its status over the course of the global financial crisis of 2007–09. Neoliberalism does not shrink state power, but it does involve it shifting from spheres designated (pejoratively) as ‘political’ to those viewed as unpolluted by the dangers of politics. Finally, I will identify some of the core contradictions at the heart of the neoliberal state, and draw out what these mean for the critique of neoliberalism.

The idea of the neoliberal state

A defining feature of neoliberal thinking is the presumption that there is no a priori distinction between the realm of the ‘political’ and that of the ‘economic’. The way in which individuals act in the marketplace is not substantially any different from how they act in public sector bureaucracies or as participants in democracy. From a neoliberal perspective ‘there is no separate economic motive’ (Hayek, 2007 [1944]: 93), a principle reiterated by various members of the Chicago School of Economics (e.g., Friedman, 1962; Becker, 1976). A commensurate assumption is that there is no ‘separate’ institutional sphere of economy. A recurring motif of neoliberal political critique is to extend metaphors, norms and measures from the economic realm of markets and business to the political realm of government. For example, the discourse of ‘national competitiveness’ borrows the language and methodologies of business strategy, and applies them to questions of national executive decision-making, representing political leaders as national ‘CEOs’.

In The Birth of Biopolitics (2008), Foucault argues that this application of economic critique to the state was the main hallmark of neoliberalism. In contrast to liberalism, which required government to develop techniques and knowledge through which to retreat into a limited ‘political’ space and leave economic activity alone, neoliberalism involves relentless efforts to remake social and political life around an ideal plucked from the market. As Foucault argued, it:

…is not a question of freeing an empty space [as laissez-faire was], but of taking the formal principles of a market economy and referring and relating them to, of projecting them on to a general art of government. (Foucault, 2008: 131)

It is not simply that neoliberalism privileges markets, but that it seeks to buttress markets (and market-like behaviours and culture) using the force of the state and to transform the state around principles extracted from the market (Davies, 2014). Foucault examined this via the writings of the Freiburg School of ordoliberalism and the Chicago School of neoclassical economics. While these two intellectual traditions are strongly divergent in their theoretical approach and political implications, what they share is the assumption that the state (in addition to other non-market realms of existence) can and should be reformed through a deliberate re-organization around principles associated with the marketplace.

In the case of ordoliberalism, the authority of the state is derived from its capacity to enforce the rules of the market ‘game’, preventing firms from dominating markets, combating inflation, entrenching property rights, and defending the rights of entrepreneurs and small businesses through competition law (Bonefeld, 2012). The state should act aggressively to produce an overarching framework, robust enough to withstand whatever economic upheavals occur within the competitive market (Gerber, 1994). Ordoliberalism allows for copious state intervention, but only to act upon the conditions and formal properties of economic action, and never to direct or control it. The ordoliberal state would be focused purely on a priori conditions of competition, and ~~blind~~ to utilitarian questions of outcomes. This philosophy is resonant with the fear of ‘moral hazard’ that is often used to obstruct government interventions in the market, on the basis that flexibility in the application of rules will make them ineffective in disciplining behaviour in future.

It needs noting that the ordoliberal paradigm is compatible with many policies associated with social democracy or even socialism. Welfare policies and social spending could be perfectly legitimate, so long as they were structured in such a way as to preserve the formal structure of the competitive market as the a priori logic of society. Many German and French neoliberal thinkers of the 1930s saw neoliberalism as a path between socialism and laissez-faire, that would harness the capabilities of the growing welfare state towards the promotion of enterprise (Burgin, 2012). What was often known as the ‘social market’ model (including by many neoliberal think-tanks in the UK during the 1960s and 1970s) was as much about harnessing the instruments of social democracy as it was about promoting the free market (Gamble, 1988). In this respect, neoliberalism was and remains an agenda for the transformation of society, and not simply for the expansion of the market (Dardot and Laval, 2013). In addition to the influence that ordoliberals exerted over German reconstruction and European integration during the 1950s, legacies of this tradition might also include the ‘Third Way’ policies of centre-left governments of the 1990s, which focused on ‘active’ labour market interventions rather than labour market protections.

From the perspective of the Chicago School (and equally the Virginia School of public choice) by contrast, the authority of the state needs to be relentlessly questioned and tested through the application of neoclassical economics to the study of law-makers, bureaucrats and democratic processes. ‘The economic critique the [American] neo-liberals try to apply to governmental policy’, Foucault argued, ‘is also a filtering of every action by the public authorities in terms of contradiction, lack of consistency and nonsense’ (2008: 246). The ‘imperialism’ of neoclassical economics is therefore an integral part of the American neoliberal project of state rationalization, which gradually crowds out alternative logics from the social and political realms (Fine and Milonakis, 2009). This is manifestly a more state-phobic, pro-business orientation than that of ordoliberalism and the traditions that spun off it. It is also in strong contrast to liberal political philosophies, which preserved space for a separate realm of political interaction not reducible to economics (Brown, 2015). It rests on a latent libertarian suspicion that politicians, bureaucrats and law-makers are likely to be just as self-interested as business-people and consumers, only less honest about this fact.

Implicit and sometimes explicit in this analysis is the idea that the ideals associated with the state are more dangerous than those associated with the market. Perversely, the ideals of the market might be a more effective (and certainly a safer) basis on which to safeguard key political principles, such as democracy, liberty and justice. If all action is fundamentally economic action, it makes perfect sense to treat the state as a particular type of economic entity, and to view economic institutions as safeguards of political values. Gary Becker claimed that ‘there is relatively little to choose between an ideal free enterprise system and an ideal political democracy; both are efficient and responsive to preferences of the “electorate”’ (Becker, 1958: 108). However, the neoliberal stance is that the market will act as a better guarantor of democracy than vice versa. It therefore makes sense to entrench the market in a quasi-constitutional fashion, and assume that democracy (or at least, individual liberty) will follow. The alternative, to trust democracy to safeguard markets, is treated as self-evidently misguided, given the rise of socialism and fascism over the course of the twentieth century.

So what are the perceived virtues of markets that need to be used as a basis on which to re-imagine and reconstruct the state? There is potentially a wide range of answers to this question, from more conservative ones which point to the ethic of self-reliance associated with entrepreneurship, to more modernizing ones, which view the market as a source of constant innovation. Here I want to focus on two perceived ideals of the market that provide inspiration, purpose and templates for the reform of the state: competition and explicitness.

Competitiveness

As various scholars have argued, competition and competitiveness are primary and fundamental virtues within neoliberal thinking (Dardot and Laval, 2013; Davies, 2014; Brown, 2015). It is precisely the capacity of markets to produce new and unequal outcomes that makes them valuable, because this inequality is deemed a valid empirical reflection on the ideas, efforts, productivity and knowledge of those who are party to the market contest. Competition, according to Hayek, is a ‘discovery procedure’ (Hayek, 2002).

This implies various roles for the state. First and foremost, the state must act as the regulator and guarantor of economic competition via the provision and enforcement of antitrust law. Ever since the earliest congregations of neoliberal thinkers in the 1930s, antitrust had been viewed as one of the most important functions of the state (Gerber, 1998). What this indicates is that, while competition might be viewed as an ideal that emanates from the market, it is not something that real-world markets will safeguard left to their own devices. It will not exist or survive naturally and inevitably, in the way that classical liberals like Adam Smith assumed. Businesses, individuals and entrepreneurs are just as likely to form cartels, avoid competition or seek to suppress it, and this provides the state with an important regulatory and legal function (Bonefeld, 2012). In this sense, the ‘free’ market needs the state to act as its law-giver and policeman (as Polanyi argued), just as much as the ‘liberal’ state needs the market to provide it with discipline.

Given the unique qualities of competition as a basis for social interaction, it makes sense that other institutions and spheres of existence should be governed in ways to render them competitive. This provides the state with additional areas of focus. First, the neoliberal state must strive to push competition and competitive dynamics into areas of social life that are otherwise resistant to entrepreneurial values and ethos, such as universities, and to inculcate people with a respect for competition generally (Dardot and Laval, 2013). Each individual is exhorted to become ‘an entrepreneur of himself’, and learn and train accordingly, for optimal positioning in the market (Foucault, 2008: 226; Binkley, 2014). Second, government institutions should themselves be re-imagined along competitive principles where possible, reducing the state’s monopoly power through outsourcing and seeking to make ‘national competitiveness’ a loosely-defined teleology of all policy (Cerny, 1990). Neoliberals (and other conservative economists such as Joseph Schumpeter) of the mid-twentieth century shared a deep-set fear that the benefits of competition were invisible to the public, who were too easily seduced by the short-term promises of socialists and planners (Schumpeter, 1976). Ideally, therefore, the rules of competition would be placed beyond the scope of democratic politics, where they could not be touched. Unelected commissions, regulators and auditors would serve a valuable function in safeguarding competition from short-sighted political counter-movements.

Explicitness

A second principle that the market upholds, and that carries potential political value for the state, is what might be termed explicitness. Chicago School economist George Stigler argued that ‘the price system lays the cards face up on the table’, in contrast to other institutions which are mired in opacity and ambiguity (Stigler, 1975: 36). Right from the beginning of the ‘socialist calculation debate’, which catalyzed the earliest forms of neoliberal critique in the 1920s (Gane, 2013), the merits of the price system have been treated by neoliberals as partly phenomenological in nature. While markets have an in-built system of explicit, quantitative and public valuation in the form of prices, socialism was deemed to suffer from a necessary inability to grasp value in any rational or objective way. As Ludwig von Mises put it in 1920, under socialism ‘there is only groping in the dark’ (1990 [1920]: 17). This stems from a pessimistic view of moral discourse, shared by both European and American neoliberals, which assumed that it would be impossible to reach agreement on common values or goals in the absence of a neutral calculative technology such as markets, economics or some combination of the two.

This celebration of the market’s public, phenomenological properties has certain implications for the critique and reform of the state. These can be seen in the overall push for better ‘governance’ in the public sector in general, and for more ‘transparency’, ‘accountability’ and ‘value for money’, in particular. Capturing the ‘outputs’ of public sector workers and agencies in quantitative, standardized forms represents a way of reconfiguring the state in market-like ways, without simply privatizing it. Performing cost-benefit analysis becomes a crucial way of capturing the value of public goods or social costs (Fourcade, 2011). The political pessimism of the neoliberal mindset, which doubts the capacity for collective action or agreement on normative or teleological grounds alone, becomes manifest in a constant evaluative scrutiny of public sector employees and professions – a feature of what Michael Power has termed the ‘audit society’ (Power, 1997). The various new forms of audit, derived from the private sector or invented anew for the public sector, have often been bracketed together as ‘new public management’ (Hood, 1995). But the same quest for explicitness can also be seen in subsequent efforts to quantify the work of the state, such as new metrics for the capture of ‘social value’ or the push for more ‘open data’ through which the public can critically scrutinize the work of government in the digital age.

The neoliberal state in practice

Being both the agent of reform and the object of critique, the state provides neoliberalism with a profound dilemma. Which part of the state will drive reform and which part of the state will be the object of reform? Unless state agencies and civil servants are expected to undergo some mystical conversion to the neoliberal vision, the practical realities of the neoliberal state involve a permanent confrontation with this problem. The prosaic day-to-day activities of the neoliberal state are too copious and various to be easily synthesized into a brief description. It goes without saying that such a state never entirely conforms to the ideals of competitiveness and explicitness described in the previous section, but operates via channels that remain noticeably ‘political’. Neoliberal politics is riven as much as any other politics by what Weber famously termed the ‘strong and slow boring of hard boards’, confronting obstacles that need to be overcome via compromise, coalition-building and patience. The strategic battles that are prioritized will vary from case to case, depending on national political traditions and the contingent strength of opposition in parliaments, within the state and in civil society. There is no pure or perfect example of the neoliberal state. This also accounts for the fact that neoliberal reform is perpetually incomplete, chasing ideals that remain elusive, and hence endlessly compelling.

The neoliberal project of state reform typically operates in a parasitical fashion, drawing on the political and social energies of one set of existing institutions and traditions, so as to subvert or undermine others (Mitchell, 2002). Paradoxically, the reduction of politics to economics requires copious political will and authority to be achieved (Davies, 2014). With the exception of the think-tanks which were set up in the decades preceding the Reagan and Thatcher victories, neoliberalism has no indigenous bases from which to launch its critique and transformation of the state, so depends on building alliances within sympathetic corners of state and civil society. This is manifestly a political challenge, but one of the most effective rhetorical and cultural strategies is to re-purpose the category of ‘political’ as a pejorative one, designating certain state institutions as corrupted by ‘politics’ and in need of reform. The legislature, permanent civil service, professions and trade unions are frequent objects of this kind of rhetorical strategy. A key justification for this fear of ‘politics’ is that democracy and political movements lead to unaffordable promises being made to citizens, leading inexorably towards inflation (Blyth, 2013). Meanwhile, another set of interests and power centres can be designated as ‘non-political’, allowing them to act in ways that seem to circumvent the intrinsic defects of the state. The more that economic policy-making can be insulated from the vanity and ideologies of politicians, the better it will be for the public in the long term. This argument in favour of quasipermanent policies, and against the vagaries of political whims, was summed up in an influential paper, ‘Rules Rather Than Discretion’ (Kydland and Prescott, 1977).

#### Capitalism is terminally unsustainable and at a turning point – reinforcing structures causes extinction and turns their impacts.

* TCC = Transnational Capitalist Class, TNS = Transnational State

Robinson 20 [William I. Robinson, American professor of sociology at the University of California, Santa Barbara, “The Global Police State,” 2020, Pluto Press, EA]

But the globalization boom of the late twentieth and early twenty-first centuries was short-lived. The global financial meltdown of 2008 marked the onset of a new structural crisis of global capitalism, one that opens the possibility for systemic change. Karl Marx was the first to identify crisis as immanent to capitalism and there is a vast literature on capitalist crisis.11 Here I identify three types of crisis. Cyclical crises, or recessions, occur about every ten years in the capitalist system and typically last some 18 months. These comprise the so-called “business cycle.” There were recessions in the early 1980s, the early 1990s, and the early 2000s. “Structural crises,” so called because the only way out of crisis is to restructure the system, occur approximately every 40–50 years. A new wave of colonialism and imperialism resolved (that is, displaced) the first recorded structural crisis of the 1870s and 1880s. The next structural crisis, the Great Depression of the 1930s, was resolved through a new type of redistributive capitalism, referred to as the “class compromise” of Fordism-Keynesianism, social democracy, New Deal capitalism, and so on (more on this below). As we have seen, capital responded to the next structural crisis, that of the 1970s, by going global. Each of these major episodes of structural crisis have presented this potential for systemic change. Historically, each has involved the breakdown of state legitimacy, escalating class and social struggles, and military conflicts. In the past, structural crises have led to a restructuring that includes new institutional arrangements, class relations, and accumulation activities that eventually resulted in a restabilization of the system and renewed capitalist expansion. Yet a new period of far-reaching restructuring through digitalization appears to be under way at this time. Before we return to this new wave of restructuring, let us focus on the nature of the current crisis, which shares aspects of earlier system-wide structural crises of the 1880s, the 1930s, and the 1970s. Yet there are several interrelated dimensions to the current crisis that I believe sets it apart from these earlier ones and suggest that a simple restructuring of the system will not lead to its restabilization—that is, our very survival requires now a revolution against global capitalism. Above all is the existential crisis posed by the ecological limits to the reproduction of the system. We have already passed tipping points in climate change, the nitrogen cycle, and diversity loss. For the first time ever, human conduct is intersecting with and fundamentally altering the earth system in such a way that threatens to bring about a sixth mass extinction.12 While capitalism cannot be held solely responsible for the ecological crisis, it is difficult to image that the environmental catastrophe can be resolved within the capitalist system given capital’s implacable impulse to accumulate and its accelerated commodification of nature. The ecological dimensions of global crisis have been brought to the forefront of the global agenda by the worldwide environmental justice movement. Communities around the world have come under the escalating repression of a global police state as they face off against transnational corporate plunder of their environment and demand environmental justice and action by governments to avert the climate catastrophe. And climate change refugees, who are likely to run into the hundreds of millions in the years ahead, are vilified by racist and neo-fascist forces and repressed by a global police state. This accelerated commodification of nature points to another underlying dimension of the current crisis. We are reaching limits to the extensive expansion of capitalism, in the sense that there are no longer any new territories of significance to integrate into world capitalism and new spaces to commodify are drying up. The capitalist system is by its nature expansionary. In each earlier structural crisis, the system went through a new round of extensive expansion—that is, incorporating new territories and populations into it—from waves of colonial conquest in earlier centuries, to the integration in the late twentieth and early twenty-first centuries of the former socialist bloc countries, China, India and other areas that had been marginally outside the system. There are no longer any new territories to integrate into world capitalism. At the same time, the privatization of education, health, utilities, basic services, and public lands are turning those spaces in global society that were outside of capital’s direct control into “spaces of capital,” so that intensive expansion—that is, the commodification of what were non-commodified resources and activities—is reaching depths never before seen. Commodification refers to the process of turning people, the things that people produce, and nature into things that are privately owned, have a monetary value, and that can be bought and sold. Capitalism by its nature must constantly expand intensively by commodifying more and more of the world. What is there left to commodify? Where can the system now expand? New spaces have to be violently cracked open and the peoples in these spaces must be repressed by a global police state. But what does exhaustion of spaces for extensive and intensive expansion imply for the reproduction of the system? The sheer magnitude of the means of violence and social control is unprecedented, as well as the magnitude and concentrated—and increasingly privatized—control over these means of violence along with the means of global communication and the production and circulation of symbols, images, and knowledge. As I will discuss in more detail in Chapters 2 and 3, computerized wars, drone warfare, robot soldiers, bunkerbuster bombs, satellite surveillance, cyberwar, spatial control technology, and so forth, have changed the face of warfare, and more generally, of systems of social control and repression. We have arrived at the panoptical surveillance society, a point brought home by revelations of the defector from the U.S. National Security Agency (NSA), Edward Snowden, that the NSA monitored virtually every communication on the planet. It is no exaggeration to say that we are now in the age of thought control by those who control global flows of communication, information, and symbolic production. But most frightening is the production and deployment of a new generation of nuclear weapons and the threat of “limited” nuclear war.13 If global crisis leads to a new world war, the destruction would simply be unprecedented. Combined with ecological meltdown, it is difficult to see how humanity could survive such a conflagration. Global capitalism lends itself to escalating inter-national tensions with the potential to spill over into major interstate conflict. But we should not explain these tensions through the outdated nation-state/interstate mode of analysis that attributes such tensions to national rivalry and competition among national capitalist classes for international economic control. Rather, these tensions derive, above all, from an acute political contradiction in global capitalism that I already alluded to above: economic globalization takes places within a nation-state-based system of political authority. Nation-states face a contradiction between the need to promote transnational capital accumulation in their territories and their need to achieve political legitimacy. In the age of capitalist globalization, governments must attract to the national territory transnational corporate and financial investment, which requires providing capital with all the incentives associated with neo-liberalism—downward pressure on wages, deregulation, low or no taxes, privatization, fiscal austerity, and on so— that aggravate inequality, impoverishment, and insecurity for working and popular classes. As a result, states around the world have been experiencing spiraling crises of legitimacy. To put it in more technical terms, there is a contradiction between the accumulation function and the legitimacy function of nation-states. This situation generates bewildering, unstable, and seemingly contradictory politics. It helps explain the rise of far-right and neo-fascist forces that espouse rhetoric of nationalism and protectionism even as they promote neo-liberalism, such as the Trump government in the United States, and has confused some into believing that “deglobalization” is under way as we move backward to an earlier era of national protectionism. In fact, the “old protectionism” of the twentieth century aimed to protect national products and the national capitalist groups that produced them with tariffs and subsidies. The new protectionism—if we could call it that, as the term is extremely misleading and leads to much confusion—aims to create the conditions to attract transnational capital to national territories. Despite its protectionist rhetoric, for instance, the Trump White House called not for locking out foreign investors but for transnational investors from around the world to invest in the United States, enticed by a regressive tax reform, unprecedented deregulation, and some limited tariff walls that would benefit groups from anywhere in the world that establish operations behind them. “America is open for business,” Trump declared at the 2018 meeting of the global elite gathered for the annual conclave of the World Economic Forum (WEF) in Davos, Switzerland: “Now is the perfect time to bring your business, your jobs and your investments to the United States.”14 And the biggest single beneficiary of steel tariffs that Trump imposed in 2018 on imported steel was ArcelorMittal, the Indian-based company that owns majority shares in U.S. Steel.15 Moreover, as we will see later, TCC contingents from countries around the world that appear to be in geopolitical competition are not just heavily invested in global police state but they are cross- and mutually invested in it. More to the point here, economic globalization as it has unfolded within the interstate system generates mounting international and geo-political tensions to the extent that the crisis exacerbates the problem of legitimacy and destabilizes national political systems and elite control. Inter-national tensions must be seen as derivative of the contradiction between the expansion of transnational capital within the framework of the nationstate/inter-state system, in which global capitalism pits nationally constrained workers against one another and sets up the conditions for the TCC to manipulate the crises of state legitimacy and the international tensions generated by this contradiction. The political tensions generated by this contradiction can and do take on the appearance of geo-political competition.16 Will the centrifugal pressures produced by this contradiction undercut the centripetal pressures brought about by economic globalization? Will these centrifugal pressures break out into open, largescale inter-state warfare?17 Will geo-political tensions “overdetermine” the corporate interests of the TCC? We need here to extend the analysis of transnational politics and the TNS in order to understand this dimension of global crisis, especially so considering that it is central to the story of global police state. Transnational elites have been clamoring for more effective TNS institutions, in part, in order to resolve this disjuncture between economic globalization and the nation-state system of political authority. However, the fragmentary and highly emergent nature of TNS apparatuses makes the effort problematic given both the dispersal of formal political authority across many nation-states and the loose nature of TNS apparatuses with no center or formal constitution. The more “enlightened” elite representatives of the TCC are now searching for ways to develop a more powerful TNS, one that could impose regulation on the global market and certain controls on unbridled global accumulation. They are seeking transnational mechanisms of “governance” that would allow the global ruling class to rein in the anarchy of the system in the interests of saving global capitalism from itself and from radical challenges from below—from both an insurgent Left and extreme Right. More than in any other forum, the politicized strata of the transnational elite comes together in the activities of the WEF, a “network of networks” for the TCC and the transnational elite that holds its famed annual meeting in Davos. Indeed, it is not for nothing that “Davos Man” has been used to describe the new global ruling class. WEF founder and Executive Chairman Klaus Schwab called in 2008 for renovated forms of “global leadership” by the TCC: Whether it is poverty in Africa or the Haze over Southeast Asia, an increasing number of problems require bilateral, regional or global solutions and, in many cases, the mobilization of more resources than any single government can marshal … The limits of political power are increasingly evident. The lack of global leadership is glaring, not least because the existing global governance institutions are hampered by archaic conventions and procedures devised, in some instances, at the end of World War II. Sovereign power still rests with national governments, but authentic and effective global leadership has yet to emerge. Meanwhile, public governance at the local, national, regional, and international levels has weakened. Even the best leaders cannot operate successfully in a failed system.18 But if the transnational elite wants a stronger TNS in order to cement the TCC’s rule and stabilize the system, it has not been able to resolve the contradictory mandate it has accorded to the TNS. On the one hand, the TNS sets out to promote the conditions for capitalist globalization; on the other, it tries to resolve the myriad problems globalization creates: economic crisis, poverty, environmental degradation, chronic political instability, and military conflict. The TNS has had great difficulty addressing these issues because of the dispersal of formal political authority across many nation-states. To reiterate, TNS apparatuses are fragmentary; there is no center or formal constitution, and there is certainly no transnational enforcement capacity. These TNS apparatuses have not been able to substitute for a leading nation-state—what the international relations literature refers to as a “hegemon”—with enough power and authority to organize and stabilize the system, much less to impose regulations on transnational capital. The politicized strata of the TCC and transnationally oriented elites and organic intellectuals, including those who staff TNS institutions, attempt to define the long-term interests of the system and to develop policies, projects, and ideologies to secure these interests. Since the specific interests of the various components of the global power bloc are divergent, it is the TNSs’ role to unify and organize the various classes and fractions to uphold their long-term political interests against the threat of the exploited and oppressed classes around the world. But the inability of the TNS to impose coherence and regulation on transnational accumulation and to stabilize the system is also due to the vulnerability of the TCC as a class group in terms of its own internal disunity and fractionation, and its ~~blind~~ pursuit of immediate accumulation—that is, of its immediate and particular profit-seeking interests over the long-term or general interests of the class. There is of course a profound social dimension of global crisis. In these times of unprecedented worldwide inequalities, capitalist crisis breaks apart the social fabric and devastates communities everywhere. Billions of people around the world face struggles to survive from one day to the next, with no guarantee that they will succeed in this struggle (indeed, many are not and many more won’t). In academic terms we could call this a crisis of social reproduction, but this phrase does nothing to capture the depths of misery that poverty, disease, un- and underemployment, food insecurity, social exclusion, racist, xenophobic, and other forms of social violence into which billions are thrust on a daily basis, or to the persecution that they face as migrants, refugees, surplus labor, and so on. The next two chapters will take up these matters. However, let us point out that the social crisis is decidedly not a crisis for capital, and may even help it to reproduce its rule, until or unless it leads to mass rebellion that threatens the ruling groups’ control.

