# 1NC Semis

## OFF

### T Prohibit---1NC

#### Prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. 7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97. Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis.

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Violation: The plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical affs must increase prohibitions on the practices themselves.

#### Vote neg for limits and ground---infinite behavioral remedies and no link uniqueness for offense.

### Cap K---1NC

#### Anti-trust is capitalist---competition inevitably replicates market collapse.

Richard Wolff 19 Professor Emeritus of Economics at University of Massachusetts, Amherst. Transcript from YouTube video: “Economic Update: Competition and Monopoly in Capitalism.” Democracy @ Work. December 9th, 2019. https://www.democracyatwork.info/eu\_competition\_monopoly\_in\_capitalism.

Today I'm going to devote the program to something many of you have asked me to present, to talk about, to analyze, and that is the question of monopoly. It has to do with the assertions we hear often these days that somehow our capitalist system, here in the United States and beyond, is being negatively affected because monopolies have replaced or displaced competition. The idea here is if only we can get competition back, recreate a competitive capitalism, why then the problems we face will go away. Today's program is a design to show you how and why that is not the case, to think about these things in a different way from this nice story that capitalism is basically fine; it's just the monopoly form we have to get rid of so we get back to the competition which we're all supposed to believe is wonderful and presents us with no problems to solve. So let's go, and let's do it in a systematic way.

First, it is of course easier, faced with a declining capitalism, a capitalism that's all around us with its extreme inequalities, with its instabilities – here we are, trying to cope with the effects of the Great Crash of 2008, even while we anticipate the next downturn coming down the road soon – an economic system that has shown (that is, capitalism) that it is not respectful of the natural environment; it is not, as the words now go, sustainable in a reasonable way. Yeah, we're surrounded by problems of capitalism. So it's comforting in that situation to get the idea from somewhere that this really isn't a problem of capitalism as a system but rather the problem brought in somehow from the outside – monopoly – a situation in which competition among many companies gives way in some way we're not quite sure about to a domination by one or a small handful of companies. And so the argument goes, we don't have to be critical of capitalism; we don't have to think about an alternative system. No, no, we just have to deal with this little detail, the monopoly problem. And if we can deal with that, well, we'll get back to a competition, to a competitive capitalism that is good.

There are three big mistakes involved in this way of thinking, which is nonetheless very widespread and very popular, more so now than in quite some years. First mistake: Capitalism has been wrestling with the problem of monopoly from day one. We have had repeated periods of monopoly. They have eventually led to movements, often of many people, to destroy or remove monopoly. We used to call that in America trust-busting, or antitrust. We even have a department within the Department of Justice in Washington devoted to antitrust activities. Yeah, we've been waging battles against monopoly over and over again, and you know why? Because we keep having monopolies over and over again. Google is a monopoly. Amazon is a monopoly. They're all around us: companies that have effectively no real competition. This is a problem that capitalism has always displayed. And that ought to lead you to wonder whether thinking about it as something we can do away with isn't maybe the best possible example of wishful thinking.

The second big mistake is to imagine that competition is some unmixed blessing. It never was, and it isn't today. A competitive market is a human institution. Like every other human institution, it has strengths, and flaws, and weaknesses. To think of competition as some magical perfection is a silly abnegation of your own rational capability to evaluate something. It's sort of advertising thinking. By that, I mean the advertiser tells you what's good about the product they've been told to advertise; they don't tell you what's bad about it. If you want to evaluate it, you don't talk to an advertiser because they only give you one side. The people who promote competition use advertising logic. We're not going to do that here. Competition is no unmixed blessing.

And finally, I'm going to show you that competition is itself the major cause of monopoly. So that even if we ever got back to a competitive capitalism, all that would mean is we're back in the process that produces monopoly – as it always has.

All right, so let's begin. I'm going to start with explaining how competition has all kinds of consequences that most of you, like me, don't like, don't want. It's a discussion, if you like, of competition's other side: you know, the part that the advertiser doesn't tell you about. The used-car salesman who wants you to buy that junk doesn't tell you about what happened last week in the car crash that that was part of, etc., etc.

All right, let's begin. One of the major reasons that American corporations shut down their operations in the United States and moved them to China, among other places, is because of – you guessed it – competition. They wanted to make more money than they had been before. They were afraid of other companies beating them in the competitive game, so they said wow, let's go to China, because there you can pay workers a lot less. There you don't have the same rules to obey. There they don't care that much about pollution as they do here. So we can save on all kinds of costs, and that will allow us to undercut our competitors. Yeah, one of the consequences of competition was the exodus of American companies to other parts of the world, and the enormous unemployment that resulted from it. Yeah, that was a result, among other things, of competition.

