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# 1NC

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### 1NC – CIL CP

#### The United States federal government should prohibit anticompetitive business practices by the financial industries in the domestic, private sector by expanding the scope of its interpretive obligations under customary international law.

#### Competes and solves – it renders the same conduct equally unlawful but expands CIL rather than antitrust statute. That signals U.S. adherence to international economic law.

Banks ’12 [Ted; 2012; Scharf President, Compliance & Competition Consultants; Denver Journal of International Law & Policy, “40th Anniversary Edition: The International Law of Antitrust Compliance,” 368]

Introduction

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. 1 Enforcement of criminal antitrust laws takes place against both individuals and businesses, 2 and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate [\*369] conduct become more universal, they reflect adherence to what is essentially an international law - the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a bona fide compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the ultra vires act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

The Concept of Organizational Liability

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, 3 which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in New York Central & Hudson River Railroad v. United States, 4 that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. 5 The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow. 6

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the [\*370] company was not aware of the violation, 7 prohibited the conduct that led to the violation, 8 or there was no actual benefit to the corporation through the acts of the employee. 9 So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee - in addition to the liability of the employee - may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an in terrorem effect on the corporation and force the entity to make certain that employees obey the law. 10 As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company. 11 This approach derives from the common law doctrine of respondeat superior, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for [\*371] which there is no actual or apparent authority). 12 The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability. 13 Employees are assumed to be acting within the scope of their employment 14 if they are doing acts on the corporation's behalf in the performance of their general line of work. 15 An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated - at least in part - by an intent to benefit the corporation." 16 It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable. 17 In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong. 18

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law. [\*372] Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. 19

The key here is "diligence." Was a compliance program something that existed only on paper, 20 or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy. 21

[\*373] Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an "effective" compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, 22 this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. 23 To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. 24 Therefore, this growing, worldwide acceptance, combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

#### U.S. commitment prevents the disintegration of international economic law – extinction.

Arcuri ’20 [Alessandra; 2020; Full Professor of Inclusive Global Law and Governance at the Erasmus School of Law, Journal of International Economic Law, “International Economic Law and Disintegration: Beware the Schmittean Moment,” vol. 23]

Introduction

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state. Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.1 International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.2 Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives3 resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,4 as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and redistributive policies cannot be realized. As Rodrik put it: ‘So, I accept that nation-states are a source of disintegration for the global economy.’5

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,6 in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today’s daunting challenges. It is misleading in so far as it promises solutions that nation-states alone cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the ‘rule of exception’ and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, ‘America first’ echoes too closely fascist slogans.7

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A ‘SCHMITTEAN MOMENT’

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the ‘left behind.’8 In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—‘populist turn’ rests on the idea that the ‘other’, the ‘foreigner’ has stolen ‘our’ welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump’s slogan ‘Buy American, Hire American.’ It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by ‘progressive’ politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: ‘When it comes to providing the arrangements that markets rely on, the nation-state remains the only effective actor, the only game in town. Our elites’ and technocrats’ obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.’9 Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver institutional diversity which is needed to realize the social contract: ‘Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.’10 The nation-states can meet different preferences, and ‘[i]nsufficient appreciation of the value of nation-states leads to dead ends.’ Rodrik also concedes that international market liberalization is the offspring of well-functioning nation-states rather than international institutions: ‘Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.’11 Against this background, Rodrik defends ‘economic populism’ in so far as it constitutes a form of resistance to ‘liberal technocrats’ imposing undue restraints on domestic economic policy.12 The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.13

Many of Rodrik’s arguments are compelling, such as his critique of the economic profession’s misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,14 are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik’s work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, 15 which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik’s Straight Talks on Trade. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection ‘from unfettered markets and from permanently incumbent austerity’ and it constitutes a ‘refusal of a “liquid society” and of its very solid … inequalities.’16 Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.17 The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a ‘right to regulate.’ Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump’s claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a ‘Grotian moment’?18

Without indulging on this question, this article posits that we should beware the ‘risk’ of entering a ‘Schmittean moment’.19 This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest ‘political’ dimension, which can find its realization only in the decisionist state.20 To understand the risk of a ‘Schmittean moment’, it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt’s work offers a lucid critique of the ‘exclusionary character of liberal universalism.’21 His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of ‘just’ war.22 In fact, it is the very core of the contemporary international legal project that gets questioned: ‘The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’23 This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: ‘As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.’24 This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.25 In decrying how the economical is rescinded by the political, Schmitt unveils the absent ‘presence’ of (mostly American) politics in the economy. In short, Schmitt’s analysis cogently engages with the problem of depoliticization that the international liberal order yields.26 It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt’s critique resonates with the critique of ‘hyper-globalization’ articulated by Rodrik:27 ‘one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.’28

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt’s analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the jus publicum Europaeum. Regrettably, this age has been golden only for some; the jus publicum Europaeum for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt’s historical analysis, which portrays the times of the jus publicum Europaeum as times where war gets domesticated by the modern state eclipses the fact that the ‘development of the modern state apparatus … helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.’29 His conception of sovereignty, which finds essential realization only in the ‘unlimited jurisdictional competence’ normalizes the rule of exception. A related trouble with Schmitt’s core normative ideas is the totalizing enemy-friendship antithesis: ‘the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’30 This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.31 In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence in potentia: ‘the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.’32 In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The Nomos of the earth, starting with the act of appropriation—nehmen (take)—and continuing with dividing the land—nemein (divide)—does not engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: ‘to remove justice from the content of the law.’33

### 1NC – Advantage CP

#### The United States federal government should:

* impose a higher ratio of capital-to-assets, a more demanding leverage ratio, and required submission of an orderly resolution plan on systemically important financial institutions and derivative clearinghouse organizations.
* impose new biannual stress tests on systematically important financial institutions and derivative clearinghouse organizations
* Eliminate safe harbors from the Volcker rule
* Expand the purview of the CFPB to cover unfair, deceptive, or abusive practices that pose systemic risk
* Impose more stringent capital, leverage, or liquidity requirements based on “living will” submissions under Title 1 of Dodd-Frank.
* Direct the FDIC to apply its Orderly Liquidation Authority to systemically important financial institutions and derivative clearinghouse organizations in the case of a solvency crisis.
* Use authority pursuant to the Dodd Frank section 5331(a)(5) and 165(d) to separate systemically important financial institutions and promote diversity in membership in derivative clearinghouse organizations.
* Use authority pursuant to the Riegle-Neal act to prohibit mergers and acquisitions that exceed a concentration cap defined by systemic risk.

#### The counterplan regulates and separates SIBs without use of the FTC.

Logan D. Hovie, Ropes & Gray, JD @ Boston College, ’19, Breaking Up Is Hard to Do: Why American Banks Remain Too Big to Fail, 60 B.C.L. Rev. 2185

A. Dodd-Frank Regulatory Changes

To prevent another financial crisis and bailouts of “too big to fail” banks, the Dodd-Frank Act changed numerous aspects of banking regulation.161 Notably, Dodd-Frank increased capital and liquidity requirements, limited proprietary trading and investments in hedge and private equity funds, enhanced consumer protection by establishing the Consumer Financial Protection Bureau (CFPB), and provided regulators authority to mitigate systemic risk. 162

In the context of banking, capital refers to the amount of money a bank can lose while still meeting its obligations.163 To assure that banks can weather losses without failing, modern financial regulation has required banks to hold an amount of capital proportional to the riskiness of their assets.164 During the 2008 Financial Crisis, many banks did not have enough capital to withstand asset losses—highlighting the insufficiency of existing capital quantity and quality regulations.165Accordingly, in the aftermath of the crisis, financial regulators increased the amount and quality of capital that banks are required to hold.166Additionally, regulators imposed stress tests and required that a portion of a bank’s assets remain liquid.167 Doing so allowed regulators to supervise preparedness for a hypothetical crisis and ensured that a bank could easily sell off its assets to withstand financial difficulties.168

Many question whether capital requirements can prevent a crisis.169 Historically they have failed because they are “lagging indicators” that a bank is unhealthy and are vulnerable to both arbitrage and erosion.170 Separately, the Federal Reserve has proposed altering their stress-testing model, weakening its potential effectiveness.171 The change would provide more information about the model to banks and impose the tests biannually, rather than annually, on banks with asset levels between $100 and $250 billion.172

In addition to taking steps to increase the likelihood that a bank can withstand a financial shock, Dodd-Frank also sought to prevent the next crisis.173 An example of this is the Volcker Rule.174 The Volcker Rule prohibits banks from engaging in proprietary trading and significantly limits their ability to invest in hedge and private equity funds.175 These activities are inherently risky, making it improper for banks to engage in them while safeguarded by a taxpayer-funded “safety net.”176 Nonetheless, delayed implementation and the inclusion of numerous regulatory exemptions and safe harbors have limited the Volcker Rule’s effectiveness.177

Dodd-Frank also sought to prevent future financial harm through the CFPB.178 The proliferation of dangerous consumer credit products, particularly subprime home mortgages, played an important role in the financial crisis.179 Prior to the crisis, the enforcement of consumer financial protection statutes was spread across numerous agencies where it was not a priority, resulting in the insufficient regulation of banking practices.180 To address this vulnerability, Congress tasked a single agency with consumer protection.181 The CFPB was granted power over all consumer financial protection statutes and given additional authority to address practices it deemed “unfair, deceptive, or abusive.”182 Just as it fought the Volcker Rule, the financial services industry has staunchly opposed the CFPB, attacking it in court and lobbying for its overhaul in Congress, which has significantly limited its influence.183

Finally, Dodd-Frank provides heightened prudential regulation and supervision based on a bank’s total assets.184 This power is intended to address the systemic risk posed by the failure of large and interconnected banks.185 The framework imposes increasingly stringent regulation as banks grow larger, with the country’s largest banks, dubbed global systemically important banks (G-SIBs), facing the highest requirements.186 This includes maintaining a higher ratio of capital-to-assets, meeting a more demanding leverage ratio, and submitting an orderly resolution plan.187 In short, these provisions, which largely heighten existing expectations for large banks under Dodd-Frank, are an attempt to address the “too big to fail” problem.188

Like many other components of the Dodd-Frank Act, these regulatory requirements have been delayed and weakened.189 From the start G-SIBs fought enhanced prudential requirements; decrying any connection between a bank’s size and systemic risk, a number of bank CEOs personally pressured then Federal Reserve Board Governor Daniel Tarullo to relax the requirements.190 The banks succeeded.191 Moreover, the rules that survived the initial onslaught are beginning to erode.192 The Federal Reserve Board recently advanced a rulemaking proposal that would reduce the amount of capital that G-SIBs must hold.193 Although proponents argue that the change will minimally impact the amount of capital held by banks, critics argue large banks’ subsidiaries will hold less capital—increasing risk.194

B. Dodd-Frank Hard Breakup Options

Although not the focus of the regulatory overhaul, two Dodd-Frank provisions authorize federal banking regulators to break up banks.195 The first, referred to as the Kanjorski Amendment, empowers the Federal Reserve Board to break up banks with over $250 billion in assets if the bank is a “grave threat” to the stability of the United States.196 This determination, however, must also attain a two-thirds majority vote from the Financial Stability Oversight Council (FSOC), which has ten voting members, consisting largely of the heads of federal financial regulators.197 The statute leaves undefined what constitutes a “grave threat,” nor is “grave threat” a term of art in banking law.198 If the Federal Reserve Board and FSOC find that a financial institution posed a “grave threat” to the United States, they are authorized under section 5331(a)(5) to break up the bank after a hearing.199 Nonetheless, this action would first require a finding that other remedies provided in subsection (a) would not redress the grave threat; these remedies include limiting future mergers and acquisitions, restricting product offerings, requiring termination of certain activities, or imposing conditions on the bank holding company’s conduct.200 Regulators have yet to use this provision, and, notably, when the Dodd-Frank Act was passed the asset threshold for a bank to be subject to the Kanjorski Amendment was set at a $50 billion.201 In 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act raised the threshold to $250 billion, a move that lessened the number of banks potentially subject to breakup.202

The second breakup provision is provided by section 165(d) of DoddFrank.203 This provision allows the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC) to together determine that a bank with greater than $250 billion in assets has failed to adhere to the statutory requirements for providing an “orderly resolution plan.”204 Under Dodd-Frank, large banks are required to prepare “living wills” such that they could be efficiently wound down should they fail.205 If a bank whose living will has previously been rejected fails to resubmit an adequate plan within two years of the rejection, and other remedies are exhausted, the Federal Reserve Board and the FDIC may, after consultation with the FSOC, break up the bank.206 Like the Kanjorski Amendment, this provision has not yet been used to break up a bank and the Economic Growth, Regulatory Relief, and Consumer Protection Act raised the threshold from $50 billion to $250 billion, reducing the number of banks that must adhere to it.207 Moreover, federal regulators have indicated that they plan to reduce the frequency of the annual living will submissions.208

C. Riegle-Neal Depository Cap

Riegle-Neal does not expressly provide banking regulators the power to break up banks; however, it sets a concentration cap that serves a similar, but more limited, function.209 Specifically, section 1842(d) bars the Federal Reserve Board from approving a merger where the surviving bank holds more than ten percent of total domestic insured deposits, or thirty percent in any state, though states may alter this cap.210 Importantly, this cap only limits merger approvals and cannot be applied when a bank has acquired more deposits through natural business expansion.211

After the crisis, Congress bolstered this provision.212 Section 622 of Dodd-Frank prohibits the Federal Reserve Board from approving mergers where the surviving bank would hold more than ten percent of all banks’ combined liabilities.213 Moreover, Dodd-Frank clarified that the ten and thirty percent deposit caps governs all banks that are FDIC-insured.214 This was a response to actions taken by the Federal Reserve Board during the 2008 Financial Crisis.215 When Bank of America was attempting an emergency takeover of Merrill Lynch in 2008, Bank of America held 11.9 percent of total deposits, which would have prohibited the merger’s approval.216 The Federal Reserve Board, however, determined that the rule was inapplicable.217 Under its creative interpretation of the statute, the calculation of the depository cap did not include deposits held in thrifts and industrial banks.218 This strained reading reflected the belief that the dangers of financial concentration paled in comparison to the harm that would arise from the failure of large financial institutions.219

#### The counterplan raises compliance costs equal to the social costs of systemic financial risk, functioning as a Pigouvian tax. Forcing banks to internalize costs induces financial sector to self-divest.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

However, two former members of the Board of Governors of the Federal Reserve have argued that Dodd-Frank’s compliance costs—the very costs that are purportedly “unrelated to the financial crisis”18—can actually be understood as an economic tool.19 In two short speeches, former Federal Reserve Chair Ben Bernanke and former Federal Reserve Governor Jeremy Stein observed that Dodd-Frank functions like a Pigouvian tax—that is, a tax that corrects market imperfections by forcing individual actors to bear the costs of the externalities resulting from their actions. 20 Stein, for example, commends Dodd-Frank’s “price-based approach” for “creat[ing] some incentive . . . to shrink” while also “let[ting] [banks] balance this incentive against the scale benefits that they realize by staying big.”21 In other words, even though large financial institutions do not naturally bear the social costs of being systemically important, Bernanke and Stein contend that Dodd-Frank forces banks to internalize some of these costs by making them pay additional compliance costs for being systemically important. This Note both substantiates and extends Bernanke’s and Stein’s claims that Dodd-Frank works like a Pigouvian tax. We substantiate their argument by analyzing the SIFI divestitures that have occurred since Congress passed DoddFrank in 2010 and by identifying which divestures were motivated—or at least heavily influenced—by compliance costs associated with Dodd-Frank. In this way, we document how Dodd-Frank incentivizes SIFIs to internalize the costs of being systemically important. In addition, we show that these costs have induced SIFIs to shed risky assets and thereby fundamentally change the nature of their operations. Put another way, while Bernanke and Stein have argued that compliance costs serve an economic purpose by allowing regulators to fix market imperfections, this Note argues that those compliance costs can also serve an important regulatory purpose by incentivizing SIFIs to shed the business units that generate financial risk in the first place. Because of these regulatory effects, we call Dodd-Frank a “Pigouvian regulation.”22

Viewing Dodd-Frank as a Pigouvian regulation has several important consequences. First, it reveals Dodd-Frank’s novel and effective regulatory model. Scholars may be correct that firms remain too big to fail, but by creating incentives for SIFIs to shed risky assets, Dodd-Frank provides a blueprint for addressing systemic risk without requiring regulators to formally break up large financial institutions or to establish a viable bankruptcy regime. Instead, Dodd-Frank gives SIFIs a simple choice: either pay the hefty SIFI compliance costs or shed risky business lines and, in doing so, reduce the chance that their failure will trigger an economic crisis.

Furthermore, because regulators can tailor Dodd-Frank’s compliance costs to the perceived riskiness of certain financial activities, they can target the most systemically destabilizing business units and can adjust those costs as market conditions change. This flexibility has three informational advantages over alternative regulatory frameworks. First, regulators can tailor the costs to the unique risks posed by different financial institutions. Second, regulators can adjust costs over time as they acquire additional information and as market conditions change. And third, Pigouvian regulations take advantage of relative institutional expertise. Traditional command-and-control regulations require regulators to calculate both the costs and benefits when determining the socially optimal level of a risky activity. By contrast, under Dodd-Frank, regulators simply determine the social costs of being systematically important and allow financial institutions—which better understand the value of being large and engaging in certain transactions—to determine the benefits

#### The plan’s prohibition creates an overnight bank run. The resulting liquidity crisis that flushes 20% GDP down the drain – turns case.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

Finally, although compliance costs have prompted SIFIs to spin off significant business units, it is worth noting that the organizational structure of a given firm may create a ceiling beyond which that firm can no longer divest additional assets. Recall that a bank is automatically a SIFI if it has more than $50 billion in assets. Although GECC was able to shed nearly all of its financial services operations to escape the SIFI label, many other SIFIs would simply cease to exist if they undertook a similar reduction. The deposits currently held by Citigroup, Wells Fargo, Bank of America, and JPMorgan, for instance, approach $4 trillion, which is roughly twenty percent of the GDP of the United States.321 No matter how much regulators increase the cost of holding deposits, it would be difficult— perhaps impossible—for these companies to tell customers that they could no longer deposit checks in their generic commercial savings accounts. Customer deposits are the bread and butter of traditional banking. Without them, banks could hardly be considered depository institutions.322

Similarly, other firms do not share the idiosyncrasies of GE’s business, which played a critical role in allowing the company to shed its SIFI designation so quickly and effectively. Unlike other firms, for instance, GE, the parent company of GECC, had substantial non-financial business lines. It was therefore able to continue essential business operations even after spinning off its financial activities.323 Imagine, however, if Goldman Sachs sought to shed all of its financial activities: it would be left with an empty trading floor, some prime real estate, and a (parody) twitter feed shorn of inspiration.324

#### The counterplan is a case-by-case, market-based incentive, the plan is an across-the-board prohibition imposed by fiat. Allowing tailored, “right-sized,” and retroactively adjustable regulations preserves economies of scale and avoids one-size-fits all bans.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

A notable benefit of Dodd-Frank’s Pigouvian regulations is that they are more flexible than alternative regulatory approaches because they allow regulators to tailor compliance costs to the risks generated by individual SIFIs. To be clear: this benefit does not inhere in all market-based-regulations, but stems from the fact that Dodd-Frank grants regulators authority to tailor costs to the risks posed by specific firms in the manner described above. An ordinary Pigouvian tax would likely apply equally with equal force to different financial institutions. Dodd-Frank’s flexibility stems from the fact that capital requirements and stress tests allow regulators to account for idiosyncrasies of individual firm business models and adjust costs according to the risks posed by each particular firm.

There are two different reasons why it is desirable for regulators to be able to adjust the costs Dodd-Frank imposes on individual SIFIs. First, regulators can reward SIFIs for reducing risk and penalize them for failing to do so. Second, regulators can respond if they determine that certain activities are riskier than they thought, or if market conditions change. In this way, Dodd-Frank has shown itself preferable to traditional command-and-control prohibitions insofar as it allows for “right-sizing”287—a process by which banks calibrate to their socially optimal size, structure, and organization. This Section describes the benefits of right-sizing, providing examples of where it has occurred within the Dodd-Frank scheme while also pointing out its limitations.

At the most fundamental level, right-sizing is important because large firms create benefits, both for themselves and the financial sector writ large. For example, large firms can better exploit economies of scale, diversify risks, spread overhead costs, offer combinations of complementary products, and expand their global reach than smaller firms.288 As Bernanke has argued, “In the long run, a U.S. financial industry without large firms would be less efficient, providing fewer services at higher cost.”289 Furthermore, a strategy that simply resulted in breaking up SIFIs could involve ceding primacy in the financial services industry to countries governed by other regulatory regimes.290 For these reasons, the focus should not be on downsizing, but on right-sizing,291 as it best maintains firms that will be optimal in terms of their benefits and risks.

Of course, this proposition raises the question of whether it is possible for regulators to know the socially optimal size of a specific bank ex ante. First, it is worth noting that this problem would also exist if the government took a more direct approach and broke up banks through regulatory fiat. Moreover, the mechanism adopted by Dodd-Frank has the advantage of allowing regulators to recalibrate costs over time. Thus, while it is unlikely that the bank regulators will initially know if a bank has reached its optimal size, Dodd-Frank adopted a flexible regime that empowers regulators to see how the market reacts to certain developments and then adjust accordingly.

As demonstrated by GECC292 and the discussion of commodities regulations more broadly,293 a targeted increase in firms’ capital requirement (or the threat of one),294 can prompt SIFIs to divest themselves of billions of dollars in financially lucrative business lines. The power behind this incentive structure depends on regulatory flexibility. If the Federal Reserve did not have the authority to adjust capital requirements quickly, then the carrot and stick method would be far less effective.295

Moreover, the ability of Dodd-Frank to tailor costs to each individual firm with respect to certain regulations has an important benefit over Pigouvian taxes as well—it allows regulators to account for the fact that the risks associated with different activities will vary by firm.296 Imagine that a particular kind of commodities trading would introduce significant financial risk if owned by Bank A but have no negative effects if owned by Bank B. In this case, neither a Pigouvian tax nor a command-and-control regulation would achieve the optimal outcome of preventing only Bank A from trading the commodity because they would be either over- or under-inclusive. On the one hand, the regulators might deter both firms from owning the commodities unit by pricing the firms out of the unit (with a Pigouvian tax), or prohibiting them from trading the commodity (through a command-and-control regulation). On the other hand, regulators might allow both firms to own the unit. With a Pigouvian regulation, by contrast, regulators can increase Bank A’s regulatory burden for engaging in such activities without affecting Bank B—deterring Bank A from the activity while allowing Bank B to continue undisturbed. In this way, regulators can achieve the optimal outcome for both firms.

Finally, unlike command-and-control regulations and Pigouvian taxes, Dodd-Frank’s Pigouvian regulations allow regulators to adjust costs over time, so that banks can authorize activities previously deemed too dangerous if market conditions change. This is what happens every time the relevant bank regulators change a capital requirement or revoke the SIFI designation for a nonbank firm. For example, while the costs of commodities trading may not currently outweigh their returns for Bank A, it is possible that future circumstances might change, in which case it might make sense for banks to reenter the commodities market. Such recalibration is possible under a Pigouvian regime, but—given the political process297—it becomes much more difficult if there is a direct ban or established tax. Thus, for the sake of both expertise and fine-tuning, Pigouvian regulations are invaluable.

### 1NC – DOJ Tradeoff DA

#### DOJ antitrust investigations solve supply chain stability now.

Fishman et al. ‘3/1 [Todd Fishman, Noah Brumfield, Eun Joo Hwang, Elaine Johnston; partners at Allen & Overy, specializing in antitrust; 3/1/22; “U.S. criminal antitrust enforcement priorities take shape through inter-agency and global coordination”; <https://www.allenovery.com/en-gb/global/news-and-insights/publications/us-criminal-antitrust-enforcement-priorities-take-shape-through-inter-agency-and-global-coordination>; Allen & Overy]

The DOJ Antitrust Division is amplifying the Biden Administration’s whole-of-government approach to antitrust enforcement by seeking cooperation from enforcers outside the U.S.

On February 17, 2022, the Antitrust Division of the U.S. Department of Justice (DOJ) and Federal Bureau of Investigation (FBI) announced an initiative to combat collusive schemes designed to exploit supply chain disruptions caused by Covid-19. The agencies intend to work together to prioritize existing investigations and to proactively investigate collusion in industries that have been particularly affected by supply chain disruptions, concerned that the pandemic may have opened up opportunities for competitors to fix prices for illicit gains.

In pursuit of this effort on an international level, the DOJ has assembled a working group of global peers including the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission, and the United Kingdom Competition and Markets Authority. This working group is reportedly sharing intelligence and utilizing international cooperation tools to detect and prevent anticompetitive schemes to fix prices or wages, rig bids, or allocate markets.

Whole of government approach to Procurement Collusion Allegations

The DOJ and FBI have previously joined forces to pursue areas of criminal antitrust enforcement. In November 2019, the DOJ launched the Procurement Collusion Strike Force (PCSF) as a coordinated national response amongst U.S. Attorneys’ Offices, the FBI, and multiple agency inspectors general to combat antitrust schemes in government contracting at federal, state, and local levels. Since its creation, the PCSF has added a number of national partners and even expanded internationally with the Fall 2020 launch of PCSF: Global, which is designed to promote the investigation and prosecution of schemes outside of the U.S.

The PCSF’s public investigations have to date brought scrutiny in the markets for security services, aluminum structures, and concrete construction. These efforts have led to a total of USD22 million paid in criminal fines and multiple guilty pleas by corporations and individuals, including the PCSF’s first international resolution in June 2021 involving a Belgian firm which pled guilty to participating in a conspiracy to rig bids, allocate customers, and fix prices for defense-related security services. Most recently, in February 2022 a former executive of a North Carolina engineering firm was convicted for his participation in a bid-rigging conspiracy for aluminum structure project contracts involving the North Carolina Department of Transportation.

The PCSF, which has been described by its Director Daniel Glad as “a whole-of-government approach to combating a whole-of-government problem,” takes to heart the inter-agency cooperative approach encouraged in President Joe Biden’s July 2021 Executive Order on Promoting Competition in the American Economy. Glad indicated in an October 2021 speech that the DOJ sees an opportunity to “lead the way” in vigorous enforcement of the antitrust laws, and that the PCSF “sets a model” for cooperative government partnerships to aggressively protect competition.

A Spring 2021 update from the DOJ indicated that the agency has “nearly three dozen PCSF-related investigations opened to date,” with this number climbing as PCSF agents uncover additional conduct through its Tip Center, district teams, and the PCSF Data Analytics Project, which uses analytics to identify collusion and target bid rigging.

The recent success of the PCSF and proactive stance of the DOJ in tackling potential collusive behavior in specific markets presage an increase in criminal antitrust enforcement, and confirm that the agency’s reach will be bolstered through collaborations backed by the whole of government.

DOJ Focus on supply chain disruptions

The DOJ’s focus on supply chain collusion may have been born in part out of criticism from legislators and broader dissatisfaction from a public that has seen inflation accelerating to the highest level in decades. On February 8, 2022, Senator Elizabeth Warren (D-Mass.) implored Attorney General Merrick Garland and Deputy Attorney General Lisa Monaco to take more aggressive action against companies engaged in price-fixing. Warren wrote that increased demand coupled with buckling supply chains have allowed companies to grow their market power through anticompetitive means, which she implied is the root of today’s inflation.

The DOJ’s latest initiative expands the scope of its scrutiny into the transportation sector. In July 2021, the DOJ signed the first inter-agency Memorandum of Understanding with the Federal Maritime Commission (FMC) to foster cooperation between the agencies in oversight of the competitive conditions in the ocean liner shipping industry. This partnership was reaffirmed on February 28 through a joint announcement that the agencies would share resources to enhance enforcement in the maritime industry: the DOJ is to provide the FMC with the support of attorneys and economists for enforcement against violations of the Shipping Act, and the FMC has pledged to provide the DOJ with support and industry expertise in relation to antitrust enforcement actions. The DOJ’s most recent endeavor now brings other companies involved in the supply chain – those with trucking, warehousing, third party logistics, and delivery capabilities – into the crosshairs.

Key points

In partnership with the FBI, the DOJ Antitrust Division recently announced an initiative focused on collusive conduct arising from supply chain disruptions caused by Covid-19.

The announcement of this criminal enforcement priority follows on the heels of the Procurement Collusion Strike Force’s active prosecutions in 2020 and 2021, which resulted in a total of USD22 million in criminal fines and multiple guilty pleas.

The DOJ’s proactive posture in terms of criminal antitrust enforcement in recent years suggests an increase in both its activity and the activity of its national partners in the near future, posing a significant threat to those who seek to violate the antitrust laws.

#### Resources are finite – the plan forces tradeoffs.

Brian Blais 21. Partner in the litigation and enforcement practice group @ Ropes & Gray LLP and a former federal prosecutor, 3/26/21. “Podcast: 2021 DOJ Enforcement Priorities Under U.S. Attorney General Merrick Garland.” Interview with Lisa Bebchick. https://www.ropesgray.com/en/newsroom/podcasts/2021/March/Podcast-2021-DOJ-Enforcement-Priorities-Under-US-Attorney-General-Merrick-Garland

Brian Blais: Well, as I referenced earlier, I think one real challenge for the Garland DOJ will be the many competing demands on the resources available to DOJ leadership. In addition to the many corporate-related priorities I just discussed, there are a large number of Biden administration priorities that implicate the DOJ, many of which represent a sharp break from the priorities of the Trump Department of Justice—so those include things like environmental justice and the prosecution of environmental cases; civil rights and voting act cases; the ongoing fight against domestic terrorism, including as we talked about earlier, the January 6th Capitol attack; immigration reform and potential shifts in immigration prosecution priorities; potentially heightened antitrust enforcement; and criminal justice reform writ large, just to name a few. And putting aside even all these priorities, there’s a huge backlog of cases in the Department more broadly due to pandemic-related shutdowns, including a substantial trial backlog. So there will be a significant amount of prosecutorial time and effort in the near-term devoted to resolving these already charged matters, as well as moving along already opened investigations, so that leaves reduced prosecutorial bandwidth to advance any new enforcement priorities. So all of that’s to say, one big question for the Garland DOJ is: Can it do it all, or will these various competing demands lead to a natural prioritization of certain enforcement priorities over others? We’ll certainly have a better sense in the coming weeks and months as the remaining DOJ leadership is confirmed, as priorities get communicated, and as the first round of investigations under the new leadership start to launch.