#### The alternative is a class-based movement towards socialism – only rejecting capitalist ideology allows for sustainable development.

Foster 19 [John Bellamy Foster, professor of sociology at the University of Oregon, “Capitalism Has Failed—What Next?,” 02/01/19, *Monthly Review*, https://monthlyreview.org/2019/02/01/capitalism-has-failed-what-next/, EA]

It may be objected that socialism has been tried and has failed and hence no longer exists as an alternative. However, like the earliest attempts at capitalism in the Italian city-states of the late Middle Ages, which were not strong enough to survive amongst the feudal societies that surrounded them, the failure of the first experiments at socialism presage nothing but its eventual rebirth in a new, more revolutionary, more universal form, which examines and learns from the failures.95 Even in failure, socialism has this advantage over capitalism: it is motivated by the demand for “freedom in general,” rooted in substantive equality and sustainable human development—reflecting precisely those collective social relations, borne of historical necessity and the unending struggle for human freedom, crucial to human survival in our time.96

The great conservative economist Joseph Schumpeter, who, as Austrian finance minister in Red Vienna, had allied himself for a time with the socialist government and found himself attacked on all sides, once wrote that capitalism would perish not because of “the weight of economic failure,” but rather because its “very success” in pursuing its narrow economic ends, had undermined the sociological foundations of its existence. Capitalism, Schumpeter exclaimed, “‘inevitably’ creates conditions in which it will not be able to live and which strongly point to socialism as its heir apparent.”97 He was, it turns out, in many ways correct, though not entirely in the way he expected. The global development of monopoly capitalism and financialization spearheaded by the very same counterrevolutionary neoliberalism that first arose in response to Red Vienna in the interwar years—at a time when Schumpeter himself was a major actor—has now undermined the material bases, not so much of capitalism itself, but of global society and planetary ecology. The result has been the emergence of an “atmosphere of almost universal hostility” to the prevailing social order, though, playing out in the confused context of the present, less as opposition to capitalism itself than to neoliberalism.98

It is capitalism’s undermining of the very basis of human existence that will eventually compel the world’s workers and peoples to seek new roads forward. An inclusive, class-based movement toward socialism in this century will open up the possibility of qualitative new developments that the anarchy of the capitalist-market society with its monopolistic competition, extreme inequality, and institutionalized greed cannot possibly offer.99 This includes the development of a socialist technology, in which both the forms of technology utilized and the purposes to which they are put are channeled in social directions, as opposed to individual and class gain.100 It introduces the prospect of long-term democratic planning at all levels of society, allowing decisions to be made and distributions to occur outside the logic of the cash nexus.101 Socialism, in its most radical form, is about substantive equality, community solidarity, and ecological sustainability; it is aimed at the unification—not simply division—of labor.

Once sustainable human development, rooted not in exchange values, but in use values and genuine human needs, comes to define historical advance, the future, which now seems closed, will open up in a myriad ways, allowing for entirely new, more qualitative, and collective forms of development.102 This can be seen in the kinds of needed practical measures that could be taken up, but which are completely excluded under the present mode of production. It is not physical impossibility, or lack of economic surplus, most of which is currently squandered, that stands in the way of the democratic control of investment, or the satisfaction of basic needs—clean air and water, food, clothing, housing, education, health care, transportation, and useful work—for all. It is not the shortage of technological know-how or of material means that prevents the necessary ecological conversion to more sustainable forms of energy.103 It is not some inherent division of humanity that obstructs the construction of a New International of workers and peoples directed against capitalism, imperialism, and war.104 All of this is within our reach, but requires pursuing a logic that runs counter to that of capitalism.

Humanity, Karl Marx wrote, “inevitably sets itself only such tasks as it is able to solve, since closer examination will always show that the problem itself arises only when the material conditions for its solution are already present or at least in the course of formation.”105 The very waste and excess of today’s monopoly-finance capitalism, together with the development of new means of communication that allow for greater human coordination, planning, and democratic action than ever before, suggest that there are countless paths forward to a world of substantive equality and ecological sustainability once the world is freed from the fetters of capital.106

### OFF

T Private Sector

#### “Private sector” means all non-governmental entities – the plan only affects pharma.

Senate Report 95 [Senate Report. 104-1, “UNFUNDED MANDATE REFORM ACT OF 1995,” https://www.congress.gov/congressional-report/104th-congress/senate-report/1 , date accessed 9/10/21]

"Private sector" is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

#### Vote neg for limits and ground – the number of potential subsets is infinite – any industry, product, single companies, individuals – only big affs have link uniqueness.

### OFF

Unconscionability CP

#### The US federal judiciary should define anticompetitive settlements related to pharmaceutical patents as unconscionable market behavior.

#### Treating market exploitation as unconscionable alone and instead of an antitrust violation solves the aff, avoids circumvention, and spills over to create norms to counter inequality.

HiLA KEREN, Professor of Law, Southwestern Law School, ’15, “LAW AND ECONOMIC EXPLOITATION IN AN ANTI-CLASSIFICATION AGE” [Vol. 42:313, 2015]

In the same vein, treating the exploitation of vulnerability as unconscionable market behavior can fit the profile of a dignity claim. Like the right to control our intimate life, we all should have a right to not be exploited by others when we are vulnerable. Exploitation of vulnerability in the market not only causes devastating economic damage, it also harms dignity. It shames the vulnerable party, leaving him helpless and looking pathetic and unable to take care of his own matters. Therefore, the accumulative consequences of exploitation pose a direct threat to human dignity and courts should be allowed and even encouraged to intervene. 222 Of course, dignity and equality are intertwined, and group-based protection is not really extinct.223 As Yoshino reminds us, "[i]n finding all thirteen sodomy statutes unconstitutional, Lawrence clearly helped gay people more than it helped straight people. '224 This point is pertinent in our context as well, because establishing a norm against exploitation of vulnerability in the market would clearly assist weaker market players of disenfranchised groups more than their stronger counterparts. In that sense, predatory loan agreements cannot-and should not-be divorced from their socio-economic context. Indeed, as Siegel points out, working in the space between colorblindness and classification "entails practical, contextual judgments attentive to the concerns of differently situated members of the polity.' 22

The vulnerability theory calls upon the state to be more responsive, and therefore serves as additional theoretical support for utilizing unconscionability where reverse redlining has failed. Accordingly, as a measure of help to vulnerable subjects, this theory underscores the state's deep commitment to a proactive countering of inequalities instead of a minimalistic engagement in keeping formal equality intact. Such an expectation reflects a giant step beyond what is allowed under the private/public dichotomy, where private loans are marginally scrutinized by the public legal system. Further, it echoes a belief, shared by many (albeit not all), that contract law-despite its "private" image has a meaningful public role to play in the social arena and "is a mode of social regulation whose rules ought to serve social goals. 226

Furthermore, the use of an extensive contractual doctrine, like unconscionability, is strategically advantageous in the context of economic exploitation. Using specific legislation to forbid particular kinds of abuse, such as the ban on notorious pay-day loans, does not defend against greedy market players who will simply identify loopholes and find ways to continue to profit from exploiting others' vulnerability, such as lending via the internet to avoid state regulations. 227 At least one state has explained the special value of the unconscionability doctrine as a "blanket rule," stating, "[t]he legislative process is too slow to keep up with market practices, so the courts must have power to monitor the market for the protection of all participants. '228 Although the law cannot totally stop people from trying to make more profits by taking advantage of others, it can make it harder for them to succeed and discourage them from further attempts. This goal can be achieved by utilizing the concept of unconscionability to send a clear and general message, that any form of exploitation is forbidden regardless of the concrete method used. At least one court that had dismissed a reverse redlining argument but allowed an unconscionability argument to proceed referred to this "residual" or "catch-all" attribute of the doctrine, explaining that "[i]t also seems to the court that the purpose of the unconscionability doctrine, in providing protection to vulnerable, unsophisticated parties, is to plug the gaps left open by applicable statutory provisions when they do not afford consumers adequate protections. '229 This is the known advantage of broad standards like good faith and unconscionability over specific rules: it is much harder to escape their coverage.230 A clear and general message against exploitation will support and strengthen social and moral norms that disapprove of such behavior, which can encourage stronger market players to exercise more self-restraint.

#### Inequality is ethically intolerable and poses a linear existential risk that turns every impact.

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Widening disparities in health within and between nations reflect a trajectory of ‘progress’ that has ‘run its course’ and needs to be significantly modified if progress is to be sustainable. Values and a value system that have enabled progress are now being distorted to the point where they undermine the future of global health by generating multiple crises that perpetuate injustice. Reliance on philanthropy for rectification, while necessary in the short and medium terms, is insufficient to address the challenge of economic and other systems spinning out of control. Innovative approaches are required and it is suggested that these could best emerge from in-depth multidisciplinary research supported by endeavours to promote a ‘global mind-set.’

The human development approach begins from a premise that has deep roots in liberal political theory – namely, the idea that justice is properly about the basic social structure[s] … (political, legal, social and economic institutions of a community that have a profound impact on the health status of community members) and whether these structures guarantee community members the ‘fair value’ of their most basic human capacities.1

Descriptions abound of the extent to which we live in an unjust world and of how disparities in wealth and health within and between nations have been widening inexorably over many years.2 The state of the world in the early years of the twenty first century is characterized by multiple, deep and interlinking crises in health, education, energy, water, food security, the economy and the environment that constitute an ‘organic global crisis,’ with already evident and further predictable adverse implications for the lives and well being of all globally.3 It is arguable that these crises and escalating injustice are to a considerable extent the outcome of the way in which the global political economy has been re-structured over the past 40 years,4 and that this is causally related to a value system that has failed to lead to the benefits of economic growth and scientific and medical advances (including those in public health) being applied to processes that could reduce inequities in health and human well being.5

A recent review of four prominent theories of justice (consequentialist, relational, human rights and social contract approaches) reveals general agreement on the ethical requirement for international assistance to relieve poverty and improve the health of the most deprived. An example is the widespread agreement to pursue the Millennium Development Goals (MDGs).6

However, many such approaches are arguably minimalist in the sense that they have a dominant emphasis on philanthropy, although some attention is directed to the need to rectify previous economic and other harms. It should be noted that for every $1 of Official Development Assistance (much of which is used to pay donor country staff who assist in delivering aid),7 developing countries pay about $6 in debt repayment – mostly interest on debt.8 The beneficial effects of well directed philanthropy are acknowledged, but the limited success of philanthropy in narrowing disparities, illustrated by inability to raise the resources for the MDGs, provides insights into the need for a bolder vision for poverty reduction. Briefly, achievement of the MDGs (and these are modest in terms of needs beyond the severely poor) requires about $3/4 trillion over 15 years. The sad fact is that this sum has not been raised (and that donor fatigue is increasing) while about $17 trillion (22 x as much) was mobilized in three months for the bailouts of financial institutions during the early stages of the 2008 global economic crisis. This asymmetry between the privatization of profits and the socialization of losses reflects the extent to which the lives of a minority are valued and protected while the lives of the majority are devalued and undermined. 9

Furthermore, while discussions on health and justice are conducted under the rubric ‘global health,’ they are located within what would more accurately be called an ‘international health’ approach. International health, with its focus on the provision of biomedical health care assistance, in one form or another across regional or national boundaries, has long been an item on the agendas of many wealthy countries and academic institutions. Global Health is a newer term and properly used, goes beyond international health to include acknowledgment of health in more than merely a biomedical sense, and the critical interdependence of the health of all in a world characterized, inter-alia by excessive (often wasteful) consumption of limited resources, population growth, demographic changes, porous borders and environmental and biological dangers that threaten all lives globally.10 Seeing the health of all as interconnected and intimately linked to social and economic forces, and to the values that underlie these requires a new perspective on ways of viewing ourselves and the world.

In this commentary I provide a personal view of some distortions of our values that may in part explain our predicament of persistent global injustice 11 and suggest that ignoring these prevents us from acting with the vision and wisdom to use available intellectual and financial resources to reduce injustice, improve health and ensure better lives for billions of people**.**12 I conclude by considering some attitudes and approaches that could facilitate reduction in injustice. Throughout this commentary I ask readers to keep in mind the implications of ongoing widespread poverty, depletion of limited and unrenewable natural resources, population growth, global warming and the threat of new infectious diseases as major threats to global health in the 21st century.

Distortions of Our Values

Widely and strongly held values over many centuries include respecting the lives, rights and freedoms of all within democratic systems characterized by a significant degree of social solidarity and driven by both ongoing scientific advances and well structured economies. The extent to which many of these values have become distorted, with potentially adverse effects on modern life, has long been perceived by prescient scholars,13 and it has been argued that these inter-linked distortions are underpinned by a desire and strategy for power and control through hegemonic ideas.14

Hyper-individualism

The analysis, offered here, of a variably distorted value system, centres on an ongoing process of shifting from hard-won and highly prized individualism that has enabled magnificent economic, scientific and technological advances for the benefit of individuals and many societies, to a form of hyper-individualism characterized by demands for immediate gratification and endless economic expectations by the most privileged, whose short-term horizons and lavish consumptive patterns endanger the future for us all**.** Charles Taylor has described this ‘dark side of individualism,’ as excessively focused on individuals in a way that:

… flattens and narrows our lives, makes them poorer in meaning and less concerned with others and society. [He contends moreover, that] social relationships are depersonalised by the rise of ‘instrumental reasoning’ that values specialised knowledge, the extension of technical rationality to favour calculation, systematization, formal procedures, cost-benefit evaluations, maximizing efficiency and control over nature.15

Extreme individualism and three other characteristics underpinning the economic system, (viz. unlimited desires, short-term self-interest and a form of ‘rationality’ that emphasizes calculable and measurable issues), were identified many decades previously by John Kenneth Galbraith, who predicted that these would pose long-term threats to all.16

Within healthcare systems, hyper-individualism is revealed by expectations that everything that can possibly be done for any individual comes to be incorporated into a sense of entitlement regarding what should be provided – often at little or no cost to the recipient. As a result, health care is driven by the desire to postpone death at all costs, with little appreciation of the limits of life and of medicine.17 This applies particularly when futile health care is continued with public resources in healthcare systems that aspire to be egalitarian. Patients kept alive for extended periods in ICUs, when they have multiple organ failure and large, untreatable, suppurating pressure sores exemplify this.18 As a consequence, a high proportion of health budgets in many ‘developed countries’ is spent on prolonged end-of-life treatments that have only marginal benefits. Largely ignored in the pursuit of such ‘rescue medicine’ are the lost opportunities to prioritize many effective treatments that, if promptly applied, would result in greatly improved lives for many who are relegated to long waiting lists by current health funding priorities. Under such ideological pressures, all healthcare systems are to some extent, and in varying combinations, distorted (not structured to meet local health needs), dysfunctional (driven by vested interests with money/profits as the bottom line, within increasingly corporatized frameworks) and unsustainable (costs rising more rapidly than can be afforded even in wealthy nations).

Narrow conceptions and distorted application of human rights

Human Rights, now a widespread moral language used to promote respect for life and individuals, has been remarkably successful in many complex situations. However, instead of a comprehensive approach as outlined in the Universal Declaration of Human Rights (UDHR), the focus has largely been on civil and political rights. Protection of the privacy and confidentiality of those with HIV/AIDS is a good example of successful use of this approach. However, it is notable that there has also been considerable inconsistency and selectivity in the application and pursuit of human rights. For example security threats in the USA have led to abuses of civil and political rights that Americans have long-championed and chastened others for abusing,19 with ‘significant implications for the moral authority of civil societies in more authoritarian regimes’.20

In the context of identifying and punishing individual perpetrators of human rights abuses, a narrow conception of rights and perpetrators of abuses has also neglected powerful ‘systems-based’ forces that could promote either achievement of rights or abuses of these. The role of many structural forces (including the granting of rights to corporations as ‘persons’) imposed on the global economy by wealthy nations (and their collusion with despots) that undermine the basic rights to life for billions of people is one example.21 Other distressing examples of systemic misuse of the idea of Human Rights include the many failings of the United Nations Council on Human Rights (UNCHR), as recorded by UN Watch,22 and through the Canadian experience within the UNCHR.23

Regrettably a narrow focus on human rights tends to neglect social, cultural and economic rights as integral components of the UDHR that has been widely praised and advocated as a set of ‘indivisible’ and ‘inalienable’ rights. It is gratifying that the rationale for promoting and ensuring a more comprehensive application of rights is being advanced.24

Erosion of social solidarity and of stewardship for the future

Further distortions of our value system arise from erosion of the sense of community and social cohesion required to meet aspirations for fairness and solidarity in society, thus reducing the ability to adequately protect valued public goods (highways, urban infrastructure, legal systems etc) and to reproduce caring social institutions (such as basic educational facilities, colleges, universities, and health care), universal access to which are essential for community well being.25 Indeed private (consumer) goods are increasingly viewed as having priority over essential public goods**.** A restricted concept of ‘freedom’ as ‘freedom to act’ (liberty) that focuses on narrow and short-term self-interest does injustice to the concept of freedom that should also include ‘freedom from want’, that requires a sense of obligation, duty and commitment to others.26

Dedication to economic dogma

Another major distortion stems from dedication to a poorly regulated market system that is now increasingly widely acknowledged as based on flawed economic theory and the notion of endless economic growth within practices that are riddled with corruption and fraud, propagated by obtuse bureaucratic processes, all of which increasingly pervade all facets of life.27 Galbraith has eloquently described how the modern economic system is characterized by fraud, perpetrated not necessarily by bad people, but rather under the influence of corporations28 that seem to have all the defining characteristics of psychopaths,29 and which others more recently have recognized as unsustainable.30

The still unfolding recent global economic crisis (with associated major increases in food prices) is seriously harming the lives and health of about 50% of the world's population who live on less than $3–4 per day. The middle classes in the USA, UK, Europe and elsewhere are also affected, and even in the USA millions of families are losing their homes.31 Between 1980 and 2006, the wealthiest 1% of Americans tripled their after-tax percentage of national income, while the share of the bottom 90% dropped by 20%. Between 2002 and 2006, 75% of national economic growth went to the top 1% who own 70% of national wealth. The fact that four hundred US billionaires own more than 155 million Americans combined 32 and that disparities in wealth are wider in the USA than in all other wealthy countries (with associated higher indices of morbidity, mortality, imprisonment and other social pathologies),33 speaks volumes about the distortion of values in that society – the worst of which many seek to emulate. Once a much admired nation with the intellectual and economic potential to lead the world into a more equitable and sustainable 21st century, it is arguable that the USA's opportunity to improve global health is being squandered by short-sighted policies that undermine its own citizens, and many others globally.34 Among other highly adverse effects of a pervasive market ideology is the transformation of medical care into a product for consumption in a ‘free market’.35 With increasing commodification, much else that is valued in life is demeaned, by turning ‘goods’ that should not be sold into marketable commodities.36 Moreover, the world is rendered increasingly unstable and insecure when lives are reciprocally devalued by poverty of moral imagination that ignores the concept of social justice and the role of fairer distribution of resources.37

These criticisms also apply to the new South Africa, where adoption of the above-mentioned economic dogma generally and in relation to provision of health care services specifically, combined with pervasive corruption, has led to widening disparities in wealth (Gini co-efficient increased from 0.6 in 1995 to 0.66 in 2007 and to 0.679 in 2009),38 and health.39 This has contributed to escalating social unrest, and undermining of the hope for greater equity in this new constitutional democracy.40

Most nations now have larger debts than they can easily sustain.41 Corporate goals have come to dominate in life generally and in health care specifically.42 The now threatened middle classes are coming to appreciate the fact that their plight results from the same processes that, in the past, allowed them to flourish at the expense of those lower in the chain of exploitation. It is also arguable that within the professions, greed and personal aspirations increasingly eclipse professionalism.43

The idea of living a life in which there is place for at least some degree of modesty in expectations has seemingly been suppressed. Living beyond our means and accumulating debt seems to have become a norm. Few individuals or nations seem to realize that the solution to global health problems, the economic crisis and all the other social crises we face, lies in doing better with less rather than demanding more. Of course this is also the challenge for dealing with climate change and environmental degradation.44 Whether or not this crucial message can be absorbed and internalised by those who feel the world owes them long, luxurious and safe lives, while billions of others face daily risks and premature death, is an issue that has not been adequately addressed.45

Over-reliance on science for solutions

While it is undisputed that scientific advances have provided, and will continue to provide many solutions to the manifold problems we face,46 undue faith in ‘science’ as the solution to all problems, results in selective and idiosyncratic value being placed on knowledge, with distinct preference for old knowledge over new knowledge, and preference for both new and old knowledge over wisdom in the application of knowledge.47 For example, it should be asked why there is so much emphasis on ensuring that all who could benefit from anti-retroviral drugs (ARVs) have access to these, but insufficient attention is paid to providing food to starving people (much easier to do than supplying drugs).