Here's another one: Capitalists, employers, seeking to compete with one another, often engage in what we call automation. They bring in machines that are cheaper to use than human laborers, and that gets them a step ahead of their competitors. Okay, if we replace people with machines, we throw those people out of work. That has an impact on them, their self-esteem, their relationship to their spouse, their relationship to their children, their relationship to alcohol – should I continue? What are the social costs of automation? They're huge. They've been documented over and over again. Competition provokes and produces automation.

Let me give you another example: Companies are competing, say, in the food business – you know, trying to get a customer like you or me to buy this kind of cereal rather than another. So they get their labs to go to work, and they discover we can replace wheat, which we used to put in our little flakes, with – Lord help us – some chemical that is cheaper than wheat. We're not going to worry about what that chemical does to your chemistry in your body because we can now lower the price of our cereal, because we're saving on wheat, and undercut the competitor. The human beings who eat this stuff will suffer, now and in the future, but competition left our producer of cereal no choice.

And in case you think I'm making some up, let me give you some concrete ones. The Boeing Corporation, the major producer of airplanes in this country, is in a crisis as a corporation. You know why? Because the 737 Max crashed a couple of times, killing hundreds of people. And you know why? It turns out they economized on safety measures, and training measures. And you know why they did that? Because they're in a very tight competition with European and other airplane manufacturers, and that leads them – as it usually does – to look to cut corners: that race for, quote, "efficiency." Yeah, it was competition that contributed to those deaths and to that problem. That's competition too. You can't whitewash this story; they're real. One of the ways Amazon beats its competition is it speeds up the work process. It has figured out ways to make people work much more intensely, using up their brains, their muscles, their nerves, in ways that cause real long-term physical damage to working people. That, too, is a result of the competitive effort.

And you know, it wasn't so long ago that children were part of the labor force. That's right, kids as young as five and six years of age. We were told they have little fingers, you see. They can be more productive than people who are adults with big fat fingers, you know – that doesn't work. And by the way, you should be grateful because poor kids are the ones we hire, and that gives their poor families more income than they would otherwise have. We heard those arguments. Competition, the companies said, required them to use the more productive, and the lower-wage, children rather than adults. So child labor was also a result of competition. It was so ugly and so troubling to so many people that finally there were movements in the United States and many other countries simply to outlaw child labor. So it became a crime for any employer to use a worker who was under 16 or 18 years of age. That was a way in which people said we are not going to allow competition among capitalists to destroy our children. They were recognizing that competition has an awful effect in what it does to children.

Well, it has many awful effects. So let's be clear: In the history of capitalism, the monopoly problem (which we're going to get to in the second half of today's program) is no worse, it's just different, from the competition problems. Capitalism goes through phases of competition and monopoly, going from one to the other, as I will explain. But we shouldn't bemoan the one in favor of the other, any more than vice-versa. These are neither of them solutions; they are both phases of the problem. And the problem is capitalism, which does its number on us both in the period when it's competitive and in the period when it's monopoly. People who want us to engage one more time in an anti-monopoly crusade are doing something that in the end evades the problem, which is the system – capitalism – not this or that form of that system, such as competition and monopoly.

We've come to the end of the first half of today's Economic Update. This gives me an opportunity to remind you, please, to sign up if you haven't already, to subscribe to our YouTube channel. It's a way easily for you to support us, doesn't cost any money, and it is a big help to us in terms of our reputation and what we can accomplish. Likewise, please make use of our websites. They are there for your communication with us. They are there for you to be able to, with a click of a mouse, to follow us on Facebook, Twitter, and Instagram. And finally, a special thanks goes, as always, to our Patreon community for their ongoing enthusiastic support. It means the world to us. My final, very final for this first half, is about a new book that we have just produced and released. It's a follow-up to an earlier volume I have spoken to you about that was called Understanding Marxism. For the same reason, we have now produced a brand-new book, just out, called Understanding Socialism. It is a response, as this program is, to issues, questions, comments you have sent to us in large numbers. It's an attempt to give an overview of the different interpretations of what socialism means, of what happened in countries like Russia and China that tried to create this – the strengths, the weaknesses, the lessons to be learned, what to do, and what not to do. Please, if you're interested and want to follow up, check us out, check the book out: lulu.com is how you find both books. And I will be right back; stay with us.