#### Supply chain disruptions cause global war.

Bradley Martin 21, director of the RAND National Security Supply Chain Institute, and a senior policy researcher RAND Corporation, “Supply Chain Disruptions: The Risks and Consequences,” 11/15/21, https://www.rand.org/blog/2021/11/supply-chain-disruptions-the-risks-and-consequences.html

By now the impacts of supply chain disruption are becoming all too familiar: shortages, inflation, factory closures, goods waiting at ports to be unloaded. All these impacts are serious enough, but another more-hidden concern lurks just beneath the surface: the impact of supply chain failure on national security, broadly defined as a nation's ability to protect and ensure the well-being of its population.

This definition of “national security” is broader than just the defense industry or military-related efforts; it also could encompass the very ability of a nation to ensure economic well-being, public health, and protection of a nation's key infrastructure. Supply chain disruptions cause general economic disruption and key commodity shortages, which then in turn can, in fact, drive aggressive national behavior and international instability. And ironically, this reactive aggressive national behavior can happen even if the health of a national economy itself depends upon continued international economic interdependence. Indeed, this very interdependence can create vulnerabilities. So a systematic effort, cutting across agencies and public and private sectors, could be one way to ensure these vulnerabilities are understood and mitigated.

Supply Chain Disruption and Conflict

Dispersed supply chains develop because actors find it's economically advantageous to seek the least-expensive and most-productive sources of supply. These dispersed chains develop for good reasons, but they create complicated interdependencies whose risks and vulnerabilities are sometimes not even understood, let alone mitigated.

While the reasons for creating these chains lie largely with private interest, the effects of disruption—which can come from sources ranging from malign human action to natural disaster—are rarely localized. When shortages occur in one industry, the disruptions in one area nearly always spill into adjacent companies and sectors. Whole economies feel the impact, not isolated actors.

The impact on vulnerable populations may be particularly dire. Supply chain disruptions do not just create higher prices and shortages among high-end consumer products, such as cars. They also affect more-basic commodities such as generic drugs or energy, increasing the cost of living and the provision of basic needs.

This kind of disruption can create instability more generally, promoting conditions for conflict between and within nations. For the most part, nations try to maintain access to markets and resources by peaceful means such as stockpiling, direct investment in partner nations, and use of other financial incentives. However, there is no guarantee that such competition will remain peaceful.

As affluent nations and individuals can find ways to mitigate shortages, they may create blocs of “haves” and “have nots,” where some actors have enough but others cannot meet basic needs. “Haves” may find ways to more directly change distribution, most likely at the expense of other “have nots.” Or “have” nations may try to forcefully safeguard what they have gained and work to exclude competitors. In all these cases, the actors are facing shortages, occasioned by interdependence, and seeking security for themselves in ways that actually promote wider international systemic instability.

Escalation of Conflict

In some cases, supply chain disruptions can have an even more-direct impact than general disruption, causing shortages of commodities the nation must have to ensure national security. This kind of disruption can go beyond matters of justice, equity, and general prosperity to threatening a nation's very ability to defend itself and look after its citizens. Some examples are pharmaceuticals and personal protective equipment, energy, food, raw materials used in manufacturing, and semiconductors used in multiple different systems including military applications. Such shortages can make the need for a national government to act more dire and immediate and thus raise the risk of conflict. In some cases, particular types of raw materials only exist in certain places, so shifting to more-secure sources isn't even possible.

Supply chain disruptions create both leverage for some nations and reasons for other nations to minimize leverage. For example, Taiwan currently dominates the market for semiconductors, which in some respects gives it leverage with other actors, including the mainland People's Republic of China (PRC). Semiconductors are capital-intensive—a new fabrication facility for semiconductors costs approximately $4 billion, with some estimates as high as $12 billion, and can take three or more years to build.

This does not even account for the skilled labor, and points to the difficulty of readily shifting production. As a result, Taiwan gains considerable leverage over the PRC and indeed the world. However, this very dominance, plus its proximity to the PRC and its dependence on the PRC for other commodities, may in fact raise the incentive for the PRC to take aggressive military action to ensure access to a key commodity. Such action could range from a “quarantine” to military threats to an actual invasion.

Aggressive action may stop well short of outright war, yet still be very dangerous for actors in the system. The problem of security vulnerability overall is complicated by the complexity and spread of supply chains across the world. A nation might not be able to successfully secure a commodity just by aggressive action against a single other nation. However, that action against another nation certainly could have the unintended effect of causing supply chains to fail in a more general manner. Aggressiveness, while understandable and probably predictable, might therefore also be extremely dangerous and unproductive.

Conflict and Instability

Nations have gone to war in the past over natural resource shortages or in an effort to secure key markets and labor pools. The need to secure resources and markets was an explicit premise in German and Japanese actions leading to World War II. Such conflict has occurred even during times of significant interdependence between nations, such as in the European system prior to World War I. Historically, nations have not yet resorted to war to ensure supply chain security, but it might be a mistake to assume that such action could never occur when circumstances become sufficiently dire. Interdependence does create incentives to cooperate to avoid disruption, but may offer few alternatives for some desperate nations if some part of the interdependent chain is broken.

### 1NC – TTC CP

#### The United States federal government should establish and advocate a framework for contingent international cooperation, through the Trade and Technology Council that prohibit anticompetitive business practices by the financial industries in the domestic, private sector

#### The TTC JTCPD is driving democratic tech governance now, but that requires long-term coordination over competition policy in Spring 22.

Torbøl 21 – founding partner of the firm’s Brussels office and is a member of the antitrust, competition, and trade regulation group. Within his practice, he focuses on EU competition law, international trade laws, and internal market (Phillip, "Brussels Regulatory Brief: October," No Publication, <https://www.klgates.com/Brussels-Regulatory-Brief-October-November-2021-12-14-2021> 12-14-2021)//gcd

Promoting small and medium-sized enterprises (SME) access to and use of digital tools, by launching activities that will offer opportunities for SMEs and underserved communities to share their needs, experience, strategies and best practices with policymakers on both sides of the Atlantic, in order to ensure better understanding of the barriers to their digital empowerment.

Global trade challenges, by focusing on challenges from non-market economic policies and practices, promoting and protecting labour rights and decent work, as well as trade and environment issues.

Cooperation within the TTC will improve EU and U.S. coordination in relevant bodies and promote a democratic model of digital governance. As well, both parties will establish a Joint Technology Competition Policy Dialogue, which will focus on developing joint approaches, and cooperation on competition policy and enforcement in the tech sectors.

The European Union and the United States together form the largest bilateral economic relationship in the world, which influences the global economy. With the cooperation of both sides, we can see that the TTC marks a new phase in both trade and digital relations, where EU and U.S. partners move from addressing urgent and pressing issues, to the development of a coherent and common long-term policy.

The next gathering is planned to take place in spring 2022.

#### New antitrust approaches that are developed unilaterally destroy TTC cohesion. That turns the case alone. Only the CP solves

Stelly and Borggreen 21 – (RACHAEL STELLY AND CHRISTIAN BORGGREEN, "The EU-U.S. Trade and Technology Council is an opportunity to discuss platform regulation," Disruptive Competition Project, <https://www.project-disco.org/21st-century-trade/070821-the-eu-u-s-trade-and-technology-council-is-an-opportunity-to-discuss-platform-regulation/> JULY 8, 2021)//gcd

Separate from the new TTC, there is a long-standing dialogue between the U.S. antitrust enforcers, the Federal Trade Commission and Department of Justice, and their European counterparts in the competition department of the European Commission. This dialogue has helped competition enforcement authorities engage productively on information gathering as well as specific elements of antitrust enforcement such as evidentiary requirements and the assessment of economic data. The [EU-U.S. Summit declaration](https://www.consilium.europa.eu/media/50758/eu-us-summit-joint-statement-15-june-final-final.pdf) suggested that this dialogue on competition enforcement would continue with a greater degree of formality under the umbrella of a Joint Technology Competition Policy Dialogue, likely focused on cooperation on active enforcement actions.

Continued dialogue between antitrust enforcers is important for the future of competition policy and its aspiration for transatlantic convergence. However, there are more fundamental directional challenges currently being discussed with the EU’s Digital Markets Act that would shift the landscape far beyond antitrust reform and enforcement. It is therefore critical that these novel regulatory approaches to platform governance are discussed among those drafting the new laws, not just those enforcing them.

The TTC provides an ideal forum for elevating these new and complex challenges and ensuring thoughtful political and legislative consideration of the different interests and values underlying these regulations. A lack of high-level transatlantic coordination – and the absence of regulatory dialogue – will inevitably lead to lopsided rules, and potentially contradictory regulatory systems that no level of enforcement cooperation will be able to resolve. What one jurisdiction may find an acceptable infringement of the rights to intellectual property, security and privacy protections, or the freedom to contract, may go beyond what another would countenance, particularly when foreign companies are targeted. A conflict of laws will also negatively impact relations between the EU and U.S. in the long term, directly undermining the shared ambition under the TTC “to deepen transatlantic trade and economic relations.”

The TTC is an opportunity for a frank dialogue on transatlantic and global tech challenges as well as an opportunity to drive EU-U.S. leadership on the future of the digital economy in the face of increasing global threats. Political leaders across both jurisdictions will need to be clear-eyed about opportunities for shared technological leadership as well as the risks of inadvertently empowering authoritarian countries through blunt or untested regulatory approaches. Building a strong forum to collaborate on tech standards and address diverging approaches to platform regulation would be a timely and appropriate place to start.

#### Effective TTC coordination is necessary to resolve all existential risks.

Tocci 21 – Director of the Istituto Affari Internazionali, Honorary Professor at the University of Tübingen (Nathalie, “After the Honeymoon, How to Make the EU-US Relationship Work.” Politico, October 6, 2021)//gcd

Indeed, [the launch of the EU-U.S. Trade and Tech Council (TTC)](https://www.politico.com/news/2021/09/29/us-eu-trade-tech-council-pittsburgh-514760) in Pittsburgh last week points the way to the relationship’s revival, and to the true center of 21st century transatlantic relations. The fourth industrial revolution, public health, economic recovery, the green energy transition — this is where European change is actually taking place, and it is where the greatest potential for cooperation with the U.S. lies. For all the talk of diplomacy and alliances on full display in [Biden’s U.N. General Assembly address](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/21/remarks-by-president-biden-before-the-76th-session-of-the-united-nations-general-assembly/), the U.S. will act — as it always has — in its national interest. And while U.S. interests do align with the EU on European security, its [need to strategically reorient toward China](https://www.politico.eu/article/us-joe-biden-eu-reckons-asia-push/) and to invest more in deterrence in the Indo-Pacific region will also mean a continued gradual disengagement from Europe’s surrounding regions. The only reasonable conclusion for the EU to draw is to step up to its own responsibilities in its neighborhood. Both Afghanistan and AUKUS have reignited the debate about European defense and strategic autonomy — but unfortunately, hardly anything is happening. Europeans continue to talk about security and defense and, in fairness, are gradually investing more in their capabilities. But when it comes to action, with the exception of France’s operation in the Sahel, there is not much to see. A strong transatlantic partnership should eventually include a more balanced security and defense relationship — one with greater European responsibility, as well as greater respect from the U.S. Perhaps one day it will. But that day is not today. This doesn’t mean there isn’t much the two sides can do together. Areas like the economy, technology, climate and energy transition offer far more promising avenues for meaningful cooperation. In these realms, the pandemic offered the EU the opportunity for action — and Europe seized it. The EU is navigating out of this coronavirus crisis as one, with its ability to deliver for its citizens on full display. The TTC is the most immediate example for the potential for this type of transatlantic coordination. The inaugural meeting’s concern with the market behavior of China also reflects a fundamental truth: The world is settling into a new bipolar structure, largely revolving around the U.S. and China. This does not mean that other powers — including the EU — are irrelevant. But it does imply that they will be drawn to either one pole or the other, largely depending on the nature of their political systems. Unlike the Cold War, however, the current competition features deep interdependence and primarily plays out in the economic and technological spheres. This places Europe in a distinctly different position than before: Whereas in the 20th century, Europe mattered to the U.S. because it was on the proverbial menu, today the EU matters because it has a seat at the table. The economic, technological and energy transitions will be the beating heart of 21st century transatlantic partnership. In contrast to defense, these are areas where Europe has taken responsibility — and earned respect. This is not to say that differences don’t exist in these areas as well. While progress has been made — on decarbonization targets, pledges for climate finance and the launch of the global methane alliance, for instance — there are still deep waters separating the EU and the U.S., most notably on issues like carbon pricing. If the two sides can’t manage to make common ground, some of these risk turning into consequential transatlantic gaps, both strategically when it comes to China and for the future of our planet. Honeymoons come and go, but now that real life has kicked in, it’s time to make the relationship work — especially in these areas of transition that are so existential to both.

### 1NC – Court Clog DA

#### Federal courts are managing caseloads now.

Nekritz ‘12/15 [Alyssa; 12/15/21; “A look at pandemic backlog in court proceedings and resources”; <https://www.ncsc.org/information-and-resources/info-and-res-page-card-navigation/trending-topics/trending-topics-landing-pg/the-pandemic-caused-delays-in-many-court-proceedings.-what-are-states-doing-about-backlog>; NCSC; TV]

About one third of U.S. courts saw an increase of over 5% in backlogs. This increase would have been larger had courts not adapted quickly to online operations. Several types of court proceedings, particularly trials, were delayed. Some court professionals are optimistic that the existing backlogs will be resolved quickly. Others are worried backlogs will continue.

In order to avert for a growing backlog, some states have or are dropping non-violent criminal cases when courts reopen . Other prosecutors are prioritizing repeat offenders. Although it is important for the court system to manage the cases timely, there are staunch critics who believe dismissal is a bad idea. Critics argue adjournments and the associated delay can create access to justice concerns, placing courts in a tough position.

Other state courts, like Florida and Washington, have requested more retired judges to assist pulled judges out of retirement and temporarily increased staffing to help with backlogs. Some jurisdictions continue to look for effective ways of addressing their backlogs.

NCSC’s Effective Criminal Case Management Project conducted extensive data collection on felony and misdemeanor cases. The project built resources on case flow management to help courts process cases efficiently.

Courts continue to innovate and NCSC is tracking pandemic related backlogs. More data will be necessary to draw conclusions about future impacts. Revisit the 2020 CCJ/COSCA Pandemic Backlog Report for more resources on dealing with a surge in civil cases. Additionally, courts can access the ECCM’s Cost of Delay Calculator (PDF and Excel) to compute a simple estimate revealing how quickly and significantly the costs of delay accumulate across a court.

#### Antitrust cases are resource-intensive and intersect with other domains of law. Specifically, spills over to patent litigation.

Warren ’15 [Daniel R. Warren, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis]

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Efficient court review underpins patent-led innovation. That averts nuclear war and a host of existential threats.

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

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

Intellectual Property in “Interesting Times”

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

The Changes In Intellectual Property Law

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

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

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

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

Patents

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

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

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

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

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

Copyrights

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

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

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

Trademarks

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

Trade Secrets

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

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

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

Privacy Rights

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

America’s Need For Strong Intellectual Property Protection

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

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

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

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

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

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

Conclusion

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

## Derivatives

### 1NC – AT: Derivatives

#### SEC regulation balances competition with capital market stability – antitrust courts will overreach.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 926-927

A. The False Positives Concern

1. The SEC's Comparative Advantage

There are several reasons to prefer that the scope of permissible conduct in the securities industry be determined by the SEC rather than by antitrust courts. First, SEC regulation serves a sufficient antitrust function. The Commission is required to take into consideration competition effects when it promulgates regulations 75 and, when promulgating a regulation pursuant to its authority under the Exchange Act, it must explain the effect of the regulation on competition in its statement of basis and purpose.' 6 Because antitrust principles permeate the securities laws, the utility of parallel antitrust enforcement is dubious.

Moreover, SEC regulation possesses two affirmative advantages over antitrust litigation. First, the SEC is a specialized agency with a great deal of expertise in the securities area, whereas antitrust courts are generalized tribunals and antitrust matters occupy only a small portion of their dockets." In addition, when promulgating and enforcing its regulations, the SEC can take an industry-wide perspective and can alter its position on the basis of new information. By contrast, judicial decisions are limited to the facts of the particular case at bar and are comparatively less dynamic.

Second, relative to SEC regulation, antitrust analysis is comparatively narrow in scope. Whereas antitrust courts focus exclusively on the effect of an activity on competition,78 SEC regulation takes into account, in addition to competition, the effect of a potential rule on the volatility of the capital markets, the accuracy of securities pricing, fraudulent practices by brokerdealers, and the health of regulated companies. 79 To the extent that these goals might, at times, conflict with the paradigm of unfettered competition,8o the SEC is in a better position to strike the right balance among them than are antitrust courts.$1 In particular, because antitrust courts can be expected to undervalue the non-competition-related benefits of a given activity, they are likely to prohibit some conduct that should be permitted. For example, price stability, a policy which is germane to securities regulation,82 is potentially in tension with traditional antitrust principles. 8' As such, antitrust courts may impose liability for concerted action designed to stabilize securities prices even if such action is on balance beneficial. 84

#### Turn: treble damages create overdeterrence in finance. Punitive measures aren’t necessary in regulated sectors because visibility of practices is high.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 933-935

Potentially the most rhetorically appealing objection to the argument that the SEC is likely to have an advantage over antitrust courts in distinguishing securities market activities that should be prohibited from those that should be allowed is that, even if the SEC possesses such an institutional advantage, it may not have the resources necessary to detect all harmful antitrust violations in the securities area." 5 In particular, the Clayton Act provides for treble damages against persons in violation of the antitrust laws."' By contrast, the SEC has no power to issue such a punitive remedy. The traditional justification for treble damages is that they are necessary to counterbalance underdetection and thereby force antitrust violators to internalize the full social costs of their actions." 7 Thus, one might expect that, without parallel antitrust actions, SEC regulation would lead to underdeterrence.

However, this argument ultimately rings hollow because the need for treble damages is likely to be fairly dubious in situations in which implied immunity might be found to exist. As scholars have recognized, the utility of treble damages as a mechanism for achieving optimal deterrence is positively related to the concealability of the antitrust offense at issue."' When a particular activity is relatively visible, the probability of detection may be high and extracompensatory damages may lead to overdeterrence rather than to optimal deterrence. In the context of implied immunity under the antitrust laws, the critical point is that a finding of immunity, even under the Billing standard, is predicated first and foremost on the SEC actually possessing jurisdiction over a particular activity and being actively engaged in the process of evaluating the costs and benefits of that activity." 9 But if an activity is such that it has captured the attention of regulators at the SEC in this way, then it is a fortiori unlikely to be sufficiently concealable to justify a treble damages award."' By contrast, when a particular activity is difficult to detect and the SEC is thus unlikely to be aware of its existence or prevalence, a requisite condition for a finding of implied immunity-the exercise of the SEC's supervisory authority--will be absent, and antitrust suits will not be precluded."'

Of course, it is not inconceivable that, even if the SEC is actively engaged in reviewing the potentially anticompetitive effects of a particular securities market activity and has made a determination that the activity should be prohibited, it may still fail to detect particular instances of that activity. But the SEC has at its disposal a number of disciplinary tools with which to punish violators, tools that are significantly more focused and precise in their application than is automatic trebling under the antitrust laws. For example, willful violations of the securities laws or SEC regulations can lead to criminal sanctions 2 and, if committed by a broker-dealer, may be grounds for the SEC to suspend the broker-dealer's registration." 3 These mechanisms are adequate safeguards against the risk of underdeterrence of antitrust violations in the securities industry.

Thus, the unavailability of treble damages in SEC enforcement actions and private securities lawsuits is not a compelling argument against a broad implied immunity standard. When the SEC actively oversees a particular activity, permitting parallel antitrust suits in which damage awards are automatically trebled is an exceedingly heavy-handed method of solving any supposed detection problem and is instead likely to deter beneficial conduct."

As such, the treble damages argument does not undermine, and in fact affirmatively reinforces, the comparative advantage of SEC regulation over antitrust suits.

#### Anticompetitive conduct in securities is rare – there’s little benefit or opportunity for market power.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 936

Harmful anticompetitive activity in the securities industry is likely to be relatively uncommon. The reason, as Professor Hovenkamp has explained, is that there are thousands of sellers of any given security, and securities are close substitutes for one another. As a result, the securities markets are close to perfectly competitive.12 6 The critical distinction to recognize is between the market for a firm's products or services and the market for ownership of that firm. Even if two companies produce entirely different products, the securities that they issue are close substitutes for one another. The value of those securities is a function of the cash flows that they can be expected to generate, whether in the form of regular dividends or a liquidating payment in the event that the company is sold, and the risk properties of those expected cash flows. As a result, assuming that the efficient capital market hypothesis holds and stock prices reflect all publicly available information, 127 any two stocks are essentially substitutes: they differ only in the extent to which their expected returns co-vary with the market (that is, their market betas).12' Moreover, because investors can adjust the contents of the securities in their portfolios and the relative weights of those securities in any number of ways to achieve their desired levels of risk, there is no reason to believe that any one security does not compete with thousands of others. In short, "all stocks are in the same relevant market insofar as antitrust is concerned."1 3

Because the economic concerns that animate the antitrust laws depend on an assumption that particular firms possess market power,' the competitive nature of the securities markets makes it unlikely that conduct that might be considered anticompetitive in other settings is in fact harmful in the securities context.13 2 As an example, consider the tying scheme at issue in Billing, in which underwriters allegedly insisted that IPO investors purchase additional less attractive non-IPO shares. The theoretical economic concern with tying is that a firm with market power in the tying product market may use that power to suppress competition in the tied product market. 3 In the IPO context, the concern would be that some purchasers might prefer to purchase the tied security from a different seller but may end up purchasing it from the underwriter in order to obtain the IPO share. 3 4 A compelling argument can be made that tying arrangements generally will not impose any incremental harm on competition even when the defendant possesses market power in the tying product market because the defendant can only exercise that market power once, and any profits generated through sales of the tied product will be offset by a decline in profits from the tying product."' But even accepting the premise that in certain scenarios tying arrangements may enable a firm to expand the scope of its market power into the tied product market, the IPO context is pretty clearly not such a scenario. The reason is that any supposed anticompetitive effects of tying in this context are unlikely to be significant since sellers presumably do not have market power in the tying product, at least to the extent that IPO shares are not considered an independent market distinct from the equity market generally.'3

#### Antitrust doesn’t exceptional check regulatory capture.

Justin **HURWITZ** Law @ Nebraska **’14** “Administrative Antitrust” 21 GEO. Mason L. REV. 1191 (2014) p. 1230-1231

A consequence, if perhaps not a purpose, of moving away from implied immunity and the complementary view of antitrust and regulation is that antitrust is less prone to exceptional treatment. This is an undeniable good, as there has never been a sound justification for this exceptional treatment.

The only argument that commentators have made to support the exceptional treatment of antitrust is that courts are less subject to public choice concerns-that is, capture by interest groups-than regulatory agencies. 3"3 While antitrust might be a form of regulation, as the argument goes, public choice concerns suggest that administration of antitrust laws by the courts is preferable to administration by regulatory agencies."4 This argument has been substantively critiqued by some.3"5 But there is a more fundamental problem with such an argument: it simply proves too much. Competition policy is not the only area of law subject to public choice concerns. In fact, given its economic basis, it is likely that antitrust law is far less subject to public choice concerns than, say, so-called "public interest" determinations or evaluations of environmental impact. Courts do not retain substantive decisionmaking authority when reviewing EPA rules-rather, they follow administrative law principles for reviewing the EPA's decisionmaking procedures to ensure that the agency has reached a substantively valid decision. This approach is designed, in part, with full awareness of public choice concerns. Antitrust is certainly subject to public choice concerns as well, but this does not make it exceptional.

#### Rule of reason doesn’t compensate for lack of financial expertise.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 928-929

87. In the last several decades, the Supreme Court has abandoned per se antitrust rules in favor of a rule-of-reason analysis for a number of practices. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (applying the rule of reason to resale price maintenance); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296-97 (1985) (limiting the application of the per se rule against group boycotts to cases in which the defendants possess market power); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16-18 (1984) (restricting the per se rule against tying to cases in which the defendant possesses market power in the tying product); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (applying the rule of reason to vertical territorial restrictions). Some commentators have argued that the rule of reason enables antitrust courts to adapt their analyses to the particular concerns of the securities industry and thus undermines the assumption that courts will prohibit too much conduct. See Stacey L. Dogan & Mark A. Lemley, Antitrust Law and Regulatory Gaming, 87 TEX. L. REV. 685, 700-01 (2009); Kahn, supra note 14, at 1494. But this argument is unconvincing since it is still the case that nonexpert and generalist judges and juries are applying the rule-of-reason analysis, and the rule of reason still focuses narrowly on competition to the exclusion of other policy goals. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691-92 (1978).

#### SEC solves competition. Because investors are consumers of financial services, regulation will protect consumer welfare.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 929-930

Although the SEC is required to take into account competition concerns when it promulgates rules,88 two commentators recently suggested that the SEC is nevertheless unlikely to give competition values sufficient weight when making policy decisions. 8' The SEC, they reasoned, is "first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices." 9" Thus, they expressed skepticism that the SEC would adequately police competition." This argument is unconvincing for two reasons. First, it implies that regulation to promote competition in the securities industry and regulation to promote investor protection and information disclosure are disjoint sets. They are not. Most securities regulation designed to protect investors will in fact also promote competition and consumer welfare because investors are "consumers" of financial services.92 Thus, activities that are injurious to competition and to consumer welfare will generally be inimical to the goal of investor protection as well.9 3

Second, to the extent that, as discussed above, competition and investor protection may at times be in tension,9 4 there is no obvious reason to think that the SEC will exhibit systematic bias against competition. SEC personnel include economists and other policymakers who are capable of making analytical determinations concerning market concentration and power, barriers to entry, and the like. In addition, not only is the SEC required to consider competition effects when it promulgates regulations, but the Exchange Act expressly prohibits the SEC from promulgating a rule that will have a negative effect on competition unless it finds that such an effect is necessary or appropriate to pursue some other policy of the securities laws." Just as important, the SEC is required to explain the likely competitive effects of a rule in the rule's published statement of basis and purpose.9 6 This creates a focal point for a reviewing court considering a challenge to the rule under the Administrative Procedure Act (APA) as arbitrary and capricious or inconsistent with the Exchange Act's prohibition on unnecessary restraints on competition. 97 Moreover, in order to survive such review, the SEC will have to demonstrate that it considered public commentsg8 received that were critical of the rule, as well as any academic studies that are inconsistent with the factual predicates of the rule, and will likely have to explain why it rejected possible alternative rules that might have been less injurious to competition." Such "hard look" judicial review under the APA ensures that the SEC will not be able to blithely disregard its statutory mandate to regulate in the interests of competition, even if for some reason it were otherwise inclined to do so."'

#### No populism impact---democracy is resilient

James Miller 18, professor of liberal studies and politics, and faculty director of creative publishing and critical journalism at the New School in New York, 10/11/18, “Could populism actually be good for democracy?”, https://www.theguardian.com/news/2018/oct/11/could-populism-actually-be-good-for-democracy

Current affairs may seem especially bleak, but fears about democracy are nothing new. At the zenith of direct democracy in ancient Athens, in the fifth century BC, one critic called it a “patent absurdity” – and so it seemed to most political experts from Aristotle to Edmund Burke, who considered democracy “the most shameless thing in the world”. As the American founding father John Adams warned, “there never was a democracy yet that did not commit suicide”.

For almost 2,000 years, most western political theorists agreed with Aristotle, Burke and Adams: nobody could imagine seriously advocating democracy as an ideal form of government. It was only at the end of the 18th century that democracy reappeared as a modern political ideal, during the French Revolution.

Ever since, popular insurrections and revolts in the name of democracy have become a recurrent feature of global politics. It needs to be stressed: these revolts are not an unfortunate blemish on the peaceful forward march toward a more just society; they form the heart and soul of modern democracy as a living reality.

It is a familiar story: out of the blue, it seems, a crowd pours into a city square or gathers at a barnstorming rally held by a spellbinding orator, to protest against hated institutions, to express rage at the betrayals of the ruling class, to seize control of public spaces. To label these frequently disquieting moments of collective freedom “populist”, in a pejorative sense, is to misunderstand a constitutive feature of the modern democratic project.

Yet these episodes of collective self-assertion are invariably fleeting, and often provoke a political backlash in turn. The political disorder they create stands in tension with the need for a more stable, peaceful form of collective participation. That is one reason why many modern democrats have tried to create representative institutions that can – through liberal protections for the freedom of religion, and of the press, and the civil rights of minorities – both express, and tame, the will of a sovereign people.

Thus the great French philosopher Condorcet in 1793 proposed creating a new, indirect form of self-rule, linking local assemblies to a national government. “By ingrafting representation upon democracy,” as Condorcet’s friend Tom Paine put it, the people could exercise their power both directly, in local assemblies, and indirectly, by provisionally entrusting some of their powers to elected representatives.

Under the pressure of events, another ardent French democrat, Robespierre, went further and defended the need, amid a civil war, for a temporary dictatorship – precisely to preserve the possibility of building a more enduring form of representative democracy, once its enemies had been defeated and law and order could be restored.

But there was a problem with these efforts to establish a modern democracy at scale. Especially in a large nation such as France or the US, representative institutions – and, even worse, dictatorial regimes claiming a popular mandate – inevitably risk frustrating anyone hoping to play a more direct role in political decision-making.

This means that the democratic project, both ancient and modern, is inherently unstable. The modern promise of popular sovereignty, repeatedly frustrated, produces recurrent efforts at asserting the collective power of a people. If observers like the apparent result of such an effort, they may hail it as a renaissance of the democratic spirit; if they do not, they are liable to dismiss these episodes of collective self-assertion as mob rule, or populism run amok.

No matter. Even though the post-second world war consensus over the meaning and value of liberal democratic institutions seems more fragile than ever – polls show that trust in elected representatives has rarely been lower – democracy as furious dissent flourishes, in vivid and vehement outbursts of anger at remote elites and shadowy enemies.