Another example is how, in child health research, 97% of grants are designed to develop new technologies that could reduce child mortality by 22%. If more were spent on research on effective delivery of existing treatments, child mortality could be reduced by 66%.48 In health care, new research agendas and arrangements that include explicit priority setting and allocation of resources could address the distortions, dysfunctionality and unsustainability that characterize health services everywhere.\

The Report, ‘Beyond Technology: Strengthening Energy Policy through Social Science’, notes that despite having spent over $70 billion since 1977 on research programs in the USA to develop advanced, more efficient, cleaner and more cost-effective energy technologies, these have not been widely implemented.49 Reasons given for this lack of implementation include the complexity of a diverse political milieu with multiple layers of governance and weak public understanding of energy-related challenges and opportunities.

Seeking Solutions

A decade ago we described several values that need to be widely promoted to address the moral challenges posed by global health disparities: respect for all life and universal ethical principles; human rights, responsibilities and needs; equity; freedom; democracy; environmental ethics; and solidarity.50 It seems that distortions of these values may in part account for inadequate progress. In addition to the transformative approaches we suggested at that time, some additional suggestions are provided here.

Individual level

Faced with such daunting crises, I suggest that in order to overcome feelings of helplessness, the first task for each of us, as privileged people, is to become more introspective about our privilege and to re-examine our lives. Questions we need to ask ourselves include: Who am I? What does it mean to be a privileged person? What are my goals in life? What are my academic responsibilities in relation to global health? Should the pursuit of social justice be a priority for health care professionals? Am I a citizen of the world, and should global health be a significant focus for those with an interest in bioethics?

Social level

In responding to what needs to be done at the levels of institutions, states and internationally to seek and achieve significant constructive changes, an important task is to recognize that faith in a market ‘guided by an invisible hand’ as the means of improving the lives of all, has been severely undermined by decades of widening disparities between the wealthy and the poor, and by the implications of the most recent and ongoing severe global economic and other social crises world wide.51

On one account, systematic abuses of basic human rights, including those rights that are critical for achieving a basic, decent minimum good life, are contingent on the absence (or perversion) of an ethics of virtue both in individuals and in institutions.52 Allen Buchanan provides a conceptual framework for what he calls ‘social moral epistemology’ that considers individual virtues to be either strengthened or subverted by the extent to which institutional frameworks are based on factually correct and morally virtuous concepts.53 The pervasiveness of the moral corrosion of institutions and individuals, that allows the perpetuation of harmful or evil practices, poses daunting and complex global problems.54 Addressing these may require a ‘Grand Challenges’ approach, and new depths of understanding to assist in re-framing the ways in which we see ourselves, and the world that could foster thoughtful and constructive approaches towards more sustainable life trajectories.55

A new Grand Challenges agenda

By ‘Grand Challenges’ I mean a large scale, multi-disciplinary series of research projects to explicate in some detail the workings of a complex global system that is undergoing entropy.56 Identification of ‘nodal points’ and ‘receptors’ to target for generating and amplifying change could serve as a prelude to modelling possible ways of effecting constructive changes with the potential to improve global health through structural changes to our economic and values systems. The magnitude of this task is arguably no less than the task of producing an HIV vaccine, which also requires profound understanding of the ways in which the HIV damages the immune system, and how systems' defences can be mounted to oppose such damage. There are no simple answers to either of these challenges, hence the need for a visionary research programme. Similarly suggested solutions for energy sustainability include creating a national vision for future energy use through systematic interdisciplinary social science-based research and policy formulation.57

Among the many issues that need to be pursued through such an agenda would be promotion of understanding and acknowledgment of the values and processes that have shaped the world over the past century, and of the modes of reasoning that have played a central role in framing and driving these values and processes.58 A critical, open and well-publicized re-appraisal of the currently dominant value system and of the adverse effects of the global political economy on health will require interrogation and modification of overt and covert power structures.59 Exposure and critiques of how the wealthy are deeply causally implicated in causing and perpetuating poverty and inequality, and what this implies in terms of distributive and retributive justice,60 could lead to new ways of thinking about progress through nurturing progressive values.61

These would include enhancing literacy and empowerment among women, socialization of many of the ‘risks experiences’ suffered by the global majority,62 and modification of taxation with reduction of tax avoidance and evasion mechanisms.63 Reviewing and restructuring many current institutional arrangements64 could lead to rebuilding the social commons. Within health care, re-examination of the quest for health and how health care services are structured and could be improved, would be a major task.65

### OFF

FTC DA

#### FTC focusing on algorithmic bias now – success is key for follow-on litigation.

Fath 10/19 [Kyle Fath, Kristin Bryan, Christina Lamoureux, and Elizabeth Helpling, \* counsel in the Data Privacy, Cybersecurity & Digital Assets Practice at Squire Patton Boggs, “Data Privacy and Cybersecurity FTC Priorities Going Forward,” 10/19/21, *Consumer Privacy World*, https://www.consumerprivacyworld.com/2021/10/data-privacy-and-cybersecurity-ftc-priorities-going-forward/, EA]

In mid-September, the FTC voted to approve a series of resolutions, directed at key enforcement areas, including the following, each discussed in further detail below:

• Children Under 18: Harmful conduct directed at children under 18 has been a source of significant public concern, now, FTC staff will similarly be able to expeditiously investigate any allegations in this important area.

• Algorithmic and Biometric Bias: Allows staff to investigate allegations of bias in algorithms and biometrics. Algorithmic bias was the subject of a recent FTC blog.

• Deceptive and Manipulative Conduct on the Internet: This includes, but is not limited to, the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

The approval of this series of resolutions will enable the Commission “to efficiently and expeditiously investigate conduct in core FTC priority areas. Through the passage of the resolutions, the FTC has now directed that all “compulsory processes” available to it be used in connection with COPPA enforcement. This omnibus resolution mobilizes the full force of the FTC for the next ten years and gives FTC staff full authority to conduct investigations and commence enforcement actions in pursuit of this goal. The FTC has offered very little elaboration on this front, however, regarding how it will use such “compulsory processes,” which include subpoenas, civil investigative demands, and other demands for documents or testimony.

What does seems clear, however, is that the FTC is buckling down on the enforceability of its own actions. Previous remarks by Chair Lina M. Khan before the House Energy and Commerce Committee expressed frustration at the frequent hamstringing of the agency at the hands of courts in its enforcement efforts in the past. With this declaration of renewed energy, the FTC is summoning all the power it can to do its job, and we should expect to see an energized FTC kick up its patrol efforts in the near future. Businesses that conduct activities that implicate these renewed areas should be aware of the FTC’s focus and penchant for investigations and enforcement in such areas.

Children Under 18

The FTC’s mandate to focus on harmful conduct directed at children under 18 is a signal that the Commission plans on broadening and doubling down on its already active enforcement efforts in this area. Areas of the Commission’s prior and current focus on children include marketing claims, loot boxes and other virtual items that can be purchased in games, and in-app and recurring purchases made by children without parental authorization. Most importantly, the FTC is the main arbiter of children’s online privacy through its enforcement of the Children’s Online Privacy Protection Act (“COPPA”), but that law only applies to children under 13 (i.e., 12 and under). With this new proviso to focus on children under 18, we can certainly expect the FTC to focus on consumer privacy issues, broader than COPPA, for children from ages 13 to 17 as well.

Algorithmic and Biometric Bias

The FTC already has enforcement capabilities to regulate the development and use of artificial intelligence (“AI”) and its associated algorithms. These include the Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices,” the Fair Credit Reporting Act, which rears its head when algorithms impact lenders’ decisions to provide credit, and the Equal Opportunity Credit Act, which prohibits the use of biased algorithms that discriminate on the basis of race, color, sex, age, and so on when making credit determinations. In using these tools, the FTC aims to clarify how algorithms are used and how the data that feeds them contributes to algorithmic output, and to bring to light issues that arise when algorithms don’t work or feed on improper biases.

Bias and discrimination arising from use of biometrics will also now be a focus of the FTC. Interestingly, much recent research and criticism has pointed out that algorithms and biometric systems are biased against faces of color. This has arisen in many contexts, from the iPhone’s FaceID feature to the 2020 remotely-administered bar exam that threatened to fail applicants of color because their webcams could not detect their faces. These are just some of the issues that arise when companies turn to algorithms to try to create heuristics in making business decisions. The FTC has not let these concerns go by the wayside, and after preliminarily addressing them in an April 2021 blog post, has now reestablished that algorithmic and biometric bias is a new focus for the upcoming years.

Notably, AI and other automated decision-making, particularly that which results in legal and/or discriminatory effects, will also become regulated under omnibus privacy legislation in California, Virginia, and Colorado, forthcoming in 2023.

Deceptive and Manipulative Conduct on the Internet (Including “Dark Patterns”)

The sinisterly-nicknamed practice of “dark patterns” happens constantly to online consumers, albeit in ways that tend to seem benign. For example, shoppers contemplating items in their cart may be pressured to complete the sale if they receive a notification like, “Hurry, three other people have this in their cart!” More annoyingly, online consumers who wish to unsubscribe to newsletters or email blasts may find themselves having to click through multiple pages just to free their inboxes, rather than an easily-identifiable and quickly-accessible “unsubscribe” button. “Dark patterns” is the term coined for these sorts of techniques, which impair consumers’ autonomy and create traps for online shoppers.

Earlier this year, the FTC hosted a workshop called “Bringing Dark Patterns to Light,” and sought comments from experts and the public to evaluate how these dark patterns impact customers. The FTC was particularly concerned with harms caused by these dark patterns, and how dark patterns may take advantage of certain groups of vulnerable consumers. The FTC is not alone in its attention to this issue; in March, California’s Attorney General announced regulations that banned dark patterns and required disclosure to consumers of the right to opt-out of the sale of personal information collected through online cookies. These regulations also prohibit companies from requiring consumers who wish to opt out to click through myriads of screens before achieving their goals. On the opposite coast, the weight-loss app Noom now faces a class action alleging deceptive acts through Noom’s cancellation policy, automatic renewal schemes, and marketing to consumers.

With both public and private entities turning their eyes toward dark patterns, the FTC has now declared the agency will put its full weight behind seeking out and investigating “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices…including, but not limited to, dark patterns…” Keeping an eye on this work will be important—just as important as keeping an eye on which cookies you accept, and which are best to just let go stale.

In addition to being in the crosshairs of the FTC, dark patterns are also a focus of regulators across the globe, including in Europe, and will be regulated under California’s forthcoming California Privacy Rights Act.

Anticipated Litigation Trends

With the FTC declaring its intent to vigorously investigate these three aforementioned areas, we now turn to what the agency’s new enforcement priorities mean for civil litigation. As practitioners in this field already know, it is unlikely that they will result in an influx of new litigations. The FTC’s enforcement authority exists pursuant to Section 5(a) of the FTC Act, which outlaws “unfair or deceptive acts or practices in or affecting commerce,” but does not contain a private right of action – so plaintiffs cannot technically bring new suits based on the new enforcement priorities, as they have no private right to enforce those priorities.

However, these areas of focus could influence broader trends in civil litigation, even if, on their own, they do not create any new liability. Successful enforcement actions by the FTC could bring about new industry standards with respect to algorithmic bias, dark patterns, and other areas of focus. These standards, in turn, could be cited in consumer privacy class action complaints. New civil actions could also stem from enforcement actions by the FTC and the information revealed in settlements resulting from such actions. For example, the FTC announced a settlement with fertility-tracking app Flo Health Inc. in January; this month, a consolidated class action complaint was filed against Flo Health, stemming from seven proposed class actions filed against it this year, alleging that the app unlawfully shared users’ health information with third parties.

#### The plan trades off – empirically privacy and antitrust are zero-sum.

Kovacic 13 [William E. Kovacic & David A. Hyman, Professor of Law at George Washington University, "Competition Agencies with Complex Policy Portfolios: Divide or Conquer?" GW Law Faculty Publications, 2013, https://scholarship.law.gwu.edu/faculty\_publications/631, accessed 7-4-21]

A second mechanism is to fund new projects adequately by a relatively silent form of triage. This consists of draining resources away from other programs ostensibly designed to implement congressionally imposed duties. To support new programs in areas such as privacy, data protection, and mortgage lending fraud, the FTC over time has quietly abandoned other programs that used to be mainstays of enforcement. To some extent this is done with at least the implicit approval of Congress. Through official budget requests and oversight hearings, Congress is at least generally aware of how the Commission is spending its money. It can detect that some areas of policy responsibility seem to be inactive. Congress can observe, for example, that the FTC has brought two Robinson-Patman Act price discrimination cases in the past 23 years.112 This reliably indicates diminished attention to a statute whose enforcement in the 1960s yielded hundreds of cases. For the most part, the FTC has constructed or retooled major programs involving privacy, financial services, mergers, horizontal restraints, and single firm conduct by severely reducing outlays for the enforcement of the Robinson-Patman Act and consumer protection statutes dealing with fur and textile labeling.

#### Extinction

Thomas 20 [Mike Thomas, Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn, “The Future of Artificial Intelligence: 7 ways AI can change the world for better ... or worse,” 04/20/20, *BuiltIn*, https://builtin.com/artificial-intelligence/artificial-intelligence-future]

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too.

“I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.”

What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing.

“Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.”

But no one knows for sure.

“There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.”

But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should.

“Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### OFF

Common Law CP

#### Without reference to the laws of the United States, the United States federal government should determine that anticompetitive settlements related to pharmaceutical patents constitute an unlawful restraint on trade and commerce. The United States Congress should restrict the scope of its core antitrust laws to exclude illegalizing anticompetitive settlements related to pharmaceutical patents.

#### The CP creates federally preemptive statute-independent common law with the same effect as the plan.

HLR 20, Harvard Law Review, “Antitrust Federalism, Preemption, and Judge-Made Law,” 133 Harv. L. Rev. 2557, Lexis

None of this is to say that ERISA preemption fails to raise federalism concerns or that the concerns addressed in Part II are unique to anti- trust. In its decision to expressly preempt state law in ERISA, a wise Congress should have considered the difficulties of preemption via judge-made law. Part II’s concerns with preemption via judge-made law could be applied to any delegation to the judiciary that overrides the states’ will. But given the brevity of federal antitrust statutes and the relative lack of executive branch involvement, Congress should be even more wary if it decides to preempt state antitrust law.159 [FOOTNOTE 159 BEGINS] 159 Complaints about brevity and lack of executive branch involvement land an even stronger blow against preemption via statute-independent federal common law. A grant of federal common lawmaking power does not have to be statutory. All that is needed to support the development of federal common law is “some expressed or implied affirmative grant of power to the national government by the Constitution or a statute enacted pursuant to it.” 19 MILLER, supra note 132, § 4514. When courts make law from a constitutional grant, there may not even be a brief statute. See, e.g., Clearfield Tr. Co. v. United States, 318 U.S. 363, 366–67 (1943) (“When the United States disburses its funds . . . it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); see also 19 MILLER, supra note 132, § 4515; Volokh, supra note 94, at 1429 (discussing courts’ “statute-independent federal common-lawmaking powers”). Because statute-independent common law is created completely by the courts, preemption via statute- independent common law will preempt the states while also excluding the federal executive branch.

Part II’s critique then undermines statute-independent common law preemption even more than it undermines a preemptive Sherman Act. But Part II proffers only an argument that weighs against preemption; that argument must be balanced against the various pro-preemption critiques of Part I. When it comes to statute-independent common law, the pro-preemption arguments may simply be greater than they are in the antitrust arena. After all, such statute-independent common-lawmaking power exists only “in suits implicating a sufficiently strong interest of the national government.” 19 MILLER, supra note 132, § 4515. And it makes sense that common law grounded in the Constitution has more sway than does common law grounded in statute. Although antitrust law has sometimes been likened to the Constitution or other founding documents, see United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Antitrust laws . . . are the Magna Carta of free enterprise.”); Thomas B. Nachbar, The Antitrust Constitution, 99 IOWA L. REV. 57, 69 (2013), courts simply give its commands less weight than those of the Constitution. Compare, for example, the (limited) deference given to professionals in the antitrust sphere, see Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 696 (1978) (analyzing agreements by professionals under the rule of reason), to the zero deference given to professionals under the First Amendment, see Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–72 (2018). Even if statute-independent common law’s complete lack of input from the democratic branches increases the power of the federalism critique, that increase is rebutted by an increase in the power of the pro-preemption arguments. [FOOTNOTE 159 ENDS]

#### Revitalizing non-statutory common law as binding spurs quick climate mitigation – extinction

Mark P. Nevitt & Robert V. Percival 19, Mark P. Nevitt is the George Sharswood Fellow at the University of Pennsylvania Law School and a former active duty Navy Judge Advocate General (JAG) officer who served in the rank of commander; Robert V. Percival is the Robert F. Stanton Professor of Law & Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law, “Could Official Climate Denial Revive the Common Law as a Regulatory Backstop?,” Washington University Law Review, Vol. 96, No. 3, pp 441-494

“Global warming may be a ‘crisis,’ even ‘the most pressing environmental problem of our time.’ Indeed, it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it. It is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.”

— Chief Justice John Roberts, dissenting in Massachusetts v. EPA (2007)1

“The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.”

— Donald J. Trump, Nov. 6, 20122

INTRODUCTION

Prior to the advent of comprehensive regulatory programs to protect the environment, the common law served as the primary vehicle for redressing environmental harm. More than a century ago, states used the common law of interstate nuisance to seek redress for the most serious transboundary pollution problems.3 Exercising its original jurisdiction over disputes between states, the U.S. Supreme Court issued injunctions limiting smelter emissions4 and requiring cities to build sewage treatment plants5 and garbage incinerators.6

Today the common law has been eclipsed by the enactment of federal legislation requiring agencies to regulate sources of pollution. These statutes have been interpreted broadly to give agencies great power to respond to emerging problems. For example, in Massachusetts v. EPA the U.S. Supreme Court held that the Clean Air Act (CAA) gives the U.S. Environmental Protection Agency (EPA) the authority to regulate greenhouse gas (GHG) emissions if they “endanger public health or welfare”7 by contributing to global warming and climate change.8 The Court rejected not only the claim that EPA lacked such authority, but also the agency’s other rationales for refusing to take action. 9 Following the ruling, EPA had to decide “whether sufficient information exist[ed] to make an endangerment finding.”10 It made the endangerment finding two years later.11

In a series of cases beginning in the 1970s, the Court has held that the comprehensive regulatory programs erected by the Clean Water Act (CWA) and the CAA displace federal common law nuisance claims.12 When states sought to use public nuisance law to address the threats posed by climate change, industry groups urged the Court to bar such actions on constitutional grounds. 13 Instead, in June 2011 the Court held in American Electric Power Co., Inc. v. Connecticut (AEP) that the CAA displaced federal common law nuisance claims in the context of regulating GHG emissions. At the time of the ruling, the Obama Administration EPA was moving aggressively to regulate GHG emissions. But, writing for a unanimous Court, Justice Ginsburg warned that a decision by the EPA not to regulate greenhouse gas emissions would invite litigation and would be subject to judicial review.14

With the election of President Trump, federal environmental policy has sharply shifted. The President has announced his intent to withdraw the U.S. from the Paris Agreement that every other country in the world has accepted as a global response to climate change.15 EPA is moving aggressively to repeal the Obama Administration’s Clean Power Plan, 16 roll back Corporate Average Fuel Economy (CAFE) standards, and attempt to preempt state programs to reduce GHG emissions. 17 Many Trump supporters want EPA to reverse its finding that GHG emissions endanger public health and welfare by contributing to climate change.18

If the Trump EPA reverses the 2009 endangerment finding, this would foreclose the EPA’s ability to use the CAA to regulate GHG emissions. This Article considers whether such an action unwittingly could revive the federal common law of nuisance as a regulatory backstop. While the Supreme Court ruled in AEP that the CAA displaces any federal common law right to seek abatement of carbon-dioxide emissions from fossil fuelfired power plants, this was predicated on EPA actually making a reasoned and informed judgment of GHG emission dangers—not jettisoning agency expertise in favor of politics.19 This litigation, particularly if brought by states as quasi-sovereigns against EPA, could serve as a powerful prod to force federal action on climate change. After all, states have the “last word as to whether [their] mountains shall be stripped of their forests and [their] inhabitants shall breathe pure air.”20

In light of the Trump EPA’s current stance on environmental regulations, the Court’s decision in AEP, and other nuisance cases decided by federal appellate courts, 21 this is a propitious time to reconsider the use of public nuisance law to redress environmental problems. This Article focuses on what we call “the common law of interstate nuisance”—a body of law developed when states, acting in a parens patriae capacity, sought to protect their citizens from environmental harm originating in other states through public nuisance actions under either federal or state common law.22

### OFF

States CP

#### The 50 states and all relevant territories should prohibit anticompetitive settlements related to pharmaceutical patents.