Welcome back, friends, to the second half of today's Economic Update. This program, as I explained, is devoted to the analysis of competition and monopoly as two interactive, sequential phases of capitalism as a system. The first part of the program was devoted mostly to competition, so let's turn now to monopoly. What is the basic definition and criticism of monopoly? Strictly speaking, monopoly is defined simply as a situation in which the producers of a particular commodity – shoes, software programs, haircuts, it doesn't matter – have been reduced to only one. Literally one seller – a monopolist. But in general language, it includes also situations where many producers who once competed with one another have been reduced to only a handful. The strict term for only a handful is "oligopoly," but we don't have to split hairs about this. "Monopoly" will be the word we use for either one or a very small number.

For example, there were once dozens of automobile companies, but very quickly their competition reduced them to basically three for much of the post-World War II period, and you know their names: Ford, General Motors, and Chrysler. And likewise there were once many cigarette producers, there were once many television-set producers, and they became very few, whose names, therefore, we all know.

What's the criticism of a monopoly or oligopoly situation? Again, very simple: The idea is, if there's only one seller of something, that seller can jack up the price way above what he might have otherwise because he doesn't have any competitor. If he had a competitor, if he raised the price, the competitor would get all the business because we'd all go to the competitor who hadn't raised the price rather than buy it at a higher price from the monopolist. So we don't like monopolies, because they can jack up their prices and their profits because they don't have a competitor. And if it's a few, a handful, well then we talk about things like cartels: arrangements when a few get together over dinner, or out on the golf course, and tell us what the price is. If you ever wondered why the prices of different cars, different cigarettes, and so on, are so close to one another – mm-hmm – that's because there are few sellers, and somehow they worked it all out. But the basic criticism is that a monopoly is a situation in which the seller of something jacks the price up way beyond what they could otherwise get because there are no more competitors.

So let's talk about this monopoly problem and where the monopolies come from. Well, the first and most important lesson is this: Competition produces monopoly. It's not something external, imposed on competition. It has nothing to do with human greed or anything else. Are people greedy? You betcha – some more, some less – but that's really a separate matter. It's competition that produces monopoly, and let me show you how that works. In competition, we have, by definition, a whole bunch of producers. They all produce the same thing. They compete with one another, hoping we, the consumer, will buy from one rather than the other. They compete in the quality of what they produce and in the price of what they produce. And we are supposed, as consumers, to go look for the best quality at the lowest price, and to patronize that one who offers that to us better than the others that we could buy from but choose not to.

Okay, that's a fair definition. Now let's follow the logic. Company A produces – however it manages it – a better quality and/or a lower price than Company B. So we all go to Company A. Company B can't find any buyers because it's not competitive. Or to say the same thing in other words, Company A outcompetes Company B. Here's what happens: Company B collapses. Because it can't sell its goods, we're all going to Company A. So Company B sooner or later declares bankruptcy. It can't continue. It lays off its employees, it stops buying inputs, because it can't compete. Good. Now what happens in Company A? Company A says hey, there's a whole bunch of workers that have just lost their job at Company B; they're trained in producing what we produce; let's go hire some of them. And likewise, Company A says, they're not using their computers, or their trucks, or their other inputs. They're going to have to sell them on the secondhand market. We can get some important inputs we need at a lower price than we would have to pay if we bought them new. So what begins to happen is, where before there were two companies, A and B, there's now one larger A, and B has disappeared. Or to say the same thing in simple English, A – the winner in the competitive struggle – eats, absorbs into itself, what's left of Company B.

And this process is repeated over and over, until 30, or 300, companies have become one, or two, or three. That's the result of competition. That's how competition is supposed to work. That's how competition does work. It's important to understand: Monopoly is where competition leads. And as if that weren't enough, let me make sure you understand this from the business point of view: It is the great dream of every entrepreneur to become the last one standing in the competition, to win the competition, not just because it makes you feel good you outmaneuvered your competitors, but because if you're the last one standing, you're the monopolist. The reward for having outcompeted the others is that you're now in a position to jack up the profits, and the prices, way beyond what you could have done before.

So we have a system that produces monopoly, and all the incentives for every entrepreneur in competition to work as hard as possible to become the monopolist. So why is anyone surprised that monopolies keep happening, because they're the whole point and purpose of capitalist competition. If you ever were – and we never have, but if you ever were – able to get rid of all the monopolies and re-establish competition, all you would be doing is setting this same process in motion again for the umpteenth historical time. In other words, fighting against monopoly is pointless as long as you have capitalism, because it is the endless reproducer of this problem – as it always has been.