## Securitization

### 1NC – AT: Securitization

#### No solvency – the plan does not end all asset securitization. 1AC swiss cheese highlighting gets zero credit.

#### Credit ratings regulations post 08 AND post-covid lending restrictions solve asset securitization.

Elizabeth Caviness | Asani Sarkar | Ankur Goyal | Woojung Park, September ’21, “The Term Asset-Backed Securities Loan Facility” Federal Reserve Bank of New York Staff Reports, no. 979 https://deliverypdf.ssrn.com/delivery.php?ID=736013002124027110099072012025108006049071008034054034076085123076112022014102104011028039028119052022051077107088005081076000040038068062019126106092111071027113091026038006113092124089020025103088115117006099123119016064073065120112089092090123117&EXT=pdf&INDEX=TRUE

Conditions in Securitization Markets around the Pandemic Crisis

When financial firms provide loans to borrowers, they may keep and fund the loans on their balance sheets until loans are repaid or may securitize the loans by financing them off balance sheet. In a securitization, large numbers of loans are pooled and used as collateral to issue ABS backed by the principal and interest payments on the loans (see Figure 1 below). Further, the cash flows from the loan pools are divided into multiple tranches with different risk characteristics and ratings, allowing investors such as asset managers, insurance companies, or commercial banks to buy the tranches that meet their capacity and willingness to bear risk. For example, risk-averse investors may choose to buy only the AAA-rated tranche of a securitization. Financial firms typically sell the loans to a separate, bankruptcy-remote entity (known as a Special Purpose Vehicle) that holds the loans and issues securitized debt, freeing up their capacity to make new loans.

The importance of securitization as a funding source is evident in the large volume of ABS issued in 2019, when more than $300 billion were brought to market. After a seasonal lull in December 2019, ABS issuance was on the upswing in January and February of 2020 (see chart below). However, as coronavirus cases surged and authorities imposed social distancing and shutdowns beginning in March 2020, the economic outlook became highly uncertain, disrupting the financial markets. Total ABS issuance declined more than 70% from February to April 2020 (see Figure 2).

Along with declines in issuance, the spreads on the ABS spiked, reflecting both the heightened credit risk from loan losses and liquidity risk as investors ran short of cash (see Figure 3 below). For example, between February 20 and March 19, spreads on AAA-rated tranches of commercial mortgage-backed securities (CMBS) of 10-year maturity increased from by almost 200 basis points to about 280 basis points and spreads on AAA-rated tranches of 3-year maturity prime auto loan ABS widened by almost 180 basis points to 200 basis points. Since the ABS market has historically funded a significant portion of consumer and business lending, continued disruption of these markets – and of financial markets more broadly -- had the potential to strain the liquidity and balance sheet capacity of financial institutions and hamper the flow of credit to consumers and businesses by limiting their ability to make loans.3

The Establishment of the TALF

To facilitate the issuance of ABS, stabilize ABS markets generally, and support the continued availability of credit to households and businesses, the Federal Reserve Board authorized the Federal Reserve Bank of New York (FRBNY) to establish the TALF under the authority of Section 13(3) of the Federal Reserve Act, with the prior approval of the Secretary of the Treasury.4 The initial size of the facility was $100 billion, supported by $10 billion of equity authorized by the U.S. Department of the Treasury, using funds appropriated to the Exchange Stabilization Fund by Congress under section 4027 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

What Did the TALF Do and How Did It Do It?

The TALF was designed to facilitate the issuance of ABS backed by new or recently originated consumer and small business loans, leveraged loans, and commercial mortgages. The FRBNY lent to a special purpose vehicle (TALF SPV), which provided funding to eligible borrowers that own eligible ABS (see Figure 4 below). 6 The TALF lent an amount equal to the market value of the ABS, less a haircut to account for the credit risk of the collateral, and the loan was secured at all times by the ABS. By offering TALF loans to investors to purchase new or recently issued ABS, the facility provided liquidity to securitization markets and thereby facilitated the issuance of new ABS. In turn, financial firms that sell ABS to investors were able to free up capacity to continue lending to households and businesses.

The TALF contained several features intended to protect taxpayers from losses under adverse economic conditions. For an ABS to be eligible for a TALF loan, it needed a AAA credit rating from at least two rating agencies. Since AAA-rated tranches are the safest and largest in securitizations, limiting eligibility to these tranches allowed TALF to have the greatest effect on market functioning while minimizing credit risk assumed by the Federal Reserve. In addition, TALF borrowers were required to post a haircut that ranged from 5 percent to 25 percent, depending on the asset class and average life of securities. Haircuts are calculated as a percentage of the underlying value of the ABS, implying that the TALF SPV did not take a loss unless price of the pledged ABS declined more than the haircut. The TALF only accepted underlying assets or ABS structural features that are relatively simple and safe so as to further reduce the risk of loss to the taxpayer.7

#### Not reverse causal – foreign asset securitization won’t stop even if Americans stop.

#### Alt causes to emerging economies – COVID.

UGLC ’21 [US Global Leadership Coalition; 8/12/21; “COVID-19 Brief: Impact on the Economies of Low-Income Countries”; <https://www.usglc.org/coronavirus/economies-of-developing-countries/>; AS]

The failure to control the COVID-19 pandemic has had far reaching impacts on the global economy, with global GDP falling by 3.3 percent in 2020. Even with the global economy projected to grow by 6 percent in 2021, recovery will depend on equitable distribution of the vaccine globally. Failure to do so could cost the world economy up to $9 trillion, according to the International Chamber of Commerce, with the costs born equally by wealthy and poor countries, causing more economic devastation than the 2008 financial crisis.

The COVID-19 pandemic erased the equivalent of 255 million jobs in 2020, losses were particularly high in Latin America and the Caribbean, Southern Europe and Southern Asia.

The global economic downturn is having a disproportionate impact on low-income and emerging economies. They will take the hardest hit, according to Kristalina Georgieva, Managing Director of the International Monetary Fund, as they have “less resources to protect themselves against this dual…health and economic crisis.” World Bank President David Malpass also warned that the global recession could set back decades of progress in low-income countries, stating that the COVID-19 pandemic would lead to higher infant mortality rates and stunted growth for children.

The United Nations Development Programme (UNDP) projects that developing economies will lose at least $220 billion in income.

An additional 95 million people are expected to have entered the ranks of the extreme poor in 2020 (80 million more undernourished than before) due to the average annual loss in per capita GDP, says the IMF.

An additional 207 million people could be pushed into extreme poverty by 2030, due to the severe long-term impact of the coronavirus pandemic, bringing the total number to more than a billion, according to a new study from the UNDP.

Failure to Distribute Vaccines Around the World

Vaccine access has emerged as the leading determinate of global economic recovery, particularly for low-income and emerging economies.

Low-income countries would add $38 billion to their GDP forecast for 2021 if they had the same vaccination rate as high income countries.

Rand Corporation estimates changes in real annual GDP for four scenarios:

Graph from Rand Corporation

Differences in ongoing financial support are degrading economic growth and recovery prospects for low-income countries.

Regional Assessments

The World Bank reports that sub-Saharan Africa experienced its first economic recession in 25 years, with the economy declining by 2.0 percent in 2020. Growth in the region is forecast to rise to between 2.3 – 3.4 percent in 2021.

For the first time in 60 years, East Asia’s economic growth stalled

– growing by a mere 1.2 percent in 2020 – and the pandemic could drive 19 million people into poverty.

Latin America and the Caribbean experienced the worst economic contraction in the region’s history with the economy declining by 6.7 percent in 2020, with expected growth by 4.4 percent in 2021. Unemployment is expected to reach 13.5 percent, the economic downturn could push 28 million people into extreme poverty.

Foreign direct investment flows – a critical source of financing for emerging and developing economies – fell by 42 percent in 2020, with expectations FDI will remain weak due to pandemic related uncertainty. Low-income countries saw more than $100 billion flowing out from the region in early 2020 – more than three times the amount during the global financial crisis. The dramatic capital outflow led to major emerging market currencies depreciating by 15 percent and forcing people to pay more for imported goods. UNCTAD projects a 5-10% FDI slide in 2021.

Low-income countries debt burden may soar to between $2.6 trillion and $3.4 trillion over the next two years, according to UNCTAD. A significant share of low-income country’s public debt is mainly in U.S. dollars, the depreciation makes it difficult to pay their debts.

#### Structural issues issues hamper emerging markets.

Sen ’21 [Kunal; October 2021; Professor of Development Economics in the Global Development Institute @ University of Manchester; “Least Developed Countries are facing five major challenges”; <https://www.wider.unu.edu/publication/least-developed-countries-are-facing-five-major-challenges>; AS] \*LDC = Least Developed Countries

Five main challenges

The challenges of the LDCs were widely discussed in the Future Forum. I would narrow the list down to five main problems.

The first one is weak economic growth. Average growth in LDCs stood at 4.7% during 2011–19, which was significantly lower than the average of 6.6% during 2001–10. This implies that the living standards of many LDCs will not converge to the levels of the fast-growing developing countries in North and South-East Asia. With the onset of the pandemic in 2020, economic growth has been particularly affected in 2020 and 2021, leading to sharp increases in poverty.

Second, there is a lack of productive capacity. The gap in productive capacity of LDCs and other developing countries has not narrowed in the last ten years. There has been very little diversification into manufacturing or high-value services. Agriculture still remains the major source of value added and employment.

Third, there is lack of diversification of exports and high commodity dependence. We see an excessive dependence on a few products in the export baskets of many LDCs. Many countries seem to specialise in one or two products with respect to exports. This means that they are vulnerable to trade shocks and the sudden loss of export markets when another developing country becomes competitive in that product.

Fourth, there is high vulnerability to environmental shocks. Extreme weather events have an adverse effect on LDCs. For example, Myanmar is the second most climate risk-affected country in the world. Climate change also poses serious threats to the Pacific Islands LDCs.

Fifth, there is the potential loss of preferential market access such as the EU’s ‘Everything But Arms’ (EBA) for the LDCs that are in the process of graduating. As most of the successful exporters among LDCs specialise in products that are price-sensitive such as apparel, the possible tariff increases may lead to big losses in competitiveness.

#### COVID and 2008 empirically deny risks stemming from asset backed securities.

#### No one models the US – hypocrisy.

Graham E. Fuller 21, MA Degree in Russian and Middle Eastern Studies from Harvard University, Former Vice Chairman of the National Intelligence Council at the CIA, Former Senior Political Scientist at RAND, and Current Adjunct Professor of History at Simon Fraser University, “Hell Hath No Fury Like a Superpower in Decline”, Responsible Statecraft, 3/22/2021, https://responsiblestatecraft.org/2021/03/22/hell-hath-no-fury-than-a-superpower-in-decline/

It is simply astonishing that in approaching a new course of relations with Russia, President Biden should have called Vladimir Putin “a killer” and lacking “a soul.”

It is similarly astonishing to have chosen an important opening moment in our delicate relationship with China to employ derogatory language. Did Blinken believe that flashing testosterone at the first high-level meeting of Beijing’s foreign policy leadership would help achieve the diplomatic goals Washington seeks? One wonders who the secretary of state was trying to impress — Beijing or a U.S. domestic audience?

The United States undoubtedly has its own grievances towards China, and China likewise possesses many grievances towards the United States. But surely this name-calling and accusatory language are immature and counterproductive in terms of future U.S.-China or, for that matter, China-Russian relations.

And what message do these events send to other world leaders? It raises serious questions about the professionalism and vision of the new administration’s leadership as to whether Washington is any longer responsible or capable of the “global leadership” about which it talks so incessantly.

When both the U.S. president and his secretary of state seem to have chosen such ill-considered approaches to Russia and China, it certainly will make many other countries quite hesitant to sign on to an American vision and style of global leadership.

The degree of hypocrisy about “killing” or “foreign interference” is likewise disturbing if not myopic. U.S. policies over the past 20 years or more have shown a great willingness to kill in great quantity in a failing effort to achieve political goals that have stunningly failed in nearly every case. Consider the hundreds of thousands of Iraqi, Syrian, Somali, Libyan, Iranian, Afghan, and Pakistani civilians who are perceived as little more than “collateral damage” in endless U.S. military interventions. Not to mention American assassinations of high-level foreign officials such as Iranian General Qassem Soleimani who also happened to be perhaps the most revered public official in Iran.

Antony Blinken, seemingly without embarrassment, speaks of the United States as upholding “the rule of law globally” in the self-deception or the belief that such is the case. In fact, Washington has always expected other countries to support the international rule of law — although exempting good friends like Israel and Saudi Arabia. The United States invariably defends its own “exceptionalism” in pointedly not signing onto International law when it suits its interests. That includes foreign assassinations and the launching of several wars without authorization at the international level, provoking “Color Revolutions,” and refusing to ratify UN Conventions on the Law of the Sea or the Rights of the Child, or honor adverse judgments by the International Court of Justice. And It is difficult to understand how Blinken feels comfortable at lecturing China on its domestic failings at a time when U.S. democracy and social policy have never presented a more damaging face to the world.

#### No EU financial crisis – they have more power than the US to apply structural remedies on bank size now.

Donald **BAKER** Lecturer in Law @ GW **’15** From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies, 80 Antitrust L.J. 353 (2015) p. 370-371

The Supreme Court has not heard a Clayton Act Section 7 case since 1975. Everyone expects that today's much more conservative Court would be more restrictive in applying Section 7 of the Clayton Act than "the new antitrust majority" was when Justice White criticized them in 1974. Moreover, it has often been hard to find a predictable level of specific competitive harm necessary to satisfy an evidence-seeking federal judge to enjoin a privately profita- ble capital market transaction because its "effect ...may be substantially to lessen competition."44 This was even true back in the late 1960s and early 1970s, when the DOJ was regularly winning bank and other merger cases in the Supreme Court.45 Today, looking back at the merger transactions that have created the largest financial institutions in the United States during the last two decades, I find it quite improbable that the DOJ could have mounted an antitrust enforcement program that could have had any serious impact on the major expansions in size of the largest bank holding companies.

It is possible that the European type of administrative system for antitrust merger review would have been able to do slightly more than the DOJ has done in dealing with some of the mergers that created TBTF institutions be- cause the EU merger prohibition decisions are made by a pro-active administrative body (i.e., the European Commission), rather than a court. The Commission makes rulings based on its interpretation of facts and law, and it has sometimes been willing to make decisions based on more subjective concerns in evaluating competitive risks, although some of these decisions have been overturned by the EU Court of First Instance (now the General Court), for lack of sufficient economic evidence to support the result.47 In addition, the Competition Directorate at the European Commission also has the unique power to regulate "state aids"-i.e., subsidies by Member State governments to favored national enterprises; and the Commission has used this authority to force after-the-fact divestitures of branches and assets by some of the TBTF banks that were saved by national governments during the 2008-2009 crisis.

#### The EU is already applying remedies – solves their modeling arguments.

Donald **BAKER** Lecturer in Law @ GW **’15** From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies, 80 Antitrust L.J. 353 (2015) p. 375-376

After-the-Event Structura lRegulation. What the European Commission has done in dealing with consequences of the 2008-2010 financial crisis is inter- esting and might well be a useful model for the United States to consider in the context of some major political wave generated by the next financial cri- sis. The Commission enjoys a unique power under the Treaty Establishing the European Community56 to regulate so-called state aids given by EU national governments to enterprises based in their jurisdiction. 57 The purpose of this system of regulation is to prevent subsidy-driven distortions of competition and preserve a level playing field for all enterprises in the European Union. The state aid regulatory system is administered primarily by the antitrust arm of the Commission (the Directorate General for Competition), where about a third of its resources are used in enforcing state aid rules.

When the national governments in the European Union member states had to bail out depository institutions after 2008, the Commission treated these payments and guarantees as state aids under the EC Treaty and compelled the national governments to make major changes in how the recipient institutions operated .58

A particularly interesting example occurred in the United Kingdom after the British government provided Lloyds Banking Group (LBG) with £17 bil- lion in recapitalization and became a 43 percent shareholder.59 LBG was ap- parently the largest retail bank in the United Kingdom. It was described as having 30 million customers, 2,968 branches and market shares in the 20-40 percent range for different product lines. The Commission's plan contained a lot of detailed requirements designed to ensure that the bank would face less risk going forward and thus not require continuing or future state aid. The Commission also required divestiture of at least 600 branches, dispersed around the country by geography and income areas, accounting for at least 4.6 percent of personal accounts. As the Commission explained in its accompany- ing press release, "This proposed divestment package will facilitate the entry of a new competitor or reinforcement of a smaller existing competitor on the U.K. retail banking market and will therefore remove the distortions of com- petition created by the aid."60 The ultimate result was that a new bank was set up, using a secondary brand called "TSB" that LBG was also forced to divest.

This kind of structural approach would have some potential political appeal because it would show the politicians and the public that the TBTF bank had to pay some price for being rescued, while perhaps reducing the incentives of some managers to take on additional risks. Finally, if used in a concentrated market, then such divestitures, if done carefully and well, would serve the antitrust goal of creating additional competition in the market. However, the banking industry would be opposed, and nothing so major is likely to be seriously considered in the United States, absent another crisis.

#### Cant solve – Philadelphia Bank is a case from the 90s. The global financial system does not depend on it.

#### Multilat high now.

JT 3-4-22, Japan Times, “Biden demonstrates true leadership in the Ukraine crisis” https://www.japantimes.co.jp/opinion/2022/03/04/editorials/biden-demonstrates-true-leadership-ukraine-crisis/ Mar 4, 2022

Central to Russian President Vladimir Putin’s calculations as he weighed the invasion of Ukraine was a belief that he would encounter an enfeebled and divided West. It was a reasonable expectation given political developments in those countries in recent months and the seeming discord that surfaced among them as they studied his preparations. He was wrong, however. The West, and virtually the entire world, has united to oppose the invasion of Ukraine. While many leaders deserve credit for helping to forge this coalition, a good deal of the credit goes to U.S. President Joe Biden, who has demonstrated remarkable acuity in handling this crisis. He and his team overcame deep fissures in U.S. domestic politics to build that international front, wrong-footed Putin and prevailed in the information war. Biden is laying out the terms for a new era in international relations, one that he believes will be defined by the struggle between democracy and authoritarian governments. While there was considerable public debate and great skepticism about Putin’s intentions, the U.S. has been steadfast in its insistence that an invasion was planned. To great risk, the U.S. revealed intelligence that burned off the cloud of doubt and confusion that Moscow hoped to use to win the information war and denied Russia the advantage of surprise. Biden and his team used that intelligence and a calibrated strategic approach to engage allies and partners, and to identify and pursue the consensus that would unify the West in response to any aggression. Working behind the scenes, Washington has let other governments move at their own pace: For example, Europe was first to announce that Russian banks would be barred from the SWIFT financial messaging system. The result has been the creation of a coalition that not only surprised Putin, but many in the West as well. It has strengthened NATO and burnished its appeal to other European countries. His team has worked with the Japanese government to ensure that it is part of this coalition. While condemnation of the invasion was obligatory, joining the sanctions effort was not. Tokyo has traditionally been slow to use sanctions, insisting instead on the need to maintain channels of communication with target countries. This logic has been especially useful when dealing with Putin, with whom even conservative politicians engaged in hopes of reaching a solution to the Northern Territories dispute. Prime Minister Shinzo Abe was one of the few Western leaders to attend the Opening Ceremony of the 2014 Sochi Winter Olympics, held as another crisis brewed in Ukraine, one that would result in the annexation of Crimea. The speed with which all parties agreed on sanctions and the severity of those measures is an example of the success of Biden’s strategy. The shocking shift in German security policy — announcing that Berlin will send military weapons to Ukraine and that it will increase defense spending by €100 billion this year and reach the goal of spending 2% of gross domestic product on defense — is another. The stunning United Nations General Assembly vote of 141-5 against the invasion is yet another. These achievements are even more impressive given the damage that his predecessor Donald Trump did to U.S. alliances, multilateralism and the rules-based order. The most important lesson of the last week has been that international cooperation and coordinated action in pursuit of shared values and principles are essential to the survival of that order and to the peace and security it creates. The protection of national interests is best achieved through cooperative actions, not myopic or narrowly defined nationalism. Just as important has been Biden’s restraint. He made clear before the invasion began that the U.S. would not commit military forces. He has talked tough, but he has not drawn intemperate red lines. When Putin brandished his nuclear arsenal in a seeming warning that he was prepared to use those weapons, the U.S. by contrast canceled a planned missile test to avoid any risk of an accident. And throughout the crisis, Biden has focused attention on where it belongs. He has applauded the heroism and resilience of the Ukrainian people and condemned Putin for his aggression. He has not made it about himself or put himself at the center of the unfolding crisis. Instead, he has framed this as a struggle between the forces of good and evil, as when he closed his State of the Union address in Washington Tuesday evening by noting that “Now is the hour. Our moment of responsibility. Our test of resolve and conscience, of history itself. It is in this moment that our character is formed. Our purpose is found. Our future is forged … . We will save democracy.” For 70 years, the world has looked to the U.S. for leadership in international crises. In recent years, there has been growing doubt about both the capacity and the will of the U.S. president to play that role. These questions have arisen as power within the world is being redistributed: Indeed, that shift is driving some of the concern. New divisions of labor and responsibility are needed; some are being created. But there remains a critical need for leadership, albeit leadership of a new kind. The world is fortunate to have Biden in the White House as it grapples with a world in transition.

#### The plan’s unilateral measure slaps every government on earth in the face – crushes multilateralism.

Xenia Lapin, Department of European, International and Comparative Law, University of Vienna, ’20, “Review: Global Banks on Trial: U.S. Prosecution and the Remaking of International Finance” Global Banks on Trial: U.S. Prosecution and the Remaking of International Finance. By PIERRE-HUGUES VERDIER, New York: Oxford University Press, 2020. ISBN 9780190675776, 272 pp.

The 2008/09 financial crisis is often classified as an ‘all-American crisis’. As historian Adam Tooze claims in his book ‘How Decades of Financial Crisis Changed the World’,3 the crisis was not solely a US or Anglo-Saxon crisis, but a global crisis. The ensuing unilateral measures and the expanding power of US prosecutors abroad required justification on an international level. The crisis ultimately impacted economies around the world, and while the Bush Administration’s reluctance to deal with the problem only grew, the responsibility to deal with the crisis fell to the nations themselves. A multilateral approach to solving the crisis featuring global cooperation would have balanced international financial politics and enabled nations’ collaboration. This was important as at this moment other states began denying ‘American values’ and the ‘American dream’, as seen in Russia with the election of Vladimir Putin in 2000 and in 1993 in Europe with the formation of the EU and its overall increasing collaboration of the Member States. At the United Nations General Assembly on 23 September 2008 in New York, France’s President Nicolas Sarkozy said that ‘no country, however powerful, could effectively solve the current global financial crisis’. He stated ‘that the world is no longer a unipolar world with one super-power, nor is it a bipolar world with the East and the West. It’s a multipolar world now’.4 This raises the question of whether it would be more beneficial to solve these problems through cooperation on an international level. The argument espousing US prosecutors’ efficiency and other states’ lack of competency, also calls into question international organizations’ capacity to deal with this problem. Granting primacy to the US prosecution mechanism prohibits and denies the establishment of the much-needed interconnection in financial politics and regulation.

# 2NC

## CP

### 2NC – OV

#### Adopt cumulative solvency framing: even if one plank doesn’t perfectly solve, the combination of the planks makes the risk of the case so small that the net benefit decisively outweighs. The counterplan is a set of failsafes designed to reduce the number of SIFIs, the likelihood they fail, and the impact to failing.

#### The first three planks function like Pigouvian tax by increasing the capital requirements, expanding the Volcker rule and amplifying stress tests until it is unprofitable to be a SIFI. Consequently, banks will divest and simplify by themselves by internalizing the cost of systemic financial risk.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

A. A Pigouvian Theory of Dodd-Frank

In contrast to the prevailing view that Dodd-Frank is just a command-andcontrol regulation, Bernanke and Stein have argued that higher capital surcharges and other onerous regulations on systemically important firms could have the effect of a Pigouvian tax insofar as these regulations force banks to internalize the costs of being too big to fail.114 Their point is that, because SIFIs receive advantageous credit terms based on the market’s perception that the government will bail them out should they fail, the government should correct that market distortion by imposing costs that counteract this implicit subsidy. However, as discussed below, our research shows that these compliance costs serve a regulatory purpose by incentivizing banks to divest themselves of risky business assets. In fact, financial regulators have been using Dodd-Frank— which ostensibly rejected a market-based approach in favor of a command-andcontrol regulatory approach—to nudge SIFIs out of risky activities. This observation shows that Dodd-Frank is effectively functioning as a market-based solution that is reducing the too big to fail problem.

Moreover, Dodd-Frank is acting like a market-based regulatory solution without requiring the actual use of public funds. In other words, Dodd-Frank shows that the government can use market-based solutions without formally taxing or subsidizing private entities. Indeed, under Dodd-Frank, the government can adjust the compliance costs borne by SIFIs in a number of creative ways. Compliance costs are the expenditures that businesses incur adhering to government or industry requirements.115 In the case of Dodd-Frank, SIFIs face a wide variety of compliance costs; indeed, one study estimated that the economywide costs of complying with Dodd-Frank between 2010 and 2016 were as much as $36 billion.116 These costs range from the comprehensive stress tests to the onerous reporting standards associated with swap transactions to the capital requirements that limit banks’ ability to extend credit. Although a few commentators117 and affected institutions118 have mentioned that the costs of Dodd-Frank amount to a tax on bank size, these commentators have generally viewed these costs negatively and have largely ignored the ways in which they are being used to serve a regulatory purpose.

Commentators have likely overlooked this regulatory purpose because compliance costs are widely considered an ancillary and undesirable feature of regulations. For example, in 2002, Congress passed the Regulatory Right-to-Know Act in response to the concern that compliance costs were too great.119 The Regulatory Right-to-Know Act directs the Office of Management and Budget (OMB) to submit a report to Congress each year detailing the costs and benefits of major rules as a way of controlling the growth of compliance costs.120 Likewise, commentators have often treated the compliance costs created by DoddFrank as simply an unwanted side effect of the regulatory scheme.121 Our research shows, however, that compliance costs can be the essential feature of certain regulatory approaches. In the case of Dodd-Frank, it is precisely the costs that OMB seeks to reduce that end up making the regulation effective. Thus, the costs of complying with Dodd-Frank should not be viewed as an unwanted byproduct, but rather as a mechanism for shaping the behavior of financial institutions and for incentivizing them to move away from financially risky activities.

At the outset, we concede that Dodd-Frank has not yet solved the too big to fail problem. As noted above, the largest banks remain enormous and the threatened failure of a single SIFI would likely require a taxpayer bailout. Furthermore, if a SIFI did fail, its failure could still have a devastating effect on the economy because SIFIs are larger today than they were before the financial crisis.122 In fact, over the past thirty-five years, the number of American banks has declined from about 14,500 to 5,600.123 Bank consolidation accelerated during the crisis in part because bank failures led to crisis-era mergers and acquisitions.124 The fact that banks are larger today arguably suggests that Bernanke and Stein are incorrect and that SIFI regulations are not in fact prompting banks to downsize. Our research, however, shows that the story is more complicated and that the costs associated with being designated a SIFI have a significant effect on firm activities. As the remainder of this Part shows, SIFIs are shedding business lines in response to heightened regulatory costs. Some of this is evident in the sheer size of assets that SIFIs have dropped: Citigroup, for example, has shed over $700 billion in assets since the crisis.125 Equally important, however, is the nature of that reduction. In 2007, only thirty-seven percent of Citi’s liabilities were customer deposits,126 which are generally considered among the most stable sources of bank funding;127 by 2014, that number had ballooned to fifty-seven percent. 128 “In other words,” according to one commentator, “not only is Citigroup smaller than it was seven years ago, but it also finances itself through more stable sources that are less prone to runs.”129 This story has played out across the large banks. In short, while the aggregate size of SIFI assets has grown, banks have shed many of their risky assets in response to Dodd-Frank.

Consequently, critics who argue that Dodd-Frank has failed to solve the too big to fail problem miss an important point: the Act grants financial regulators the power to *ratchet up the cost of remaining too big to fail and engaging in certain high-risk financial activities.* Indeed, regulators have already begun to use this power to incentivize banks to simplify and shed risky assets, which in turn has rendered the market safer. In summary, Dodd-Frank’s compliance costs have allowed regulators to craft a regulatory regime much more effective than its critics let on

#### The next three planks prevent the impact to financial crisis. Liquidation authority/living wills create contingency plans for the scenario that a bank becomes insolvent that are audited by the government to ensure that the costs don’t fall on taxpayers.

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B. Dodd-Frank’s Command-and-Control Response to Too Big To Fail

Dodd-Frank explicitly adopts a “command-and-control” approach to the problem of financial institutions being too big to fail. Although the Act does not outright prohibit banks from being a certain size, it enacts a number of command-and-control provisions to reduce the risk that large financial institutions will fail or that their failure will harm the broader economy.71 First, Dodd-Frank mandates regulations to curb excessive risk-taking and to require systemically important banks to hold significant capital, increasing the likelihood that the firms can weather turbulent financial times.72 And second, the Act creates a resolution mechanism to minimize the effect of a firm’s failure on the overall financial system.73

First and most prominently, the Act bans specific activities perceived as particularly risky. The Volcker Rule, for example, restricts banks’ ability to engage in certain proprietary trading activities.74 In addition to direct bans, Dodd-Frank also imposes requirements designed to increase transparency in financial markets. For instance, Title VII requires banks to report specific information on swaps, establishes margin requirements for certain swap transactions, and mandates that parties follow certain procedures such as trading on an exchange when executing swap deals.75 Failure to comply with these affirmative regulations can result in hefty fines.

Another powerful command-and-control provision for deterring risk-taking is the SIFI designation. Under Dodd-Frank, there are two methods by which a firm can be designated as a SIFI. First, any bank with more than $50 billion in assets is automatically designated as a SIFI.76 Second, Dodd-Frank empowers the Financial Stability Oversight Council (FSOC) to designate certain “nonbank financial institutions” as systemically important if they meet certain requirements.77 Once regulators have designated a firm as a SIFI, they can dramatically increase the firm’s compliance costs. For example, regulators have imposed capital surcharges on SIFIs—that is, SIFIs are required to retain additional capital—based on the regulators’ perception of the firm’s risk of failure.78 In addition, SIFIs are required to undergo an annual “stress test,” which forces the firms to convince regulators of their resiliency in the face of market turbulence.79 If a bank fails a stress test, regulators may increase their supervision of the failing firm, prevent it from paying shareholder dividends, or even force it to divest entire business units

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These approaches may reduce the likelihood that a SIFI will fail, but ultimately, the only certain way to make sure that a SIFI will not fail is to make sure that there are no SIFIs in the first place, an approach Dodd-Frank rejected when Congress decided not to break up the banks.81 Although the risk of a bank failing may be mitigated ex ante by measures that regulate its balance sheet and risk portfolio, it is impossible to prevent bank failures altogether while large, complex financial institutions remain. However, a certain degree of risk-taking is essential for banks to fulfill their mission of connecting lenders with borrowers. That risk-taking, however critical to the financial system, creates some potential for failure.