### OFF

T-Exemptions

#### The scope of antitrust law is exclusively bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, 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, 3/18/19, 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.

#### Vote neg – eliminating exemptions and immunities provides a limited AND predictable basis for prep – the aff allows infinite expansions

### OFF

Adv CP

#### The United States Federal Government should

#### ---Substantially increase opioid treatment programs;

#### ---Establish a covert policy of not intervening in Mexico in the event of state collapse;

#### ---Eliminate wasteful spending on healthcare; and

#### ---Substantially invest in research to develop antibiotics against AMR.

## Solvency

#### Vagueness dooms solvency – big business lawyers and judges subvert the plan

Stoller, 21 -- American Economic Liberties Project research director

[Matt Stoller, former policy advisor to the Senate Budget Committee, "Why Did Congress Just Vote to Break Up Big Tech?," BIG, 6-25-21, https://mattstoller.substack.com/p/why-did-congress-just-vote-to-break, accessed 6-25-2021]

The bad is pretty simple. The tech-specific bills, as written, probably won’t deliver what their sponsors think they will, because they didn’t get all the specifics right. This isn’t intentional, it’s just that it is hard to write this kind of legislation. A friend once told me a good legal expression, ‘to write a good law, you have to think like a criminal.’ And that’s basically right. There are **extremely well-paid lawyers** who will spend their time exploiting the **tiniest loophole**, so good drafting means thinking about making statutes airtight. Competition law is complex and warped to make drafting full of **legal minefields**, so without extreme care in the language, the law will likely be **subverted**.

To understand why it’s so hard to get these laws right, it helps to start with the two basic problems with antitrust law. The first is that regulators and enforcers make key policy decisions, and have done a very bad job at it. A good example is they just decided to stop enforcing the anti-chain store Robinson-Patman Act, which prohibits certain forms of kickbacks, as well as prohibiting giving better prices to bigger customers. At some point in the 1970s and 1980s, the Department of Justice and FTC chose not to enforce the law anymore. And when they stopped doing so, Walmart and other chain stores, and eventually Amazon, exploded in size and power.

And then there are judges. Judges have been trained in a type of thinking in which antitrust is all about promoting a certain form of economics, known as ‘consumer welfare.’ Most of the things you and I would consider unfair, like paying kickbacks to someone to stop them from selling rival products, or selling below cost to drive your competitors out of business, or intentionally making your products incompatible to undermine smaller rivals, judges tend to see as ‘pro-competitive,’ which is to say, good and efficient. I’m not kidding. Yesterday, Obama-appointed judge Daniel Crabtree dismissed an antitrust case against Epipen maker Mylan, which was paying bribes to stop their competitor’s product from being available to consumers. To Crabtree, such bribes weren’t corrupt, they were efficient!

It’s not that judges are corrupt, it’s that there is now 40 years of case law saying that they must generally be hands-off and let firms do what they want. And to get judges to rule in your favor, plaintiffs must spend millions of dollars getting an economist to make up fancy models saying that intervening in a particular case creates more economic value than not intervening, and then hopefully the judge flips a coin and likes your expert more than Amazon’s expert. To put it differently, imagine if, say, you had to show in any robbery case not just that your money was stolen, but that you would spend your money more wisely than the person who took it. That’s basically what antitrust is like these days. This is called ‘consumer welfare’ but it is in fact just a corrupt and foolish way to understand law.

The way to address both problems - bad regulators and bad judges - is to write very specific and careful legislative text. Give clear instructions on which practices are and are not legal, and try to avoid corrupted words like competition, which only invite judges to opine on economic questions. Moreover, have a clear vision on what gets broken off from what. These bills don’t really do that. (Neither did Klobuchar’s bill introduced earlier this year; state Senator Michael Gianaris’s antitrust update in New York came closer.)

The break-up bill, for instance, centers on conflicts of interest between lines of business. But it never defines what it means by “line of business,” and **this stuff gets very blurry**. **Big tech will use** this **ambiguity to its advantage**. Right now, for instance, Amazon has a marketplace on Amazon.com. It also has a logistics business, Fulfillment by Amazon. If you try to split these two obviously different divisions apart, Amazon will claim that these are all one line of business, with Amazon Prime, Fulfillment by Amazon, and Marketplace all one thing. And then a judge gets to decide whether that’s true, because this bill doesn’t. Judges really don’t like to make what they perceive of as product design decisions, preferring to defer to monopolists. So yeah, that’s a problem.

This problem is pervasive across the legislative text. The merger bill, rather than a straightforward ban on big tech mergers, instead says big tech firms have to jump through a bunch of hoops showing that whoever they are buying doesn’t compete with them or potentially compete with them. That sounds fine, except that judges understand ‘competition’ to mean very expensive and unwieldy fights over how to define the market, according to fancy expensive economists. So basically enforcers will still have to unnecessarily spend massive resources to stop big tech mergers, though they will have more authority to do so. (Also, during the mark-up, big tech managed to punch a hole through this one, exempting mergers of less than $50 million. But that happens.)

## Access Adv

#### Congress is taking on product hopping and pay for delay *now* – antitrust is unnecessary

Kevin Dunleavy 7/30, graduate of George Mason University, “Pharma Senate takes aim at pharma's patent schemes, pay-for-delay deals in renewed drug pricing crackdown,” 7-30-2021, Fierce Pharma, <https://www.fiercepharma.com/pharma/as-a-way-to-reduce-drug-prices-and-enhance-competition-senate-takes-aim-at-patent>

Answering the call on Thursday was the Senate Judiciary Committee, which voted unanimously to [advance](https://www.durbin.senate.gov/newsroom/press-releases/senate-judiciary-committee-advances-bipartisan-bills-to-address-lack-of-competition-in-pharmaceutical-industry-and-rising-cost-of-prescription-drugs) four pieces of legislation which would help rein in the cost of prescription drugs.

The new laws take particular aim at the tactics used by drug companies to extend patent protections and stifle competition from cheaper generic and biosimilar drugs. The legislation, which would enhance the Federal Trade Commission's ability to initiate enforcement actions against drug companies, now moves to the Senate floor for a vote.

In introducing the legislation, co-sponsor Sen. Dick Durbin (D-Ill.) took aim at the world’s best selling drug, AbbVie’s Humira. The drug has 130 patents, 90% of which were obtained after its initial approval, the senator said.

But the legislation didn't advance without debate over unintended consequences.

“I agree with the general proposition across these four bills,” said Sen. Chris Coons (Del.). “But I also am concerned that we continue to protect the patent system itself. Overly aggressive use of the tools created in this legislation could sweep up good actors as well as bad actors and could have unintended negative consequences.”

One of the bills, The Stop STALLING Act, would give the FTC authority to take action against companies that file sham petitions with the FDA to delay market entry for generics and biosimilars.

The Preserve Access to Affordable Generics and Biosimilars Act would limit “pay-for-delay” deals in which companies compensate generic manufacturers to delay the entrance of their products into the market. Sen. Amy Klobuchar (D-Minn.) explained that the bill would still allow companies to pursue agreements but would narrowly target “the type of settlement agreements that raise serious competitive concerns.”

The Prescription Pricing for the People Act calls on the FTC to examine the pharmaceutical supply chain and determine whether pharmacy benefit managers—such as CVS and Express Scripts—are engaged in anti-competitive behavior.

The Affordable Prescriptions for Patients Act would curb drug companies’ abuse of patents through “product hopping,” where companies extend exclusivity by switching patients to a tweaked version of a drug while an older version succumbs to generics.

“What we’re essentially trying to do here is make the patent system stronger by validating new products, innovation and generics so they can come to market and reduce the costs of pharmaceutical prices,” said Sen. Richard Blumenthal (D-Conn.).

Eliot Fishman, the director of health policy at Families USA, a consumer health care advocacy organization pushing for drug price reforms, lauded the initiative.

"Effective prescription drug reform needs to get prices down and also to close off dysfunctional incentives that suppress innovation," said Fishman in a statement. "The Judiciary Committee took a major step to the second part of this agenda. We are optimistic that both Medicare prescription drug negotiation and reforms to patent, pay for delay and PBM abuses will become law in this Congress."

#### Increasing generics isn’t enough to solve demand – people don’t have health insurance OR refuse treatment

#### Can’t solve demand in other countries

#### Cartels are diversifying – opioids not key

**O’Dowd 20** [Peter, Senior editor for Here & Now, with Allison Hagan, 2/7/20. “Why Avocados Attract Interest Of Mexican Drug Cartels.” https://www.wbur.org/hereandnow/2020/02/07/avocados-mexican-drug-cartels]

Reports on the murders say clandestine avocado farms had something to do with the two deaths. Mexican drug cartels have broken into the lucrative avocado business in the state of Michoacán, where most of the avocados imported to the U.S. come from. For several years, the cartels have been diversifying their portfolios to include a range of legal economies in addition to drugs, says Eduardo Moncada, an assistant political science professor at Barnard College. “Avocados represent a major source of income in the state of Michoacán in Mexico,” says Moncada, who is writing a book in part about extortion in Michoacán. “And as such, they've been mobilizing to try and capture money from that sector.” The cartel engages in extortion of avocado producers, transporters and packers to gain control over the sector. By taking over lands used to produce avocados, they become “informal owners” of the fields and profit from sales, he says. The cartels are broadening their portfolios beyond avocados, too. Taking control of land — like the butterfly reserve — allows them to produce more agricultural goods, and the wood and timber there is also valuable, he says. Mexico’s war on drugs began in 2006 under the reign of former President Felipe Calderón. On top of the violence that the conflict unleashed, it also fragmented the country’s handful of large cartels to many smaller ones, he says. “In order to survive and thrive in that kind of context, the cartels began to diversify their portfolios in a way to try and gain resources,” he says.

#### Mexican government can’t control cartels – alt causes

1AC Grinberg ’19 [Alexander Grinberg, U.S. Army officer, “Is Mexico a Failing State?” Strategy Bridge, Reeal Celar Defense, 2—7—19, <https://www.realcleardefense.com/articles/2019/02/07/is_mexico_a_failing_state_114170.html>, accessed 5-15-20]

One of the reasons Mexico cannot gain ground over the cartels is because its military is deteriorating through ineffective leadership. The first indicator of the military’s breakdown is the deterioration of discipline where there is a growing number of unlawful killings and human rights violations. Human Rights Watch reported that by 2016, the National Human Rights Commission received almost 10,000 complaints, and more than a 100 cases were considered as “serious human rights violations.” Of those abuses investigated from 2012 to 2016, only 3.2% reached a conviction. Instead of cracking down on these abuses, President Nieto expanded military participation in policing. As the drug war continues, and the federal government does not crack down on the human rights violations, the Mexican military will further deteriorate. The Mexican military leadership’s lack of control over the behavior of their forces indicates an erosion in the chain of command and the respect for their Code of Military Justice, and it suggests further corruption.

Mexican cartels provide financial incentives for members of Mexico’s armed forces to defect, a symptom of the Mexican military's weak state. A 2008 USA Today article noted that from January to September 2007 4,956 soldiers deserted, approximately 2.5% of the force. Fox News reported that by 2012 over 56,000 soldiers deserted. As of 2016, the total approximate number of deserters is around 150,000. PBS interviewed local reporters in Cancun and a former police officer, learning the cartels would offer payments of $26,000 compared to the soldier’s $600 salary. Also, these underpaid officers were poorly trained and equipped, some to a point where an officer carried only six rounds of ammunition. The article also reported the cartels were waging a propaganda war against the military. They posted ads and offered better pay than the army. The cartels successfully recruit from the military, specifically even finding recruits from Mexican special forces communities. Many of these deserters end up working for the cartels as trained hitmen who comprehend Mexican military tactics. These trained ex-soldiers understand how to circumvent Mexican patrols, and have a basic understanding of how to effectively engage conventional military forces.

The gradual comprehensive collapse of order in Mexico is unlikely to reverse even with the recent election of Andrés Manuel López Obrador. Obrador’s counter-cartel policy platform of amnesty, as well as his aspirations for a military reformation, will only embolden the cartels. However, as he just took office, it is important to wait and see what he and his cabinet will pursue and the effectiveness of their policies.

Obrador’s amnesty proposal, a way to attack cartel funding and offer a peaceful alternative for certain low ranking and non-violent cartel members, is idealistic but naive. Vanda Felbab-Brown is a Senior Fellow at the Brookings Institution and the author of Narco Noir: Mexico’s Cartels, Cops, and Corruption. She discussed Obrador’s platform in a 2018 Foreign Affairs article, critiquing Obrador and specifically focusing on the problematic reality of Mexico’s lack of ability to adequately fund its programs, much less its military. For example, she highlights President Nieto’s Social Prevention of Violence and Delinquency program, with its limited success. Unfortunately, that success was not expanded, as the program’s funding ran out by 2016. Brown discusses targeting mid-level cartel leadership instead of the top leaders as a means of preventing violent successions of their rule. Her suggestion targets Obrador’s platform of amnesty for non-violent cartel members.

#### Their ev says US forces thought Mexico would collapse in 2009 – thumps the impact

#### Covid doesn’t amplify the risk – it’s an alt cause

#### No reason conflict in Mexico causes the US to pull out of commitments in other countries – Mexico not a priority and their ev is from 11 years ago

#### No readiness impact – aversion to war solves

Mueller 20 [John Mueller, Woody Hayes Senior Research Scientist at the Mershon Center for International Security Studies, and adjunct professor of political science at The Ohio State University, ““Pax Americana” Is a Myth: Aversion to War Drives Peace and Order,” 2020, *The Washington Quarterly*, Vol. 43, Issue 3, pp. 115-136, https://www.tandfonline.com/doi/full/10.1080/0163660X.2020.1813398, EA]

Maintaining a Large Military Force is Unnecessary

Third, the rise of an aversion to international war suggests that there isscarcely a need to maintain a large military force. In fact, the achievements of the US military since World War II, not to put too fine a point on it, have not been very impressive. Some continue to maintain that it was the existence of the US military that kept the Soviet Union or China from launching World War III. However, as suggested earlier, the Communist side never saw direct war against the West as being a remotely sensible tactic for advancing its revolutionary agenda; that is, there was nothing to deter. Moreover, for all the very considerable expense, the American military has won no wars during that period—especially if victory is defined as achieving an objective at an acceptable cost—except against enemy forces that scarcely existed: Grenada, Panama, Kosovo, and Iraq in the Gulf War of 1991.

More recently, there has been a successful war against the insurgent group the Islamic State, or ISIS. However, the principal American contribution has been air support; others have done the heavy lifting—and dying.71 The US military can take credit for keeping South Korea independent—no other country at the time would have been able to do that. But it went to war there in 1950 for other reasons, and it badly botched the effort and massively increased the costs by seeking to liberate North Korea as well. And in the 21st century, American military policy, especially in the Middle East, has been, for the most part, an abject failure. In particular, at the cost of hundreds of thousands of lives, Iraq and Afghanistan have undergone more travail and destruction than they would likely have undergone even under the contemptible regimes of Saddam Hussein and the Taliban.

Maintaining a huge and expensive US military force-in-being might make sense, despite the abundant record of failure, if there existed coherent threats that required such a force. Although there are certainly problem areas and issues in the world, none of these seems to present a security threat to the United States large or urgent enough.72 It may make sense to hedge a bit, however, by judiciously maintaining small contingents of troops for rapid response and for policing functions, a capacity to provide air support for friendly ground troops in localized combat, a small number of nuclear weapons for the (wildly) unlikely event of the rise of another Hitler, something of an effort to deal with cyber, an adept intelligence capacity, and the development of a capacity to rebuild quickly should a sizable threat eventually materialize.

And there is a related issue: having a large force tempts leaders to use the military to solve problems for which it is inappropriate, inadequate, and often counterproductive. In the wake of the disastrous Vietnam War, Bernard Brodie wistfully reflected that “one way of keeping people out of trouble is to deny them the means for getting into it.”73 More than forty years later, Brodie’s admonition continues to be relevant.

## Econ Adv

#### Covid thumps the internal link and impact

#### Antitrust doesn’t solve

Christine S. Wilson & David A. Hyman 20, Wilson is a commissioner of the Federal Trade Commission. Hyman is the Scott K. Ginsburg Professor of Health Law & Policy at Georgetown University School of Law and former commissioner of the Federal Trade Commission, 7-10-2020, "Pharma pricing is a problem, but antitrust isn't the (only) solution," The Hill, https://thehill.com/blogs/congress-blog/healthcare/506763-pharma-pricing-is-a-problem-but-antitrust-isnt-the-only?rl=1

As current and former FTC officials, we believe these proposals represent a flawed approach. The notion that the FTC should prevent mergers absent evidence of an antitrust violation is deeply misguided – and jeopardizes the FTC’s impressive winning streak based on the many cases it has brought. During the past five years, the Commission has challenged 14 pharmaceutical mergers and required companies to divest 131 drugs. Beyond mergers, in 2013 the FTC won a landmark victory at the Supreme Court in FTC V. Actavis, essentially eliminating anticompetitive patent litigation settlements. And in January, the FTC sued Vyera Pharmaceuticals and “pharma bro” Martin Shkreli. These efforts result in massive savings for consumers and taxpayers; just ending reverse payments in patent litigation settlements saves $3.5 billion each year.

Still, drug prices continue to rise, especially for new drugs debuting at prices once considered unimaginable. For example, Zolgensma, a gene therapy for treating spinal muscular atrophy, has a list price of $2.1 million. Cancer drugs are so expensive that oncologists talk about “financial toxicity” as a side effect of treatment.

This is a particularly knotty problem for the elderly who receive health care coverage through Medicare and have been hard hit by COVID-19. The government is prohibited from using competitive bidding or direct negotiation when sourcing drugs for Medicare Part B — those administered by medical professionals. So drugmakers name their price and the federal government must pay.

Medicare Part D operates under a different model – companies use formularies to push down prices for outpatient drugs. Even that model falls short for drugs that do not yet face competition, and Part D is projected to cost more than $88 billion in 2020. Market exclusivity on so-called biologics like vaccines and insulin often outlasts patent protection, given the technological challenges in creating bioequivalent generics known as biosimilars. Incumbents often compound this problem by restricting distribution and withholding samples from potential competitors.

We support efforts to address rising drug prices while maintaining strong incentives for innovation. Strategies include the new CREATES Act, which allows drug makers to sue for access to drug samples; expedited or automatic approval for biosimilars that have passed muster with the European Medicines Agency; and incentivizing innovation with prizes.

As this list indicates, many causes of breathtaking pharma prices lie beyond the reach of the antitrust laws. Notably, the structure of the U.S. health care system inhibits consumers’ ability and incentive to choose among different providers and products, including prescription drugs. Because insurers pick up much of the tab, patients have little incentive to compare the prices of potentially interchangeable drugs. Even if they were so inclined, the opacity of drug prices and dearth of data available to patients about quality and outcomes inhibits comparison shopping.

To fix the root causes of high pharma prices, we should focus on the drivers of those prices rather than scrapping fundamental antitrust doctrine, including the requirement for evidence of an actual competitive problem.

#### Alt causes to rising healthcare costs – population growth, increased access to care, demographics

**Scott, 21** -- New York attorney with extensive experience in tax, corporate, financial, and nonprofit law, and public policy

[Michelle P. Scott, "U.S. Healthcare Costs Projected to Reach Almost 20% of GDP by 2028," Investopedia, 9-29-2021, https://www.investopedia.com/u-s-healthcare-spending-rising-fast-5186172, accessed 10-7-2021]

External cost factors: basic economics and demographics

CMS estimates, as well as other projections of future increases in U.S. health spending, assume that the current structure of the healthcare sector generally will continue. These projections also take into account external developments that impact costs. Although academic, political, and industry sources are generating many proposals for cost savings—including significant structural changes—the prospect for substantial change is uncertain. Certain externalities, particularly demographics, will challenge cost-containment efforts.

Supply and demand—Healthcare spending is subject to the basic economic principles of supply and demand. As the population grows and more individuals enjoy better access to care because of developments such as the Affordable Care Act, increased Medicare enrollment, and expanded Medicaid and other government programs in some states, expenditures will rise. What’s more, limitations on current and future supply, particularly with respect to the education and licensing of medical professionals, may result in unmet demand that could easily lead to rising prices.17 In addition, the increase in the production of expensive drugs protected by patents will also cause spending increases unless cost-containment measures—much if not all of which will probably require legislation—are adopted.18

Baby boomers and the larger insured population—Demographics constitute a significant contributor to the rapid ascent of healthcare costs and will have a substantial, immediate impact. As increasing numbers of the baby boom population born between 1946 and 1964 reach Medicare age, that program is projected to experience its highest-ever rate of spending growth among healthcare payers—7.6%—between 2019 and 2028.2 Based on the distribution of births between 1946 and 1964, the peak year for new Medicare enrollment likely will be 2022, 65 years after 1957, the year the greatest number of boomers were born.1920

As of 2019, 10,000 baby boomers were aging into the program every day.21 MedPAC has estimated that Medicare enrollment will reach 80 million by 2030.22 And as years pass, the Medicare program will have an increasing number of older—and thus more expensive—beneficiaries.