Now, how do monopolies maintain themselves? If you're the only one standing, you're a monopolist. Or you're an oligopoly, you're a few, and you get together and jack up your prices together. The question becomes look, a monopolist makes very high profits – much higher than a competitor can achieve – and isn't that an enormous incentive for other capitalists to get in on that business? Because look at the profits they're earning, because they're the only one. Apple, Amazon, Google – the profits are staggering. Everybody wants to get in. So the way a monopolist has to think is, I've got to create obstacles that block other people from coming in to get a piece of the enormous profits my monopoly allows me to get. We call that in economics "barriers to entry." Monopolists need to create barriers. Let me give you a couple of examples.

The major soft drink makers in the United States – basically Coca-Cola and Pepsi Cola – they produce a drink that has sugar and coloring in it, and lots and lots of water. Let me assure you, there is nothing difficult or complicated about producing a mixture of sugar, color, and water. It doesn't take a genius; it never did. Pepsi and Coca-Cola make a fortune off of their product, as we know, and they have for decades. They have a virtual monopoly. Now, lots of other people could produce water, sugar, and color close to, if not identical with, whatever they produce, but they can't break through. They can't really get to that status. And you know why? Because Coca-Cola and Pepsi erected a barrier to entry. And the way they did that was with advertising. Every billboard, every magazine cover, every doorway of every institution you've ever been to has a picture of smiling, happy people drinking one or the other. You've learned: that's the drink, that's the drink. Another company might make a perfect substitute, but they can't afford the enormous cost of advertising. The advertising costs more than the water, and the sugar, and the color. What you pay for when you buy Pepsi and Coke is the advertising that got you to buy it. You're paying for being hustled. But it works, because it means other companies know that they can't get in there by cheaply producing an alternative, because you have to produce the advertising that goes with it, or else you can't do it. And so their monopoly is maintained.

Here's another way to maintain a monopoly: Get the government to step in. Here the famous example is the milk producers. Some years ago, there was a crisis with milk. There was contamination; people were getting sick. So the clever milk monopolies came in and said, we're going to support the enormously expensive, special equipment to guarantee pasteurization, and so on, of milk. Why did they support it? Because your small farmer, your small dairy producer, can't afford it, so they go out of business. Only the big, rich few that are left can afford the enormous equipment. They used governmental rules to create a barrier to entry.

Here's another way: corrupt public officials. President Trump denounces Huawei corporation because it compromises our national security. It denounces European car producers because somehow their shipping cars here compromises our security. Who cares? As long as the president blocks other companies from getting into the business that might compete with an American, a barrier to entry exists. Monopolists have been very creative in coming up with ways to preserve their monopolies.

I don't want to lose the basic point. The basic point is: Capitalism oscillates, back and forth between competition and monopoly – first this industry, then that one. For a while, Ford, General Motors, and Chrysler were the monopolies – or the oligopoly, if you like – in automobiles. But eventually, Toyota, and Nissan, and Peugeot, and Fiat broke the monopoly. In that case, it was foreigners who did it. And then we had some competition, and that, then, is now shrinking. The French – the last two producers in France – have just agreed to merge. You get the picture. Industry by industry, first this one, then that one, go through one phase or another.

The important point is: The phases are not our problem. They merge into, and incentivize, each other. Each provokes movement in the other direction. The point to understand is that the problems of a capitalist system are not about this oscillation of phases. We're not going to solve the problem of monopoly by getting rid of them and re-establishing competition. We've been there; we've done that; it reproduces monopoly; and it doesn't change the basic inequality, unsustainability, instability of capitalism. We need to get beyond that stale, old debate – competition versus monopoly – and face the underlying reality: Capitalism is the problem, and getting beyond it is the solution.

#### Capitalism drives extinction and structural violence.

Jamie Allinson et al 21. Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Introduction. July 2021. Verso EBook. ISBN: 9781839762963 //shree

This is the question that vexed us as we set out to write The Tragedy of the Worker. From the vantage point of the present, the history of capitalist development is, as Marx expected, the history of the development of a global working class, the proletarianisation of the majority of the world’s population. But the very same process of that development has brought us to the precipice of climate disaster. Our position, to recall Trotsky’s rationalisation of War Communism in 1920, is in the highest degree tragic.

It is now clear that we will pass what scientists have long warned will be a tipping point of global warming, accelerating the already catastrophic consequences of capitalist emissions. How do we imagine emancipation on an at best partially habitable planet? Where once communists imagined seizing the means of production, taking the unprecedented capacities of capitalist infrastructures and using them to build a world of plenty, what must we imagine after the apocalypse has befallen us? What does it mean that as capitalism has become truly global, the gravediggers it has created dig not only capitalism’s grave, but also that of much organic life on earth?