For this reason, Dodd-Frank’s second approach to reducing systemic risk is to mitigate the financial turmoil that would ensue in the event that a SIFI actually failed. Acknowledging that bank failures can never be eliminated altogether, Dodd-Frank creates a resolution mechanism to oversee the orderly liquidation of SIFIs.82 There are two components to this resolution mechanism. First, under Title I, SIFIs are obliged to prepare resolution plans—often referred to as “living wills”83—that explain how they could be resolved under the Bankruptcy Code.84 Living wills are essentially prepackaged bankruptcy plans. If a company’s plan does not demonstrate that the company can be resolved in bankruptcy, the regulators may jointly impose more stringent capital, leverage, or liquidity requirements.85 Second, Dodd-Frank authorizes financial regulators to resolve a SIFI if the insolvency of that institution would place the economy at risk86—a power known as the Orderly Liquidation Authority (OLA).87 In theory at least, the OLA improves upon traditional bankruptcy because it would allow the FDIC *to resolve a SIFI without requiring a taxpayer bailout or triggering an economic crisis*.88

At least on the surface, these rules seem to follow a command-and-control framework. Rather than pushing SIFIs away from certain activities by making those activities more expensive, they instead force SIFIs to take certain actions to reduce their financial risk. The critical point for our command-and-control analysis is that it is the requirements themselves—not the incentives they create—that are intended to reduce systemic risk. As Federal Reserve Governor Lael Brainard said of a capital requirement levied on SIFIs, “the capital surcharge is designed to build additional resilience and lessen the chances of an institution’s failure.”89 Federal Reserve Chair Janet Yellen has echoed this view by arguing, for instance, that swap reporting and clearing rules have reduced the risks posed by trading derivatives.90

#### Cumulatively, these planks prevent any internal link or impact to systemic risk.

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Under Dodd-Frank, by contrast, regulators force banks to internalize the costs of creating systemic risk not by taxing SIFIs, but by requiring them to, for example, hold more capital, draft living wills, and perform stress tests. These measures themselves reduce risk. In raising capital requirements, the Federal Reserve both increases the costs of being systemically important and makes the party responsible for the externality better equipped to bear those costs since the regulatory costs used in “right-sizing” the banks also require SIFIs to hold a capital buffer that will make them—rather than the government—the first line of defense against an economic crisis. Thus, Dodd-Frank not only incentivizes banks to divest risky assets, but also makes banks better able to withstand the risk created by the assets they continue to hold.

#### The last two planks threaten the plan’s prohibition as a measure of last resort – star this argument. The two dodd-frank provisions cited allow the FDIC to separate banks in the circumstance that they are noncompliant with the regulations listed above or if they continue to pose systemic risks. The last plank then prohibits any future mergers under the Riegle-Neal act to prevent systemic risk in the future. In short, if the counterplan doesn’t work, the non-antitrust version of the plan gets implemented in as a backstop.

### AT: PROA Key

#### SEC solves competition. Because investors are consumers of financial services, regulation will protect consumer welfare.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 929-930

Although the SEC is required to take into account competition concerns when it promulgates rules,88 two commentators recently suggested that the SEC is nevertheless unlikely to give competition values sufficient weight when making policy decisions. 8' The SEC, they reasoned, is "first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices." 9" Thus, they expressed skepticism that the SEC would adequately police competition." This argument is unconvincing for two reasons. First, it implies that regulation to promote competition in the securities industry and regulation to promote investor protection and information disclosure are disjoint sets. They are not. Most securities regulation designed to protect investors will in fact also promote competition and consumer welfare because investors are "consumers" of financial services.92 Thus, activities that are injurious to competition and to consumer welfare will generally be inimical to the goal of investor protection as well.9 3

Second, to the extent that, as discussed above, competition and investor protection may at times be in tension,9 4 there is no obvious reason to think that the SEC will exhibit systematic bias against competition. SEC personnel include economists and other policymakers who are capable of making analytical determinations concerning market concentration and power, barriers to entry, and the like. In addition, not only is the SEC required to consider competition effects when it promulgates regulations, but the Exchange Act expressly prohibits the SEC from promulgating a rule that will have a negative effect on competition unless it finds that such an effect is necessary or appropriate to pursue some other policy of the securities laws." Just as important, the SEC is required to explain the likely competitive effects of a rule in the rule's published statement of basis and purpose.9 6 This creates a focal point for a reviewing court considering a challenge to the rule under the Administrative Procedure Act (APA) as arbitrary and capricious or inconsistent with the Exchange Act's prohibition on unnecessary restraints on competition. 97 Moreover, in order to survive such review, the SEC will have to demonstrate that it considered public commentsg8 received that were critical of the rule, as well as any academic studies that are inconsistent with the factual predicates of the rule, and will likely have to explain why it rejected possible alternative rules that might have been less injurious to competition." Such "hard look" judicial review under the APA ensures that the SEC will not be able to blithely disregard its statutory mandate to regulate in the interests of competition, even if for some reason it were otherwise inclined to do so."'

### AT: SEC Captured

#### Regulatory arbitrage wont happen and if it did the counterplan fiats that regulators tax the behavior. Behind the scenes deals apply equally to the aff.

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A. Regulatory Arbitrage

“Regulatory arbitrage” is the process by which firms exploit loopholes in a regulatory scheme to avoid unfavorable regulation.307 Critics argue that as regulators make it more difficult to engage in certain risky activities, banks will simply shift their focus to other risky, but less-regulated activities—thus negating the benefit of the regulation. There are a number of related arbitrage criticisms. For example, scholars in the past have criticized capital requirements for causing banks to engage in regulatory arbitrage to avoid holding additional capital.308 Likewise, more recently, scholars have criticized Dodd-Frank for failing to adequately regulate “shadow banking”—the financial activities involved in facilitating the creation of credit across the global financial system, but that are not subject to regulatory oversight.309 Others argue that onerous regulations will push risky activities away from highly regulated banks and towards the less regulated entities.310

But these critiques ignore a critical fact: regulators have the ability to regulate a wide swath of a SIFI’s operations simply by finding that a certain activity will make it difficult for the SIFI to unwind under OLA or lead to its living will having shortcomings or being deficient. Thus, regulators who become aware of regulatory arbitrage—like shadow banking activities—can ratchet up compliance costs to nudge the SIFI out of such activities, if they in fact post unacceptable risks. Although there may be some concern that regulators will not be able to spot SIFIs’ engagement in under-the-table risks, this concern is not unique to a Pigouvian regime.311 If it later turns out that SIFIs have increased their exposure to other risky markets, it simply falls to financial regulators to ensure that capital requirements lead banks to fully internalize the costs of those new risks. In other words, if banks migrate to other risky activities, financial regulators could ensure that firms pay the social costs of engaging in those activities.

Moreover, there is little reason to be concerned that less-regulated entities will simply take up risky activities where SIFIs left off. Insofar as SIFI regulations push SIFIs away from risky activities, we should applaud their success in making sure that systemically significant firms are avoiding inefficient risks. Similarly, if nonbank firms take on an unacceptable level of risk, FSOC, within its statutory strictures, can designate that firm a SIFI and thus subject it to the stringent requirements faced by other systemically significant firms.312 For these reasons, the critique that regulatory costs push risky activities from highly regulated banks towards less regulated financial institutions is misplaced: the SIFI regulations allow financial regulators to impose stringent requirements on bank and nonbank firms alike, so long as the firm can be so-designated.

Ironically, the prospect of regulatory arbitrage may actually counsel in favor of Pigouvian regulations as the best mechanism to prevent regulatory arbitrage. It will never be possible for regulators to anticipate every source of systemic risk. Prospective, substantive regulations will always be playing catch-up to financial innovations. By contrast, the Pigouvian approach used in Dodd-Frank allows regulators to adapt to new circumstances and information. In 2012, for example, shortly after JPMorgan’s London Whale trading desk incurred at least a $6.2 billion loss,313 the Federal Reserve expressed concern about JPMorgan and Goldman Sachs’s forecasts for losses in a crisis.314 The London Whale trading losses highlighted flaws in the calculations of risk-weighted assets,315 which are a central feature in the calculation of capital requirements,316 and the Federal Reserve became skeptical about the hedging strategies JPMorgan had used to manipulate models, downplay risk, and thus reduce its capital burden.317 Following the scandal and the attendant regulatory scrutiny, JPMorgan released a report on its internal investigation, noting numerous areas where it intended to change its business practices in order to reduce risk.318 It also coincided with JPMorgan’s decision to begin spinning off commodities and private equity units to reduce its Dodd-Frank-related compliance costs.319

Thus, whereas command-and-control regulations must pass through congressional vetogates or comply with the onerous rulemaking process, DoddFrank’s compliance costs can be adjusted fairly quickly and with great effect. The prospect of regulatory arbitrage suggests that regulators need tools to adjust to new risk factors as they emerge, and the flexibility of Pigouvian regulations makes them a superior solution to regulatory arbitrage, despite their inability to stop the practice completely.

#### APA review sufficient to stop SEC capture.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 930-932

b. Agency Capture

A potentially more persuasive argument as to why the SEC might display excessive tolerance for anticompetitive activities in the securities industry is the agency capture theory,1 2 which posits that regulated entities and organized special interests may exert undue influence on federal agencies." 3 Agency capture could manifest itself in a number of different forms. There may be a revolving door between the regulated industry and the agency such that current agency officials are reluctant to promulgate regulations that might upset their potential future employers.'0 4 More subtly, regulated firms may be more likely to participate in the notice-and-comment rulemaking process,'"5 and thus their views may have a disproportionate effect on the form and content of the regulations ultimately adopted by the SEC.1 6 Excessive industry influence is particularly likely to occur, it is said, when the costs of a proposed regulation affect a small concentrated group while the benefits from the regulation accrue to the public generally, as in the case of competition issues."0 7 Because federal courts are presumably better insulated from the influence of the financial services industry than is the SEC, they might be thought to offer a superior venue for regulating competition even in the complex securities area. 10

Commentators hold different views regarding the degree to which the SEC is likely to be subject to capture by the securities industry,' and a full examination of the issue is beyond the scope of this Note. However, several points bear emphasizing here, two of which have already been discussed. First, the agency capture concern is mitigated by the availability of judicial review of SEC regulations under the APA."° In addition, the Supreme Court recently held that even decisions not to initiate a rulemaking process are presumptively subject to review, albeit highly deferential review."' Thus, an unreasonable refusal by the SEC to prohibit certain anticompetitive conduct can potentially be challenged in an action brought under the APA. Moreover, to the extent that APA review of agency inaction may not be particularly rigorous, this approach seems consistent with Congress's intent to delegate broad rulemaking authority to the SEC through the securities laws." 2

### 2NC – Solves Derivatives

#### Regs solve.

**Barr ’17** (Michael S. Barr – Professor of Law, Faculty Director of Finance, and Professor of Public Policy @ the University of Michigan, nonresident senior fellow at the Center for American Profess, JD @ Yale, “Financial Reform: Making the System Safer and Fairer,” 4 January 2017, http://www.rsfjournal.org/doi/full/10.7758/RSF.2017.3.1.01)

OVERVIEW OF REFORMS In the United States, passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) ushered in **comprehensive reform** in key areas: enlarging the regulatory perimeter by creating the authority to regulate financial firms that pose a threat to financial stability, without regard to their corporate form; enacting a resolution authority to **deal with** **the** **potential collapse** of these major firms in the event of a crisis, without feeding a panic or putting taxpayers on the hook; attacking regulatory arbitrage, **restricting risky activities**, and beefing up banking supervision; requiring central clearing and exchange trading of standardized derivatives, and capital, margin and transparency throughout the market; improving investor protections; and establishing a new Consumer Financial Protection Bureau to look out for the interests of American households. Today, major financial firms are subject to **higher prudential standards**, including higher capital and liquidity requirements, **stress tests**, and resolution planning through “living wills.” By forcing firms to **internalize more of the costs** that they impose on the system, they will be **incentivized to shrink and reduce their complexity**, leverage, and interconnections. Should such a firm fail, there will be a **bigger capital buffer to absorb losses**. To

stem a panic, the Dodd-Frank Act permits the Federal Deposit Insurance Corporation (FDIC) to resolve the largest and most interconnected financial companies **without exposing the system** to a sudden, disorderly failure that puts the economy at risk. On the global level, the international community has put forward new rules on capital, so that there are **bigger buffers in the system** in the event of failures. Capital will be measured in a **more conservative way**, and capital levels are going up significantly. Systemically important firms will hold even higher levels of capital. There are new rules on liquidity and a global leverage limit. **Derivatives reforms are proceeding**, as are new approaches to dealing with the risks from repo and securities financing transactions. Yet much more work remains to be done, and the financial sector did not leave the battlefield after their defeats in 2010. Far from it. The brutal fight over financial reform rages on, and there is serious risk that a collective amnesia about the causes and consequences of the financial crisis appears to be descending on global financial capitals that will further weaken the resolve for reform (See, for example, Coffee 2011, 2012). COMPARING U.S. FINANCIAL REGULATION PRE-CRISIS AND POST-REFORM **Many readers may be skeptical** regarding the efficacy of the reforms that have taken place thus far, either because they think they did not change the system enough, or because they think that they went too far. The following section takes the time to chart the path of reform so far, before turning to the difficulties and dangers on the road ahead. First, before Dodd-Frank, if an entity was a bank, it had tougher regulations, more stringent capital requirements, and more robust supervision; but if an entity was an investment bank engaged in the same kind of maturity transformation, it had to abide by different rules (see Scott 2010). When U.S. investment banks needed to find a “consolidated holding company regulator” in order to meet European Union standards for doing business in Europe, the Securities and Exchange Commission set up a voluntary Consolidated Supervised Entity program which had little oversight. The SEC was not established as a prudential regulator, did not have clear supervisory power, and had little experience and few trained examiners. Moreover, the leverage ratio that served as a backstop for bank capital requirements was not applied to investment banks. The Federal Reserve was too lax in supervising firms where it did have authority and it did not have any authority to set and enforce capital requirements on the major institutions that operated businesses outside of bank holding companies. That meant it had no supervision over investment banks, diversified financial institutions such as AIG, or the nonbank financial companies competing with banks in the mortgage, consumer credit, and business lending markets. The Office of Thrift Supervision viewed its role as supervising thrifts, not their holding companies (such as AIG). Banks and thrifts freely engaged in risky mortgage lending, and regulators did not step in until it was too late. Today, Dodd-Frank has provided authority for **clear**, **strong** and **consolidated supervision** and regulation by the Federal Reserve of any financial firm—regardless of legal form—whose failure could pose a threat to financial stability. The largest investment banks that survived the financial crisis merged into or became bank holding companies subject to Fed oversight. AIG, GE Capital, Prudential, and MetLife have now been brought under Fed supervision through the Financial Stability Oversight Council (FSOC) designation. As a result of Dodd-Frank changes, thrift holding companies (including those with large insurance operations) are now supervised by the Fed. The Office of Thrift Supervision and the SEC’s investment bank regime have been abolished. Thus, all bank and thrift holding companies, as well as **systemically important** **nonbank firms**, **regardless of corporate form**, are supervised by the Federal Reserve. We will have a single point of accountability for tougher and more consistent supervision of the largest and most interconnected financial firms. Although the regulatory infrastructure is, to put it mildly, far from ideal, with too many divided responsibilities and too many opportunities for turf battles or regulatory gaps, Dodd-Frank created the FSOC, which is responsible for identifying threats to financial stability and dealing with them. The FSOC can recommend stricter regulatory action, and regulators must either implement such changes or explain publicly why they are not acting (see Gerson 2013). Already, this process has led the SEC to impose **stricter regulation of money market funds** than would otherwise have occurred (Barr 2015a). The FSOC has the potential to get information across the financial services marketplace through the Office of Financial Research (OFR), which Dodd-Frank established and empowered to collect data from any financial firm, and to develop and enforce standardization for data collection. The OFR has begun to use this authority by developing a “legal entity identifier” for financial transactions. The OFR is charged with independently assessing risks in the financial system, and can potentially serve as a counterweight to the Fed by providing independent assessments of whether the Fed is adequately supervising the largest firms and dealing with the critical issues in systemic risk. A strong OFR can serve as a **check and balance** for regulatory agencies, ensuring that they improve their own performance or risk being criticized (Ludwig 2012; Barr 2015a). Dodd-Frank provides for more stringent prudential standards and higher capital and liquidity standards for the largest bank and nonbank firms. In addition to the heightened capital requirements applicable to all firms, the largest firms are subject to a capital surcharge, a leverage ratio, a toughened supplemental leverage ratio, a more stringent liquidity requirement, and capital required to pass stress tests. Already, capital levels in the banking system have doubled, and banks’ use of short-term nondeposit funding has plummeted. The **annual stress tests** are evaluating a firm’s ability to withstand **deep market contractions**. There are enhanced rules on affiliate transactions and lending limits, and much stricter proposed limits on counterparty credit exposures. Deposit insurance premiums are going up on the very largest firms. The Volcker Rule prohibits banking entities from engaging in certain proprietary trading or running internal hedge funds, subject to a number of exceptions, and also helps to simplify the task of winding down major firms that are at risk of failure. Moreover, the Fed is using macro-prudential supervision as it increases its capacity to understand and **mitigate risks to the financial system as a whole**. There is a healthy debate about breaking up or limiting the size of financial firms. Under the Dodd-Frank Act, major firms are subject to a **concentration limit** that generally prohibits a financial company from engaging in mergers or acquisitions that would result in the firm’s liabilities—including wholesale funding and off-balance sheet exposures—exceeding 10 percent of the liabilities of financial companies as a whole. Dodd-Frank provides regulators with the authority to require financial institutions to restructure their activities to make it credible that they can be resolved if they are in danger of collapse; the resolution planning process has already forced firms to begin to simplify their organization form, develop “clean” holding companies, and place large amounts of capital and long-term debt in the holding company to assist with the resolution. The act also permits regulators to force firms to be broken up if they fail to submit a credible plan and thereafter fail to meet regulators’ requirements to restructure themselves to make resolution credible. Such firms can also be broken up if they are found to pose a grave threat to financial stability. These enhanced prudential measures for major financial firms are likely to reduce risk in the financial system, constrain further concentration, and **reduce “too big to fail” distortions**. Second, before Dodd-Frank, shadow banking markets grew dramatically with little oversight and in the absence of even regulatory or marketwide knowledge about the nature of the markets they were serving. For example, the OTC derivatives market—with a notional amount of $700 trillion at its peak—grew up in the shadows, with little oversight. Credit derivatives, which were supposed to diffuse risk, instead concentrated it. Synthetic securitization with embedded derivatives magnified failures in the real securitization market. Major financial firms used derivatives to increase their credit exposure to each other, rather than decrease it. **We should never again face a situation**—such as AIG’s $2 trillion derivatives portfolio—where the potential failure of a virtually unregulated, capital-deficient major player in the derivatives market can impose devastating risks on the entire system. Insufficient capital meant that major participants in the system could not reliably pay out on their obligations, and insufficient margin meant that counterparties on every transaction were more exposed to the risk of nonpayment. When the crisis began, regulators, financial firms, and investors had an insufficient understanding of the degree to which trouble at one firm spelled trouble for another, because of the opacity of the market. This lack of information magnified the contagion as the crisis intensified, causing a damaging wave of margin increases, deleveraging, and credit market breakdowns. Lack of transparency, insufficient supervision, and inadequate capital and margin left our financial system vulnerable to concentrations of risk, and to abuse. Today, under Dodd-Frank, regulators are putting in place the tools **comprehensively** **to** **regulate the OTC derivatives market** for the first time. The act requires all standardized derivatives to be centrally cleared, which will substantially reduce the buildup of bilateral counterparty credit risk between major financial firms. Under Dodd-Frank rules, **75 percent** of new derivative contracts were centrally cleared in 2015 as compared to only 15 percent in 2007 (Massad 2015). Central clearinghouses are subject to strong prudential supervision under the Dodd-Frank Act. Dodd-Frank requires standardized derivatives to be traded on exchanges or alternative swap execution facilities, which improves pre- and post-trade price transparency. Trading transparency will help to improve price competition as well as to improve safety and soundness, as market participants and regulators will have full access to current prices in the event of system disruptions. Even non-centrally-cleared OTC derivatives are to be reported to a trade repository, making the market far more transparent. The act provides for prudential regulation, capital requirements, and business conduct rules for all swap dealers and major swap participants. It provides for robust capital and margin requirements for derivative transactions, and higher requirements for those that are not centrally cleared, providing a strong incentive to use central clearing and maintain a bigger buffer against losses. It also provides for regulatory and enforcement tools to go after manipulation, fraud, and other abuse. At the same time as the act reforms derivatives markets, it provides a new framework for **regulation of financial market utilities** and critical payment, clearing, and settlement activities, including not only those in the derivatives markets but also those in the wholesale funding markets—securities financing transactions (such as repo and securities lending), commercial paper, and prime brokerage—that are critical to the shadow banking system. In the lead-up to the financial crisis, major financial firms became increasingly funded not by traditional bank deposits, nor even longer-term funding in the commercial markets, but rather by overnight funding in the repo markets. An important part of that market, the triparty repo market, became increasingly concentrated in only two major clearing banks, which were themselves exposed to counterparty risk from securities firms borrowing intraday credit. As the triparty repo market became more concentrated, it also became riskier because counterparties came to accept not only Treasury securities as collateral, but also highly rated but opaque asset-backed securities. These securities in turn became riskier as credit rating agencies became increasingly willing to label as safe assets that were lower quality, including pools of securities backed only by poorly underwritten subprime and Alt-A mortgages. When the financial crisis hit, repo and commercial paper markets froze, and investors in money market funds ran, causing a massive contraction in credit not only for financial firms but also major firms in the real economy (that is, non-financial). This contraction was overcome only with massive interventions by the Fed, the FDIC, and the Treasury. The Dodd-Frank Act provides the foundation fundamentally to reform the wholesale funding markets by providing strong authority for the Federal Reserve to regulate financial market utilities and critical payment, clearing, and settlement activities; to set new rules for capital, collateral, and margin requirements for repo and other securities financing, and other critical markets; and to establish uniform prudential standards throughout the financial system. While repo and other securities financing policies are still a work in progress, short-term financing reforms are already being reinforced by new capital and liquidity requirements, liability concentration limits under the act, and reforms to the assessment base for deposit insurance that encompass all liabilities. Once fully implemented, these reforms will have the combined effect of taxing short-term liabilities, which will force firms to internalize more of the costs of short-term funding. These steps have already reduced the use of short-term funding, and will provide incentives to manage their use more carefully even when interest rates normalize. The act also **fundamentally transforms** regulation of another major element of the shadow banking system, securitization. The act **requires deep transparency** into the structure of securitizations, including information about assets and originators. Securitization sponsors must generally retain risk in their securitizations, unless the mortgages they pool meet guidelines as plain vanilla “qualified residential mortgages” so that incentives are better aligned among participants in the system. Capital rules will better account for risk in securitizations. Parallel changes in accounting rules will now bring the most common forms of securitization onto the balance sheet. Credit-rating agencies will be subject to heightened liability for failure to conduct ratings with integrity, with comprehensive oversight by the SEC, including policing of ratings shopping and conflicts of interest; ratings themselves will be more transparent and will include key information on rating methodology, compliance, qualitative and quantitative data, due diligence, and other protections.

### 2NC – Net Benefit [Liquidity Crisis]

#### The net benefit outweighs and turns the case on time frame and scope. The plan’s prohibition is too sudden, instead of allowing banks to slowly exit, it establishes an immediate prohibition. That will instantly obliterate the savings of millions of americans which 1NC evidence says costs 20% GDP. Allowing the banks to internalize the costs of risks and separate themselves creates better designed regulations that avoid crisis.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

Given both the timeline of divestitures and GECC’s close working relationship with FSOC, GECC presents a quintessential example of the benefits that Pigouvian regulations afford by leaving business decisions in the hands of the regulated businesses. Ultimately, the Federal Reserve achieved the same result it would have obtained through more traditional command-and-control regulations—i.e., the divestiture of risky assets and the de-designation of GECC. But, by vesting discretion in GECC instead of unilaterally deciding which assets to shed, the Federal Reserve allowed GE to determine the timing and scope of divestitures. In this way, GE could determine for itself which business lines to shed and which to keep. This is, of course, not the case with a command-and-control regulation where it is the lawmakers or regulators who decide whether a certain activity is permissible.226

The regulated entity can decide which business opportunities to pursue, and in effect, what level of regulation it is willing to tolerate. GECC is again a case in point.227 In April 2015, when GECC announced its plans to shed its SIFI label, it also announced plans to retain certain bank-like activities. In its press release announcing the new strategy, GECC noted its intent to keep its “vertical financing” businesses including GE Capital Aviation Services, Energy Financial Services and Healthcare Equipment Finance, since these “directly relate to [GECC’s] core industrial businesses.”228 Consequently, one newspaper compared GECC postdivestment as “essentially a captive finance arm,” which exists to support the core business lines of the firm.229 FSOC noted the positive features of this change in its rescission notice: “GE Capital now focuses on the healthcare, energy, and aviation leasing markets, among others, in which other large financial institutions are generally less concentrated.”230

Ultimately, by June 28, 2016, GECC and FSOC had both achieved their goals. GECC had shed its SIFI designation while following its own business plan and increasing shareholder value.231 FSOC had satisfied itself that material financial stress at GECC would not pose a systemic threat to the U.S. financial markets, and in the process, reduced the number of firms that could be considered too big to fail.

#### The counterplan results in the best case implementation of the affirmative by right sizing regulations instead of implementing a one-size fits all prohibition. Allowing industry experts to determine how to downsize preserves activities where the benefits outweigh the risks.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

In addition to enabling right-sizing, Pigouvian regulations empower the party most knowledgeable about the costs and benefits of an activity to determine the best way to comply with regulations. This approach is both more efficient and more effective than command-and-control regulation. While a command-and-control regulator should hypothetically be able to determine the socially optimal amount of an externality-producing action (and limit it accordingly), in the real world of administrative costs and imperfect information, regulators cannot possibly know both the costs and benefits of each activity as well as those closer to the activity itself.298 Therefore, it is possible that regulators will impose absolute prohibitions on activities where the benefits of the activity actually outweigh the risk. Pigouvian regulations help mitigate this informational asymmetry because a regulator need only know the spillover costs and benefits associated with an activity—leaving firms themselves to undergo the private cost-benefit analysis and determine market demand as the firms themselves will ultimately decide whether they should bear costs imposed by regulation and continue the activity. This approach has two benefits related to expertise. First, this characteristic of Pigouvian regulations incorporates firm knowledge and expertise into the regulatory scheme. When using compliance costs rather than bans, regulators have an opportunity to see how much of a certain activity is desirable from firms’ perspective, which incorporates the market demand for a good as measured by what level of an activity firms think will be profitable. To the extent that market demand reflects the social benefits of the good or service, Pigouvian regulations place decisional power in the hands of the entity most equipped to assess the costs and benefits of an activity. In this way, Pigouvian regulations allow for the possibility that even risky activities can sometimes be desirable.

The second informational benefit of Dodd-Frank’s Pigouvian approach is that it allows regulators to adjust rules as they receive more information. Once regulators observe how much the market values a particular activity, as measured by firms’ responses to compliance costs, regulators can adjust those costs accordingly. For instance, imagine that Bank C and Bank D both participate in the same commodities business, and the Federal Reserve increases the capital requirement of both institutions by the same amount because it regards this business as risky.

If Bank C sells the business but Bank D holds onto it, regulators will have learned that Bank C, but not Bank D, regards the private benefit of holding this unit to justify the increase in capital requirements. This could suggest that market demand for Bank C’s product is greater than that for Bank D’s product, or else that Bank D uses this unit in a more productive manner—such as to hedge or diversify its other activities—than Bank C.299 Either way, the Federal Reserve might regard this information as important when determining whether it should further raise Bank C’s capital requirement to prompt the firm to divest itself of this unit altogether. If regulators felt that the social cost remained excessive, it could further increase Bank C’s compliance costs. If, on the other hand, the Federal Reserve believed that the current capital requirement forced Bank C to bear the true social costs of the activity, it might permit Bank C to continue trading because the market demand for that activity indicated that its social benefits outweighed its social costs. In this way, as firms adapt to regulations, regulators not only affect firm behavior, but also acquire more information about the market value of certain activities. Over time, this additional information allows the government to regulate with more precision.

#### Using Pigouvian regulations allows allow financial institutions to maintain the benefits of scale, such as low interest rates.

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One of the most significant advantages of Pigouvian taxes is that they permit the best-suited parties to determine the costs and benefits of an activity to do so.52 Writing about Pigouvian taxes in the context of environmental regulations, one scholar has observed that regulatory goals are often “frustrated by a lack of information” when regulators adopt a command-and-control approach.53 By contrast, market-based solutions “create a system of incentives in which those who have the best knowledge about control opportunities, the environmental managers for the industries, are encouraged to use that knowledge to achieve environmental objectives at minimum cost.”54

In other words, market-based solutions—and especially Pigouvian taxes55— have informational advantages because command-and-control regulations require regulators to estimate both the costs and the benefits of a behavior.56 For example, if the government pursued the nonmarket-based solution of capping the size of banks, then the government would need to determine both the costs and the benefits associated with exceeding particular size thresholds. In order to determine the optimal level of regulation, the regulator would need to know not only the negative externalities created by every large financial institution, but also the benefits of scale that each firm enjoys from being large. Under a marketbased approach, by contrast, the government would only need to know the social costs of the activity. By imposing those costs on the firms, the firms themselves would be responsible for determining whether the scale benefits derived from achieving a particular size outweigh those costs.

Unlike command-and-control regulations, a tax on bank size does not require that the government determine whether the costs of bank size outweigh the benefits. It may be the case that, although bank size introduces a systemic risk, large banks enjoy scale benefits that allow them to, for example, charge lower interest rates, and that those scale benefits actually outweigh the social costs. If the market continues to prefer large banks after they have been forced to internalize the social costs of being large, then it seems that the scale benefits of being large provide a net benefit that outweighs the social costs. Significantly, it may be the case that a tax prompts only some firms to downsize. This information is also useful for regulators because it suggests that some firms—those that did not downsize—realized scale benefits that outweighed the costs generated by bank size. By contrast, the scale benefits realized by the firms that shrunk in response to the tax were not sufficient to justify remaining large once they were forced to bear those costs. For this reason, scholars have concluded that market-based regulations have the additional benefit of being more precise than command-and-control alternatives.57

Incentive-based regulations therefore allow the market to determine the optimal level of production. As regulators attempt to correct the market distortion that results when firms do not bear certain costs of producing a particular good, there is no reason why a firm should not realize the benefit of that good in the form of consumers’ willingness to pay for it. Thus, in market-based approaches, the government only runs the risk that it will miscalculate the cost of the good. Command-and-control regulations, by contrast, also run the risk that the government will miscalculate the benefits of the good.