With per-person healthcare expenditures for individuals age 65 and older estimated at five times the spending per child and almost three times the amount per working-age person, the impact of the older cohort is obvious. In 2019 the average Medicare expenditure per enrollee was $13,276, while overall the national average per-person spending was $11,582. Private insurers, who generally pay higher fees than Medicare does but whose enrollees are typically younger and less expensive than the Medicare population, spent $5,927 per person in 2019. Medicaid, which covers individuals of all ages, spent an average of $8,485 per person.2

During periods of increased enrollment in private insurance and public programs, healthcare costs generally can be expected to increase as more people take advantage of their coverage. Assuming enrollees continue their insurance coverage indefinitely and preventive care reduces the severity and cost of later healthcare needs, individual healthcare costs may decline. However, longer-term savings may not be realized because of terminated insurance coverage (for example, when job loss ends employer coverage or individuals lose government benefits). In addition, high deductibles and copays may discourage the use of covered services by lower-income enrollees and limit their access to long-term and continuing coverage, thereby preventing comprehensive care.23

#### None of their ev says there would be a total economic collapse – not enough to trigger their impact

#### No impact to economic decline – COVID proves.

Walt 20 [Stephen M. Walt, Robert and Renée Belfer professor of international relations at Harvard University, “Will a Global Depression Caused by the Coronavirus Pandemic Trigger Another World War?,” 05/13/20, *Foreign Policy*, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/, EA]

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

## Innovation Adv

#### This advantage is dependent on winning the econ adv – otherwise ABR innovation doesn’t matter because no one can afford it

#### Double bind – either other countries fill in OR there are alt causes to innovation in ABR

#### No ev that tech breakthroughs can solve ABR – their internal link is about generic innovation

#### No natural ex risk

Ord 20 [Toby Ord, Senior Research Fellow in Philosophy at Oxford University, “The Precipice: Existential Risk and the Future of Humanity,” 2020, Hachette Books, EA]

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

#### No impact to ABR

Smith 16 [Drew Smith, former R&D director at MicroPhage and SomaLogic, “The Myth Of The Post-Antibiotic Era,” 06/14/16, *Forbes*, https://www.forbes.com/sites/quora/2016/06/14/the-myth-of-the-post-antibiotic-era/, Accessed: 04/28/21, RC EA]

The worst-case scenario would be that it would be like 1940, only without a raging World War. Keep in mind that by 1940, before the introduction of penicillin, deaths from infectious diseases in the US had been reduced by 90% from their 19th century levels [1]. This reduction was entirely due to the provisions of clean food, water, and vaccines. We have (or should have) better systems for delivering these public health goods than we did 75 years ago.

But there is never going to be a post-antibiotic era. Antibiotic therapy will continue to be effective most of the time. If antibiotic therapy is informed by rapid microbiology testing, then it will be effective nearly all of the time. Very few bugs are, or will be, pan-resistant and untreatable by antibiotics. Even the worst superbugs—MRSAs, CREs, ESBLs, and now MCR-1s—are almost always susceptible to at least one clinically useful antibiotic (XDR TB is the most troubling exception to this rule).

What has changed is that resistance to at least one first-line antibiotic is now common, and doctors will have to become smarter about their prescribing practices. They can no longer mindlessly write scripts based on signs and symptoms alone and expect good results every time. Doctors consistently underestimate local levels of resistance, and exhibit high levels of complacency about the impacts of resistance on their practices [2] [3] [4] . This culture of complacency will have to change.

Antibiotics will continue to be effective, but our traditional method of prescribing them, called empiric therapy [5], will become increasingly ineffective. This will require a change in the way that we use antibiotics, but will not be an end to the usefulness of antibiotics. That is an important distinction to keep in mind when reading articles about the coming antibiotic apocalypse: change, yes; the end, no.

# 2NC/1NR

## T-No Courts

### 2NC – AT: WM

#### Inserting their 1AC ev here –

#### The Actavis doctrine is flawed—an overreliance on the size of reverse payments opened the floodgates for brands to avoid scrutiny by shifting to other methods, and strike down valid settlements—the result is a massive delay in generic entry.

Lavery et al. 21 (William Lavery is a lawyer whose practice focuses on antitrust and competition law, cartel and criminal antitrust investigations, and litigation. Will has also been recognized as a leading antitrust practitioner by The Legal 500 (2017-2020) and Super Lawyers (2014-2020), as well as being named a "Rising Star" by Law360 (2016) as one of the top competition lawyers under 40 in the country and a "Next Generation" partner by The Legal 500. Christine Ryu-Naya is an experienced antitrust lawyer whose practice focuses on U.S. and international merger clearance, counseling, investigations, and antitrust litigation. Christopher Wilson is a senior associate in Baker Botts' Antitrust and Competition Practice group. His practice focuses on civil antitrust, intellectual property, and other complex commercial actions. 4-13-2021, accessed on 7-19-2021, Baker Botts, "Fifth Circuit Hands FTC Win in FTC’s First Fully-Litigated Reverse-Payment Case Following the Supreme Court’s Landmark Actavis Decision", https://www.bakerbotts.com/thought-leadership/publications/2021/april/fifth-circuit-hands-ftc-win-in-ftc-first-fully-litigated-reverse-payment-case)

\*italics are from the original article

On April 13, 2021, the U.S. Court of Appeals for the Fifth Circuit upheld the Federal Trade Commission’s (“FTC” or “Commission”) ruling that the “reverse-payment” settlement agreement between Endo Pharmaceuticals Inc. (“Endo”) and Impax Laboratories LLC (“Impax”) violated federal antitrust laws. The Fifth Circuit’s decision—which upholds the FTC’s first fully-litigated reverse-payment case since the Supreme Court’s landmark 2013 ruling in FTC v. Actavis (“Actavis”)—found the FTC’s findings that Endo and Impax entered into an unlawful “pay-for-delay” agreement to be supported by “substantial evidence.” Significantly, the panel also rejected Impax’s primary argument that the FTC needed to do more under the rule of reason to balance the anticompetitive conduct against procompetitive justifications—namely that the FTC needed to evaluate the strength of the patents at issue and assess whether it was likely Impax would have entered the market earlier absent the settlement. The court “disagree[d] that Actavis requires the Commission to assess the outcome of the patent case in order to find anticompetitive effects”—focusing heavily on the mere size of the alleged payment—and found the fact that generic competition was “possible” absent the settlement, combined with the large payment, was enough to infer anticompetitive effect under the framework outlined in Actavis.

The Fifth Circuit’s decision leaves in place the FTC’s cease-and-desist order enjoining Impax from entering similar reverse-payment settlements going forward (as the decision noted, the FTC did not invalidate Impax’s agreements with Endo or impose any monetary sanctions). But the impact of the decision on the industry as a whole—and courts’ treatment of patent settlements—may be widespread. Indeed, according to the FTC’s acting chair Rebecca Slaughter, the panel’s decision represents an “important milestone in the decades of work by FTC staff to stop pay-for-delay agreements.” And while it remains to be seen how courts (particularly courts in other circuits) will view this decision—and in particular, the Fifth Circuit’s interpretation of the guidance set out in Actavis—the ruling here will certainly have an impact on how parties approach settlement agreements to resolve Hatch-Waxman suits in the future.

Background and FTC Decision

Endo, the brand-name pharma company in this case, began selling an extended-release formulation of oxymorphone (an opioid) called Opana ER in 2006. In 2007, Impax filed the first application to market generic extended-release oxymorphone. At the time, two of Endo’s patents for Opana ER would not expire until September 2013, and Endo sued Impax for patent infringement in January 2008. Under the Hatch-Waxman Act, this would delay any FDA approval of the generic for 30 months—until June 2010—unless the litigation concluded earlier in Impax’s favor.

Early settlement talks between the two companies failed, and Endo purportedly projected that generic entry would cut Opana ER sales by 85 percent and cost it approximately $100 million in revenue within six months. Separately, Endo also planned to move customers to a new reformulated version of Opana ER that would be protected by new patents and not be therapeutically equivalent to Impax’s generic, thus precluding pharmacists from automatically substituting the generic in place of the brand when filling prescriptions—a move known as a product transition or “product hop.” But the success of Endo’s product hop depended on the reformulated Opana ER getting to market sufficiently in advance of Impax’s generic product.

Endo also allegedly projected that the reformulated Opana ER would generate about $200 million in annual sales by 2016 if the market transitioned to the reformulated product before the generic entered, but only $10 million annually if the generic entered first. In June 2010, with the possible launch date for Impax’s generic imminent, the parties settled the patent litigation shortly after the patent infringement trial began and less than a week before the FDA granted final approval to Impax’s generic product.

Under the settlement, Impax agreed to delay launching its generic until January 2013—two and a half years after it otherwise could have entered at risk, but several months before certain patents for Opana ER expired. In return, Endo agreed not to market its own generic version of extended-release oxymorphone until after Impax’s 180-day Hatch-Waxman exclusivity period expired in July 2013, and it agreed to pay Impax a credit if sales revenue for the original formulation of Opana ER fell by more than 50 percent between the dates of settlement and the date of Impax’s entry. The agreement to provide Impax with the credit protected Impax if Endo transitioned its customers to the reformulated Opana ER; which Endo did in March 2012, resulting in a $102 million credit to Impax.

In January 2017, the FTC brought separate actions against Endo and Impax alleging that the settlements was an “unfair method of competition” in violation of Section 5 of the FTC Act and an unreasonable restraint of trade under the Sherman Act. Endo settled, but Impax chose to litigate. The case proceeded in the FTC’s administrative court.

In May 2018, following a three-week trial with 37 witnesses and over 1,250 exhibits, the FTC’s administrative law judge (“ALJ”) D. Michael Chappell concluded that although the reverse-payment agreement restricted competition, it was nonetheless lawful because “as a whole” its procompetitive benefits outweighed the anticompetitive effects because it allowed Impax to enter the market before the Opana ER patents would have expired. Specifically, he found that “the evidence proves that consumers have benefitted from the [Endo-Impax agreement] by having uninterrupted and continuous access to generic Opana ER since January 2013,” and that the “real-world effect procompetitive benefits of the Endo-Impax Settlement are substantial.” Judge Chappell also found that any anticompetitive harm was “largely theoretical” because there was little chance of Impax entering the market earlier absent a settlement, and Impax would not have launched “at risk.”

The full Commission reviewed the ALJ’s decision de novo and reached an entirely different conclusion. The Commission unanimously reversed the ALJ, finding that to be procompetitive, the benefits of the “pay-for-delay” agreement must be directly linked to the restraint of competition to outweigh the proof that the restraint harms competition—which the Commission held was not the case here. The Commission further held that Impax’s procompetitive justifications failed because there were less restrictive ways of achieving the purported benefits. Impax’s appeal to the Fifth Circuit followed.

Fifth Circuit Decision

On appeal, the Fifth Circuit upheld the Commission’s ruling, holding that the FTC had “substantial evidence” to conclude that the reverse payments replaced “the possibility of competition with the certainty of none.” The panel found that the over $100 million in payments from Endo to Impax did not represent the fair value of services rendered or avoided litigation expenses, nor was it otherwise linked to the restraint of competition in a way that would outweigh the proof that the agreement harmed competition.

The opinion also rejected Impax’s argument that the rule of reason required the FTC to do more to balance the harm with the procompetitive justifications—specifically, Impax contended that the FTC should have looked at the strength of the patents and assessed whether Impax could have entered the market earlier absent the settlement. The court held that Actavis does not require Impax’s proposed analysis, and the fact that generic competition was “possible,” combined with the large payment, was enough to infer anticompetitive effect. Indeed, in evaluating the parties’ arguments, the panel placed great emphasis on the size of the payment in evaluating the settlement. And despite holding that the FTC was not required to assess the strength of the patents or predict the outcome of the patent infringement action, the panel nonetheless reasoned that if Endo was actually “highly likely” to prevail in the infringement suit, then Impax would have likely settled for early market entry only—without any payment at all. The more than $100 million Endo ultimately paid to Impax would have been a “windfall” if Impax was likely to lose the infringement suit. The court held that the “need [for Endo] to add that substantial enticement” indicates that at least some portion of the payment was for exclusion beyond the point that would have resulted from litigating the case to conclusion. In other words, the court found the objective of the payment to Impax was to delay its product so Endo could maintain supra-competitive prices for Opana ER, the profits from which it then shared with Impax rather than face a competitive market.

Impax also argued that, in hindsight, the settlement was not anticompetitive for two primary reasons. First, Endo obtained additional patents after-the-fact and has proven their validity in court. And second, Endo’s alleged “product hop” ultimately failed because in 2017 Endo voluntarily withdrew the reformulated Opana ER from the market due to safety concerns. Impax’s generic version of extended-release oxymorphone—which it began marketing in January 2013—is the only version available on the market today. But the Fifth Circuit rejected this argument as well, holding that it is “a basic antitrust principle that the impact of an agreement on competition is assessed at the time it was adopted,” and that principle applies equally in reverse payment cases. So, the focus of the inquiry is on the facts as they existed when the parties adopted the settlement.

The panel concluded that because the payments at issue were unquestionably “large” and “[n]either the saved costs of forgoing a trial nor any services Endo received justified these payments,” “[s]ubstantial evidence supports the Commission’s finding that the reverse payment settlement threatened competition.”

The panel next addressed the question of whether Impax could show procompetitive benefits, which the Commission concluded it could not. Although the ALJ concluded that the settlement benefitted competition, the Commission found that the procompetitive benefits did not “flow from the challenged restraint—the reverse payments themselves.” As a result, the Commission did not treat Impax’s ability to enter the market nine months before the patents expired as benefits to be weighed against the anticompetitive effects of the reverse payments. The Commission assumed arguendo that Impax could connect the settlement’s purported procompetitive effects with the challenged restraint, but nonetheless determined that even if that was the case, there was a “less restrictive alternative” because “Impax could have obtained the proffered benefits by settling without a reverse payment for delayed entry.”

Given the Commission’s assumption, the panel reviewed only the “less restrictive alternative” finding—i.e., whether “substantial evidence” supports the Commission’s conclusion that FTC’s Complaint Counsel had established a less restrictive alternative. Impax argued that the evidence the FTC relied on was not probative of whether it in fact ever had the opportunity to enter in a no-payment settlement or could have done so. The panel nonetheless found that the FTC’s findings—relying on “industry practice,” as well as fact and expert witness testimony—would “allow a reasonable factfinder to conclude that the no-payment settlement was feasible.” And because there was “more than enough evidence” to uphold the Commission’s view that a less restrictive alternative was viable,” the panel held that it “must uphold” the Commission’s conclusion that the reverse-payment settlement was an agreement to preserve and split monopoly profits and amounted to an unreasonable restraint of trade.

Conclusion

The Fifth Circuit’s opinion handed both the FTC and private plaintiffs a huge win in the years-long battle against purported “pay-for-delay” settlements. But the panel’s interpretation of the guidance set out in Actavis—particularly the Supreme Court’s guidance that only “large and *unjustified* payments” should be subject to antitrust scrutiny—potentially places outsized importance on the size of the alleged payment (and in effect treats the payment itself as the restraint), regardless of the strength of the patents at issue or the parties’ valuations of the patent infringement action. This interpretation goes beyond what Actavis and other courts have held. And while the court’s decision may have been impacted by the highly deferential and highly nebulous “substantial evidence” standard which the FTC is accorded in its appeals, the opinion will inevitably have a significant impact on future patent settlements.

#### Courts are the key bottleneck—they’ve failed to adapt to unique factors in the pharma market

Daniel Burke 18. Cleveland-Marshall College of Law. “An Examination of Product Hopping by Brand-Name Prescription Drug Manufacturers: The Problem and a Proposed Solution” Cleveland State Law Review. Volume 66; Issue 2; Article 8. 04-01-18. <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=3995&context=clevstlrev>

Specifically, courts should consider, as a third prong to the analysis of potentially monopolistic conduct, whether the relevant market under review is typical or is one that has unique competitive (i.e., pricing) concerns lending that market to a more skeptical judicial inquiry. In effect, this new prong would be a sub-issue of the first prong of the analysis concerning whether the market actor in question has market monopoly power.193 Courts have stated that monopoly power exists in a market when one product comprises two-thirds of the relevant market,194 ninety percent of the relevant market,195 and eighty-seven percent of the relevant market.196 A presentation detailing company performance from 2013 indicated that Mayne Pharma Group, Ltd. (Warner Chilcott’s partner in the production and distribution of Doryx) reported a sixty percent market share for Doryx.197 This substantial control of the market that treats severe acne puts the drug’s manufacturer in position to continue to drive up prices and harm consumers. The prescription drug market is not like other markets. Pharmaceutical companies invest tremendous sums of money into research and development.198 This investment is superseded, however, by investment in marketing the fruits of research and development’s labors.199 For example, Johnson & Johnson spent twice as much on marketing than it did on research and development in 2013 ($17.5 billion and $8.2 billion, respectively).200 The even more interesting part of this breakdown is determining the target of that marketing. In 2012, pharmaceutical companies spent $24 billion marketing toward physicians as compared to a relatively modest $3 billion marketing toward consumers.201 This discrepancy highlights a point previously made and articulated in the Federal Trade Commission’s (“FTC”) Amicus Brief in support of Mylan: “the consumer who pays does not choose, and the physician who chooses does not pay.”202 Physicians, through no fault of their own, are the ones who limit consumers’ market by the very nature of the system of prescriptions. If courts refuse to accept the characteristics of the pharmaceutical market as being unique, and thus requiring bespoke analysis, rising prescription drug prices will continue to harm those same consumers who are powerless to affect change. The FTC’s amicus brief filed after the Mylan decision urged the court to understand the differences in the pharmaceutical market. The FTC specifically argued that, given market differences, consumers will be harmed if this practice is permitted to continue.203 The brief stressed that automatic substitution laws are “vital means to a successful competition since [they are] aimed to address the ‘disconnect between prescribing physicians and payors.’”204 Drug substitution laws, discussed supra, allow pharmacists to substitute cheaper, bioequivalent drugs for patients.205 This lowers costs and allows true competition from actors other than brand-name prescription drug manufacturers.206 The FTC’s concern that consumers would be harmed absent these laws is warranted and should be heeded by courts when addressing this issue.

## Cap K

### 2NC – TL

#### 1 – Topic Education and Real-World – antitrust implementation is just the expression of assumptions underlying formal rules – any other interpretation lacks explanatory power.

Ergen 19 – Senior Researcher, Max Planck Institute for the Study of Societies [Timur Ergen and Sebastian Kohl, “Varieties of economization in competition policy: institutional change in German and American antitrust, 1960–2000,” 2019, *Review of International Political Economy*, Vol. 26, Issue 2, pp. 256-286, https://www.tandfonline.com/doi/full/10.1080/09692290.2018.1563557]

In the 1960s, Hofstadter ([1964] 1996) observed a bureaucratic routinization of antitrust enforcement in postwar embedded liberalism. While his diagnosis that competition policy had been transformed from an issue relevant for mass mobilization and contentious politics to a professional enterprise turned out to be highly accurate, the amount of policy change through processes within that routinized system was beyond his grasp. All four regimes of antitrust enforcement described above – the activist and economized US regimes and the postwar German regimes – did not just exist in states of rule-bound ‘implementation.’ They were driven by ideational fads and systems of professionally negotiated beliefs and values. In our discussion of alternative approaches to explain change in competition policy, we highlighted the fact that structural determinants of economic regulation underdetermine policy trajectories. This is what the trajectories of American and German enforcement doctrines reveal. Switches from form-based to effect-based approaches within legal regimes, from deconcentrating agendas to efficiency enhancing ones and vice versa within established Varieties of Capitalism, and diverging trajectories despite similar economic pressures are examples of how changing ideas can alter policy directions in ‘imprecise’ institutional regimes.

#### 2 – Turns clash and fairness – ideological examination of capitalism is the core of topic and the only functional limit given zero link UQ – infinite prep checks regression.

Lao 14 [Marina Lao, Professor of Law and the Maury Cartine Endowed Faculty Research Fellow, Seton Hall University School of Law, “Ideology Matters in the Antitrust Debate,” 2014, *Antitrust Law Journal*, Vol. 79, No. 2, http://awa2015.concurrences.com/IMG/pdf/ssrn-id2328329.pdf, EA]

This article has suggested that economics and empiricism do not provide answers to all questions arising in antitrust law, particularly those pertaining to dominant firm conduct and vertical restraints. The various economic theories offered to support either permissive or restrictive rules are usually inconclusive, with deficient empirical support. In that case, one’s ideology almost invariably comes into play, influencing one’s choice of economic models or of the default of intervention or non-intervention when the effects are unclear. Ideological differences are also certain to influence how one evaluates the evidence, what kinds of evidence would be considered relevant, and the quality and quantum of evidence one would demand. These differences also matter in the Schumpeter-Arrow debate on whether industry concentration or competitive markets are more conductive to innovation. And they matter in decision-theoretic analysis, where perspectives on the robustness of markets and the efficacy of government intervention drive the assumptions that underlie the analysis.

Some unease over the progression toward greater permissiveness in Section 2 enforcement seems to be percolating in the antitrust community these days. Recent discussions about the FTC’s possible use of Section 5 of the FTC Act—which prohibits unfair methods of competition—to challenge dominant firm conduct not reachable under today’s reading of the Sherman Act are probably a signal of that dissatisfaction.165 Additionally, the emergence of behavioral antitrust, which advocates a radical departure from price theory analysis in antitrust based on behavioral economics principles, could reasonably be interpreted as a pro-intervention movement.166 Pleas for treating exclusion as an important antitrust concern have also been made in recent scholarship.167 The debate about appropriate antitrust policy, particularly toward controlling dominant firm conduct, is likely to continue for some time.

It would be helpful in this discourse to bring to the fore the ideological underpinnings of the conservative and liberal divide, and to have a normative conversation based on these value differences rather than rely on economic theories as a proxy for discussion. What is needed is an honest conversation on what values should matter and why they should matter in Section 2 enforcement, and whose interests are important and how those interests should be reconciled if they conflict. For antitrust liberals, for example, instead of simply dueling with conservatives over economic theory, it may be more persuasive to set forth normative arguments as to why more vigorous enforcement against dominant firm conduct is good policy. In short, a discussion of competing ideological visions, subject to certain economic boundaries, would be informative and helpful.

#### 4 – Specifically, the imagination of alternative futures is key to shifting way from the present – try or die.

Goode 17 [Luke Goode and Michael Godhe, \* Associate Professor in Media and Communications at the University of Auckland, \*\* Associate Professor of Culture and Media Production, Linköping University, “Beyond Capitalist Realism – Why We Need Critical Future Studies,” 2017, *Culture Unbound*, Vol. 9, https://cultureunbound.ep.liu.se/article/view/123, EA]

Utopia/Dystopia – Why We Need Critical Future Studies Today

Critical reflection on our capacity to imagine potential futures is surely valuable at any point in history. Indeed, framing the future as a human project has been a recurrent theme throughout modernity. We should also be wary of assuming that our own times and current predicaments are somehow of special importance: writing about the hyperbolic contemporary fascination with the internet and comparing it with late 19th century claims about the telegraph, Tom Standage (1998) identifies the ‘chronocentrism’ to which we are always prone. Caveats aside, we do, however, want to suggest that the project of critical future studies is especially urgent at our current historical juncture. Narrating this briefly requires broad brushstrokes and simplifications but it’s important nonetheless to reflect on this context.