Finally, market-based incentives are typically less invasive than commandand-control regulations because market-based approaches leave the regulated parties free to decide whether and how to comply.58 For example, under DoddFrank, the government not only permits financial institutions to remain large and to engage in risky activities, but also gives banks an opportunity to restructure those activities in a manner that would be less systemically risky. This flexibility ultimately fosters innovation by promoting technological development59 and creative problem-solving.60

#### The counterplan encourages safer financial sector growth instead of prohibiting growth altogether.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

3. Reducing Systemic Risk

To be sure, one might object that these divestitures are of little significance if firms simply replaced the business units they spun off with other risky activities. In other words, Dodd-Frank’s compliance costs would have little effect at reducing systemic risk if banks simply replaced one risky investment with another. The evidence, however, suggests that banks and other institutions regulated by Dodd-Frank have, in fact, become safer over time. Of particular significance is that many banks have downsized and simplified in ways not explicitly required by Dodd-Frank, and that annual stress tests identify these divestitures as reasons for reducing firms’ compliance costs.

A number of academics and policymakers have argued that, although DoddFrank has not ended too big to fail, it has reduced the systemic risks posed by SIFIs. Larry Summers, Director of the National Economic Council under President Obama, for example, noted that “[p]olicymakers and political commentators alike have heralded Dodd-Frank as ushering in a new era of financial security.”268 During a Senate Banking Committee Hearing in 2014 regarding systemic risk in the financial sector, Federal Reserve Chair Janet Yellen likewise stated that the Fed “ha[s] put in place numerous steps and ha[s] more in the works that will strengthen these [financial] institutions, force them to hold a great deal of additional capital and reduce odds of failure.”269 International experts agree. Mark Carney, Governor of the Bank of England, has observed that SIFIs have increased their Tier 1 capital ratios, which are used to measure a SIFI’s resilience to market turbulence and ability to absorb losses,270 more than twofold since 2009.271 These comments suggest that even though banks have grown since the financial crisis, they have done so by concentrating in safer business lines—not by investing in exotic and potentially destabilizing financial instruments.

Dodd-Frank regulators evince similar confidence in the stabilization of the SIFI regime. As noted above, Dodd-Frank requires covered institutions to create resolution plans detailing how the institution could be wound down without taxpayer support.272 The Federal Reserve and the FDIC jointly determine each year whether the plans are sufficient or have deficiencies that must be corrected.273 Identifying the changes in a firm’s resolution plan each year is thus a good indicator of the firm’s overall change in risk profile. Collectively, these living wills suggest that SIFIs have grown less risky since the passage of DoddFrank. Morgan Stanley’s 2016 resolution planning process provides a useful example. On April 13th, 2016, the Fed and the FDIC announced that they had identified “weaknesses” in Morgan Stanley’s 2015 plan, stating that it “was not credible or would not facilitate an orderly resolution under the U.S. Bankruptcy Code” and declaring that the firm would have to remedy these shortcomings in its resubmission.274 After receiving this verdict, Morgan Stanley noted that resolution planning was among “the highest priorities of [the] firm” and committed itself to continue “work[ing] with [its] regulators to improve [its resolution plan].”275

In their following April 14th, 2016, letter, the two regulators provided more detail to Morgan Stanley on where it had improved and where further progress was needed in order for its resolution plan to be considered adequate.276 The regulators found that Morgan Stanley had “improved its funding structure and increased the level of firm-wide high-quality liquid assets, . . . developed a legal entity rationalization framework,” and “ha[d] reduced the overall number of legal entities in its organizational structure,” among a number of other changes that made the firm simpler and safer.277 However, the regulators also noted shortcomings related to liquidity, derivatives and trading activities, and governance mechanisms.278

Less than six months later, Morgan Stanley responded to each of the concerns in the regulators’ April 14th letter and provided information on additional actions Morgan Stanley intended to take in connection with its submission of its 2017 resolution plan.279 Finally, in December of 2017, the Federal Reserve and the FDIC noted that Morgan Stanley’s 2017 living will noticeably improved upon its previous submission and, crucially, that the 2017 submission satisfactorily responded to the regulators’ concerns.280

The story is the same at other SIFIs. In 2016, for example, agency feedback to Goldman Sachs noted similar improvements in its resolution plan compared to previous years’ submissions.281 The agencies noted that Goldman had “improved [its] funding structure and increased [its] loss-absorbing capacity by increasing [its] balance of high-quality liquid assets.”282 Such an improvement could not have been made if Goldman had acquired additional risky assets. Instead, it seems that Goldman has actually been pushing into plain vanilla retail banking with an online banking platform, which is among the least risky financial activities.283 Indeed, Goldman’s CEO, Lloyd Blankfein, explicitly stated that the firm was expanding into this area because of new regulations. He confessed that “[Goldman Sachs is] dissuaded from growing into certain activities that are capital-intensive, and it’s easier to grow into other areas that are more favored by the regulators and capital rules.”284 It thus appears that in shedding its commodities, private equity, and hedge fund units, Goldman has been replacing them not with similarly-risky businesses, but rather with safer ones that are favored by Dodd-Frank and the regulators who enforce the law.285

#### Tailored made regulations avoid our DA.

AARON M . LEVINE, associate at Sullivan & Cromwell, JD Yale, & JOSHUA C . MACEY, Clerk for Judge Harvey Wilkinson, JD Yale, ’18, “Dodd-Frank Is a Pigouvian Regulation” The Yale Law Journal 127:1336

Ultimately, the divergent paths of the four nonbank SIFIs highlight the benefits of Pigouvian regulations. The SIFI designation process allows for coordination and cooperation among the regulators and regulated entities. Further, the process keeps business decisions in the hands of the entities with the most information about the effective allocation of resources—the regulated business themselves. And most importantly, the Pigouvian compliance costs associated with SIFI designations allow for varied results. In the cases of AIG and GECC, compliance costs resulted in firms significantly reducing their size and potential for systemic risk. In return, they received a reduced regulatory burden. In the case of MetLife, compliance costs prompted both resistance and experimentation, leading to delayed divestures and a refinement of FSOC’s administrative process. And in the case of Prudential, the firm decided that maintaining its size and interconnectedness is a price that it is willing to pay. In exchange, FSOC can apply enhanced regulatory standards to minimize the systemic risks that Prudential poses to the economy. Finally, each of these cases also demonstrates the benefits of allowing regulators to impose compliance costs that are tailor-made to a firm’s unique structure and risks—allowing firms to respond as they deem fit, in accordance with their own financial strategies and risk-tolerance.

### AT: Add On

#### No food wars.

Vestby ’18 [Vestby, Ida Rudolfsen, and Halvard Buhaug; 5-18-18; Doctoral Researcher at the Peace Research Institute Oslo; doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO; Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography; “Does hunger cause conflict?” Prio, https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/]

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

#### It doesn’t go nuclear.

Bruusgaard 17 Kristin Ven Bruusgaard is a Stanton Nuclear Security Fellow at CISAC, Stanford University and a Ph.D. student at King’s College London. [The Myth of Russia’s Lowered Nuclear Threshold, 9-22-2017, https://warontherocks.com/2017/09/the-myth-of-russias-lowered-nuclear-threshold/]

Yet the evidence for a lowered Russian nuclear threshold is getting weaker by the day. First, there is very little hard evidence that de-escalation is part of Russia’s nuclear doctrine. In fact, Russia’s doctrinal statements indicate an increased rather than a decreased nuclear threshold. Second, the idea of lowering the nuclear threshold logically flows from a lack of conventional capabilities, while in fact Russia’s conventional capabilities are rapidly improving. Third, it is difficult to understand why Russia would want to pursue military adventurism that would risk all-out confrontation with a technologically advanced and nuclear-armed adversary like NATO. While opportunistic, and possibly even reckless, the Putin regime does not appear to be suicidal. Make no mistake: Nuclear weapons remain essential to Russian national security, and the deterrent utility of the largest nuclear arsenal in the world remains significant. Nuclear weapons remain the single most important deterrent asset Russia has. Still, Russia today is less, not more likely to use nuclear weapons than it was 10 or 15 years ago. Advances in conventional and non-military capabilities have made Russia less reliant on using nuclear weapons to deal with security threats. Russia has a broader range of tools to signal her resolve to a potential adversary than she did a decade ago. Officially declared Russian doctrine over the past seven years confirms this increased range of options. This was not always the case. Seventeen years ago, Russian leaders were indeed contemplating a lower nuclear threshold. NATO’s intervention in Kosovo made it clear that Russia’s conventional capabilities seriously lagged behind the West’s, leaving a deep and lasting impression on the Russian political and military leadership. Nuclear weapons came to be seen as Russia’s only trump card in the face of massive Western conventional (particularly air) superiority. This viewpoint produced a seminal article by Russian military theorists V. I. Levshin, A. V. Nedelin and M. E. Sosnovsky, “On the use of nuclear weapons to de-escalate military conflict”. The article explained how the limited use of nuclear weapons early in a conflict could convince an adversary of the risks associated with continuing aggression, thereby de-escalating the situation. There were several indications of a lowered nuclear threshold in this period, from the purported de-escalation strike with nuclear weapons in the 1999 Zapad exercise to the open-ended wording of the 2000 Russian military doctrine, which said nuclear weapons could be used “in situations that are critical to the national security of the Russian Federation.” Still, even at the height of perceived Russian conventional backwardness, the theory of nuclear de-escalation was never doctrinally codified or officially endorsed. Russia watchers were actively contemplating this reduced nuclear threshold at the time, but in a benign security environment, Western policymakers paid little attention to this strategy shift. Over the next two decades, Russia’s prescriptive solutions to strategic challenges would change. Analysts still pondering the lowered Russian nuclear threshold pay too little attention to this shift, focus in part on outdated elements of Russian strategy. Since the early 2000s, Russia’s declaratory nuclear strategy has actually become more restrictive. The current Russian military doctrine, issued in 2014, states that nuclear weapons can be used “when the very existence of the state is under threat,” compared to the more expansive conditions laid out in 2000. Nonetheless, many nuclear hawks claim that a classified document outlining nuclear deterrence strategy, which Russia retains in addition to the openly declared military doctrine, must spell out the nuclear de-escalation theory. This may be so: We have yet to see any leaked or other information on this. An alternate interpretation of the lack of official confirmation of the de-escalation theory is that this is not, in fact, a dominant aspect of Russian warfighting strategy. It would be nonsensical for the secret and public documents to blatantly contradict one another. The nuclear de-escalation concept was also controversial inside Russia. A number of theorists questioned whether using or threatening to use nuclear weapons early on would produce the desired effect, i.e. a cessation of hostilities rather than compelling the adversary to escalate in kind. Both Russian officials and analysts emphasized that the 2000 doctrine, with its increased reliance on nuclear weapons, was intended for a transitional phase, until conventional forces and other capabilities could contribute to more effective and more credible deterrence consisting of a broader range of military and non-military options. Many observers wanted a less risky and less nuclear-focused deterrence strategy as soon as this would be viable. By the late 2000s, discussions of “Russian strategic deterrence” had overtaken deliberations about nuclear de-escalation, and by 2010, this concept was part of the official military doctrine. The Russian strategic deterrence concept depicted the seamless integration of nuclear, conventional, and non-military capabilities to influence the adversary in times of peace, conflict, and war. The backbone of strategic deterrence was, of course, nuclear weapons. But crucially, it also entailed a range of assets, precisely in order to avoid an unhealthy dependence on nuclear weapons to compensate for conventional inferiority. Non-nuclear deterrence involves both military and non-military assets that can convince an adversary that the costs of aggression against Russia would outweigh any benefit. These include precision strike capabilities, effective command, control, intelligence, and reconnaissance capabilities, effective strategic assets such as aerospace defense forces and special operations forces, information warfare capabilities, and non-military tools such as diplomatic, economic, and political instruments of influence. These non-nuclear tools would add to the combined credibility of Russian deterrence, particularly in deterring regional conflicts and emerging threats, such as color revolutions. Nuclear weapons were still central under the strategic deterrence concept, but rather than taking on an elevated role to compensate for a lack of conventional options, they shifted toward a more normalized role in deterring large-scale aggression. By 2014, official Russian strategy documents reflected this development; the main novelty in the 2014 military doctrine was its introduction of non-nuclear deterrence: “A complex of foreign policy, military and military-technical measures aimed at preventing aggression against the Russian Federation through non-nuclear means.” At the height of Western post-Crimea stress syndrome and nuclear paranoia, the timing of this publication is interesting. If ever there was a perfect time to cement the Western perception of a Russian “madman” nuclear strategy, this would be it. The Russians missed it, opting instead for a concept that increased, rather than decreased, the requirements for nuclear use. The more conspiracy-prone may claim this is a classic Russian diversionary tactic. The problem is that deterrence only works if your adversary actually understands what your intentions and capabilities are. Declared and non-declared nuclear doctrines that point in opposite directions not only seem absurd; they also confuse your adversary and make deterrence less effective. This is all the more reason to pay attention to the clear message in Russian official doctrine, now reflecting a deterrence concept that had been developing among Russian theorists for a decade. Russia has been piling significant effort and resources into developing cutting-edge conventional capabilities, which further undermines the idea of a lowered threshold. Seeing the holistic Russian approach to strategic deterrence is essential for understanding the role of nuclear weapons in that strategy. The comprehensive modernization of Russia’s conventional armed forces and the development of a broad set of non-traditional tools of statecraft have enabled Russia to rely less on nuclear weapons to influence adversaries. To predict when and how Russia may use nuclear weapons, that is, Russia’s nuclear threshold, we need to understand how and when Russia may use these other tools to achieve similar goals. The list of capabilities that give Russia increased flexibility in a potential conflict is long. The precision strike regime’s impact on Russian capabilities is by far the most significant leap providing enhanced conventional deterrence. Indeed, conventional precision strike capabilities may take over some of the tasks that Moscow previously assigned to nuclear weapons. Russian military theorists such as A. A. Protasov, V. A. Sobolevskii and V. V. Sukhorutchenko explain how conventional strategic assets could carry out demonstration strikes or strikes inflicting unacceptable damage on an enemy to force him into submission – precisely the kind of tasks nuclear weapons would carry out under a de-escalation doctrine. Although it is difficult to know whether Russian operational planning incorporates these changes, we do know that these capabilities are becoming available to Russia – should it want to use them. Examples of the non-military tools Russia has been developing include offensive cyber capabilities, used for denial of services attacks in Estonia in 2007 and Georgia in 2008, and most likely, for kinetic attacks against critical infrastructure in Ukraine. Russia’s improved information operations capabilities, as seen in the disinformation campaigns seen in several European countries, can erode the will of another state’s political leadership or population. According to Russian General Staff Chief Valeriy Gerasimov, the center of gravity in modern warfare is not the enemy troops, but the population’s willingness to fight. A combination of military and non-military pressure may be sufficient to sway this willingness without the use of nuclear weapons.

## DOJ

#### The United States federal government should substantially increase resources for the DOJ antitrust division.

### 2NC CP’s – Good

2NC counterplans are good:

1. Tests the intrinsicness of new aff offense – negation theory means we just need to prove a competitive option avoids our DA, not the original 1NC counterplan.
2. Our interp checks vague plans and sketchy solvency mechanisms that get re-explained in the 2AC – theirs incentivizes sand-bagging, which breaks debate because late-breaking debates reduce intricate clash.
3. Arbitrary – you wouldn’t ban new 1NR impacts to politics – proves any restraint is arbitrary, which creates an unpredictable burden for the neg that incentivizes goalpost shifting and crowds out substance.
4. Justified by conditionality – the distinction between the 1NC and 2NC is arbitrary.

## Derivatives

### XT – PROA Bad

#### The plan shocks the financial industry and is WORSE for financial stability –

#### 1. Courts are ill-equipped to police or regulate the financial sector – judges are generalist and not familiar with the complexities of financial policy. Only SEC regulation can bake systemic risks into account when determining whether a practice is too big to fail.

#### 2. Treble damages are worse and overdeter as compared to SEC conduct – especially when anticompetitive conduct is rare now – that’s Kling. This sets up both uniqueness AND counterplan solvency – regulations now strike a middle ground that does not overly prohibit anticompetitive conduct – plan goes too far.

#### 3. That means this turns the second advantage – maintaining economy of scale key to global financial competitiveness.

Jeremy C. Kress, Assistant Professor of Business Law, University of Michigan Ross School of Business. J.D., Harvard Law School; M.P.P., Harvard Kennedy School, ’19, Solving Banking's 'Too Big to Manage' Problem, 104 MINN. L. REV. 171 (2019).

This Article contends that existing proposals to solve the TBTM problem suffer from critical shortcomings. Breaking up all of the largest U.S. financial institutions could have detrimental unintended consequences. Once broken up, for example, JPMorgan, Citigroup, and other U.S. firms might struggle to compete with their larger international counterparts. 22 Similarly, shrinking the banks could reduce economies of scale, making large financial institutions-and the broader financial system-less efficient. 23 Moreover, if policymakers were to reinstate the Glass-Steagall Act, financial institutions might become less diversified and, thus, less stable. 24 In sum, even if it were politically possible, breaking up all large U.S. banks could create more problems than it solves.

This Article proposes a better solution to the TBTM problem. It recommends that financial regulators use their existing statutory authorities to require that a financial conglomerate divest operations when it falls out of compliance with minimum regulatory standards. Regulators could use these authorities to compel a troubled financial conglomerate to sell certain subsidiaries, spin them off to shareholders as separately capitalized companies, or shutter them entirely. Regulators might, for example, order Wells Fargo to divest its scandal-plagued wealth management unit or notoriously troubled Deutsche Bank to cease its U.S. banking operations. 2 5

Forced divestitures are better than other plans to break up the banks for four reasons. First, the threat of such a significant sanction would increase financial conglomerates' incentives to operate prudently. Second, divestitures would safeguard the broader financial system by reducing the systemic footprint of banks that fail to comply with minimum regulatory requirements. Third, in contrast to more draconian break-up proposals, targeted divestitures would affect relatively few firms and thereby preserve economies of scale and scope for most financial conglomerates. Finally, unlike some politically infeasible breakup plans, no new legislation is required because Congress has already authorized regulators to mandate divestitures under existing law.

#### Lastly, every argument for the net benefit is also a case solvency takeout. Judges are not experts, and they will end up implementing the plan in ways that solve nothing but create significant economic risk. Devil is in the details of separation design.

Rory Van Loo, Professor of Law, Boston University ’20, "In Defense of Breakups: Administering a "Radical" Remedy," Cornell Law Review 105, no. 7 (November 2020): 1955-2022

In assessing breakups as a remedy, the question is how the government might perform today rather than how it performed decades ago. The literature on private sector breakups emphasizes that divestitures' success varies depending on the design and management of the process. 276 Three principles are important for designing the administration of antitrust breakups: leveraging business sector expertise, streamlining court involvement, and remaining open to large breakups. The first of these principles, business expertise, is important in light of perhaps the primary source of resistance to breakups: "Judges aren't good at breaking up companies." 277

Observers are right to doubt courts' competence in administering such day-to-day business decisions. However, that critique of breakups reflects an antiquated understanding of governance. Since the last large-scale breakup, many agencies have evolved toward what scholars have described as "new governance" and "collaborative" methods of regulation. 278 These and related concepts speak to regulatory process design and are most closely associated among legal scholars with administrative law.279 In the context of breakup administration, this model of governance would encourage the regulator to leverage private-sector expertise and knowledge rather than recreating it.2 8 0 The Environmental Protection Agency (EPA), Consumer Financial Protection Bureau (CFPB), and other agencies now pervasively rely on large businesses to develop internal selfregulatory processes, often through a compliance department or third-party inspectors. The agencies then monitor or manage the firm's internal self-policing infrastructure. 28

These new governance models allow the agency to benefit from the firm's skill in designing the best path to achieving a regulatory goal.282 A key design feature is establishing a regular dialogue with regulated entities, in which the regulator learns about and assesses the process and outputs. 28 3 Viewed through this more expansive new governance lens, the government's competence in designing and managing breakups should not be the determinative factor in assessing whether breakups are administrable. By some measures, the FTC has been slower than other agencies in shifting toward new governance. For instance, whereas the CFPB and EPA have about as many lawyers as monitors (which are called examiners or inspectors), the FTC enforces the law almost entirely through lawyers. 284 However, the FTC appears open to relying on private parties, such as independent third-party monitors in divestitures.28 5 Assuming a large gap exists between the FTC's tactics and regulatory best practices, the differences should lend further confidence that improvements in its historic approach to breakups are possible by moving closer to administrative best practices.

#### 6. Concurrent regulatory and antitrust jurisdiction imposes high costs on industry.

Justin **HURWITZ** Law @ Nebraska **’14** “Administrative Antitrust” 21 GEO. Mason L. REV. 1191 (2014) p. 1199-2000

Antitrust and regulation are typically discussed as either substitutes for or complements to one another." In principle, they are substitutes to the extent that they have the same goal-if either is successful, the other is superfluous.5 But they are complements to the extent that if neither completely achieves that goal, together they may come closer. 2 Under this view, "antitrust picks up where the regulatory regime leaves off."53 The question, then, is whether regulators and antitrust enforcers should treat them as substitutes, expecting whichever governs a given situation to be effective; or whether they should instead incur the costs and deal with the complexity of complementary competition policy institutions, in the hope that this multiplicity better realizes the mutual goals of antitrust and regulation.

This balance is especially important in concurrent-jurisdiction regimes, where both regulatory and judicial antitrust institutions might investigate or take action based upon the same underlying conduct. 4 As disussed below," the U.S. model is such a regime, and the costs of concurrent jurisdiction can be-and frequently are-high. 6 They include duplicative legal costs for parties and institutional costs for agencies and the courts. 7 In addition, they include costs appurtenant to any regulatory efforts: 8 potentially conflicting results 9 and strategic coordination between regulatory regimes that unduly disadvantages regulated parties.6"

#### The threats of treble damages and disgorgement under antitrust law have a unique chilling effect

Eisenstein 21 – Ilana H. Eisenstein, Co-Chair of Appellate Advocacy Practice at DLA Piper, “BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS,” 4/19/21, https://www.supremecourt.gov/DocketPDF/20/20-1293/176027/20210419132645500\_Chamber%20of%20Commerce%20of%20the%20United%20States%20of%20America%20Amicus%20Curiae%20Brief.pdf

Companies face significant enforcement and litigation risks without Noerr-Pennington immunity— risks that will undoubtedly deter their exercise of First Amendment protected activity absent intervention by this Court to establish clear rules for the doctrine’s scope and the narrow “sham” litigation exception.

In the antitrust context, companies face liability for treble damages in suits brought by government enforcers, their competitors, or customers. Octane Fitness, 572 U.S. at 556 (observing the “chilling” effect of the threat of treble damages pursuant to 15 U.S.C. 15). The $500 million dollar disgorgement award obtained by the FTC in this case, on top of a private settlement, demonstrates the substantial risks a company faces when deciding whether it may proceed with efforts to petition the courts or other governmental agencies.

Additionally, unfair competition laws similarly may impose punitive and substantial liability. See, e.g., ADP, LLC v. Ultimate Software Grp., Inc., No. 16-8664-KM-MAH, Dkt. Entry No. 119 (D.N.J., Mar. 5, 2018) (assessing Noerr Pennington immunity in light of claimed punitive damages and attorneys’ fees under various federal and state trade secret and unfair competition laws); Boydstun Equip. Mfg., LLC v. Cottrell, Inc., No. 3:16-cv-790-SI, 2017 WL 4803938, at \*9-\*13 (D. Or. Oct. 24, 2017) (applying Noerr-Pennington immunity to alleged violations of state and federal anti-monopolization laws and “Walker Process” fraud, citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965), which permits treble damages).

The FTC, moreover, has vigorously asserted its claimed right not only to damages, but also to disgorgement. See Shari Ross Lahlou, Greg Luib, & Michael Weiner, HIGH STAKES AT THE HIGH COURT: THE FTC’S DISGORGEMENT AUTHORITY COMES BEFORE THE SUPREME COURT, 35 Antitrust 71, 72 (Fall 2020) (“Since 2012, however, the FTC has routinely sought disgorgement in antitrust cases”); see also AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n, 141 S. Ct. 194, No. 19-508 (argued Jan. 13, 2021).6 Regardless of how this Court decides that question in AMG, private parties may be able to seek disgorgement and other equitable remedies under state law, resulting in substantial exposure. Such a risk is particularly dangerous, when the “sham” exception has been traditionally limited to “those rare instances where other conduct or incriminating documents” show bad faith. Lars Noah, Sham Petitioning as a Threat to the Integrity of the Regulatory Process, 74 N.C. L. REV. 1, 41 (1995).

#### Antitrust liability is distinct from other forms of liability – the massive damages associated with antitrust judgements increases the potential cost of all conduct – the counterplan is a lighter touch

Delrahim ’20 [Makan; JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice; “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>]

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

### Econ High – General

#### Economy strong now – built-up savings mute the impact to inflation and the Fed will pilot a soft landing

UBS 3/28 – UBS bank editorial team, including Mark Haefele, Global Chief Investment Officer, “The US economy can cope with higher rates,” 3/28/2022, https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1561929.html

The move comes after further indications from the Federal Reserve that it is set on a swift series of rate rises this year, with the market priced for around 240 basis points over the course of 2022—which would be the fastest pace of tightening since 1994.

But despite these signals from bonds, we see grounds for optimism that the US economy can cope with higher rates.

The boost from post-COVID-19 reopening has further to go. COVID-19 case counts have fallen by more than 95% since the peak in mid-January. Mobility indicators, such as air travel and dining out, have recovered to pre-omicron levels, but are still below normal. We believe that there is still pent-up demand for the services that were most impacted by the pandemic, as well as for goods that have been in short supply, especially cars.

Household balance sheets remain strong, providing some cushion against the blow from higher borrowing costs and elevated inflation. The recent increase in consumer spending has been mostly driven by a falling savings rate rather than income growth. Although the savings rate is now in line with pre-pandemic norms, in our view there is still room for it to decline further.

Since the start of the pandemic, a lot of savings have been built up, and household wealth has surged due to rising equity markets and home prices. In addition, employment growth has remained robust, which should also help limit the downside to spending. Nonfarm payrolls were stronger than expected in February, rising by 678,000, and the unemployment rate fell to 3.8%.

The Federal Reserve retains the capacity to slow the pace of easing in response to an abrupt slowdown in growth. Although the pace of tightening penciled in by the Fed is the fastest seen in decades, we still believe the Fed’s goal is to normalize growth, rather than push it below trend or into recession. At present, the Fed is seeking to reassert its credentials for maintaining price stability. The focus could shift back to maximizing employment if rate rises or the war in Ukraine lead to an unexpectedly swift deceleration in growth.

Despite the considerable challenges, the Fed has an encouraging track record of tightening rates without causing recessions, including in 1965, 1984, and 1994. Other recessions, including the pandemic recession of 2020, were not the result of monetary tightening.

So, our base case is that the US economy can avoid a recession, lowering the threat of a sustained downtrend in stocks. As such, investors should brace for higher rates—including potentially adding exposure to value and financial stocks which tend to outperform as central bank policy tightens—without overreacting by exiting equity markets. We favor selected equity overweight and underweight positions, resulting in a neutral overall stance on the asset class.

#### The most likely outcome is continued expansion, but everything has to go right – the plan throws a wrench into the fragile recovery

Zandi 3/24 – Mark Zandi, chief economist at Moody’s, “Tough to Handicap the U.S. Outlook,” 3/24/22, <https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1323358>

The most likely near-term outlook—our baseline—remains that the U.S. economic recovery will evolve into a self-sustaining expansion in coming months (a 50% probability). But recession is a serious threat (35% probability), and dreaded stagflation—high inflation and high unemployment—has become a meaningful possibility (10% probability). While more of a stretch (5% probability), events could turn out better for the economy, since there is evidence that underlying productivity growth is reviving.

Despite all the economy has had to deal with, odds are that the current economic recovery will evolve into a self-sustaining expansion. That is, by late this year, the economy will return to full employment. This is consistent with an unemployment rate in the low 3s and an employment-to-population ratio for prime-age workers of over 80%. Real GDP growth will throttle back to the economy’s potential growth rate of near 2%. Inflation should also moderate back to the Fed’s target of close to 2%, but this will take longer, until late 2023. For this sanguine outlook to come to pass, the pandemic must continue to fade—with each new wave of the virus less disruptive to the economy than the one before it—and the worst of the fallout from the Russian invasion of Ukraine on oil and other commodity prices must be at hand. It is critical that the Fed gets monetary policy more or less right, which means quickly normalizing interest rates over the next 18 months. We also need to catch a break, so that nothing else goes materially wrong for the economy.

### AT: Capture

#### Antitrust doesn’t exceptional check regulatory capture.

Justin **HURWITZ** Law @ Nebraska **’14** “Administrative Antitrust” 21 GEO. Mason L. REV. 1191 (2014) p. 1230-1231

A consequence, if perhaps not a purpose, of moving away from implied immunity and the complementary view of antitrust and regulation is that antitrust is less prone to exceptional treatment. This is an undeniable good, as there has never been a sound justification for this exceptional treatment.

The only argument that commentators have made to support the exceptional treatment of antitrust is that courts are less subject to public choice concerns-that is, capture by interest groups-than regulatory agencies. 3"3 While antitrust might be a form of regulation, as the argument goes, public choice concerns suggest that administration of antitrust laws by the courts is preferable to administration by regulatory agencies."4 This argument has been substantively critiqued by some.3"5 But there is a more fundamental problem with such an argument: it simply proves too much. Competition policy is not the only area of law subject to public choice concerns. In fact, given its economic basis, it is likely that antitrust law is far less subject to public choice concerns than, say, so-called "public interest" determinations or evaluations of environmental impact. Courts do not retain substantive decisionmaking authority when reviewing EPA rules-rather, they follow administrative law principles for reviewing the EPA's decisionmaking procedures to ensure that the agency has reached a substantively valid decision. This approach is designed, in part, with full awareness of public choice concerns. Antitrust is certainly subject to public choice concerns as well, but this does not make it exceptional.

#### Rule of reason doesn’t compensate for lack of financial expertise.

Jacob **KLING** JD Yale **’11** “Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine” 120 YALE L. J. 910 (2011) p. 928-929

87. In the last several decades, the Supreme Court has abandoned per se antitrust rules in favor of a rule-of-reason analysis for a number of practices. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (applying the rule of reason to resale price maintenance); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296-97 (1985) (limiting the application of the per se rule against group boycotts to cases in which the defendants possess market power); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16-18 (1984) (restricting the per se rule against tying to cases in which the defendant possesses market power in the tying product); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (applying the rule of reason to vertical territorial restrictions). Some commentators have argued that the rule of reason enables antitrust courts to adapt their analyses to the particular concerns of the securities industry and thus undermines the assumption that courts will prohibit too much conduct. See Stacey L. Dogan & Mark A. Lemley, Antitrust Law and Regulatory Gaming, 87 TEX. L. REV. 685, 700-01 (2009); Kahn, supra note 14, at 1494. But this argument is unconvincing since it is still the case that nonexpert and generalist judges and juries are applying the rule-of-reason analysis, and the rule of reason still focuses narrowly on competition to the exclusion of other policy goals. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691-92 (1978).

### XT – Defense

#### COVID external shock proved derivatives markets are resilient. Derivatives moved over-the-counter and are much more transparent than 2008.

**Financial Stability Board ’21** https://www.fsb.org/wp-content/uploads/P130721.pdf p. 5-6

Have the post-crisis reforms provided the intended level of resilience for the financial system? What have been the main challenges to date?

Core parts of the global financial system entered the pandemic in a more resilient state than during the financial crisis of 2008. Large banks hold more capital, have more liquidity and are less leveraged, which allowed them to absorb rather than amplify the macroeconomic shock as occurred in 2008. OTC derivatives reforms have replaced much of the complex and opaque web of ties between market participants with simpler and more transparent links between CCPs and their clearing members, supported by robust risk management requirements. And aspects of structured finance that contributed to the 2008 financial crisis – such as structured investment vehicles and collateralised debt obligations of subprime credits – have significantly declined**.**

However, the pandemic experience also highlighted differences in resilience within and across financial sectors. While core parts of the financial system have been able to withstand and absorb the COVID-19 shock thus far, key funding markets experienced acute stress in March 2020. Even though some degree of financial stress was to be expected going into the pandemic, its breadth and depth turned out to be unprecedented. As in previous stress periods, the shock caused a sharp repricing of risk and a heightened demand for safe assets. In its more acute phase, the stress led to an extremely high demand for cash and near-cash assets – a ‘dash for cash’ – creating large imbalances in the demand for, and supply of, liquidity needed to facilitate intermediation.

A wide set of monetary, fiscal, regulatory and supervisory measures cushioned the impact of the COVID-19 event on the financial system. While this in part reflects the extraordinary magnitude of the external shock, it was also a response to specific problems experienced in some parts of the financial system. Central banks took unprecedented action on a scale, and at a speed, that exceeded that during the 2008 financial crisis. Central bank assets expanded much more than in 2008, reflecting the provision of support in different forms and through different channels. Regulatory and supervisory measures encouraged banks to use available buffers to support lending, and to free up resources and alleviate operational burdens.1 Securities regulators also took measures to support market functioning. Fiscal authorities provided significant support to companies and households to shield them from the effects of the pandemic and to maintain credit supply. The degree of government support in emerging market economies (EMEs) has overall been markedly lower than in advanced economies, and the policy mix somewhat different, reflecting the specific challenges and constraints that many EMEs face.2

As a result of greater overall resilience and determined policy interventions, financing to the real economy has generally remained available throughout the COVID-19 event. Notwithstanding a significant tightening of funding conditions during the March 2020 market turmoil and a challenging operational environment, banks have continued to lend (Graph 2.1). Indeed, BCBS analysis indicates that more strongly capitalised banks showed higher increases in lending to businesses and households than other banks. While capital markets experienced severe disruption during the peak of the March turmoil, policy interventions restored market functioning and facilitated the issuance of significant equity and debt financing to the real economy. Derivatives volumes also increased, enhancing the ability of market participants to transfer and hedge risks.

To an important extent, the banking sector’s resilience can be attributed to the adoption of Basel III reforms. From 2013 to the end of 2019, banks’ capital, leverage and liquidity positions improved as reforms were implemented.3 Core equity tier 1 (CET1) capital ratios improved by nearly 3 percentage points on a weighted average basis for large internationally-active banks (left panel, Graph 2.2). Leverage ratios exhibited marked improvement since the introduction of the Basel III reforms, with weighted average leverage ratios for large internationally-active banks increasing by between 1-2 percentage points. Liquidity positions also improved materially, both qualitatively and quantitatively. Taken together, most banks entered the pandemic with capital and liquidity levels well above minimum regulatory levels.

Significant progress in addressing the too-big-to-fail problem also added to bank resilience.4 Systemically important banks in advanced economies have built up significant loss absorbing and recapitalisation capacity by issuing instruments that can bear losses in the event of resolution. These reforms have given authorities more options for dealing with banks in distress. Recovery and resolution planning have also improved the operational capabilities of banks and authorities, and supported risk management on a cross-border basis through enhanced liquidity monitoring and reporting.

FMIs, including CCPs, functioned as intended. The increased use of CCPs and bilateral margining for OTC derivatives products in recent years helped mitigate counterparty risks, unlike in 2008. This was the case despite challenging operational conditions and heightened market activity (including high asset price volatility) in the early stages of the pandemic. Initial margin played a key role in mitigating counterparty risk during the March 2020 market turmoil (right panel, Graph 2.2) – ensuring sufficient prefunded loss absorbing resources for the risks associated with derivatives and securities transactions.

### XT – AT: Populism

#### No populism impact – it’s part of the democratic project. Backlash against elites is a call to the promise of popular sovereignty – that’s Miller.

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

Cooper 16 [Louis F. Cooper, His online writing includes “Reflections on U.S. Foreign Policy” at the U.S. Intellectual History Blog (July 16, 2014). His Ph.D. is from the School of International Service, American University., 12-6-2016, "WPTPN: Will Populist Nationalism Lead to Great-Power War?," No Publication, http://duckofminerva.com/2016/12/wptpn-will-populist-nationalism-lead-to-great-power-war.html]

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

#### No impact to populism – political incompetence, safety valves

Moravcsik, PhD, 20

(Andrew, Politics@Princeton, https://foreignpolicy.com/2020/09/24/euroskeptic-europe-covid-19-trump-russia-migration/)

Over the past two decades, extreme-right populist parties with anti-Muslim, anti-immigrant, anti-terrorist, and anti-Europe appeal have increased their vote shares across Europe. They now participate in government in six countries. In Britain, they spearheaded Brexit. And in the last two decades, scholars—and, it seems, journalists—have written more about extreme-right populist parties than all other European parties combined. Leading foreign-policy pundits argue that homegrown extremism in Europe, the United States, and elsewhere—and not rising great-power challengers—now poses the greatest threat to the post-Cold War liberal international order. In Europe, many fear that extremist governments might win more EU exit referendums or join Trump and Putin in adopting protectionist and pro-Russia stances. Yet this proved to be journalistic hype. Rather than panicking over populist threats, European leaders calmly drained their energy by dampening migration and terrorism and hanging tough in negotiations with Britain—to which they can now add the political benefit of managing the coronavirus pandemic well. Today, European unity—in any case, a practical necessity for small and highly interdependent states—is more popular than at any time in recent history. In fact, populists were never as powerful as headlines made them seem. Consider the case of Marine Le Pen, who heads the French extreme-right National Rally party. When she ran for the French presidency in 2017, newspapers across the globe proclaimed, as one New York Times article put it, that “the next president of France will be Marine Le Pen” and speculated what her administration would do once in office. Yet her campaign was clearly hopeless from the start. All of her potential rivals, polls showed, could defeat her by comfortable double-digit margins, and Emmanuel Macron eventually did so by winning twice as many votes. Today, the National Rally holds just seven of 577 seats in the National Assembly. Outside of Britain, extreme Euroskepticism enjoys scant support. The impotence of the extreme-right in France is no exception. Outside of Britain, extreme Euroskepticism enjoys scant support. Of 27 EU members (plus Britain), 12 have no extreme-right or Euroskeptic party at all or none that scores above 10 percent in national elections. In 10 more countries, including France and Germany, other parties consistently exclude extremists from government coalitions. In three more—Latvia, Estonia, and Bulgaria—extremists participate only as minority coalition partners, which reduces their influence close to zero. Only in Britain, Hungary, and Poland does an extreme-right or Euroskeptic party actually lead the government. Of course, their extremism poses threats to the quality of democracy and rule of law, as in the United States, but their effect on foreign policy is slight. Migration is the only EU issue on which policy has moved in a direction extremists favor—but this, as we have seen, is only because the position held by extremists happens to be that of large majorities of moderate voters in nearly every country. Otherwise, Poland and Hungary, both of which are among the biggest beneficiaries of EU policies and have exceptionally pro-EU populations, follow their neighbors on nearly every aspect of external policy, from sanctions on Russia to development aid to Africa—dissenting occasionally only on symbolic declarations. That leaves Brexit as the only major Euroskeptic achievement of a populist party in recent years. Yet Brexit is, at best, an exception that proves the rule. That it happened at all reflects a perfect storm of astonishingly unlikely circumstances unrepeatable elsewhere. Britain is the only European country where Euroskepticism attracts more than a tiny fringe of the electorate. Even so, Brexit could happen only because a prime minister overruled his advisors to call an unnecessary referendum, which happened to fall at the only brief moment in the last five years when a majority of Britons opposed EU membership. Brexit was later ratified by an election in which a 44 percent vote share gave Boris Johnson a comfortable majority: Without Britain’s electoral institutions, the most biased in Europe, a pro-EU majority would have ruled instead. Today, Brexit remains stalled. Britain is much smaller and dependent on Europe’s good will to gain access for nearly half of its exports, particularly of services like banking. This allows Europe to take a tough stance in negotiations over the terms of the U.K. withdrawal. British Brexiteers once hoped that Trump would bail them out with a quick trade agreement. Yet U.S.-U.K. negotiations have gone nowhere after the United States badgered the British about agricultural imports and aircraft subsidies. Trump embarrasses prime ministers on his visits, remains unpopular among the British public, and is struggling to be reelected. Britain is running out of options. These realities, combined with the more general lack of support for their Euroskeptic views, have led populists elsewhere to moderate their ideas rather than follow London’s lead. Five years ago, 15 extreme-right parties, including Le Pen’s National Rally, advocated a Brexit-style withdrawal from the EU or the eurozone. Today none do. Even so, the most worrisome populist challenger in Europe, Matteo Salvini of the League party, is hemorrhaging popular support to the Brothers of Italy, a new and less Euroskeptic right-wing party. The wave of populist Euroskepticism seems to have crested.

#### No impact – populism is a cyclical reaction to crises.

Balfour ’20 [Rose; July 15; Director of Carnegie Europe, specializing in European politics, institutions, and foreign and security policy; Carnegie Europe, “Why Populism Can Survive the Pandemic,” https://carnegieeurope.eu/2020/07/15/why-populism-can-survive-pandemic-pub-82293]

Bolsonaro, Johnson, Salvini, Trump. Erdoğan, Kaczyński, Le Pen. Modi, Orbán, Putin. Some of these global leaders are populists; some have authoritarian streaks; others are authoritarians using populism to consolidate power. Some will be booted out after their disastrous mismanagement of the coronavirus pandemic. Others will stay, and new ones will arrive. Given the poor performance of many populist governments in dealing with the coronavirus, populism looks like it could be magically swept away. But such wishful thinking ignores the reasons for the rise of populism and its likely endurance. To rid the world of populism, its root causes must be addressed.

Europe’s Populism Problem Goes Deeper Than Its Many Crises

Many in Europe believe that populism came about because of external crises that have hit the continent over the past ten years. These include the impact of the 2008 financial crisis on the eurozone, which sparked displeasure with the euro and economic inequality, and the refugee influx of 2015 and 2016, which unearthed fears of identity loss and led to greater skepticism about the EU.

In short, EU scholars and policymakers assume that the EU’s success is tied to its performance. They reason that better policies and more efficient institutions will ensure that European and national politics can coexist smoothly. If populism is driven by economic grievances and fears of identity loss, it can be solved by creating more jobs and closing borders to reduce immigration.

This interpretation is wrong. The multiple crises have been a perfect storm for populists, true. But they did not cause the fundamental dissatisfaction that has rattled Europe and other democracies. People who vote for populist politicians do not usually care how well a particular policy performs. In fact, the populist politicians’ common claim—to embody the will of the people—eliminates the possibility that they could ever be wrong. So, populist leaders’ attacks on the elite are rarely questioned—even when they are part of that elite themselves.

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

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

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

#### Their ev is hype.

Strobaek ’17 [Michael; 6/5/17; Chief Investment Officer, free-lance journalist, and political analyst for CNBC; CNBC, “From the cacophony of populism, is a stronger middle emerging?” http://www.cnbc.com/2017/07/05/from-the-cacophony-of-populism-is-a-stronger-middle-emerging.html]

One would presume that anger breeds irrationality, radicalism and political as well as economic instability. But it need not. Anger – or let us call it, less dramatically, dissatisfaction with current affairs – can also lead to renewal and progress. Indeed, this year's elections in Europe suggest that voters are rather heading in that direction, i.e. seeking greater stability as well as reform while rejecting angry populism which has no real solutions to offer for today's major issues. With this in mind, it should thus come as no surprise that the radical right was soundly defeated in Austria, the Netherlands and France, and that the AfD (Alternative for Germany) is in rapid decline in Germany. In Finland, the radical right has just split into two, pragmatists and "purists." In Italy, too, recent local elections suggest that populist promises alone do not convince the electorate. Similarly, the setbacks for the Conservatives in the U.K. election in part represented a rejection of simplistic chauvinistic slogans. Leftist populism in demise? Conversely, we see few signs that the radical left is benefiting from this trend. Those who believe that the gains of the Labour party in the U.K. – headed by a rather dogmatic old-style socialist – suggest that leftist populists stand a good chance to govern are likely to be disappointed. Quite to the contrary, even in countries that have suffered deep crises – Spain and Greece come to mind – voters have become disillusioned with their recipes. Bernie Sanders would not, we believe, have won the U.S. election had he been the Democratic opponent of Donald Trump. Returning to what looks like a detail of the U.K. election, the very strong performance of the Conservative leader in Scotland, Ruth Davidson, an avowed "(EU) remainer" and opponent of the Scottish National Party suggests that separatism, another form of "anger," may also be on the way out. The outcome of the Catalan vote in the fall, should it take place, will be a further test of this thesis. Finally, beyond Europe, recent political shifts in Argentina and the upheaval in Brazil also suggest that leftist populism is in demise. Let us hope that Venezuela will soon be able to rid itself of one of its more extreme forms. Return to the center Putting these observations together suggests to me that voters have in fact started to head away from the extremes back to the center. Emmanuel Macron won the French election on an openly centrist platform. The state elections in Germany recently boosted Angela Merkel's centrist CDU, but even if the SPD and Martin Schulz were to win in September, this would hardly signal a turn of the electorate in a radical direction. Voters seem to be seeking politicians who offer pragmatic solutions to the complex problems of the day rather than simplistic recipes. The next U.S. president, I dare predict, is quite likely to be an avowed centrist as well. Maybe the disillusionment with radicalism – in this case of a truly brutal nature – will even strengthen forces of compromise in the Middle East at some point in the not-too-distant future. All in all, fears of significant political destabilization and systemic disruptions thus seem overdone, which may be one reason why markets, equities in particular, have been so stable and calm until recently despite rather stretched valuations. Does this mean that we will, after all, experience the unabashed victory of economic and political liberalism that Francis Fukuyama proclaimed? This remains rather unlikely, in my view, for three reasons: First, our multipolar world suggests that national and regional interests will take precedence over those promoting free markets and unfettered globalization. Second, distrust of market solutions has not been overcome, not least due to the "misdeeds" during the financial crisis.

## Securitization

### XT 1 and 2 – Post-COVID regs solve.

#### Credit ratings regulations and post-covid lending restrictions solve asset securitization – the Fed can provide liquidity to securities markets and secure triple AAA credit ratings – Caviness.

#### COVID response proves Fed is an effective lender of last resort – asset backed security crisis has a government safety net under the fed’s authority under 13.3 of the FRA. That solves every risk on this advantage.

Ramaa Vasudevan, Colorado State University, Fort Collins, ’22, “The Doom-Loop Redux: The Corporate Bond-Purchase Program and the Political Economy of the Fed’s Pandemic Response” Review of Radical Political Economics 1–19 © 2022 Union for Radical Political Economics

The US Federal Reserve (Fed) launched extraordinary interventions to stem the collapse of financial markets as the outbreak of COVID-19 assumed the proportions of a full-fledged global pandemic in March 2020. In reinstituting the facilities to buy and lend against commercial paperand asset-backed securities, the Fed has followed the playbook of its unconventional policies in response to the global financial crisis triggered by the collapse of Lehman Brothers in 2008. At that time, unconventional policies to revive the stalled credit machinery marked a departure from traditional practice, with the Federal Reserve expanding its backstop beyond commercial banks to embrace the broader shadow banking system. However, both the scale and the scope of the current response have gone much beyond the interventions in 2008–9. A significant new dimension of the current interventions is the Fed’s deployment of the emergency authority under Section 13.3 of the Federal Reserve Act to extend its balance sheet support to provide a backstop the market for corporate debt.1

In launching this program, the Fed has ventured further along the path paved by interventions in 2008–9, when it took on the mantle of buyer and underwriter of last resort for asset-backed securities and commercial paper not only from financial institutions but also from nonfinancial corporations like Verizon, McDonalds, and Caterpillar. The commercial-paper market plays a major role in the short-term financing of both the financial and nonfinancial corporate sector, and the precedent established in this earlier intervention has been extended out the yield curve, with the establishment of the new special facility to buy corporate bonds (McCauley 2020). The Fed is going beyond stabilizing the flows of liquid funding that enable nonfinancial corporations to conduct their operations smoothly, to spreading its safety net to underwrite and support the market for long-term corporate debt. In this article, we delve into the political economy of the Fed’s corporate-bond buying program, placing it in the context of its interventions in 2008 and the broader swathe of facilities it launched in March 2020.

#### Asset backed securities only gained popularity due to inflation – the market will naturally self-correct.

Adam Lewis, Freelance Journalist, 3-4-22, "Asset-backed securities an added ‘cushion’ against inflation," International Adviser, https://international-adviser.com/asset-backed-securities-an-added-cushion-against-inflation/

Philip Matthews, manager of the TB Wise Multi-Asset Income fund, has positioned the portfolio’s fixed income holdings into defensive assets such as asset-backed securities (ABS) and senior loans, to hedge against rising inflation. Faced with the problem of trying to generate an attractive level of income that can, at the same time, provide an element of inflation protection should interest rates move higher, Matthews said he has chosen to diversify the portfolio in a more defensive direction. “With yields on government bonds remaining low and real yields negative, investors still appear to be relying on inflation proving to be transitory to justify current yields,” he said. Rather than investing into corporate credit, Matthews believes the yields on offer within ABS and senior loans are higher than corporate bonds of a similar risk. Greater inflation protection “This should provide an extra level of cushion if the cyclical headwind of higher inflation and tighter monetary policy prove greater than expected,” he said. “In addition, both asset-backed securities and senior loans are better protected against inflation. “The coupons payable to investors are floating rate in nature, meaning the yield on the bond moves up as interest rates rise, providing some indirect protection against rising inflation.” As way of example, the fund recently increased its exposure in the TwentyFour Income fund, an investment trust, managed by a team that specialises in investing across the spectrum of higher-yielding ABS such as mortgages, credit card debt, senior secured corporate loans and auto loans. “The quality of the credit work from the team at TwentyFour gives us confidence the portfolio is well protected on the downside should default rates rise, whilst the fact that ABS use floating rather than fixed rates offers a hedge against rising rates if the reflationary environment proves more than transitory,” he said. Fixed income more balanced Matthews added the fund’s other fixed income holdings, such as GCP Infrastructure and Starwood European Real Estate, also have an element of floating rate exposure. “Furthermore, GCP Infrastructure should see improving credit fundamentals as many of the underlying borrowers benefit from rising power prices, one of the causes of the recent spike in inflation,” he said. “Similarly, a return to normal activity should improve the earnings outlook for the borrowers at Starwood, in particular the hospitality sector (hotels) which represent circa 40% of the loan book,” he added. “The loans are strongly asset-backed with a modest loan to value of 62%, providing significant downside protection.” In both cases, as inflationary fears perhaps are reaching a crescendo, the fund has topped up its holdings in both trusts as Matthews said the risk-reward outlook for investors in fixed income starts to look a little more balanced. “On the one hand, if current inflation feeds through into higher wage settlements, this will force central bankers to be more aggressive in raising rates,” he argued. “Equally, inflation expectations are now no longer surprising on the upside and any shock to global growth forecasts from events, such as Ukraine or a new variant of covid, would most likely see bond yields to reverse some of their recent strength.”

### XT 4 – Emerging Economies D

#### Alt causes to emerging economies – COVID has crushed billions in income and FDI fell by 42% last year alone – UGLC.

#### Structural issues issues hamper emerging markets.

Sen ’21 [Kunal; October 2021; Professor of Development Economics in the Global Development Institute @ University of Manchester; “Least Developed Countries are facing five major challenges”; <https://www.wider.unu.edu/publication/least-developed-countries-are-facing-five-major-challenges>; AS] \*LDC = Least Developed Countries

Five main challenges

The challenges of the LDCs were widely discussed in the Future Forum. I would narrow the list down to five main problems.

The first one is weak economic growth. Average growth in LDCs stood at 4.7% during 2011–19, which was significantly lower than the average of 6.6% during 2001–10. This implies that the living standards of many LDCs will not converge to the levels of the fast-growing developing countries in North and South-East Asia. With the onset of the pandemic in 2020, economic growth has been particularly affected in 2020 and 2021, leading to sharp increases in poverty.

Second, there is a lack of productive capacity. The gap in productive capacity of LDCs and other developing countries has not narrowed in the last ten years. There has been very little diversification into manufacturing or high-value services. Agriculture still remains the major source of value added and employment.

Third, there is lack of diversification of exports and high commodity dependence. We see an excessive dependence on a few products in the export baskets of many LDCs. Many countries seem to specialise in one or two products with respect to exports. This means that they are vulnerable to trade shocks and the sudden loss of export markets when another developing country becomes competitive in that product.

Fourth, there is high vulnerability to environmental shocks. Extreme weather events have an adverse effect on LDCs. For example, Myanmar is the second most climate risk-affected country in the world. Climate change also poses serious threats to the Pacific Islands LDCs.

Fifth, there is the potential loss of preferential market access such as the EU’s ‘Everything But Arms’ (EBA) for the LDCs that are in the process of graduating. As most of the successful exporters among LDCs specialise in products that are price-sensitive such as apparel, the possible tariff increases may lead to big losses in competitiveness.

#### Weak healthcare systems and lock downs incinerate development.

Schifferes ’20 [Steve; Honorary Research Fellow in City Political Economy Research Center @ University of London; “Developing countries are facing economic disaster: four ways western nations can support them to shore up the global economy”; <https://theconversation.com/developing-countries-are-facing-economic-disaster-four-ways-western-nations-can-support-them-to-shore-up-the-global-economy-139083>; AS] \*Edited

While attention in developed countries has been focused inward on the effects of the pandemic at home and the anticipated exit from lockdown, an economic and health disaster is emerging in developing counties that make up 85% of the world’s population.

Infection rates are now rising rapidly, overwhelming weak healthcare systems. Hot spots are appearing in the vast slums and favelas of sprawling cities from Sao Paolo to Capetown to Mumbai.

Even more worrying is the massive economic damage that has already been caused by both the pandemic and the widespread lockdowns that most developing countries have imposed. UN agencies estimate that 1.5 billion people – half the global labour force – will become unemployed, with 500 million thrust back into poverty while 250 million could face famine, reversing all the gains of the past two decades.

The collapse of the global economy will seriously damage our chances of recovery, hurting exports, disrupting supply chains and threatening the global financial system. The failure to contain the global spread of virus will also ensure that a reservoir of infection remains that could jump back to developed countries.

Read news coverage based on evidence, not tweets

A triple crisis

Developing countries are facing a hammer blow to their economies on three fronts:

1) Domestic economies have been severely affected by the lockdown.

The majority – who work in the informal economy without regular jobs, employment rights or social benefits – have immediately lost their livelihoods, and there are no government safety nets to pay their wages or prevent destitution. The result has been a rapid fall in economic output and a massive dislocation as millions are forced to return to the countryside.

2) The collapse of world trade has accelerated this decline.

Without enough income from exports, many developing countries are facing a balance-of-payments crisis where they haven’t earned enough foreign currency to buy the essential imports needed to keep their economies running, such as fuel, food and medicine.

In many cases this also causes a sharp fall in the value of their currency, making foreign imports even more expensive. Most of the good jobs in developing countries are in the export industries, and from garment workers in Bangladesh, to copper miners in Zambia, just as in the 2008 crisis, they are being laid off in large numbers.

3) The economic collapse is threatening the world financial system.

Emerging market countries owe US$17 trillion (£14 trillion) to western investors, and many are already on the verge of default. Capital is fleeing developing countries at a faster rate than in the 2008 global financial crisis. The emerging sovereign debt crisis could ~~paralyse~~ [hurt] foreign investment for decades and cause serious damage to global bond markets already reeling from the burden of corporate debt.

#### Poor working conditions, declining labor force participation, wage gap, climate change, and child labor.

AFD ’19 [Agence Francaise de Development; 5/10/19; “5 CHALLENGES FOR EMPLOYMENT IN DEVELOPING COUNTRIES”; <https://www.afd.fr/en/actualites/5-challenges-employment-developing-countries>; AS]

Between mass unemployment, poor working conditions, wage gaps, discrimination and other concerns, finding a job can be a challenge, and having one does not guarantee decent living conditions, particularly in low-income countries. There are 5 primary challenges that must be met to improve this situation and move toward decent employment for everyone.

1INCREASING DECENT EMPLOYMENT

Poor working conditions are the main global employment challenge, according to the International Labor Organization (ILO).So much so that the UN has made “decent work for everyone” one of its priorities for the next decade, as part of the Sustainable Development Goals (SDG No. 8).“Having a job does not always guarantee decent living conditions,” explains Damian Grimshaw, Director of Research at the ILO.“As proof, 700 million people live in extreme or moderate poverty even though they have a job.”

The scope of the problem is particularly demonstrated in the statistic that 61% of workers worldwide—i.e.. 2 billion people—currently hold an informal job, meaning one not governed by the rules that dictate the rights of employers and employees. This results in a number of problems, including lack of social protection, extended hours, the ability to be fired without notice or severance pay, and dangerous working conditions, amongst others.

“This constitutes a two-fold challenge; improving working conditions in the informal sector, which still accounts for the vast majority of jobs in developing countries, while also, as much as possible, encouraging the formalization of activities and developing social protection mechanisms to reinforce the application of labor laws and enable workers, self-employed workers included, to receive the allowances to which they are entitled depending on their situation regarding health, unemployment, family, retirement, etc.,” adds Céline Gratadour, who handles employment-related issues at Agence Française de Développement (AFD). Despite this, initiatives designed to improve the quality of work on a global scale remain limited.

2IMPROVING YOUTH EMPLOYMENT

Worldwide, more than one out of five young people (under the age of 25) are without an occupation, meaning that they are unemployed, with no training and not in school. At the same time, 145 million young workers live in poverty. This is a situation that is not expected to improve anytime soon, according to the ILO’s World Employment and Social Outlook - Trends 2019, which forecasts that the decline in the youth labor force participation rate over the past 25 years will likely continue.

This is particularly alarming because youth unemployment is a vicious cycle—those who remain excluded from the job market for a long time fail to acquire the skills that future employers will be looking for. There is, thus, an urgent need to recognize youth employment as a priority for both public policy and the private sector to offer young people more and better employment opportunities.That is the goal of the global Decent Jobs for Youth initiative. Sponsored by the UN, it aims to accelerate partnerships for action in this area, in part by disseminating the necessary information (studies, expert recommendations, innovations, etc.) to key players.

In Côte d’Ivoire, for example, AFD supports government authorities in geographically expanding and improving employment services targeting youths, including support for starting a business.In Morocco, AFD is currently preparing an ambitious project to implement Regional Employment Programs, which aim to reinforce the joint efforts of the entire chain of public and private players working on employment issues.

Another example is the French initiative Choose Africa, sponsored by AFD, to devote €2.5 billion by 2022 to 10,000 small and medium enterprises in Africa to encourage the entrepreneurial potential of young people.

3ACHIEVING GENDER EQUALITY IN THE WORKPLACE

The wage gap between men and women is one of today’s greatest social injustices. On average, a woman with the same skills and responsibilities earns 20% less than a man, according to the ILO.

This is compounded by another inequality—women are much more likely than men to be involuntary part-time workers, although many of them would prefer to work more hours. In combination with persistent stereotypes, these injustices result in much lower labor force participation rates among women (48%) than men (75%). “After a period of rapid improvement that lasted up until 2003, progress toward reducing inequalities in [labor force] participation between men and women has slowed,” states the ILO.

Facilitating women’s participation in economic life, however, is essential in helping them have control of their lives.And the community has everything to gain.“If women were to achieve the same labor force participation rate as men, our GDP [gross domestic product] would jump by 26 points globally,” Gratadour points out, citing a study by the McKinsey Global Institute.

“With that said, it is very difficult to change existing mindsets on this topic,” she continues. “We believe that the best way to reverse the trend is to devote ambitious resources to integrating gender issues, particularly gender equality in the workplace, into AFD’s projects and communicating about successful experiments that could inspire other projects.For example, AFD supported projects in Turkey to eliminate the obstacles faced by women trying to keep their jobs by supporting the development of daycare centers and breastfeeding rooms at the workplace.”

4RESPONDING TO THE ENVIRONMENTAL CRISIS

Climate change and the decline in biodiversity will affect millions of workers worldwide, particularly farmers whose crops are vulnerable to extreme weather events (intense precipitation, drought) or dependent on insect pollinators.The transition toward more environmentally respectful societies, will meanwhile destroy 6 million jobs globally, many in fossil fuels, according to ILO estimates.

“If we close coal mines, we leave people unemployed, which not only requires planning how to support those workers through professional retraining program but also anticipating green job opportunities in sectors of the low-carbon economy via appropriate measures for skill development and support for entrepreneurship.The ecological transition will benefit workers only if we anticipate these situations,” insists Gratadour. “In Africa, for example, we are working with electrical companies on the human resources implications, particularly in terms of training, of a transition to greener modes of production.”

Most economic sectors, along with America, Asia, Australia, and Europe, should enjoy a net increase in jobs.And this increase could be a significant one—by 2030, policies promoting a more environmentally friendly economy will create 24 million jobs, according to the ILO, particularly in the energy sector (renewable production, energy efficient buildings, electric vehicles) and the circular economy (recycling, repairing, renting, reusing).

However, the ILO report advises “training workers in the skills required by a greener economy and providing them with social protection to facilitate their transition into new jobs.”Otherwise, many workers could be left behind.