A number of recent global events have cast the future in a new (and radically uncertain) light. A spate of protest movements from the Arab Spring to Occupy to Black Lives Matter (Mason 2013), coupled with the rise of new forms of political populism (dominated but by no means monopolized by the variants of right wing neo-nationalism), all signal profound dissatisfaction with the institutional status quo in many parts of the world. Global capitalism and liberal democracy (as it has been traditionally practiced) still govern much of our world but their legitimacy is subject to unprecedented questioning. Meanwhile, reports of the irreversible consequences of climate change are piling up. Calls to rethink the future have reached a crescendo in recent years. Meanwhile, images of potential (most often dystopian or apocalyptic) futures proliferate in popular culture.

However, this renewed questioning of the future follows on from – and reacts against – a prolonged period in which the neoliberal mantra “there is no alternative” (infamously sloganized by Margaret Thatcher) enjoyed exceptional dominance. Alternative futures were kept largely off the agenda following the collapse of world’s second superpower and Francis Fukyama’s declaration of the “end of history”. This despite the irony that the origins of neoliberalism itself can be seen as the planned application of a utopian blueprint for an alternative society, crafted in Mont Pèlerin and Chicago, and pitted against the consensus politics of welfare capitalism prevailing in Western democracies. Politicians of Left and Right in Western (and increasingly in non-Western) societies came to accept the new neoliberal consensus, and despite the visible negative consequences (cyclical economic crises, rising inequality and environmental degradation, for example), questioning the fundamental principles was easily marginalized and debating alternatives stigmatized as naïve or dangerous utopianism: realism was the prevailing wisdom. But while overt political utopianism was successfully suppressed for the best part of two decades, a technological utopianism flourished. Where the space race faded in significance, the internet stepped in.

There is no question that utopian ideas since the 19th Century “have become closely intertwined with a belief in the blessings of science and technology”, often expressing a “sense of the sublime”, as philosopher Rein de Wilde (2000: 1-7) points out (see also Nye 1994). New technological achievements have provoked admiration and astonishment, and continue to do so. The blessings of science and technology have promised us golden futures of prosperity and sustainability, without war and poverty. Communications revolutions from the telegraph and the train to the Internet have promised us the end of geography, a future without limits or borders.

Utopian energy has, in recent decades, been most readily found among what de Wilde calls the futures industry, i.e. “various (postmodern) technocrats” who gained significant ground in the 1990s, “such as cyber gurus, digerati (prophets of digital life), management consultants, and transhumanists – who specialize in selling bright futures” (2000: 4). The information society, for example, appeared as the symbol par excellence for modernity and progress in the Western World towards the close of the 20th and through the dot.com bubble (cf. Johansson 2006). This was the era of the “digital sublime” (Mosco 2004). Dominant discourses on communications revolutions were implicitly and sometimes explicitly founded upon technological determinism – even technological fate or destiny. The view prevailed that information technologies were the sine qua non of economic, social and cultural progress.

Because the futures industry valorized technology above human agency as the object of its utopian gaze, this enabled it to enjoy a virtual monopoly on the utopian imagination during an era in which political utopias were discredited and even taboo. In fact, in the late 20th century, the apparent demise of any viable alternatives to market capitalism allowed the technocrats to smuggle in a utopia comprised of both technological salvation and unfettered markets, while disguising it as realism. As political scientist Wendy Brown argues:

This loss of conviction about the human capacity to craft and steer its existence or even to secure its future is the most profound and devastating sense in which modernity is “over”. Neoliberalism’s perverse theology of markets rests on this land of scorched belief in the modern. (cited in Vint 2016: 11)

This kind of future thinking, at once realist and utopian, has generally retained a belief in progress and a sense of the sublime but, as historian Carroll Pursell claims, “science and technology, once agents of progress, became its measure instead… Technology, after all, is not something that merely happens to us; it is something we have created for certain purposes, not always acknowledged” (2007: x; cf. Marx 1994). The future is and should be open – or at least negotiable – but the utopian belief in progress found in the futures industry make us “imagine the future only as an intensification of the present” (Vint 2016: 7).

Drawing on sociologists Barbara Adam and Chris Groves, utopian theorist Ruth Levitas extrapolates their distinction between present future and future present to utopian theory: “Present futures are imagined, planned and projected in and for the present: the future appears from the standpoint of the present. Future presents are both imagined and produced by actions in the present” (Levitas 2013: 129–130). Present futures, based on free market utopias and the technological sublime, appear in large part “inevitable” (e.g. Kelly 2016) and therein lies their realist disguise and their ideological potency.

The dominance of the present future today has, according to science fiction scholar Sherryl Vint, turned the future into “a site of crisis”, where hegemonic global liberal capitalism is narrowing our imagination:

the future is only more of the present, more of the same capitalist values and sites of invisibility – as the present in which some of us already live – while the actual present pales in comparison to the techno-product-saturated future to which we aspire. (2016: 12)

Various authors on the post-Marxist Left have produced perceptive diagnoses of our entrapment in this present future. Mark Fisher, for example, narrates the “slow cancellation of the future” (2014: 2-29), and the autonomist activist/theorist Franco Berardi (2011) has argued elegantly that the Left must now learn to live “after the future”. However, such works not only diagnose but risk reproducing a pervasive sense of pessimism or “Left melancholy” (Brown 1999). If our present course (economic, environmental, geopolitical) is indeed unsustainable, then there is no sense in which we can avoid a radically different future, be that a desirable or repugnant one. As such, “develop[ing] a positive version of the future” based on “socio-cultural ethics, wisdom, imagination and responsibility” (Levitas 2013: 130), becomes necessary in avoiding the twin pitfalls of abdicating to technocratic prescriptions or falling into political despair.

Recent years have indeed seen growing attempts to reclaim the utopian imagination from the futures industry and to challenge technocratic visions of progress which abandon political agency in the name of realism. This can be witnessed in diverse forms of activism. For example, regardless of their merits and efficacy, movements such as Occupy and Black Lives Matter have articulated an audacity (and “realist” critics would claim naivety) of ambition in calling for the end of “1% capitalism” and structural racism respectively. Of course, both movements (one now dissipated) have been characterized by tensions between those who hold to the radical goals of institutional reinvention and those who believe piecemeal reform is their best hope. We have also witnessed a resurgence of interest in utopian thinking at the interface between academia and politics. Levitas’ project to rethink sociology in terms of “utopia as method” is a notable example, as are growing interventions by progressive economists who seek to put once unthinkable issues on the agenda such as the universal basic income, radical reduction of the working week through automation, and a post-capitalist commons economy (e.g. Srnicek and Williams 2015; Bregman 2016; Frase 2016).

Levitas states that the “repression of active engagement with alternative possible futures has given way in recent decades to wider consideration of utopia in sociology and social and political theory” (2013: 127). She concedes that much of this has been ambiguous, avoiding direct use of the much-maligned concept of utopia. But, steadily, the concept of utopia is enjoying a resurgence. Vint, for example, argues for the “urgent need for genuinely open and new futures, the need to reclaim the power to imagine the future outside of industry-produced advertising images” (2016: 8). As a science fiction scholar, it’s unsurprising that Vint emphasizes the role of speculative fiction in imagining alternative futures. We would also point to the urgency of a “speculative sociology” and, more broadly, speculative and utopian cultural analysis. Glimpses of alternative (and better) futures can be found in every conceivable corner of public culture, from popular science to political activism, and these all merit our (critical) attention. Utopian thinking can – and we would argue should – be deployed in the service of opening up the field of imagined futures. Utopias, “far from providing us with blueprints of the future” (Vint 2016: 8; see also Jameson 1982), are vital insofar as they expand rather than shrink our horizons.

In fact, we suggest that both utopian and dystopian modes of imagination are important nutrients for a revitalized futural public sphere. This requires some explanation. The first point to make is that utopian thinking does not necessarily imply a singular, closed or finished model of an alternative society. Certainly, the history of utopian thought abounds with examples that aspired to be complete visions of the alternative society. This is true not only of communist and fascist political utopias but also progressive literary utopias of the 19th and early 20th centuries, such as Edward Bellamy’s Looking Backward 2000—1887 (1888), William Morris’ News from Nowhere (1890) and H.G. Wells’ A Modern Utopia (1900). Unlike the aforementioned political utopias, however, these texts – which, written before the horrors of the 20th century, now seem politically naïve, at best – can be read merely as generative thought experiments that added to the available repertoire of images of the future available to the contemporary public sphere. Of course, they could also be read as standalone manifestos: for example, Looking Backward inspired the rise of Bellamy Clubs dedicated to implementing its utopian ideas. But the aggregate impact of these works was to broaden, rather than narrow the imaginative canvas. For example, Bellamy’s utopia speculated on the then radical policy of industrial nationalization, something which would become a political norm some half-century later (not exclusively thanks to Looking Backward, of course).

In any case, literary utopias since the 1960s shifted away from holistically imagining full-fledged utopian societies towards describing the utopian impulse in, for example, human interrelations, as have been emphasized in feminist utopian studies (Godhe 2010). In one of the most famous feminist science fiction novels of the 60s, The Left Hand of Darkness (1969), Ursula K. Le Guin imagines a planet inhabited by a species without gender. The utopian energy is not found in societal perfection but in the thought experiment of a world in which interpersonal relations are not structured by prejudices of gender. Utopian thinking, in short, can disrupt common sense assumptions about what is “realistic” and challenge us to question whether and how we could rethink and reshape society. And if, as suggested earlier, garnering public engagement with the future is an affective as well as a cognitive problem (for example, fatalism is an issue of sentiment, albeit intimately connected to the availability of plausible proposals for change) then we need to consider seriously the role utopian thinking can play in countering hopelessness (cf. Bacciolini & Moylan 2003).

Within popular culture today, we are more likely to encounter dystopian than utopian thinking. But it would be a mistake to assume that images of dystopia are inherently corrosive for a futural public sphere. The appeal of recent cultural texts such as The Hunger Games novels (2008-2010) and films (2012-2015), Snowpiercer (2013) or Children of Men (2006), lies not least in the way they use futurescapes to hyperbolize our current societal trajectories and sharpen our focus on a catastrophic ‘future-to-be-averted’. This could be said also of the most famous 20th century literary dystopias: Zamyatin’s We (1921), Huxley’s Brave New World (1932) and Orwell’s 1984 (1949). But more so than their 20th century counterparts, recent fictional dystopias such as those mentioned above also run against the grain of hopelessness, featuring narratives of resistance and overcoming, offering beacons of hope against intensely bleak backdrops.

In sum, then, we suggest that dismissing utopian or dystopian thinking as exaggerated, naïve, unrealistic and therefore unhelpful in debating alternative futures misses the point. Firstly, the futural public sphere contains an important affective dimension in which hope (not to be confused with optimism – we will return to this in our conclusion) or excitement or a sense of drama about the future invites participation and public engagement, while sober realism and forbidding expert discourse, and certainly cynicism or fatalism, work in the opposite direction. Even on a cognitive level it is far from clear what it means to ‘exaggerate’ given the precarious state of today’s economics, geopolitics and ecology: the spectre of collapse and catastrophe makes radical thought experiments all the more necessary (Cf. Bradley and Hedrén 2014). As “raw ingredients” (rather than final statements), utopian and dystopian futurescapes –whether as fictions or literal scenarios – have an important role to play in a revitalized futural public sphere. Not least, they can provoke us to think in different temporalities (centuries, rather than electoral cycles, for example); they can flex our imaginative muscles; and, significantly, they can move us. To clarify, this is an argument for including and taking seriously utopian and dystopian imagination as part of the futural public sphere: it is not an argument against the ‘realistic’ or the ameliorative and it is certainly not an argument against the vital role of expert knowledge.

## Solvency

#### Conservative judges will circumvent – history proves

**Newman, 19** -- a University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division

[John Newman, "What Democratic Contenders Are Missing in the Race to Revive Antitrust," Atlantic, 4-5-2019, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/, accessed 7-13-2021]

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.

#### Political backlash guts solvency – firms will lobby Congress to withdraw support from enforcement agencies

**Jones and Kovacic, 20** – Professor of Law at King’s and a solicitor at Freshfields Bruckhaus Deringer LLP; Professor at George Washington University Law School and director of their Competition Law Center

[Alison Jones and William E. Kovacic, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy," SAGE Journals, 3-20-2020, https://journals.sagepub.com/doi/full/10.1177/0003603X20912884, accessed 7-7-2021]

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

Imagine, for a moment, that the DOJ and the FTC launch monopolization cases against each of the GAFA giants. Among other grounds, these cases might be premised on the theory that the firms used mergers to accumulate and protect positions of dominance. The GAFA firms have received unfavorable scrutiny from legislators from both political parties over the past few years, but the current wave of political opprobrium is unlikely to discourage the firms from bringing their formidable lobbying resources to bear upon the Congress. It would be hazardous for the enforcement agencies to assume that a sustained, well-financed lobbying campaign will be ineffective. At a minimum, the agencies would need to consider how many battles they can fight at one time, and how to foster a countervailing coalition of business interests to oppose the defendants.

## Innovation Adv

### 2NC – Other Countries Solve

#### Sweden AND international institutions solve – innovations go global

**Blanck, 21** -- chair of the Board of the Swedish e-Verification organization (e-VIS), and member of the Swedish Government’s Life Science Advisory Board and several other Boards and think-tanks within the Swedish Life Science-sector

[Anders Blanck, "Sweden as a Global Testbed for AMR Incentive Models," 9-13-2021, https://pharmaboardroom.com/articles/sweden-as-a-global-testbed-for-amr-incentive-models/, accessed 11-23-2021]

It fills me with pride that Sweden was an early adopter when it comes to measures against AMR. As early as the mid-1980s, the use of antibiotics in animals for growth-promoting purposes was banned. Early on, academic research on antibiotics and its effects on humans and the environment was established, which developed into world-leading institutions with prominent researchers such as Professor Otto Cars, founder of the international research network ReAct. During the 1990s, the STRAMA network was formed, which works both nationally and locally in Sweden with direct oversight for, among other things, ensuring fewer healthcare-related infections and the responsible prescribing of antibiotics. Today, from an international perspective, Sweden has low antibiotic consumption and a relatively favourable resistance situation. The Swedish government has also for a long time had AMR high on the agenda and is pushing for more active efforts in global forums such as the UN and the WHO. Sweden has been a driving force in the development and implementation of the WHO’s Global Antimicrobial Resistance Surveillance System (GLASS). Sweden’s Minister of Health Ms Lena Hallengren is also one of the members of The Global Leaders Group on Antimicrobial Resistance, which was established by the WHO in November 2020 as an independent global advisory and advocacy group with the primary objective of maintaining urgency, public support, political momentum, and visibility of the AMR.

So, what can a small country like Sweden then do about a global problem like AMR, in addition to ensuring the correct use of antibiotics in healthcare and being politically motivated internationally? I believe that Sweden could be an excellent test market for various incentive models that, scaled up to a European and global level, can have very positive effects, both in terms of reducing the development of resistance and developing new effective antibiotics.

There are several major challenges in the field of antibiotics that have so far remained unresolved. One challenge is that most antibiotics have been on the market for a very long time, which means that they lack patent protection. Due to fierce competition, triggered for many years by pricing and reimbursement agencies as well as payors, prices for these antibiotics are usually very low. Within the Swedish reimbursement system, the cost for the patient for an antibiotics course can be only slightly higher than for a package of throat lozenges. Price pressure unfortunately poses a significant risk that some companies choose to use manufacturing methods with a strong negative impact on the surrounding environment which thus adds to the potential risk of developing resistance.

The pharmaceutical industry in Sweden has for a long time been a driving force for the introduction of a reimbursement system which rewards products manufactured with a lower impact on the surrounding environment. Among other things, we have developed an environmental assessment model for pharmaceuticals in collaboration with the internationally recognized institute IVL. Today, the reimbursement system for generic medicines is based only on the lowest possible price. The Government has now accepted our proposal and decided to introduce a pilot project with an environmental reward based on certain environmental criteria that will benefit companies with responsible pharmaceutical production. Antibiotics are one of the groups of pharmaceuticals that will be included in the pilot. If it turns out well, the system can be introduced widely in Sweden and hopefully be an inspiration for other countries.

Another unsolved problem is that very few new and effective antibiotics are researched and developed. This is partly because the scientific challenges are significant. Bacterial strains are becoming increasingly aggressive and are developing resistance more rapidly. But just as important is the fact that the pharmaceutical companies’ usual financial incentives for development from research breakthroughs to finished medicines and vaccines do not exist for antibiotics. The reason is that new antibiotics must be used sparsely to avoid the development of new resistance. Antibiotics that you do not sell do not generate any revenues and therefore payment models that are delinked from sales volumes are needed.

There is no lack of initiatives from the global communities and the pharmaceutical industry to develop new antibiotics. WHO and the UN have gathered around a global action plan. Initiatives on economic incentives have been taken by, among others, the EU, as well as the countries within the G7 and G20. The pharmaceutical industry has come together in the AMR Industry Alliance initiative, and in 2020 several large pharmaceutical companies, the international trade association IFPMA and WHO, the EU and the Wellcome Trust, launched the AMR Action Fund. The goal is to produce between two and four completely new antibiotics by the year 2030. The pharmaceutical companies have committed to invest one billion US dollars to bridge the funding gap that exists today.

To be able to develop new antibiotics two things that must happen. The global investments in research and development to develop new mechanisms of action and substances mentioned above are referred to as push. But at the same time, new payment models for companies must be developed that separate the companies’ compensation from antibiotic use, this is referred to as pull. It is only when new payment models are in place that companies have an incentive to go ahead with the large investments associated with developing promising substances and conduct clinical trials all the way until a new antibiotic is approved by the medical products agencies and ultimately reaches patients. So far, no actor at the global level has been able to present such a payment model. We must have respect for the complexity. Payments to pharmaceutical companies for medicines and vaccines are strictly national competencies. But I choose to be optimistic – the ongoing pandemic has shown that the global community and the pharmaceutical industry have managed to create both push and pull when they, within a year, have succeeded in taking effective vaccines against COVID-19 to mass production.

I have long since been convinced that a small country like Sweden can show the way for larger and more complex markets when it comes to push and pull. The pharmaceutical industry in Sweden has been a driving force for a long time and in 2016 we presented a first layout for a model that separates financial compensation to the company from the number of packages sold of the antibiotic. The Government and national agencies have taken this into account and the Swedish Public Health Agency are now carrying out a national pilot which looks at whether it is possible to ensure the availability of certain medically important antibiotics and thereby increase treatment options for difficult-to-treat infections.

Once we have come out on the other side of the pandemic, we can look back on a time that was marked by suffering and death – but also by constructive collaboration between countries, agencies, pharmaceutical companies, academic research teams and healthcare

In the pilot, the Swedish Public Health Agency has entered into agreements with five pharmaceutical companies which guarantee to, when necessary, deliver antibiotics used to treat patients in Sweden with severe infections caused by multi-resistant bacteria. The companies must also have a certain volume of the antibiotics in question in stock earmarked for the Swedish market. For this, a fixed annual remuneration is paid to the companies. I do not see this as an optimal solution, but it is still an important first step in the right direction. It is now important with further development and I would like to see us using an evaluation model that can determine the medical value of an antibiotic treatment. Today, there is no link between the guaranteed compensation the companies receive and the value that the antibiotic actually contributes with.

### 2NC – No Natural !

#### 6 – mRNA solves – pandemic spurred a vaccine revolution

Lurie, 21 – Strategic Adviser to the CEO of the Coalition for Epidemic Preparedness Innovations

[Nicole Lurie, served as Assistant Secretary for Preparedness and Response at the U.S. Department of Health and Human Services during the Obama administration; Jakob P. Cramer, Head of Clinical Development at the Coalition for Epidemic Preparedness Innovations; and Richard J. Hatchett, CEO of the Coalition for Epidemic Preparedness Innovations, “The Vaccine Revolution: How mRNA Can Stop the Next Pandemic Before It Starts,” Foreign Affairs, May/June 2021, accessed 6-23-21]

A new era in vaccinology has arrived. The year 2020 will be remembered not only for the pandemic but also for the fact that it witnessed the culmination of nearly a decade’s worth of technological breakthroughs in a mere 12 months. The world will emerge from the pandemic with a new arsenal of vaccine technologies at its disposal, with mRNA at the forefront. These successes in dark times provide much-needed grounds for optimism that in the future, societies will be able to respond much more rapidly, effectively, and equitably to emerging pandemic threats.

## FTC DA

### 2NC – ! OV

#### Subroutines, mind crime, and misalignment are suffering-risks

Sotala 17 [Kaj Sotala and Lukas Gloor, researchers, Foundational Research Institute, “Superintelligence as a cause or cure for risks of astronomical suffering,” 2017, *Informatica*, Vol. 41, No. 4, http://www.informatica.si/index.php/informatica/article/view/1877, Accessed: 03/10/21, EA]

Superintelligence is related to three categories of suffering risk: suffering subroutines (Tomasik 2017), mind crime (Bostrom 2014) and flawed realization (Bostrom 2013).

5.1 Suffering subroutines

Humans have evolved to be capable of suffering, and while the question of which other animals are conscious or capable of suffering is controversial, pain analogues are present in a wide variety of animals. The U.S. National Research Council’s Committee on Recognition and Alleviation of Pain in Laboratory Animals (2004) argues that, based on the state of existing evidence, at least all vertebrates should be considered capable of experiencing pain.

Pain seems to have evolved because it has a functional purpose in guiding behavior: evolution having found it suggests that pain might be the simplest solution for achieving its purpose. A superintelligence which was building subagents, such as worker robots or disembodied cognitive agents, might then also construct them in such a way that they were capable of feeling pain—and thus possibly suffering (Metzinger 2015)—if that was the most efficient way of making them behave in a way that achieved the superintelligence’s goals.

Humans have also evolved to experience empathy towards each other, but the evolutionary reasons which cause humans to have empathy (Singer 1981) may not be relevant for a superintelligent singleton which had no game-theoretical reason to empathize with others. In such a case, a superintelligence which had no disincentive to create suffering but did have an incentive to create whatever furthered its goals, could create vast populations of agents which sometimes suffered while carrying out the superintelligence’s goals. Because of the ruling superintelligence’s indifference towards suffering, the amount of suffering experienced by this population could be vastly higher than it would be in e.g. an advanced human civilization, where humans had an interest in helping out their fellow humans.