5BRINGING CHILD LABOR TO AN END

The figure is overwhelming;152 million children worldwide are still forced to work.Of those, 73 million are assigned to dangerous tasks.While these figures are decreasing, “the pace is too slow to reach the goal of ending all forms of child labor by 2025,” warns the International Labor Organization.

The majority of child labor results from a combination of a poor standard of living for the families and social norms that tolerate it, as well as a lack of decent jobs for adults and adolescents, migration, crisis situations, and discrimination against indigenous populations and lower castes, according to UNICEF.

This work not only threatens the health and education of children, but also deprives them of their childhood and opportunities for a decent life as adults.UNICEF has determined that ending child labor will require improving laws and regulations, enhancing advising and monitoring systems for companies, holding subcontracting firms accountable (as under the French law of March 27, 2017 on the duty of vigilance), reducing poverty in producing countries, ensuring high quality education, and better informing communities and families.

### XT 8 – No Modeling

#### No one models US financial systems – hypocrisy and defiance of international law – card is two lines long and does not reverse causally say that the Credit Suisse decision’s reversal was modeled globally. European competition law is more favorable to structural remedies and ex-ante regulations. The end of interstate banking restrictions in the 90s means that all of the tests of relevant markets used in Philadelphia National no longer apply. Their own uniqueness arguments that European and US banks are too big to fail proves this model was not applied in recent history in competition law. The model they are citing is treating banking as commerce and thus subject to antitrust, NOT that European countries would currently be willing to apply structural remedies to bank size. The implication is that they cannot solve foreign asset securitization in overseas markets.

#### No one models the US – hypocrisy.

Graham E. Fuller 21, MA Degree in Russian and Middle Eastern Studies from Harvard University, Former Vice Chairman of the National Intelligence Council at the CIA, Former Senior Political Scientist at RAND, and Current Adjunct Professor of History at Simon Fraser University, “Hell Hath No Fury Like a Superpower in Decline”, Responsible Statecraft, 3/22/2021, https://responsiblestatecraft.org/2021/03/22/hell-hath-no-fury-than-a-superpower-in-decline/

It is simply astonishing that in approaching a new course of relations with Russia, President Biden should have called Vladimir Putin “a killer” and lacking “a soul.”

It is similarly astonishing to have chosen an important opening moment in our delicate relationship with China to employ derogatory language. Did Blinken believe that flashing testosterone at the first high-level meeting of Beijing’s foreign policy leadership would help achieve the diplomatic goals Washington seeks? One wonders who the secretary of state was trying to impress — Beijing or a U.S. domestic audience?

The United States undoubtedly has its own grievances towards China, and China likewise possesses many grievances towards the United States. But surely this name-calling and accusatory language are immature and counterproductive in terms of future U.S.-China or, for that matter, China-Russian relations.

And what message do these events send to other world leaders? It raises serious questions about the professionalism and vision of the new administration’s leadership as to whether Washington is any longer responsible or capable of the “global leadership” about which it talks so incessantly.

When both the U.S. president and his secretary of state seem to have chosen such ill-considered approaches to Russia and China, it certainly will make many other countries quite hesitant to sign on to an American vision and style of global leadership.

The degree of hypocrisy about “killing” or “foreign interference” is likewise disturbing if not myopic. U.S. policies over the past 20 years or more have shown a great willingness to kill in great quantity in a failing effort to achieve political goals that have stunningly failed in nearly every case. Consider the hundreds of thousands of Iraqi, Syrian, Somali, Libyan, Iranian, Afghan, and Pakistani civilians who are perceived as little more than “collateral damage” in endless U.S. military interventions. Not to mention American assassinations of high-level foreign officials such as Iranian General Qassem Soleimani who also happened to be perhaps the most revered public official in Iran.

Antony Blinken, seemingly without embarrassment, speaks of the United States as upholding “the rule of law globally” in the self-deception or the belief that such is the case. In fact, Washington has always expected other countries to support the international rule of law — although exempting good friends like Israel and Saudi Arabia. The United States invariably defends its own “exceptionalism” in pointedly not signing onto International law when it suits its interests. That includes foreign assassinations and the launching of several wars without authorization at the international level, provoking “Color Revolutions,” and refusing to ratify UN Conventions on the Law of the Sea or the Rights of the Child, or honor adverse judgments by the International Court of Justice. And It is difficult to understand how Blinken feels comfortable at lecturing China on its domestic failings at a time when U.S. democracy and social policy have never presented a more damaging face to the world.

### XT – EU

#### No EU financial crisis – they have more power than the US to apply structural remedies on bank size now.

Donald **BAKER** Lecturer in Law @ GW **’15** From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies, 80 Antitrust L.J. 353 (2015) p. 370-371

The Supreme Court has not heard a Clayton Act Section 7 case since 1975. Everyone expects that today's much more conservative Court would be more restrictive in applying Section 7 of the Clayton Act than "the new antitrust majority" was when Justice White criticized them in 1974. Moreover, it has often been hard to find a predictable level of specific competitive harm necessary to satisfy an evidence-seeking federal judge to enjoin a privately profita- ble capital market transaction because its "effect ...may be substantially to lessen competition."44 This was even true back in the late 1960s and early 1970s, when the DOJ was regularly winning bank and other merger cases in the Supreme Court.45 Today, looking back at the merger transactions that have created the largest financial institutions in the United States during the last two decades, I find it quite improbable that the DOJ could have mounted an antitrust enforcement program that could have had any serious impact on the major expansions in size of the largest bank holding companies.

It is possible that the European type of administrative system for antitrust merger review would have been able to do slightly more than the DOJ has done in dealing with some of the mergers that created TBTF institutions be- cause the EU merger prohibition decisions are made by a pro-active administrative body (i.e., the European Commission), rather than a court. The Commission makes rulings based on its interpretation of facts and law, and it has sometimes been willing to make decisions based on more subjective concerns in evaluating competitive risks, although some of these decisions have been overturned by the EU Court of First Instance (now the General Court), for lack of sufficient economic evidence to support the result.47 In addition, the Competition Directorate at the European Commission also has the unique power to regulate "state aids"-i.e., subsidies by Member State governments to favored national enterprises; and the Commission has used this authority to force after-the-fact divestitures of branches and assets by some of the TBTF banks that were saved by national governments during the 2008-2009 crisis.

#### The EU is already applying remedies – solves their modeling arguments.

Donald **BAKER** Lecturer in Law @ GW **’15** From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies, 80 Antitrust L.J. 353 (2015) p. 375-376

After-the-Event Structura lRegulation. What the European Commission has done in dealing with consequences of the 2008-2010 financial crisis is inter- esting and might well be a useful model for the United States to consider in the context of some major political wave generated by the next financial cri- sis. The Commission enjoys a unique power under the Treaty Establishing the European Community56 to regulate so-called state aids given by EU national governments to enterprises based in their jurisdiction. 57 The purpose of this system of regulation is to prevent subsidy-driven distortions of competition and preserve a level playing field for all enterprises in the European Union. The state aid regulatory system is administered primarily by the antitrust arm of the Commission (the Directorate General for Competition), where about a third of its resources are used in enforcing state aid rules.

When the national governments in the European Union member states had to bail out depository institutions after 2008, the Commission treated these payments and guarantees as state aids under the EC Treaty and compelled the national governments to make major changes in how the recipient institutions operated .58

A particularly interesting example occurred in the United Kingdom after the British government provided Lloyds Banking Group (LBG) with £17 bil- lion in recapitalization and became a 43 percent shareholder.59 LBG was ap- parently the largest retail bank in the United Kingdom. It was described as having 30 million customers, 2,968 branches and market shares in the 20-40 percent range for different product lines. The Commission's plan contained a lot of detailed requirements designed to ensure that the bank would face less risk going forward and thus not require continuing or future state aid. The Commission also required divestiture of at least 600 branches, dispersed around the country by geography and income areas, accounting for at least 4.6 percent of personal accounts. As the Commission explained in its accompany- ing press release, "This proposed divestment package will facilitate the entry of a new competitor or reinforcement of a smaller existing competitor on the U.K. retail banking market and will therefore remove the distortions of com- petition created by the aid."60 The ultimate result was that a new bank was set up, using a secondary brand called "TSB" that LBG was also forced to divest.

This kind of structural approach would have some potential political appeal because it would show the politicians and the public that the TBTF bank had to pay some price for being rescued, while perhaps reducing the incentives of some managers to take on additional risks. Finally, if used in a concentrated market, then such divestitures, if done carefully and well, would serve the antitrust goal of creating additional competition in the market. However, the banking industry would be opposed, and nothing so major is likely to be seriously considered in the United States, absent another crisis.

# 1NR

## DOJ

### 1NR – AT: Straight Turn

#### Solved by the CP

#### DOJ resources high now, but it’s carefully tailored to their antitrust enforcement priorities.

Murphy et al. ‘3/17 [Justin P. Murphy, Paul M. Thompson, Han Cui, Joshua W. Eastby, Anthony S. Ferrara, Alexandra Lewis; partners in the law firm of McDermott Will & Emery LLP; 3/17/22; “Cartel Corner | March 2022”; <https://www.natlawreview.com/article/cartel-corner-march-2022>; National Law Review]

As we move into the second quarter of 2022, one thing is abundantly clear: The DOJ’s aggressive criminal antitrust enforcement will only continue to increase. The Division ended the last fiscal year with 146 open grand jury investigations—the most in 30 years.[11] President Biden has made competition a priority for his administration.[12] Attorney General Garland has specifically identified “reinvigorating antitrust enforcement” as at the center of the DOJ’s mission.[13] In its FY 2022 budget request, the DOJ requested a 9% increase in spending, amounting to an additional $200 million.[14]

At the same time, there seems to be a shift in tone and approach at the Division. The Division has started to push the boundaries of criminal antitrust enforcement. As noted above, it has pursued naked no-poach agreements criminally, something that it had never done prior to 2020. In recent remarks to the ABA Institute on White Collar Crime, Richard Powers, the US Deputy Assistant Attorney General for Criminal Enforcement in the Division, noted that the Division is also prepared to criminally charge individual executives for violations of Section 2 of the Sherman Act, the provision that prohibits market monopolization—another exceedingly aggressive and controversial approach and something that the Division has not done in decades. To cap it off, the Division has shown a tendency, of late, to take cases to trial, rather than negotiate resolutions. And, it has hired a number of prominent Criminal Division alumni, several with significant trial experience, to help with this effort. All of this suggests that the Division is prepared to stretch the law in places and go the distance to pursue what it views as criminal violations of the antitrust laws.

#### Its focused on international enforcement.

Lee et al. ‘2/24 [Craig Y. Lee, Leslie W. Kostyshak, Perie Reiko Koyama; 2/24/22; “Supply Chain Under Scrutiny: DOJ to Step Up Investigation of Collusive Activity Relating to Supply Chain Disruptions”; <https://www.lexology.com/library/detail.aspx?g=b05f3e1a-b8f0-469f-9edd-7c4a148d5763>; Lexology]

On February 17, 2022, the Antitrust Division of the US Department of Justice announced an initiative to “deter, detect and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.” DOJ’s announcement comes in the wake of supply reduction seen throughout the COVID-19 pandemic.

The global pandemic has disrupted business operations, tightened the labor market, constrained transportation, and delayed the procurement of raw materials. DOJ has made clear that the economic realities of the pandemic cannot be used as justification to circumvent the antitrust laws. DOJ identified price and wage fixing, bid rigging, and market allocation schemes as ongoing areas of prosecution, including criminal investigations related to the supply chain.

“Temporary supply chain disruptions should not be allowed to conceal illegal conduct,” said Assistant Attorney General Jonathan Kanter of the Antitrust Division. “The Antitrust Division will not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions.”

Recent international and cross-agency partnerships have signaled the intent of the Biden Administration to promote and enforce competition vigorously across many sectors. DOJ has formed a working group with global competition partners in Australia, Canada, New Zealand, and the United Kingdom to share intelligence and combat anticompetitive schemes. In July 2021, DOJ also signed a Memorandum of Understanding with the Federal Maritime Commission to collaborate in enforcing competition in the maritime industry.

Cartel enforcement related to the supply chain is not an entirely new area of interest for the federal government. For more than a decade, DOJ has actively investigated and prosecuted cartel activity in supply chains.

For example, from 2006 until 2011, DOJ prosecuted global airlines and their executives for fixing rates and surcharges on international air cargo shipments. At least 22 airlines and 21 executives were charged, and more than $1.8 billion in criminal fines were assessed against the defendants.

Between 2008 and 2013, DOJ also prosecuted US shipping executives in the coastal water freight industry for rigging bids, fixing prices, and allocating the market for customers transporting goods between the continental United States and Puerto Rico. As a result, the water freight carriers were ordered to pay more than $46 million in criminal fines. Several executives were convicted and sentenced to prison.

DOJ prosecuted ocean shippers and their executives between 2014 and 2017 for fixing prices, rigging bids, and allocating customers in the international ocean shipping industry for roll-on, roll-off cargo, a method used to ship vehicles and agricultural equipment. The shippers were ordered to pay more than $136 million in criminal fines, and several executives received prison sentences.

DOJ has also prosecuted companies and executives in the freight forwarding industry, which involved coordinating and managing the shipment of goods between destinations. In 2010 and 2011, DOJ prosecuted several international freight forwarders for a price fixing conspiracy, leading to imposition of more than $100 million in criminal fines. Again in 2018 and 2019, DOJ prosecuted freight forwarders for a conspiracy to fix prices. Several executives were sentenced to prison for this conduct.

In light of DOJ’s history in prosecuting anticompetitive conduct in the supply chain—as well as the recently announced enforcement initiative—business leaders should be vigilant about avoiding and detecting any conduct that could invite scrutiny, as well as recognize signs that their businesses could be potential victims of collusive activity. As such, one should undertake a thorough review of their antitrust compliance policies and training, monitor developments closely, and seek legal guidance before entering into any agreements with competitors.

#### The first card just establishes that credit Suisse immunized private suit and the author giving the opinion that is SHOULD not ummunize public suits. Has no implication for link v lin turn.

#### The second card is NOT a link turn card – it says that private actors SUPPLEMENT suits by agencies, NOT that they are a SUBSTITUTE for them.

#### Deterrence link card proves the substitute v supplement distinction above – this card compares private and DOJ actions and says theyre effective, but DOES NOT say that the DOJ ever stops bringing suits simply because private suits exsit and have a deterrent effect. They’ve conceded that antitrust suits are costly by themselves and the DOJ needs to amange resource now, so the risk of the link outweighs.

#### Their UQ card is from January – our ev prices in merger enforcement and is from March.

## Court Clog

### 1NR – Kick

#### Concede US doesn’t innovate and theres no impact read to innovation

#### Litigation link defense doesn’t implicate TTC coorindation link because its about the procedures surroudning lawsuits not whether unilateral antitrust is happening now.

## CIL

### 1NR – AT: Condo Bad [NEW]

#### Condo’s good – we get what we did:

#### Neg flex – the neg is always reactive – the aff gets the 2AR and has infinite prep to stake out 2AC strategy. Condo restores competitive equity.

#### Negation – the neg only has to disprove the aff – condo simulates effective negation by testing from multiple angles. Their interp evades clash by insulating the case from contradiction.

#### Critical thinking – forces smart 2AC choices, adaptation, and logic – that offsets 2AC process clarification and vague plans and impact turns aff choice.

#### Logic – the judge should endorse the best policy – proving the counterplan is bad doesn’t prove the plan is good, means you should judge kick the CP if it doesn’t solve.

#### Ideological flex – debaters are risk-averse – condo enables argumentative diversity and innovation which maximizes portable benefit.

#### Reasonability – add-ons, perms, straight-turning the net benefit, and 2AC choice check – they need to prove in-round strategic damage, or substance crowdout outweighs. Going for one in the 2NR and strategically conceding contradictions solves.

#### Reject the argument, not the team – voting aff won’t dissuade condo in other debates.

#### One condo solves none of their offense or ours

## TTC

### 1NR – O/V

#### Counterplan solves the entirety of the case – implements the plan under a multilateral competition framework with the EU, NOT under U.S. antitrust law. I2AC needed a deficit for why U.S. laws were key. The counterplan uses the TTC deliberative body to develop a new coordinated, competition regime with the European Union over the plan. This does not expand “its core antitrust laws,” but expands transnational competition policy with a different legal backing. There is no plausible reading of the plan that includes that. Im also pretty sure the 2AC did not say perm do the CP so the 1AR should not get to.

#### EU relations outweigh and control their impacts – coordination is key to COVID response, steps against the climate crisis, and defense against rising revisionist powers.

### 1NR – AT: Finance Guts

#### This is a deficit to the regulate CP – our CP still does antitrust, it just does it using EU laws developed through a multilateral competition framework. They did not make a say no argument nor contextualize this to the TTC – so the CP durably fiats the same outcome as the plan.

#### Links to the them – if the finance industry is so powerful, they would certainly assemble legal teams to fight the plan.

### 1NR – AT: Plan Says Domestic/Perm Do Both

#### This bolsters the link to our DA – the US explicitly stating the plan is for domestic purpose angers the EU. Say yes does not disprove the link because it was about the lack of consultation.

#### Only prior engagement by the US creates European buy-in – necessary to solve the net benefit.

Tews and Lewis 21 – Shane Tews is a nonresident senior fellow at the American Enterprise Institute (AEI), where she works on international communications, technology and cybersecurity issues, including privacy, internet governance, data protection, 5G networks, the Internet of Things, machine learning, and artificial intelligence. James A. Lewis is a senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies in Washington, D.C. ("Steering the Transatlantic Partnership Toward Innovation," RealClearPolicy, <https://www.realclearpolicy.com/articles/2021/09/29/steering_the_transatlantic_partnership_toward_innovation_796550.html> 9-29-2021)//gcd

SpyFone shows the tension between minimizing unwanted collection of personal data and competition. Recognizing that there are tensions between antitrust, innovation, privacy, and security means we need a balanced approach that does not sacrifice any of these. We think this can be done, but not with proposals on the table now. More competition might promote innovation, but this should not be done at the expense of security or competitiveness with China. EU competition commissioner Margrethe Vestager has laid out Europe’s plans for the US technology industry, with the introduction of the European Commission’s Digital Markets Act, or the DMA. The DMA casts a broad net of regulations for “gatekeepers” that would have wide-ranging consequences for consumers on both sides of the Atlantic. The DMA favors traditional European-style regulation, which takes a bureaucratic and at times punitive approach. There is no shortage to European innovators or startups, but they can often face insurmountable regulatory hurdles.

This stands in stark contrast to the American antitrust framework, which has been guided by the consumer welfare standard for four decades. In June, Congress introduced a package of five antitrust bills that clearly followed the blueprints provided by the Digital Markets Act, copying its ex-ante regulatory compliance approach. European-style regulation might undercut American innovation strengths. American companies have a position of leadership in technology, with few European companies managing to achieve their level of success. If anything, policymakers should pursue the “Americanization” of Europe’s approach to antitrust laws, rather than the inverse. The United States must engage with European policymakers in Pittsburgh on a balanced approach before both sides are locked into adversarial policies that do not benefit either party.

Regulators need to recognize that it is no accident that the United States has such innovative tech companies. The focus on innovation and consumer services has yielded unparalleled growth. While the era of unregulated tech is over and new rules requiring transparency and consent are needed, recent regulatory zeal shows that American policymakers should not lean too heavily on their European counterparts. EU regulation made European tech companies uncompetitive, an outcome we must avoid in a conflict with China that has more to do with technology and innovation than military strength. With the TTC, the US has an important opportunity to steer the EU-US alliance toward pro-innovation regulation, strengthen cybersecurity and minimize harm to economies on both sides of the Atlantic.

#### Genuine consultation over narrow, pragmatic outcomes is critical to American TTC credibility. The permutation is perceived as Washington dictating Brussels.

Nietsche 21 – Associate Fellow for the Transatlantic Security Program at the Center for a New American Security (CNAS).  (Carisa, "The EU-U.S. Trade and Technology Council Has the Potential to Re-conceptualize the Transatlantic Relationship," CNAS, <https://www.cnas.org/publications/commentary/the-eu-u-s-trade-and-technology-council-has-the-potential-to-re-conceptualize-the-transatlantic-relationship> 9-30-2021)//gcd

As the United States embarks on the working group meetings, the United States will be more effective if it focuses more narrowly on advancing pragmatic outcomes. Recently, the EU has preferred to adopt a risk-based approach to securing supply chains and regulating select emerging technologies. Brussels develops criteria to measure risk, performs a risk assessment evaluating the technology vendors or applications, and ultimately adopts the requisite regulations. The European Union adopted this approach to 5G and artificial intelligence. In the case of the latter, the EU’s Artificial Intelligence Act does not call out China directly, but instead outlines the criteria for high-risk AI applications. While the approach rarely bans Chinese technology companies outright and is not wrapped in “competing with China” rhetoric, it often results in the de facto exclusion of Chinese companies. As European Commission Executive Vice President Margrethe Vestager [stated](https://www.politico.eu/newsletter/brussels-playbook/submarine-blues-vestager-interview-play-it-again-breton/), “I think there will be issues where we [the transatlantic allies] would naturally agree on something where China would disagree…But it should not be done because you’re against China, it should be done because you’re pro-democracy.” The joint statement puts the focus on the competition between democracies and autocracies, [stating](https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/29/u-s-eu-trade-and-technology-council-inaugural-joint-statement/) that “The United States and European Union have significant concerns that authoritarian governments are piloting social scoring systems with an aim to implement social control at scale.”

The United States also needed to convey that it is ready for genuine consultations with its European allies—an approach that should form the basis of the future transatlantic partnership. In advance of Wednesday’s meeting, there were concerns in Europe that Washington was looking to dictate the agenda and terms of the relationship in the TTC. Thierry Breton, European Commissioner for the Internal Market, recently [expressed](https://www.atlanticcouncil.org/event/a-conversation-with-thierry-breton/) that the TTC is about developing future industrial positions, and it is not a classical trade agreement of give and takes. In other words, the United States should be ready for a dialogue, not a negotiation. Keeping this principle in mind will be critical as the working group meetings begin convening. Part of breathing life into the transatlantic relationship requires the United States to recognize that Europe has its own interests, and those interests might not always be the same as the United States’ interests. First and foremost, the allies must accept that the United States and Europe are not going to agree on everything. And that’s ok. From privacy to antitrust policy to the appropriate balance between regulation and innovation, the United States and Europe will certainly disagree on plenty of issues. But a productive dialogue will require allies to align on these thorny issues just enough to facilitate cooperation where it matters most – developing a joint industrial policy, leading on key technologies, securing supply chains, and charting democratic norms and standards for technology’s use.

At the same time, Europe has its own work to do. Margrethe Vestager warned analysts not to expect fireworks in the inaugural meeting. Her warning is largely due to the EU’s approach to the dialogue. The Commission has been keen to include the EU member countries through the European Council. This approach will require all 27 EU member states to reach agreement on a number of issues. Observers saw the risk of this approach a few days before the TTC. Already France attempted to [hinder](https://twitter.com/MehreenKhn/status/1442434821909712902) consensus by objecting to language and policy positions in the draft statement. The European Union has often failed to sing from the same sheet of music on these issues, and that has also hindered transatlantic cooperation. The TTC provides an opportunity for European countries to align their agendas internally, which will enable better cooperation with the United States.

The Trade and Technology Council provides the first step towards a newly conceptualized transatlantic partnership. To realize that potential, however, it will require the United States and Europe to approach future meetings in good faith, including on issues where we disagree. Especially on the heels of Afghanistan and the AUKUS deal, the United States cannot afford to squander this opportunity to reset the transatlantic relationship. How the TTC proceeds will be critical not just for the health and resilience of the transatlantic alliance, but for the health and resilience of democracy. Advancing a democratic approach to technology depends on the United States and Europe putting forward a joint affirmative agenda. The TTC gives the transatlantic allies the opportunity to harness the United States’ innovation leadership and Europe’s regulatory power to set that agenda and ensure a more democratic future.

#### It signals unilateralism and pushes Europe towards strategic autonomy.

Frances Burwell 9/24/21, distinguished fellow at the Atlantic Council and a senior director at McLarty Associates. "The US-EU Trade and Technology Council: Seven steps toward success" <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-us-eu-trade-and-technology-council-seven-steps-toward-success/>

As the first formal meeting of the US-EU Trade and Technology Council (TTC) gets underway on September 29, the key question should be: What will it take for the TTC to succeed? How can the TTC avoid the fate of so many official transatlantic councils and forums—from the Transatlantic Economic Council to the much-maligned Transatlantic Trade and Investment Partnership—that faded into irrelevance?

The reasons for those failures vary, from lack of interest by leaders to truly complex regulatory issues, such as pharmaceutical testing or the definition of subsidies. In most cases, these dialogues ended not with a bang, but with a whimper—no dramatic walkouts or explosive one-sided statements, but rather a simple failure to reconvene.

If the TTC is to avoid suffering the same form of negligent homicide, it must lay the groundwork for future success at Pittsburgh. The leaders will leave this first TTC either wondering why they bothered to attend, or enthusiastic about the work to be done and looking forward to their next encounter.

Announced at June’s US-EU summit, the TTC was a symbol of the restored commitment of the United States and the EU to their partnership. But it was also intended to demonstrate the interconnectedness of the two largest market economies in the world, as well as to serve as a forum for building greater cooperation across the Atlantic on regulatory and market issues.

Making the TTC a success story will not be easy. US President Joe Biden arrived in office determined to repair the transatlantic partnership, with a specific emphasis on building better relations with the European Union, but there have been few successes to date. The administration has not lifted Trump-era tariffs on steel and aluminum, nor have the United States and the EU resolved a dispute over data transfers. Moreover, the US failure to consult allies on its withdrawal from Afghanistan has left many European policymakers concerned that Biden’s “foreign policy for the middle class” is really just a rehash of former President Donald Trump’s “America First.”

As a result, Europe remains skeptical of the United States as a benevolent and predictable ally, and key European leaders talk openly about the need for strategic autonomy. In the final week before Pittsburgh, the AUKUS announcement caused a serious rift with France, leading European Internal Market Commissioner Thierry Breton to hint at doubts as to whether the TTC should go forward, as he believes US-EU relations might need a “pause and reset.”

Despite these challenges, the TTC presents the best opportunity to show that the United States and European Union can take concrete steps toward real cooperation on tech and trade and demonstrate that their relationship is based on meaningful partnership. Here are seven steps the TTC must take to achieve success:

Commit to further engagement. Above all, the TTC must earn the commitment of the US and EU leadership to its future. The continuing engagement of the five co-chairs—European Commission Executive Vice-President Margrethe Vestager, European Commission Executive Vice-President Valdis Dombrovskis, US Secretary of State Antony Blinken, US Secretary of Commerce Gina Raimondo, and US Trade Representative Katherine Tai—will be essential if this is to be more than just a one-off meeting. One of the most important announcements in Pittsburgh could simply be the date and place of the next meeting. Hopefully, the incoming French presidency of the EU will step up to host the next session in the first half of 2022, despite the charged environment before Pittsburgh. Using the rotating presidency may even increase the commitment of EU member states to the TTC.

Develop a shared vision of the TTC. US and EU leaders must leave Pittsburgh with confidence that they have developed a consistent and shared vision of what the TTC should be, and of its objectives and priorities. For the United States, this will mean giving up on the idea that the TTC is primarily a venue for rallying allies against China. For the Europeans, this will mean accepting that external views have some relevance for their current digital agenda. The EU has every right to regulate tech as it sees fit, but if there is nothing remaining to discuss, the US side will not find the TTC very useful. Similarly, if the United States simply wants to use the TTC against China, EU officials are unlikely to be eager for a return engagement.

Identify the objectives of the TTC (hint: not dispute resolution). Is the TTC intended to resolve long-standing disputes, or to build cooperation in new areas? In recent months, the United States and EU have moved challenging disputes—Airbus-Boeing, data transfers, and steel and aluminum tariffs—to separate tracks where they can be the focus of expert negotiations. The leaders at the TTC can play a role in pushing negotiators to reach a deal and then blessing the results. But the leaders cannot dedicate sufficient time or focus to resolve disputes, especially those that have festered for some time. Instead, the strength of the TTC lies in its role as a vessel for US-EU cooperation. For that reason, the goal of the Pittsburgh meeting should be to build and demonstrate that cooperation.

Launch serious efforts to develop shared standards and processes. This first TTC meeting should aim to launch a few specific efforts designed to build concrete collaboration. Early reports indicate that the Pittsburgh TTC will seek agreements on supply chains (especially semiconductors), investment screening, and export controls. Given that discussions about these topics only really began in the summer, this first TTC is likely to reach only very modest agreements even on these relatively uncontroversial topics. The leaders might promise to share more information on foreign-investment cases. They will undoubtedly make broad pledges to cooperate on building resilient supply chains and consult more on export controls. But to move beyond such vague promises, the TTC should launch a few efforts designed to develop joint approaches towards standards and processes; for example, joint cybersecurity standards, a shared approach to facial-recognition technology, or a shared methodology for evaluating mergers affecting the digital economy. As a first step, the United States and EU must first compare perspectives and policy approaches before trying to forge specific agreements. This is especially important given the significant mismatch in current EU and US policy positions: While the EU has spent the past year launching legislative proposals on a series of digital issues, the Biden administration is still struggling to get officials into their positions and develop a comprehensive approach.

Establish a clear process linking the leaders to the TTC working groups. Reaching any of these objectives will take time and expertise. But the TTC is not just the leaders; the TTC working groups provide an invaluable setting for addressing detailed technical issues. The leaders should task the working groups with realistic but concrete goals, due before the next meeting. Too often, ministerial-level meetings lead only to vague pronouncements or to assignments that are neglected because officials assume the next meeting is a full year away (or even uncertain). By setting a schedule of at least twice-yearly meetings and assigning the working groups with developing concrete plans for collaboration, the TTC can begin to move the US-EU trade and technology agenda forward.

### 1NR – AT: Net Benefit

#### TTC credibility is necessary to trans-Atlantic coordination over emerging existential technological, economic and military challenges. That solves the green transition, economic recovery, sustainable defense relationships and deters authoritarian sphere of influence world. That’s Tocci.

#### Lack of TTC competition law coordination leads to lopsided implementation and intra-regulatory conflict, which causes offshoring and makes plan implementation ineffective. That’s Stelly which was dropped in 2AC

#### Turns case – EU US divergence causes economic crisis

Csernatoni 21 – analyst at Carnegie Europe (Raluca, The technology challenge in the transatlantic relationship, European View 2021, Vol. 20(2) 157–165, [The technology challenge in the transatlantic relationship)//gcd](https://journals.sagepub.com/doi/pdf/10.1177/17816858211059251)

Conclusion The ghosts of crises past are likely to shape contemporary and future realities in EU and US relations. Should the EU and the US not reconcile their differences concerning the technology challenge, there could be severe economic consequences in store for the future of transatlantic trade and economic relations. The global governance of EDTs would also benefit from stronger multilateral international and transatlantic cooperation, especially in a world where technology is increasingly emerging as a key driver of greatpower rivalry and authoritarianism. What is also certain is that the negative perception across the Atlantic that the EU is becoming increasingly supranationalised in key fields such as defence and technological innovation, coupled with the EU’s regulatory interventions when it comes to (mostly American) tech giants, could cement in place a complicated dynamic in the transatlantic relationship. Alongside views that the EU is becoming an economic, tech and security competitor to the US, such worrying perceptions will likely continue to fuel a sceptical attitude in Washington. Yet, differing US and EU perspectives should not preclude cooperation on technological and digital matters, but instead be taken as the starting point for key areas of deeper dialogue amid a broader context of global geopolitical rivalry. In the end, the transatlantic relationship, however structurally estranged or challenged, remains one of the most integrated bonds from the democratic, economic and security points of view

#### International cohesion is integral to case solvency – link alone turns case.

Brewington 14 – (Robert, "A Case for Global Cooperation When Enforcing United States Antitrust and European Union Competition Laws Against Modern Technology Companies," *University of San Francisco Law Review*: Vol. 48 : Iss. 3 , Article 4.)//gcd

An internationally recognized cohesive agreement governing antitrust and competition laws is necessary to ensure consistency and efficiency. Companies whose business reaches outside its domestic borders can be subject to multiple enforcement agencies, often reaching very inconsistent conclusions.128 While modern global technology companies should indeed be regulated, they should not be punished multiple times when providing services that ultimately benefit consumers and advance modern technology.129 There should be more consistency between enforcement agencies so that it is easier for companies to predict the legal scrutiny they may encounter. Further, the United States Department of Justice has itself long recognized the need for more consistency among antitrust agencies.130 At the Organisation for Economic Co-operation and Development (“OECD”)131 Global Forum on Competition in 2001, then Assistant Attorney General Charles A. James132 spoke about the “explosive growth in the number of countries with antitrust laws and agencies”133 and “the importance of cooperation among antitrust agencies in ensuring sound antitrust enforcement in an increasingly global marketplace . . . .”134 Mr. James discussed instances where the Department of Justice and the European Union have lacked cohesion, most notably, the proposed merger between General Electric and Honeywell.135 The Department of Justice approved the merger, while the European Commission “blocked the transaction in its entirety”136 despite “analyzing identical product and geographic markets and having access to the same facts” as the Department of Justice.137 The General Electric and Honeywell merger is just one example of the unpredictability that can result from having inconsistent international standards regarding competition law. The major difference between the United States’ and the European Union’s analysis of this merger was that the Department of Justice focused more on the potential for improved products at lower prices as a result of the merger, while the European Union focused more on the potential for devastating effects on competitors.138 This is the crux of the problem: having to work with multiple enforcement agencies creates huge issues.139 These issues can have negative consequences for the companies subject to the enforcement, as well as the consumer. For example, in the case of the proposed merger between General Electric and Honeywell, the United States Department of Justice concluded that “the merged firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm’s competitors would then have had a great incentive to improve their own product offerings.”140 However, after speaking with the two companies’ competitors, regulators in Europe concluded that the deal would “stifle competition,” and without communicating with the Department of Justice, essentially squashed the deal.141 The European Union’s decision to put a stop to the merger had clear repercussions for the two companies.142 However, the failed merger did not only affect the two companies;143 it also affected consumers because they could not take advantage of improved products at better prices, which in the United States is “the very essence of competition.”144 This contradiction stems from different agendas (i.e., protecting competitors versus protecting consumers)145 and inconsistent enforcement standards, as well as a lack of agency cooperation.

#### Only collaboration solves every affirmative internal link

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The TTC has announced ten working groups covering challenges from global trade and green technology to human rights and access to digital technologies for small businesses. These issues require engagement and collaboration, especially the need for enhanced supply chain security and respect for Intellectual Property. Solutions based on shared values will yield the most effective results. Despite areas of disagreement, the transatlantic relationship has a history of successful collaboration driven by a shared commitment to democracy, pragmatic leadership by the United States is key to defend against the digital warfare being waged by ascendant authoritarian powers.

The COVID-19 pandemic shone a spotlight on vulnerable supply chains, showing just how easily China can use technology to threaten democracy and advance its own dominance on the global stage. The TTC should build safeguards that recognize this formidable opponent as we develop regulations for our connected world. This can help to combat the inherent risks that come with buying or using connected devices linked to China, which recent events have shown can be exploited for espionage targeting individual users, corporations and federal agencies.

Industry has an important role to play in navigating these issues, and some companies have taken steps to preemptively address policy questions aimed at them. Google launched an open-source initiative called the [Data Transfer Project](https://datatransferproject.dev/) in 2018 in partnership with Apple, Facebook, Microsoft and Twitter to establish data portability between online platforms. Apple continues to show leadership in the data governance discussion, introducing the App Tracking Transparency prompt, which requires developers to ask users’ permission before tracking them across apps and websites owned by other companies, and implementing data minimization and on-device data processing to limit the data that the company can store or access on its servers. These initiatives demonstrate that the coordination of industry and government is a strong defense against technology that threatens security and fundamental rights.

#### Siloed national regimes make enforcement gaps inevitable

Thanh Phan 18, Sessional Instructor in International Law at the University of Victoria, PhD Candidate at the Law Faculty at the University of Victoria, Doctoral Fellow at the Centre for International Governance Innovation, Former Transnational Merger Investigator and FTAs Negotiator at the Vietnam Competition Authority, Vietnam, “Realism and International Cooperation in Competition Law”, Houston Journal of International Law, Volume 40, Issue 1, 40 Hous. J. Int'l L. 297, April 2018, https://tinyurl.com/3s7rwtkc

Fourth, by conducting overlapping investigations in a certain cross-border case without cooperation, each competition authority may have a portion of evidence, but none of them may have thorough facts about the violation. 148 An international cartel may operate in different countries. Each of these countries' competition authorities can obtain evidence only within their territory, while missing any piece of evidence may make it difficult for them to prove and remedy such a transnational violation. 149 According to the OECD, cooperation allows a competition authority to use material of the counterparts and therefore offers authorities the opportunity to have more effective investigations and to generate efficiencies. 150

#### Fragmentation allows foreign violations---they rebound domestically, destroying the case

Dr. Marek Martyniszyn 21, Senior Lecturer in Law at Queen’s University Belfast, PhD from University College Dublin, LLM (with Specializations in EU Economic and World Trade Law) from the Saarland University’s European Institute, MA Degree from the Warsaw School of Economics and Postgraduate Certificate in Higher Education Teaching (PGCHET) from Queen's University Belfast, “Competitive Harm Crossing Borders: Regulatory Gaps And A Way Forward”, Journal of Competition Law & Economics, Volume 17, Issue 3, September 2021, https://academic.oup.com/jcle/article/17/3/686/6095856

I. INTRODUCTION

Progressing the integration of national economies into a global system has delivered a variety of benefits in recent decades, especially faster economic growth. However, current regulatory frameworks are inadequate when it comes to transnational anticompetitive conduct. Despite the development of a robust regulatory regime facilitating international trade, restrictive business practices continue to be dealt with domestically, except for some instances of regional integration (such as the European Union [EU]).1

Although the concept of illegal transnational conduct may seem distant or even abstract, it often affects everyday items. For example, a price-fixing cartel was discovered among producers of refrigeration compressors—the devices producing the cooling effect in fridges and freezers. In this case the violators were fined in the United States,2 Canada,3 the EU,4 New Zealand,5 Chile,6 Mexico,7 and Brazil,8 indicating how widespread their operations were. However, due to the variety of challenges and limitations involved, such conduct frequently escapes scrutiny, or worse, escapes liability even when uncovered, often hiding behind a false pretence of ungovernability. The economic harm in question is significant. Connor estimates that, between 1990 and 2016 the discovered private international cartels alone affected sales of over $51 trillion worldwide.9 The estimated global overcharges exceeded $1.5 trillion.10 In fact, international cartels overcharge much more than similar domestic arrangements.11 Furthermore, unlike in a domestic setting, such competitive harm is not just a matter of distribution of resources between producers and consumers. It constitutes an extraction of wealth from the affected state to the state hosting violators.

This article, in Part II, analyses the current regulatory regime governing anticompetitive conduct, showing that it is composed of a patchwork of rules and instruments of diverse origin and nature. These are both hard and soft laws. Some are domestic, others are international. The analysis, in Part III, identifies some of the key gaps within this regulatory framework, which creates enforcement lacunae and provides room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws12 and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. This article shows that the current regime de facto works for the select few, principally developed states, but offers little recourse to other countries affected by transnational violations of competition law. In doing so, it identifies the issue of wealth transfer, which should inform any approaches to rectifying violations.13

The current system of competition law enforcement requires a realignment to recognize and overcome some of its pitfalls. Part IV proceeds with a series of clear policy recommendations addressed principally to competition agencies and their respective constituencies. The proposals are underpinned by pragmatism, calling for incremental changes and fine-tuning within the existing regulatory framework, rather than a major overhaul. They focus exclusively on pursuing international cartels, which constitute the most rampant example of anticompetitive conduct and which are virtually universally condemned. The emphasis is principally on public enforcement, given that private enforcement is nascent or non-existent in most competition systems. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.

II. PART II: CURRENT REGULATORY FRAMEWORK

A. Conduct Causing Competitive Harm Abroad—Free from Domestic Scrutiny

In the 1950s, fewer than 20 states had competition laws. By 1990 that number nearly doubled. In the last three decades the number of jurisdictions that introduced domestic competition laws increased to well over 120.14

Anticompetitive conduct harming the domestic market is prohibited in virtually all states that introduced competition legislation. That is the raison d’être of such legislation. Conduct harming only foreign markets (causing outbound competitive harm) is virtually never proscribed. Arrangements causing competitive harm abroad are legal under most domestic competition laws. For example, in the United States the 1982 Foreign Trade Antitrust Improvement Act ‘cut back the reach of the Sherman Act [the key U.S. competition law statute] … principally to protect U.S. sellers from challenges … for their activity abroad.’15 Export cartels, for example, are permitted in virtually all jurisdictions.16 Hosting states— which are best positioned (in terms of the relative ease of enforcement) to deal with such anticompetitive conduct—wash their hands of it. Essentially, states care about national, not global, welfare.

In the long-term this is problematic. If conduct that causes harm abroad is not illegal, law enables businesspersons involved in transnational commerce to develop skills and mindsets that may be later used to cause competitive harm on the domestic market, which—in turn—will be costly and difficult to uncover and remedy. From a normative perspective, it sends contradictory signals to the public, undermining the credibility of the law, especially in those jurisdictions that envisage the severe sanction of imprisonment for some violations of competition law, such as cartel conduct or bid rigging (rigging public tenders). At a minimum, a policy of ‘you’ll go to jail if you do it here, but we do not mind if you do it elsewhere’ is unlikely to reinforce a belief in the serious nature of any such violations.

Moreover, there is now an international consensus as to the harmful nature of hardcore cartels, which entail horizontal agreements between competitors aiming, in particular, to fix prices, submit rigged bids, set output quotas, and share or divide markets. This consensus was solidified internationally by means of a soft law instrument. As early as 1998 the Council of the Organisation for Cooperation and Economic Development (OECD) adopted a recommendation that called for an effective prohibition of such arrangements.17 This prohibition was echoed and built upon in various broader fora since then.18 The widespread recognition of the harmful nature of hardcore cartels is in stark contrast to the acceptance of and indifference towards such conduct causing outbound competitive harm.

Two facts help to understand the passive acceptance, if not encouragement, of conduct causing outbound competitive harm. First, such conduct creates a transfer of wealth from the affected market to the state hosting violators. The economy of the latter benefits from the harm to foreign consumers. This may also explain why some states with well-established competition agencies seem to tolerate conduct that causes harm in the domestic market also. If the extraction of wealth from abroad is considerable, it may be outweighing the domestic harm, which is, after all, principally distributional in character (that is, from a wealth distribution perspective, anticompetitive conduct distorts allocation of resources within an economy). For example, Canada is the world’s leading producer of potash, over 95 per cent of which is sold via an export cartel (which is legal under Canadian law) on foreign markets. Overall the Canadian economy benefits greatly, even if the domestic economy is adversely affected by inflated prices of potash.19 Second, law enforcement is costly. It can be argued that any enforcement against conduct causing outbound competitive harm comes at the cost of enforcement aimed at protecting the domestic market. If that is a true trade-off, focusing exclusively on domestic harm may be rational. However, one should also factor in the already mentioned possible adverse consequences for the domestic economy of creating conditions conducive to development of anticompetitive attitudes within the business community. Nevertheless, conduct causing only outbound competitive harm is currently legal in virtually all states. Domestic competition laws do not prohibit it. Anticompetitive conduct that harms the domestic market only tangentially is likely to be seen as a low priority matter.

B. Lack of a Satisfactory International Response

The issue of transnational anticompetitive conduct could be addressed at the international level. Despite numerous efforts, the international community has so far failed to develop any binding multilateral mechanisms to deal with public or private anticompetitive conduct.20 This is so even in case of hardcore cartels, which—as mentioned earlier—are universally condemned. Public anticompetitive conduct, in some circumstances, could be challenged within the framework of the World Trade Organisation (WTO),21 but as yet such actions have been few and largely unsuccessful.22 While no progress has been achieved on the multilateral level when it comes to binding instruments, a number of valuable initiatives and platforms have emerged, allowing for interactions and experience sharing between domestic competition agencies.23 While useful, none of these frameworks offers practical help in ongoing investigations.

#### US-EU relations necessary to solve multiple global existential risks---building cooperationis key

Bruce Stokes 20, fellow at the German Marshall Fund, a former international economics correspondent for the National Journal, a former senior transatlantic fellow at the German Marshall Fund and a former senior fellow at the Council on Foreign Relations. "Together or Alone? Choices and Strategies for Transatlantic Relations for 2021 and Beyond". October. <https://www.gmfus.org/sites/default/files/Task%2520Force%25202020_Oct_5_Final%2520%2528With%2520Footnotes%2529.pdf>

In 2021 the United States and Europe face challenges that threaten our way of life and cannot be successfully dealt with alone. Only by working together will we successfully overcome these shared existential threats to our citizens’ security and wellbeing and maximize the opportunities that lie ahead. Both past frustrations and current frictions stand in the way. They can only be overcome through concerted, successful problem solving.

This Task Force report recommends concrete new policy initiatives to address our most pressing challenges. In so doing, we can ensure a better future for our people and create a fresh transatlantic alliance of like-minded, problem-solving democracies that project U.S.-European global leadership, while defending national interests and reinvigorating our citizens’ belief in democratic values and the efficacy of democratic governance.

The coronavirus pandemic and the ensuing economic collapse in Europe and the United States are the most immediate challenges facing our societies. These tragedies threaten the health and welfare of our people and test our ability to deliver on our promise to safeguard and enhance the lives of our people.

But these concerns are also emblematic of the common nature of many issues now confronting Europe and the United States: climate change that endangers humanity’s survival, an economically ascendant China with its own political values and geo-strategic interests, new and diverse security threats, and accelerating technological competition that poses both boundless opportunity and potential dramatic change in our way of life. All these issues transcend national borders. They defy unilateral or purely domestic solutions. They can only be resolved through cooperative international action.

For more than seven decades Europe and the United States have worked together in the face of threats to our wellbeing. Our cooperation has been based on a shared set of democratic values and interests that have led to greater prosperity for our people, while demonstrating that we are each other’s most essential partners and that the transatlantic relationship is one of the foundations of our strength, our security, and our mutual prosperity.

The current array of challenges we face offers an opportunity for new collaborative efforts. In the process, we need to update and broaden the goals, trajectory, and nature of the transatlantic relationship, grounding it in our belief in democracy, the rule of law, human rights, and a market economy. Only by working together in this way can we lay the foundation for the much broader multilateral cooperation that ultimately will be necessary to cope with what today are truly global problems that require global solutions.

The choices we make in the face of these shared crises will shape our future just as past decisions shaped the present. This is the lesson we learned in the wake of World War II, again at the end of the Cold War, after 9/11, and in the aftermath of the 2009-2010 financial crisis.

In 2021, as a new U.S. administration begins, the United States and its transatlantic partners will face another moment of decision. Will we confront our shared challenges together or alone? Whatever choice we make, the problems we face have been metastasizing for years. There is no returning to some earlier, untroubled status quo ante in our relationship. And the decisions we make, the strategies we pursue, and our success or failure will determine the future wellbeing of people on both sides of the Atlantic and around the world.

Our success in solving problems ultimately depends on the strength of our democracies. But our democracies are now being undermined by both internal disaffection and external disruption.

Support for democratic values and decisionmaking weakens when citizens deem their governments no longer relevant to their needs or competent to solve their problems. Recent challenges, such as the 2009-2010 financial crisis, have revealed the fragility of our democracies. Our inadequate response at the time fed the recent rise of populism on both sides of the Atlantic and contributed to the frustration that fed widespread demonstrations against racism and inequality in the United States and Europe in Spring 2020. Six-in-ten Americans and nearly half of Europeans say they are dissatisfied with the way democracy is working in their country.2 Clearly, many of our people do not think their governments are delivering on the issues of vital concern facing their nation.

At the same time the United States and Europe face an insidious threat directed from abroad. Russia has conducted repeated disinformation 0 on social media: during the coronavirus pandemic, the June 2016 Brexit referendum, the 2016 U.S. presidential election campaign, the public unrest in 2017 in Catalonia, and in France in 2017-2019. The Russian goal has been to sow public confusion, deepen polarization, and promote distrust in democracy and democratic institutions. Ominously, during the pandemic China took a page from the Russian playbook and upped its own disinformation campaign in both Europe and the United States.3

Both these internal and external challenges present European and U.S. democracies with an opportunity. We have long shared common values. We believe in the rule of law, the protection of human rights, the openness and efficacy of markets, and the obligation of society to provide both for the basic human needs of its citizens and the opportunity for them to improve their wellbeing. And when we competently address national problems, our publics express faith in governance. With regard to the early response to the coronavirus pandemic, for example, eight-in-ten Danes and Canadians and two-thirds of Germans and Italians thought their government had handled the situation well so far.4

The United States and Europe have repeatedly demonstrated that together they can overcome adversity. During the Cold War we contained Soviet expansionism, while avoiding a nuclear confrontation. In the 1990s we cooperated to resolve the secessionist conflict in the Balkans. In 2001, in the wake of the 9/11 terrorist attack on the United States, the North Atlantic Treaty Organization (NATO) allies jointly invoked their mutual defense commitments for the first time.

Today, public support again exists for targeted joint transatlantic problem solving. Overwhelming majorities of Americans say it is very important to cooperate with other countries in dealing with a range of global threats, including infectious diseases and climate change.5 And a majority of the French and Germans support transatlantic cooperation in combating climate change.6

We can build on such public interest to renew our commitment to collaboration on other issues of vital concern to our people and, in the process, craft a new community of problem-solving democracies.

### 1NR – AT: Rollback?

#### 2AC just said C/A rollback argument – unclear what this was. If it’s the financial backlash argument above it certaintly eqally links to the aff.

#### Durable fiat solves

### 1NR – AT: Antitrust Now

#### 1. The DA is unique because there is ongoing consultation over enforcement. No new laws have been enacted, but the plan must topically expand the scope of previously unchanged laws. That upsets the careful balance of the TTC, which is 1NC Stelly. Consultation solves

#### 2. Thumpers are priced in – only the plan is a bolt from the blue that upsets the balance.

#### 3. There cards at best say the FTC may attempt suits or that Congress is considering bills, NOT that the US has expanded the scope of anttirust law.

#### 4. All action now is coop with TTC BUT future noncooperation stops gains.

Ortega 22 – (Javier, "Trend to Watch: Antitrust and Data Protection Regulators Seek Greater Alignment in 2022—Big Data May Be a Target," Arnold &amp; Porter, <https://www.arnoldporter.com/en/perspectives/blogs/enforcement-edge/2022/01/data-protection-regulators-seek-greater-alignment> 1-31-2022)//gcd

International cooperation is also on the rise. In December 2021, the Federal Trade Commission (FTC) and the DOJ Antitrust Division joined forces with the European Commission to launch the EU-US Joint Technology Competition Policy Dialogue: one aim of this interagency cooperation is considering “the role of massive amounts of data” in digital investigations.

It remains to be seen, however, whether American enforcers will follow their European counterparts’ lead. The FTC, whose dual mission encompasses consumer protection and promoting competition, recently explained that understanding “the overlap between data privacy and competition” will help the FTC more effectively protect Americans’ privacy. In one data privacy case, the FTC required the wrong-doer to destroy algorithms or models derived from data unfairly collected. While the case focused on addressing the company’s deceptive practices in how it used confidential information, the FTC also noted that the remedy would prevent the company from gaining “a competitive advantage by benefiting from data . . . collected unlawfully.” Given the limitations of this case-by-case law enforcement approach, however, the FTC may look beyond these types of remedies. Lina Khan, the FTC’s Chairwoman, has theorized that allowing individuals to move their data across platforms can reduce customers’ switching costs and lessen the competitive effects derived from overbroad data collection practices, thus forcing companies to compete on privacy.

Companies subject to European or American regulatory oversight should stay abreast of developments in this area. If you need guidance on data collection and processing practices vis-à-vis commercial applications or want to better understand this increased oversight, our Antitrust/Competition and Privacy, Cybersecurity & Data Strategy groups are here to help.

#### Supply chain investigations prove

Blenkey 2-20 – staff writer at MarineLog (Nick, “Five Eyes” antitrust agencies turn their attention to the supply chain, MarineLog <https://www.marinelog.com/legal-safety/shipping/five-eyes-antitrust-agencies-turn-their-attention-to-the-supply-chain/> Feb 20 2022)//gcd

“FIVE EYES” The Antitrust Division of the U.S. Department of Justice last week announced an initiative with the FBI that will prioritize any existing investigations and prioritize measures to proactively investigate collusion in industries particularly affected by supply disruptions. The Antitrust Division will also be part of a working group set up by the competition authorities of the “Five Eyes” nations (the U.K . the U.S., Canada, Australia and New Zealand). The group will meet regularly to develop and share intelligence to detect and investigate suspected supply-chain anti-competitive behavior and collusion, using existing international cooperation tools. The five agencies—the Antitrust Division of the U.S. Department of Justice, the U.S. Department of Justice, the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority , the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority—issued coordinated statements putting companies on notice that those attempting to use supply chain disruptions as a cover for illegal anti-competitive conduct, including collusion, will face the full force of the law. None of them specifically mention the container alliances and the U.K. Competition and Markets Authority notes that to open an investigation against any business, it requires evidence that businesses may be breaching competition law. “While the CMA has received multiple complaints from businesses about supply chains, it has yet to obtain or find evidence of potential breaches of the law,” says the agency. TAKE AWAY In an [analysis of the DOJ statement](https://www.hklaw.com/en/insights/publications/2022/02/doj-to-collusive-price-gougers-exploiting-supply-disruptions), law firm Holland & Knight concludes: “In casting a broad net over the entire supply chain, and indicating its willingness to work with the FMC and foreign partners, the DOJ is highlighting that no business enterprise is immune from governmental scrutiny for antitrust violations—or from civil or criminal enforcement.

#### Lack of Dem majority prevents major FTC action

Lima 3/18 – Cristiano Lima, business reporter and author of The Washington Post's Technology 202 newsletter, “Amazon-MGM deal shows the limits of a gridlocked FTC,” 3/18/22, https://www.washingtonpost.com/politics/2022/03/18/amazon-mgm-deal-shows-limits-gridlocked-ftc/

On Thursday, e-commerce giant Amazon said it closed its $8.45 billion acquisition of entertainment juggernaut MGM after clearing a regulatory review period.

The Federal Trade Commission, which reportedly opened an investigation into the deal, has thus far declined to sue to block the deal, as called for by a slew of anti-monopoly groups.

While a federal challenge against the deal has long been seen as an uphill battle, regulators’ inaction highlights how the FTC’s aggressive agenda under Chair Lina Khan continues to face major constraints without a Democratic majority.

The agency has operated for almost the entirety of President Biden’s first term without a majority and is currently split 2 to 2 between Democrats and Republicans as nominee Alvaro Bedoya’s Senate confirmation awaits a floor vote. That has thus far dashed hopes by critics of the tech giants that Khan would swiftly usher in a new era of enforcement at the agency.

According to a Politico report, agency leaders never called a vote on a complaint against Amazon, amid concerns that Republican commissioners would oppose the measure.

“Not having a majority or full commission does make it harder to get something that's controversial out the door,” said Neil Chilson, a senior research fellow at the Charles Koch Institute and former chief technologist at the FTC.

#### No congressional action on antitrust – Ukraine and midterms

3/2 – Hirsh Chitkara, reporter at Protocol focused on the intersection of politics, technology and society, “The antitrust window is shrinking as DC turns to Ukraine,” 3/2/22, https://www.protocol.com/newsletters/policy/ukraine-russia-antitrust?rebelltitem=10#rebelltitem10

The question I want to explore today is whether the moment has also passed for Big Tech antitrust: Is there enough wind in those sails to get anything done by midterms?

For a while, antitrust enforcement sat at the top of every D.C. agenda. Sen. Amy Klobuchar spearheaded two significant, bipartisan antitrust bills. And Lina Khan landed at the FTC ready to fend off critics and launch one of its most consequential antitrust campaigns in decades.

Antitrust no longer occupies that top slot. The war in Ukraine has instead become everyone’s highest priority, for obvious reasons. D.C. has a lot to figure out in the coming days, from the ramifications of further sanctions to the diplomatic fallout in Europe.

There’s also Biden’s Supreme Court nominee, Judge Ketanji Brown Jackson. Republicans may very well attempt to block her confirmation, and that would mean further political deadlock. It would also become another wedge splitting support for Klobuchar’s bills, which already held a tenuous bipartisan balance.

The war in Ukraine has changed political calculus  
  
  
 surrounding antitrust. Big Tech and its lobbyists have pressured Republicans to steer clear of antitrust on the grounds that the U.S. needs big, powerful tech companies to uphold national security. That angle of attack may gain more traction as the U.S. faces off against Russia.

And timing is everything. We’re only eight months away from the midterms. Conventional D.C. wisdom (the irony of that phrase isn’t lost on me) says that nothing gets done during the eight weeks leading up to an election. Once you add the Labor Day recess into the mix, Congress realistically has until August to get antitrust measures passed. The lobbying arm opposing antitrust knows this, and it also knows midterms will likely swing Congress to the right. The odds are in tech’s favor, and the markets seem to agree — not that they ever took the threat all that seriously.

#### Election year and GOP midterm wins crush antitrust policy now

Lima 21 – Cristiano Lima, business reporter and author of The Washington Post's Technology 202 newsletter, “The biggest threat to lawmakers’ Big Tech antitrust agenda: Time,” 11/19/21, https://www.washingtonpost.com/politics/2021/11/19/biggest-threat-lawmakers-big-tech-antitrust-agenda-time/

With Democrats controlling Washington, a bipartisan group of lawmakers has a unique chance this Congress to revamp the nation’s antitrust laws in a bid to rein in tech giants like Google and Apple. To succeed, they will need to weave through a complex web of political agendas and rally enough support to get their bills over the finish line.

The single biggest threat to their efforts may be quite simple: running out of time.

President Biden’s slumping approval ratings and potential GOP gains in the House due to redistricting have cast doubt on Democrats’ ability to hang onto full control of Congress after the midterms, which could be key to executing the tech antitrust agenda.

While forecasting election outcomes is always fraught, the mere prospect of Democrats losing control of Congress poses a very real threat to lawmakers’ antitrust plans. They include proposals aimed at blocking tech giants from prioritizing their own products over rivals', limit their ability to buy up emerging competitors and put new restrictions on their app stores, among others.

“The political reality is that we have this Congress to really get something done in a bipartisan way on antitrust,” said Jon Schweppe, director of policy and government affairs at the American Principles Project, a conservative think tank that supports the antitrust bills.

Public Citizen competition policy advocate Alex Harman, whose progressive advocacy group also backs the proposals, declined to speculate on how the midterm elections will shake out. But he acknowledged that timing could be a factor as the bills are considered.

“I have operated in the world in which [GOP control] is a possibility, so I tend to think of our window of getting the stuff done before then, before the midterms,” he said.

A GOP takeover of the House could doom lawmakers’ chances of advancing most of the bipartisan antitrust proposals targeting the tech giants.

The two lawmakers who would be in pole position to control whether the bills are marked up and moved to the floor in a GOP-led House, Minority Leader Kevin McCarthy (R-Calif.) and Judiciary Committee Ranking Member Jim Jordan (R-Ohio), are both vocal opponents of the push.

In June, McCarthy signaled he opposes giving antitrust regulators too much power and that House Republicans plan to target Big Tech companies by focusing on issues around “free speech and free enterprise.” That’s a nod to Republican allegations that major digital platforms censor conservatives and to concerns from tech trade groups and industry-friendly lawmakers that the antitrust bills would stifle innovation.

During a podcast earlier this month with Rep. Matt Gaetz (R-Fla.), who supports the antitrust package, Jordan made clear his priorities leading the Judiciary Committee would be speech, not antitrust. “What Big Tech in collusion with big government is doing in this cancel-culture world we live in is so wrong … that’s what the Judiciary Committee has to focus on,” said Jordan, who voted against most of the proposals under consideration during a committee markup in June.

“They’ll still have an anti-Big Tech agenda, but it will be focused on Section 230,” said Schweppe, a reference to the decades-old law that shields digital platforms from lawsuits for hosting and moderating user content.

Whether Democrats retain control of the Senate may not be as crucial for lawmakers’ antitrust plans. Unlike in the House, advancing legislation in the Senate typically requires bipartisan support, since it takes more than just a simple majority to clear most bills. That makes it harder for party leaders to unilaterally block a bipartisan effort.

And unlike the House Judiciary Committee’s antitrust proposals, some of their Senate companions have the support of the Senate Judiciary Committee’s top Republican, Sen. Chuck Grassley (R-Iowa). That means if Grassley wins reelection in 2022 and Republicans retake the Senate, there would still be an ally for the antitrust push atop the key Judiciary panel.

But proponents of the push aren’t holding out hope that a GOP-led Senate would put antitrust legislation atop its agenda.

“I just don’t see Mitch McConnell running these bills as a priority,” Harman said.

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

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

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

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

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

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

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

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

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

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

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