Depending on the functional purpose of positive mental states such as happiness, the subagents might or might not be built to experience them. For example, Fredrickson (1998) suggests that positive and negative emotions have differing functions. Negative emotions bias an individual’s thoughts and actions towards some relatively specific response that has been evolutionarily adaptive: fear causes an urge to escape, anger causes an urge to attack, disgust an urge to be rid of the disgusting thing, and so on. In contrast, positive emotions bias thought-action tendencies in a much less specific direction. For example, joy creates an urge to play and be playful, but “play” includes a very wide range of behaviors, including physical, social, intellectual, and artistic play. All of these behaviors have the effect of developing the individual’s skills in whatever the domain. The overall effect of experiencing positive emotions is to build an individual’s resources—be those resources physical, intellectual, or social.

To the extent that this hypothesis were true, a superintelligence might design its subagents in such a way that they had pre-determined response patterns for undesirable situations, so exhibited negative emotions. However, if it was constructing a kind of a command economy in which it desired to remain in control, it might not put a high value on any subagent accumulating individual resources. Intellectual resources would be valued to the extent that they contributed to the subagent doing its job, but physical and social resources could be irrelevant, if the subagents were provided with whatever resources necessary for doing their tasks. In such a case, the end result could be a world whose inhabitants experienced very little if any in the way of positive emotions, but did experience negative emotions. This could qualify as any one of the suffering outcomes we’ve considered (astronomical, net, pan-generational net).

One central and unresolved problem of suffering subroutines is the requirements for consciousness (Muehlhauser 2017) and suffering (Metzinger 2016, Tomasik 2017). The simpler the algorithms that can suffer, the more likely it is that an entity with no regard for minimizing it would happen to instantiate large numbers of them. If suffering has narrow requirements such as a specific kind of self-model (Metzinger 2016), then suffering subroutines may become less common.

Below are some pathways that could lead to the instantiation of large numbers of suffering subroutines (Gloor 2016):

Anthropocentrism. If the superintelligence were programmed to only care about humans, or by minds that were sufficiently human-like by some criteria, then it could end up being indifferent to the suffering of any other minds, including subroutines.

Indifference. If attempts to align the superintelligence with human values failed, it might not put any intrinsic value on avoiding suffering, so it may create large numbers of suffering subroutines.

Uncooperativeness. The superintelligence’s goal is something like classical utilitarianism, with no additional regards for cooperating with other value systems. As previously discussed, classical utilitarianism would prefer to avoid suffering, all else being equal. However, this concern could be overridden by opportunity costs. For example, Bostrom (2003a) suggests that every second of delayed space colonization corresponds to a loss equal to 10^14 potential lives. A classical utilitarian superintelligence that took this estimate literally might choose to build colonization robots that used suffering subroutines, if this was the easiest way and developing alternative cognitive architectures capable of doing the job would take more time.

5.2 Mind crime

A superintelligence might run simulations of sentient beings for a variety of purposes. Bostrom (2014, p. 152) discusses the specific possibility of an AI creating simulations of human beings which were detailed enough to be conscious. These simulations could then be placed in a variety of situations in order to study things such as human psychology and sociology, and be destroyed afterwards.

The AI could also run simulations that modeled the evolutionary history of life on Earth in order to obtain various kinds of scientific information, or to help estimate the likely location of the “Great Filter” (Hanson 1998) and whether it should expect to encounter other intelligent civilizations. This could repeat the wild-animal suffering (Tomasik 2015, Dorado 2015) experienced in Earth’s evolutionary history. The AI could also create and mistreat, or threaten to mistreat, various minds as a way to blackmail other agents.

As it is possible that minds in simulations could one day compose the majority of all existing minds (Bostrom 2003b)—and that, with sufficient technology, there could be astronomical numbers of them—then depending on the nature of the simulations and the net amount of happiness and suffering, mind crime could possibly lead to any one of the three suffering outcomes.

Below are some pathways that could lead to mind crime (Gloor 2016):

Anthropocentrism. Again, if the superintelligence were programmed to only care about humans, or about minds that were sufficiently human-like by some criteria, then it could be indifferent to the suffering experienced by non-humans in its simulations.

Indifference. If attempts to align the superintelligence with human values failed, it might not put any intrinsic value on avoiding suffering, and may thus create large numbers of simulations with sentient minds if that furthered its objectives.

Extortion. The superintelligence comes into conflict with another actor that disvalues suffering, so the superintelligence instantiates large numbers of suffering minds as a way of extorting the other entity.

Libertarianism regarding computations: the creators of the first superintelligence instruct the AI to give every human alive at the time control of a planet or galaxy, with no additional rules to govern what goes on within those territories. This would practically guarantee that some humans would use this opportunity for inflicting widespread cruelty (see the previous section).

5.3 Flawed realization

A superintelligence with human-aligned values might aim to convert the resources in its reach into clusters of utopia, and seek to colonize the universe in order to maximize the value of the world (Bostrom 2003a), filling the universe with new minds and valuable experiences and resources. At the same time, if the superintelligence had the wrong goals, this could result in a universe filled by vast amounts of disvalue.

While some mistakes in value loading may result in a superintelligence whose goal is completely unlike what people value, certain mistakes could result in flawed realization (Bostrom 2013). In this outcome, the superintelligence’s goal gets human values mostly right, in the sense of sharing many similarities with what we value, but also contains a flaw that drastically changes the intended outcome. 11

For example, value-extrapolation (Yudkowsky 2004) and value-learning (Soares 2016, Sotala 2016) approaches attempt to learn human values in order to create a world that is in accordance with those values. There have been occasions in history when circumstances that cause suffering have been defended by appealing to values which seem pointless to modern sensibilities, but which were nonetheless a part of the prevailing values at the time. In Victorian London, the use of anesthesia in childbirth was opposed on the grounds that being under the partial influence of anesthetics may cause “improper” and “lascivious” sexual dreams (Farr 1980), with this being considered more important to avoid than the pain of childbirth.

A flawed value-loading process might give disproportionate weight to historical, existing, or incorrectly extrapolated future values whose realization then becomes more important than the avoidance of suffering. Besides merely considering the avoidance of suffering less important than the enabling of other values, a flawed process might also tap into various human tendencies for endorsing or celebrating cruelty (see the discussion in section 4), or outright glorifying suffering. Small changes to a recipe for utopia may lead to a future with much more suffering than one shaped by a superintelligence whose goals were completely different from ours.

#### Outweighs extinction.

Sotala 17 [Kaj Sotala and Lukas Gloor, researchers, Foundational Research Institute, “Superintelligence as a cause or cure for risks of astronomical suffering,” 2017, *Informatica*, Vol. 41, No. 4, http://www.informatica.si/index.php/informatica/article/view/1877, Accessed: 03/10/21, EA]

As already noted, the main focus in discussion of risks from superintelligent AI has been either literal extinction, with the AI killing humans as a side-effect of pursuing some other goal (Yudkowsky 2008), or a value extinction. In value extinction, some form of humanity may survive, but the future is controlled by an AI operating according to values which all current-day humans would consider worthless (Yudkowsky 2011). In either scenario, it is thought that the resulting future would have no value.

In this section, we will argue that besides futures that have no value, according to many different value systems it is possible to have futures with negative value. These would count as the worst category of existential risks. In addition, there are adverse outcomes of a lesser severity, which depending on one’s value systems may not necessarily count as worse than extinction. Regardless, making these outcomes less likely is a high priority and a common interest of many different value systems.

Bostrom (2002) frames his definition of extinction risks with a discussion which characterizes a single person’s death as being a risk of terminal intensity and personal scope, with existential risks being risks of terminal intensity and global scope - one person’s death versus the death of all humans. However, it is commonly thought that there are “fates worse than death”: at one extreme, being tortured for an extended time (with no chance of rescue), and then killed.

#### Probability – highest existential risk chance.

Ord 20 [Toby Ord, Senior Research Fellow in Philosophy at Oxford University, “The Precipice: Existential Risk and the Future of Humanity,” 2020, Hachette Books, EA]

In my view, the greatest risk to humanity’s potential in the next hundred years comes from unaligned artificial intelligence, which I put at one in ten. One might be surprised to see such a high number for such a speculative risk, so it warrants some explanation.

A common approach to estimating the chance of an unprecedented event with earth-shaking consequences is to take a skeptical stance: to start with an extremely small probability and only raise it from there when a large amount of hard evidence is presented. But I disagree. Instead, I think the right method is to start with a probability that reflects our overall impressions, then adjust this in light of the scientific evidence.7 When there is a lot of evidence, these approaches converge. But when there isn’t, the starting point can matter.

In the case of artificial intelligence, everyone agrees the evidence and arguments are far from watertight, but the question is where does this leave us? Very roughly, my approach is to start with the overall view of the expert community that there is something like a one in two chance that AI agents capable of outperforming humans in almost every task will be developed in the coming century. And conditional on that happening, we shouldn’t be shocked if these agents that outperform us across the board were to inherit our future. Especially if when looking into the details, we see great challenges in aligning these agents with our values.

Some of my colleagues give higher chances than me, and some lower. But for many purposes our numbers are similar. Suppose you were more skeptical of the risk and thought it to be one in 100. From an informational perspective, that is actually not so far apart: it doesn’t take all that much evidence to shift someone from one to the other. And it might not be that far apart in terms of practical action either—an existential risk of either probability would be a key global priority.

I sometimes think about this landscape in terms of five big risks: those around nuclear war, climate change, other environmental damage, engineered pandemics and unaligned AI. While I see the final two as especially important, I think they all pose at least a one in 1,000 risk of destroying humanity’s potential this century, and so all warrant major global efforts on the grounds of their contribution to existential risk (in addition to the other compelling reasons).

Overall, I think the chance of an existential catastrophe striking humanity in the next hundred years is about one in six. This is not a small statistical probability that we must diligently bear in mind, like the chance of dying in a car crash, but something that could readily occur, like the roll of a die, or Russian roulette.

### 2NC – Link T/C

#### Link alone takes-out solvency – overload collapses FTC effectiveness

Kovacic, 13 – Professor of Law at George Washington University

[William E. Kovacic & David A. Hyman, "Competition Agencies with Complex Policy Portfolios: Divide or Conquer?" GW Law Faculty Publications, 2013, <https://scholarship.law.gwu.edu/faculty_publications/631>, accessed 7-4-21]

Agencies seldom will receive the resources needed to fulfill all the regulatory commands assigned to them. This is the case of the modern FTC. In many instances, such as the automobile credit sales provision of Dodd Frank, Congress assigns major new responsibilities without providing resources to carry them out. The legislative process that generates new substantive legislation is detached from the process that appropriates funds. Thus, Congress rarely considers the resource implications of requirements that the agency enforce new laws, issue new rules, or prepare reports.

Agencies respond to these imperatives in one of two ways, both of which undermine agency effectiveness. The first is to undertake programs that exceed the agency’s ability to execute them effectively. The agency will be tempted to cut corners by weakening internal quality control measures, understaffing ambitious projects, or assigning difficult litigation or rulemaking tasks to relatively inexperienced personnel. Even though senior personnel may recognize how much resource constraints limit agency capacity, they may still acquiesce in Congressional demands for the initiation of new projects. A short term political appointee may regard the initiation of a new measure as a credit-claiming event and may see the risk that an improvidently conceived project may fail as a cost that will be borne by future agency leaders and will not be attributed fully, or at all, to the appointee who originated it. Without an effective feedback mechanism that forces the incumbent appointee to internalize such costs, it is easy to begin such projects, even when they outrun the agency’s capacity.

#### Empirics prove

Kovacic, 19 – Global Competition Professor of Law and Policy at George Washington University Law School

[William E. Kovacic, “Competition Policy in Its Broadest Sense: Michael Pertschuk’s Chairmanship of the Federal Trade Commission 1977-1981,” William & Mary Law Review, Vol. 60, Iss. 4, 2019, <https://scholarship.law.wm.edu/wmlr/vol60/iss4/6>, accessed 8-12-2021]

The experience of Michael Pertschuk’s FTC chairmanship, and the experience of the FTC in the 1970s more generally, suggests what the newly transformed FTC might expect as it attempts to roll out the new policy agenda.440 One certainty is the difficulty of policy implementation.441 The types of cases contemplated by the program outlined above will elicit strong resistance from the affected firms, which will amass large teams of accomplished lawyers and economic advisors to assist them.442 How long will it take the newly reoriented federal agencies to develop litigation teams to match the skills that the defendants will bring to the case—not just for one or a few cases, but the many high-stakes cases that the new program will call for?443 The political overseers and public interest community are likely to brush aside excuses about implementation difficulties.444 The pressures to deliver the new agenda will create serious dangers of a mismatch between commitments and capabilities—the same condition that befell the FTC in the 1970s and caused many of its flagship cases and rules to perish.445

### 2NC – AT: Thumpers

#### FTC announcements, fact-finding, and PrivacyCon all prove it’s a top priority.

Northouse 11/28 [Clayton G. Northouse, Lauren Kitces and Alexandra Mushka, \* partner in Sidley Austin LLP's Privacy and Cybersecurity practice, “FTC Announces it May Pursue Rulemaking to Combat Discrimination in AI,” 11/28/21, *Lexology*, https://www.lexology.com/library/detail.aspx?g=bfdcb7e5-2c67-4478-8c85-622581d37b8f, EA]

On December 10, the Federal Trade Commission (FTC) announced it is considering a rulemaking on commercial Artificial Intelligence (AI). The purpose of the rulemaking, according to an advanced notice of proposed rulemaking (ANPRM) titled “Trade Regulation in Commercial Surveillance,” would be “to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination.”

While not formally part of the rulemaking process mandated by the Administrative Procedure Act, advanced notices allow agencies to solicit public comment before drafting more specific proposals. The FTC has not yet issued privacy or artificial intelligence rules, though it has indicated that such rulemaking is on the horizon. The December 10 ANPRM is another signal that the FTC is gearing up to develop substantive privacy guidelines.

The anti-discriminatory focus of the notice reflects concern reflected in a variety of policy papers, research and media coverage over whether commercial AI has the potential to deliver biased outcomes. The movement towards official rulemaking also aligns with the AI fact-finding efforts and interests that the FTC has demonstrated at its last two PrivacyCon events, including a specific focus on advertising, fairness, and transparency in AI and algorithms at the summer 2020 PrivacyCon.

The language of the ANPRM is broad, and could cover a variety of commercial practices. Earlier statements, however, may provide insight into the FTC’s thought-process. The Commission has previously pointed to protected-class bias in healthcare delivery and consumer credit as prime examples of algorithmic discrimination. See Jillson, E., Aiming for truth, fairness, and equity in your company’s use of AI, FTC Business Blog (April 19, 2021). Additionally, in a recent semiannual Statement of Regulatory Priorities, the FTC expressed that, among the many pressing issues confronted by consumers in the modern economy, “abuses stemming from surveillance-based business models are particularly alarming.” Therefore, the FTC may also target algorithms that drive behavioral ad-based ecosystems.

As we have highlighted in our prior posts, the FTC recently updated its rulemaking procedures. The ANPRM contemplates rulemaking under section 18 of the FTC Act, which authorizes the FTC to promulgate “rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. Sec. 57a. The FTC’s process for issuing section 18 rules, also known as “Trade Regulation Rules,” or “Magnuson-Moss Rules,” has recently been streamlined in order to facilitate the FTC’s renewed efforts to create substantive guidelines for the modern economy.

While the FTC must still take several steps before any rules become final, categorizing certain uses of commercial AI as unfair or deceptive under the FTC Act could be a further step towards the creation of uniform federal privacy standards.

Interested parties should expect the comment period under either the ANPRM or a more formal rulemaking to begin in February 2022.

#### New guidance and Slaughter remarks prove

Cohen 21 [Bret Cohen, W. James Denvil, and Filippo Raso, \* Partner, Hogan Lovells; J.D., The George Washington University Law School, with high honors, “AI & Algorithms (Part 4): The FTC’s Guidance on AI,” 06/10/21, *JDSupra*, https://www.jdsupra.com/legalnews/ai-algorithms-part-4-the-ftc-s-guidance-3717327/, EA]

Although the U.S. has no federal law that specifically regulates artificial intelligence (AI), the Federal Trade Commission (FTC) has indicated that it may be preparing to exercise its consumer protection authority with respect to AI deployment. In May, the FTC issued new guidance for the use of AI, building upon its 2020 AI guidance and its 2016 report on big data. And FTC Acting Chair Kelley Slaughter has stated in public remarks that the Commission will be exploring concerns relating to algorithmic harms, including bias and discrimination. Organizations deploying AI systems in the U.S. are advised to familiarize themselves with the FTC guidance in order to make sure that their uses of AI are in compliance with U.S. consumer protection requirements.

#### It’s their #1 agenda item for February

O'Sullivan 1/3 [Liz O'Sullivan, Surveillance Technology Oversight Project's technology director; co-founder and vice president of commercial operations at Arthur AI, an AI explainability and bias monitoring startup, “2022 promises to bring massive change to AI regulation,” 01/03/22, *Fast Company*, https://www.fastcompany.com/90707807/2022-promises-to-bring-massive-change-to-ai-regulation, EA]

9. THE FTC WILL SET NEW RULES THAT GOVERN MOST CONSUMER-FACING AI.

Proponents of AI oversight rules have long discussed the FTC as the most appropriate (and empowered) regulator to take up the fight for consumers’ rights. With broad rulemaking powers and a progressive, expert staff, the FTC’s February 2022 agenda item signals change is coming, and fast. This will be one to watch, as it’s unclear whether February’s time slot will simply open up a period of public comment, or whether they already have draft rules in mind. Our money is on the latter.

#### Deadlock prevents antitrust enforcement

Doesn’t interfere with privacy enforcement because there’s consensus. The plan changes this by FIAT

Eleanor Tyler 10/7/21. Legal Analyst on the Litigation team, with a focus on antitrust, at Bloomberg Law. “ANALYSIS: FTC May Be Headed Into Deadlock, Delaying Big Deals.” https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-ftc-may-be-headed-into-deadlock-delaying-big-deals

The Federal Trade Commission may be about to pause, unable to act on antitrust enforcement and policy until President Biden’s nominee can be confirmed and seated.

On Oct. 8, Federal Trade Commissioner Rohit Chopra is stepping down to take up his new position as head of the Consumer Financial Protection Bureau. Because it takes a majority among the Commissioners present to conduct business, and because the remaining commissioners will be split 2-2 between Democrat and Republican appointees, the Commission may find itself sitting on its hands until an equally divided Senate can approve privacy expert Alvaro Bedoya, whom Biden nominated Sept. 20 for Chopra’s seat.

In the past, the Commission has typically managed to continue making decisions and bringing cases while short a member (or several). These aren’t normal times, however. Many actions could be easily conducted on a bipartisan basis, but decisions about antitrust policy—and, potentially, antitrust enforcement—have proven contentious. That poses a potential obstacle for deals currently under investigation at the FTC, which tend to be large deals and those with market overlap between the parties.

#### Khan hasn’t brought cases.

Gold 12/20 [Ashley Gold “Six months with Lina Khan's FTC,” 12/20/21, *Axios*, https://www.axios.com/lina-khan-ftc-six-months-4a5c4ba6-cef1-4a1f-b1dc-a528b2b41471.html, EA]

The big picture: Khan's tenure so far has seen more table-setting for future actions than major high-profile antitrust cases.

• Those who want to see Big Tech taken to task hope to see Khan bring major cases that would spin off prior acquisitions and block proposed mergers. And the clock is ticking.

#### Other enforcement is all talk

Graham 9/18 [Jed Graham, citing William Kovacic, antitrust deity and former FTC chair; Writes about economic policy for Investor's Business Daily, “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” 09/18/21, Investor's Business Daily, https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/, EA]

Khan is clearly using her bully pulpit to the utmost, trying to dissuade merger talks from reaching fruition.

But right now it's all talk. She has turned a few heads, but the S&P 500 and Big Tech leaders have kept cruising. Facebook stock is up 11% since Khan took the FTC's helm on June 15, while Apple has climbed 15% and Google stock 18%. That's despite reports that the Justice Department is preparing to file a second Google antitrust suit over its ad dominance.

The new antitrust enforcement regime may not change all that much "until they show that they can sue and win," Kovacic said.

### 2NC – AT: No Link/Other Departments Solve

#### 2 – Settlements – limited resources means FTC doesn’t pursue privacy cases.

Chin 19 [Caitlin Chin and Marla Odell, \* Research Analyst, Center for Technology Innovation - The Brookings Institution, \*\* Research Intern - Center for Technology Innovation, “Highlights: Commissioners discuss the future of the FTC’s role in privacy” 11/05/19, Brookings, https://www.brookings.edu/blog/techtank/2019/11/05/highlights-commissioners-discuss-the-future-of-the-ftcs-role-in-privacy/]

Against a backdrop of high-profile data breaches and abuses, the Federal Trade Commission (FTC) has taken center stage. On October 28, FTC Commissioners Rebecca Kelly Slaughter and Christine Wilson joined Brookings Distinguished Fellow Cameron Kerry for a fireside chat to discuss the agency’s mandate to protect consumer privacy in an increasingly data-driven world—and how federal privacy legislation could help the agency carry out its mission.

Over the past few months, the FTC has announced several settlements in major cases. These include a $575 million settlement with Equifax following a wide-reaching data breach, a $170 million settlement with YouTube due to alleged COPPA violations, and a $5 billion settlement with Facebook—the largest privacy fine recorded to date—stemming from alleged deceptive data sharing practices with third-parties, including Cambridge Analytica. To supporters of these settlements, these record-breaking fines and new oversight requirements bring immediate corporate change and consumer remedies. To critics, however, the settlements do not sufficiently deter future violations and instead reflect the FTC’s constant internal trade-off to settle privacy cases, rather than litigate or push for tougher penalties, in the face of limited agency resources and capacity.

#### 3 – Cash – FTC has limited funding for limited areas.

Rivero, 21 -- Quartz tech reporter

[Nicolás, "Biden’s antitrust crusaders can’t crusade without Congress," Quartz, 3-11-2021, https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/, accessed 8-12-2021]

A larger caseload would also require Congress to approve more funding for the cash-strapped agency, which is already struggling to pay for its current docket. “The agencies have been asked on many occasions to do a lot with relatively little…but it’s not for free,” says former FTC chair and George Washington University law professor Bill Kovacic. If the FTC wants to pursue more large cases without a bigger budget, “they’ll have to make choices, and those choices will involve backing off of other areas of enforcement.”

**Normal means includes interagency disputes and duplicated enforcement**

**PLI, 15** [Practising Law Institute, "Overview of the U.S. Antitrust Laws," Antitrust Law Answer Book, 2015, https://legacy.pli.edu/product\_files/Titles/4153/58678\_sample01\_20141108153021.pdf, accessed 7-16-2021]

But there are areas, especially with emerging technologies, where neither agency has clearly superior expertise, and conflicts can arise when both agencies request clearance. After all, both agencies have essentially the same broad legal jurisdiction, and both understandably want to be involved in interesting or visible matters. Moreover, ceding a transaction to the other agency provides it with expertise it can cite in the next clearance fight. When clearance disputes happen, they can delay efficient resolutions of a matter. Unfortunately these disputes are not uncommon, particularly in industries such as computer hardware and software, Internet-based services, media, defense products, construction materials, and agriculture. Clearance disputes have the biggest impact on mergers reported under the Hart-Scott-Rodino Act;6 because HSR has statutory deadlines for decisions to investigate, disputes between the agencies can have a significant impact on the speed at which a transaction can be reviewed. This periodic competition between the two federal agencies may be understandable, but it is neither productive nor attractive.

Given this less-than-precise allocation system, it is not always possible to predict which federal agency will handle a matter. Experienced antitrust lawyers can make educated judgments, but there are occasionally surprising results. While many lawyers have tried over the years to guide a particular matter to one agency or the other, as a general matter such efforts are not successful. As a result, one of the uncertainties at the beginning of many antitrust matters is which federal agency will be involved. Because there are significant procedural differences between the agencies, and even some substantive differences in how they apply the antitrust laws, this uncertainty could conceivably affect the final outcome and is thus frustrating to those who are subject to it. It is small consolation that many others have faced the same frustration.

### AT: FTC Not K2 Algo Bias

#### Even if they’re not fully effective, successful privacy rulemaking causes Congressional action which solves our impact

Kelly 9/29 – Makena Kelly, policy reporter for The Verge covering net neutrality, data, and privacy, “As privacy issues worsen, Congress looks to the FTC,” 9/29/21, https://www.theverge.com/2021/9/29/22699202/data-privacy-facebook-google-congress-senate-reconciliation-infrastructure

“The FTC is not very well-funded to do this kind of work. It has limited resources and limited capabilities to engage in privacy work, plus all of the other work it has to do,” Sara Collins, privacy policy counsel at Public Knowledge, said Tuesday. “It’s a competition authority. It’s a general consumer protection authority. They have to have more resources to do this work.”

Still, experts like Collins are optimistic that any new FTC rulemaking could force Congress’ hand on legislative reform. Several states, including California and Colorado, have already enacted their own state bills as well. This patchwork of regulation could build more momentum for lawmakers to tackle a federal law once and for all.

#### The reconciliation bill will increase FTC funding for privacy enforcement – that solves any residual uniqueness arguments

Ikeda 9/16 – Scott Ikeda, longtime tech reporter and senior correspondent at CPO magazine, “FTC Sets Its Sights on Big Tech: $1 Billion Proposed to Create Digital Privacy & Cybersecurity Division,” 9/16/21, https://www.cpomagazine.com/data-privacy/ftc-sets-its-sights-on-big-tech-1-billion-proposed-to-create-digital-privacy-cybersecurity-division/

The creation of a federal-level digital privacy bill continues to be a problem for the United States government, but the House Democrats are looking to put reins on Big Tech through other legislative means. A proposed $1 billion addition to the $3.5 trillion economic package would go to the Federal Trade Commission (FTC) for the purposes of establishing a digital division that focuses on privacy issues, cybersecurity incidents and other matters that center on online services and platforms.

The full scope of the bill includes “unfair or deceptive acts or practices relating to privacy, data security, identity theft, data abuses, and related matters.”

$1 Billion Boost Could Spark Stronger Regulation of Big Tech

The proposal was developed by a panel of Democrats in the House of Representatives and has yet to go up for a vote, but has a favorable path to adoption given the party’s control of Congress and the Executive. The issue is also one that has bipartisan support, though the Republican interest in regulating Big Tech has tended to be more along antitrust lines rather than privacy issues. Out of fear of a filibuster in the Senate, the Democrats will likely add this measure to the overall spending bill and attempt to pass the entire thing via the reconciliation process (which comes down to a simple majority vote).

Should the measure pass, it would increase the FTC’s budget by nearly 30% over the coming decade. The agency has struggled with regulation of Big Tech at times due to a simple lack of resources. The tech giants have much more money at their disposal than any regulatory body, and put it to use hiring away former members of these agencies as strategic resources and exhausting every possible stall tactic and challenge in courtrooms.

Cillian Kieran, CEO of Ethyca, sees empowerment of the FTC as a realistic first step to restoring balance as a federal privacy bill continues to take a long time in coalescing: “Creating the new FTC division focused on protecting Americans from privacy violations and other data abuses is an exciting, necessary, and promising first step … I think of privacy infrastructure as our other kinds of infrastructure, like bridges. Everybody crossing a bridge or using the internet deserves a safe experience, and we must ensure that the supervisors of that infrastructure—the FTC, in the case of privacy—have the tools they need to protect the public … Following Chair Lina Khan’s appointment earlier this year to lead the FTC, the proposal signals that Washington’s sentiments about privacy—Congress has introduced more than 20 privacy bills this session, yet none have passed—are finally translating into action.”

The proposal is scheduled to be finalized on September 15 and go before the House Energy and Commerce Committee next week. As it stands, it does not call for granting the FTC any new powers; the burst of funding would instead go toward enforcing existing laws with a focus on Big Tech’s transgressions. The Democrats will have to refrain from attempting to add new powers to the FTC’s arsenal if the intention is to pass the bill via reconciliation. The proposal is also part of a package that includes items unrelated to cybersecurity or regulation of Big Tech: $30 billion to remove and replace lead pipes used in water and sewage systems, $10 billion for supply chain resilience projects and $13.5 billion for the development of zero emissions vehicle infrastructure.

The FTC has its hands full with both privacy and monopoly power issues that involve Big Tech firms, and some cases leave one wondering if there might have been a better outcome if the agency was better equipped and funded. A monopoly lawsuit it brought against Facebook in late 2020 was dismissed in June, with the judge ruling that the FTC had not displayed adequate metrics or methods to hold up its assertion that Facebook owns more than 60% of the social media market. And the agency settled with upstart Zoom over its exaggerated security claims last year as well, not fining the company and only requiring it to make certain security improvements.

## Econ Adv

### 2NC – Alt Causes

#### 2 – The government can’t negotiate or regulate drug prices in the US – that’s Wilson AND

**Kliff, 18** – Senior Correspondent

[Sarah, "The true story of America’s sky-high prescription drug prices," Vox, 5-10-2018, https://www.vox.com/science-and-health/2016/11/30/12945756/prescription-drug-prices-explained, accessed 11-23-2021]

How does this happen? Why does Humira cost so much more here than it does in other countries?

Humira is the exact same drug whether it’s sold in the United States, in Switzerland, or anywhere else. What’s different about Humira in the United States is the regulatory system we’ve set up around our pharmaceutical industry.

The United States is exceptional in that it does not regulate or negotiate the prices of new prescription drugs when they come onto market. Other countries will task a government agency to meet with pharmaceutical companies and haggle over an appropriate price. These agencies will typically make decisions about whether these new drugs represent any improvement over the old drugs — whether they’re even worth bringing onto the market in the first place. They’ll pore over reams of evidence about drugs’ risks and benefits.

The United States allows drugmakers to set their own prices for a given product — and allows every drug that's proven to be safe come onto market. And the problems that causes are easy to see, from the high copays at the drugstore to the people who can’t afford lifesaving medications.

What’s harder to see is that if we did lower drug prices, we would be making a trade-off. Lowering drug profits would make pharmaceuticals a less desirable industry for investors. And less investment in drugs would mean less research toward new and innovative cures.

There’s this analogy that Craig Garthwaite, a professor at Kellogg School of Management who studies drug prices, gave me that helped make this clear. Think about a venture capitalist who is deciding whether to invest $10 million in a social media app or a cure for pancreatic cancer.

“As you decrease the potential profits I’m going to make from pancreatic cures, I’m going to shift more of my investment over to apps or just keep the money in the bank and earn the money I make there,” Garthwaite says.

Right now America’s high drug prices mean that investing in pharmaceuticals can generate a whole bunch of profits — and that drugs can be too expensive for Americans to afford.

Let’s say you’re a pharmaceutical executive and you’ve discovered a new drug. And you want to sell it in Australia. Or Canada. Or Britain.

You’re going to want to start setting up some meetings with agencies that make decisions about drug coverage and prices.

These regulatory bodies generally evaluate two things: whether the country wants to buy your drug and, if so, how much they’ll pay for it. These decisions are often related, as regulators evaluate whether your new drug is enough of an improvement on whatever is already on the market to warrant a higher price.

So let’s say you want to sell your drug in Australia. You’ll have to submit an application to the Pharmaceutical Benefits Advisory Committee, where you’ll attempt to prove that your drug is more effective than whatever else is on the market right now.

The committee will then make a recommendation to the country’s national health care system of whether to buy the drug — and, if the recommendation is to buy it, the committee will suggest what price the health plan ought to pay.

Australia’s Pharmaceutical Benefits Advisory Committee is not easy to impress: It has rejected about half of the anti-cancer drug applications it received in the past decade because their benefits didn’t seem worth the price.

But if you do succeed — and Australia deems your drug worthy to cover — then you’ll have to decide whether the committee has offered a high enough price. If so, congrats! You’ve entered the Australian drug market.

Other countries regulate the price of drugs because they see them as a public utility

Countries like Australia, Canada, and Britain don’t regulate the price of other things that consumers buy, like computers or clothing. But they and dozens of other countries have made the decision to regulate the price of drugs to ensure that medical treatment remains affordable for all citizens, regardless of their income. Medication is treated differently because it is a good that some consumers, quite literally, can’t live without.

This decision comes with policy trade-offs, no doubt. Countries like Australia will often refuse to cover drugs that they don’t think are worth the price. In order for regulatory agencies to have leverage in negotiating with drugmakers, they have to be able to say no to the drugs they don’t think are up to snuff. This means certain drugs that sell in the United States aren’t available in other countries — and there are often public outcries when these agencies refuse to approve a given drug.

At the same time, just because there are more drugs on the American market, that doesn’t mean all patients can access them. “To think that patients have full access to a wide range of products isn’t right,” says Aaron Kesselheim, an associate professor of medicine at Harvard Medical School. “If the drugs are so expensive that you can’t afford them, that’s functionally the same thing as not even having them on the market.”

It also doesn’t mean we’re necessarily getting better treatment. Other countries’ regulatory agencies usually reject drugs when they don’t think they provide enough benefit to justify the price that drugmakers want to charge. In the United States, those drugs come onto market — which means we get expensive drugs that offer little additional benefit but might be especially good at marketing.

This happened in 2012 with a drug called Zaltrap, which treats colorectal cancer. The drug cost about $11,000 per month — twice as much as its competitors — while, in the eyes of doctors, offering no additional benefit.

“In most industries something that offers no advantage of its competitors and yet sells for twice the price would never even get on the market,” Peter Bach, an oncologist at Sloan-Kettering Memorial Hospital, wrote in a New York Times op-ed. “But that is not how things work for drugs. The Food and Drug Administration approves drugs if they are shown to be ‘safe and effective.’ It does not consider what the relative costs might be.”

What happens when you don’t price-regulate drugs? Just look at the United States.

The United States has no government panel that negotiates drug prices. There are thousands of health insurance plans all across the country. Each has to negotiate its own prices with drugmakers separately. Because Americans are fragmented across all these different health insurers, plans have much less bargaining power to demand lower prices.

In other words: Australia is buying drugs in bulk, like you would at Costco, while we’re picking up tiny bottles at the local pharmacy. You can guess who is paying more.

“You could say that American health care providers and pharmaceuticals are essentially taking advantage of the American public because they have such a fragmented system,” Tom Sackville, president of the International Federation of Health Plans, says. “The system is so divided, it’s easy to conquer.”

There is one especially large health insurance plan in the United States: Medicare, which covers about 55 million Americans over the age of 65. But federal law expressly prohibits Medicare from negotiating drug prices or making decisions about which drugs it covers. Instead, Medicare is required to cover nearly all drugs that the Food and Drug Administration approves. This means that Medicare must cover drugs that aren’t an improvement over what currently exists, so long as the FDA finds they’re safe for human consumption.

Drugmakers know that as long as their products are safe, Medicare will buy them. “For Medicare, the sky really is the limit,” on drug prices, says Jamie Love, who has studied drug pricing and directs the DC nonprofit Knowledge Ecology International.

#### 3 – Supply shortages cause price spikes

Alan Friedman 15, educated at New York University (NYU) (B.A. Politics and History), the London School of Economics (International Relations) and the Johns Hopkins School of Advanced International Studies (M.A. International Economics and Law), 5-18-2015, "From the antitrust mailbag: What can the FTC do about prescription drug price spikes?," Federal Trade Commission, <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/antitrust-mailbag-what-can-ftc-do-about-prescription>

We’ve examined this issue a number of times and often found that price changes (up or down) are due to normal market forces and thus do not present an antitrust issue. One common cause of a sudden spike in the price of a drug is the development of a supply problem, such as an ingredient shortage. It’s a normal market event for prices to rise after a fall in supply. The U.S. Food and Drug Administration has the authority to address and prevent drug shortages, and that agency maintains a list of drugs that are in short supply, including the market reason for the shortage and the estimated time required to resolve the shortage. When there is no supply problem, sometimes the answer is that the drug was recently acquired by a company, and the new owner has independently increased the price. Other times, the price varies from retailer to retailer, or is due to a coverage change by the pharmacy benefit manager. In these situations, the drug may be available at a better price at another retailer or from another health plan.

For our part, we remain watchful for information that suggests the possibility that unlawful anticompetitive activity is the reason for a price increase. Although the FTC has no authority to regulate the price of any product, including prescription drugs, protecting American consumers from anticompetitive activity in the health care sector has long been one of our most important responsibilities. Congress has empowered the FTC to prevent unfair methods of competition, such as illegal anticompetitive agreements among competitors to increase prices or restrict supply, and illegal exclusionary or predatory practices.

For example, several years ago, the FTC and 32 state Attorneys General sued a drug manufacturer and the only suppliers of a key ingredient for signing illegal agreements that increased wholesale prices of two widely-prescribed anti-anxiety drugs by 2000-3000 percent. The FTC alleged that the drug maker, Mylan Laboratories, Inc., and three suppliers of a key ingredient entered into exclusive supply contracts to deny Mylan’s competitors access to ingredients necessary to manufacture the drugs. In exchange for their participation in the scheme, Mylan agreed to share its profits with the suppliers, and then raised the price of the drugs exponentially — in the case of one product, from $7.30 for a 500-count bottle to $190. The FTC’s antitrust suit led to one of the largest monetary settlements in FTC history, with $100 million returned to overcharged consumers and state agencies. The companies also agreed not to engage in similar unlawful conduct in the future.

Congress also has empowered the FTC to prevent mergers that may substantially lessen competition or tend to create a monopoly. In reviewing proposed mergers between pharmaceutical companies, the FTC looks to see if the two companies have competing products and whether the elimination of one independent competitor may lead to higher prices for an essential therapy or course of treatment. Since last year alone, the FTC has required divestitures in ten merger cases involving dozens of pharmaceutical products, including over-the-counter motion sickness medications, nicotine patches, generic eye drops, Retin-A for the treatment of acne, and generic multivitamin fluoride drops for children in the United States who do not have access to fluoridated water, as well as drugs that treat hypertension and bacterial infections. These divestitures preserve competition, ensuring that consumers do not pay higher drug prices as a result of the merger.

### 2NC – No !

#### Hegemony is irrelevant and *zero* risk of retrenchment.

Fettweis 20 [Christopher Fettweis, Adjunct scholar in the Cato Institute’s Defense and Foreign Policy Studies Department and a professor at Tulane University’s Department of Political Science; taught at George Washington University, Ohio State University, and the US Naval War College, among other institutions, “Delusions of Danger: Geopolitical Fear and Indispensability in U.S. Foreign Policy,” 06/03/20, *Cato Institute*, https://www.cato.org/publications/publications/delusions-danger-geopolitical-fear-indispensability-us-foreign-policy, kyujin]

The Indispensable Nation

Although geopolitical fear prevents current international empirical realities from receiving a fair evaluation by U.S. society, another belief prescribes a specific approach to foreign policy, one that mandates a far higher level of international activism than would otherwise be warranted. Both are based on thin intellectual foundations, and together they encourage a variety of ill‐​advised policies on the part of the United States. According to what might be considered the indispensability fallacy, many Americans believe that U.S. actions are primarily responsible for any stability that currently exists. “All that stands between civility and genocide, order and mayhem,” explain Lawrence Kaplan and William Kristol, “is American power.“37 That belief is an offshoot, witting or not, of what is known as “hegemonic stability theory,” which proposes that international peace is possible only when one country is strong enough to make and enforce a set of rules.38 Were U.S. leaders to abdicate their responsibilities, that reasoning goes, unchecked conflicts would at the very least bring humanitarian disaster and would quite quickly threaten core U.S. interests.39

Brzezinski is typical in his belief that “outright chaos” and a string of specific horrors could be expected to follow a loss of hegemony, from renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) to the collapse of the U.S. relationship with Mexico as emboldened nationalists south of the border reassert 150‐​year‐​old territorial claims. Overall, without U.S. dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.“40 The liberal world order that is so beneficial to all would come tumbling down.

Like many believers, proponents of hegemonic stability theory base their view on faith alone.41 There is precious little evidence to suggest that the United States is responsible for the pacific trends that have swept across the system. In fact, the world remained equally peaceful, relatively speaking, while the United States cut its forces throughout the 1990s, as well as while it doubled its military spending in the first decade of the new century.42 Complex statistical methods should not be needed to demonstrate that levels of U.S. military spending have been essentially unrelated to global stability.

Hegemonic stability theory’s flaws go way beyond the absence of simple correlations to support them, however. The theory’s supporters have never been able to explain adequately how precisely 5 percent of the world’s population could force peace on the other 95 percent, unless, of course, the rest of the world was simply not intent on fighting. Most states are quite free to go to war without U.S. involvement but choose not to. The United States can be counted on, especially after Iraq, to steer well clear of most civil wars and ethnic conflicts. It took years, hundreds of thousands of casualties, and the use of chemical weapons to spur even limited interest in the events in Syria, for example; surely internal violence in, say, most of Africa would be unlikely to attract serious attention of the world’s policeman, much less intervention. The continent is, nevertheless, more peaceful today than at any other time in its history, something for which U.S. hegemony cannot take credit.43 Stability exists today in many such places to which U.S. hegemony simply does not extend.

Overall, proponents of the stabilizing power of U.S. hegemony should keep in mind one of the most basic observations from cognitive psychology: rarely are our actions as important to others’ calculations as we perceive them to be.44 The so‐​called egocentric bias, which is essentially ubiquitous in human interaction, suggests that although it may be natural for U.S. policymakers to interpret their role as crucial in the maintenance of world peace, they are almost certainly overestimating their own importance. Washington is probably not as central to the myriad decisions in foreign capitals that help maintain international stability as it thinks it is.

The indispensability fallacy owes its existence to a couple of factors. First, although all people like to bask in the reflected glory of their country’s (or culture’s) unique, nonpareil stature, Americans have long been exceptional in their exceptionalism.45 The short history of the United States, which can easily be read as an almost uninterrupted and certainly unlikely story of success, has led to a (perhaps natural) belief that it is morally, culturally, and politically superior to other, lesser countries. It is no coincidence that the exceptional state would be called on by fate to maintain peace and justice in the world.

Americans have always combined that feeling of divine providence with a sense of mission to spread their ideals around the world and battle evil wherever it lurks. It is that sense of destiny, of being the object of history’s call, that most obviously separates the United States from other countries. Only an American president would claim that by entering World War I, “America had the infinite privilege of fulfilling her destiny and saving the world.“46

Although many states are motivated by humanitarian causes, no other seems to consider promoting its values to be a national duty in quite the same way that Americans do. “I believe that God wants everybody to be free,” said George W. Bush in 2004. “That’s what I believe. And that’s one part of my foreign policy.“47 When Madeleine Albright called the United States the “indispensable nation,” she was reflecting a traditional, deeply held belief of the American people.48 Exceptional nations, like exceptional people, have an obligation to assist the merely average.

Many of the factors that contribute to geopolitical fear — Manichaeism, religiosity, various vested interests, and neoconservatism — also help explain American exceptionalism and the indispensability fallacy. And unipolarity makes hegemonic delusions possible. With the great power of the United States comes a sense of great responsibility: to serve and protect humanity, to drive history in positive directions. More than any other single factor, the people of the United States tend to believe that they are indispensable because they are powerful, and power tends to blind states to their limitations. “Wealth shapes our international behavior and our image,” observed Derek Leebaert. “It brings with it the freedom to make wide‐​ranging choices well beyond common sense.“49 It is quite likely that the world does not need the United States to enforce peace. In fact, if virtually any of the overlapping and mutually reinforcing explanations for the current stability are correct, the trends in international security may well prove difficult to reverse. None of the contributing factors that are commonly suggested (economic development, complex interdependence, nuclear weapons, international institutions, democracy, shifting global norms on war) seem poised to disappear any time soon.50 The world will probably continue its peaceful ways for the near future, at the very least, no matter what the United States chooses to do or not do. As Robert Jervis concluded while pondering the likely effects of U.S. restraint on decisions made in foreign capitals, “It is very unlikely that pulling off the American security blanket would lead to thoughts of war.“51 The United States will remain fundamentally safe no matter what it does — in other words, despite widespread beliefs in its inherent indispensability to the contrary.