Our answers to these questions remain rooted in the politics of revolutionary communism. Our stance is not based on the fantasy of a homeostatic nature that must be defended but on the critique of the capitalist metabolism – the Stoffwechsel- that must be overthrown. Earth scientists are accustomed to speak in terms of ‘cycles’ by which substances circulate in different forms: the water cycle, the rock cycle, the nitrogen cycle, the glacial-interglacial cycle, the carbon cycle, and others. One way of registering the catastrophe of climate change is to see these cycles – most of all, but not solely, the carbon cycle – as disordered, under- or over-accumulating. But this is to ignore the more fundamental circuit of which these now form epicycles, like Ptolemy’s sub-orbits of the heavenly bodies: the circuit of capital accumulation, M-C-M′.

This circuit accumulates profit and produces death. Neither is accidental. It is for this reason that the debates that capitalist ruling classes permit among themselves on ‘adaptation’ versus ‘mitigation’ take place on false premises. What is to be mitigated is the impact of climate change on accumulation, rendered through the ideology of ‘growth’ as something that benefits everyone. What we are to adapt to are the parameters of accumulation, sacrificing just enough islands, eco-systems, indigenous – and non-indigenous – cultures to maintain its imperatives for a period of time until new thresholds must be crossed, and new life sacrificed to the pagan idol of capital. Already, capitalist petro-modernity builds a certain quantum of acceptable death into its predicates: at the very least, the 8.7 million killed by fossil fuels each year according to Harvard University are considered a price worth paying for the stupendous advantages of fossil capital. And the sky can only keep going up, as deforestation, polar melt, ocean acidification, soil de-fertilisation and more intense wildfires and storms tear the web of life into patches. If the necropolitical calculus of the Covid-19 pandemic appears crass, just wait until its premises are applied to climate catastrophe.

#### Vote neg for global syndicalism---pressures towards socialist state action are building, forces the hand of monopolies.

Cecilia Rikap 21. Professor of Economics and Coordinator of YSI States and Markets Working Group, Institute for New Economic Thinking. “Tilting the Scale Against Intellectual Monopoly Capitalism.” *Capitalism, Power and Innovation Intellectual Monopoly Capitalism Uncovered*. Routledge. 2021. 287-289

Capitalism is a system based on asymmetries and inequalities (of income, wealth, between classes, genders, races, countries and more). Quite striking for a system born from the motto “Liberté, égalité, fraternité”. As time passes by, this broken promise of modernity becomes all the more apparent. Inequalities deepen as knowledge is monopolized, digital surveillance reinforces firms and states control capacities over workers and citizens, and political conflicts never cease – with the US-China tech cold war at the current epicentre.

Social disrupts are an expected recurring outcome, and we have seen them everywhere in the 21st century. The specific motives differed, but there is a common root: people are fed up with capitalism’s growing inequalities, with a stagnant or even declining “middle class” in developed countries for several decades already and the highest gains accumulating at the global level for those in the richest 5% (Milanovic, 2016).

There is another shared feature; demonstrations are increasingly being organized online. The same technology that is used for surveillance, for broadcasting extreme right and even fascist ideas, and that drives the USChina world hegemony conflict, is also being used as a counterbalancing weapon. Internet, particularly social networks, is a powerful tool for the organization of grassroots movements. Workers’ unions can also learn from each other’s experiences online.

The absence or weakness of unions and social movements in some parts of the world has benefited intellectual monopolies rentiership and predation. For instance, hiring workers with a vendor contract not only hides the working relation (see Chapter 10) but also impedes unionization as it currently stands. Still, unions are adapting and workers organizing. In 2018, Google employees managed to stop the company from renewing an artificial intelligence contract with the Pentagon and to cancel its plans for a censored search engine for China. And, in 2020, 2,000 employees urged the company to cease selling technology to the US police after George Floyd’s killing. These initiatives should be taken by workers in other companies and contribute to unionization. Unions should be reconceived as a political actor capable of exercising their influence beyond wage claims. Workers’ organization is indispensable to counterbalance the power of intellectual monopolies, given both their global reach and states’ internal contradictions and limitations.

Peripheral countries should cease competing to attract outsourcing and offshoring by allowing worse wages and working conditions. As mentioned above in this chapter, world cooperation agreements to establish minimum labour regulations, forbidding new and old forms of informality and granting minimum working conditions are urgent. However, these agreements require great social pressures to take place. When it comes to transforming capitalism, social disrupts, grassroots social movements and unions play a crucial role.

To illustrate their paramount importance, let us briefly consider taxes. It is crystal clear that the global taxing system has failed. As pointed out in Chapters 7 and 10, global intellectual monopolies declare profits and IPRs in tax havens and use tax loopholes to minimize paid taxes. Global tax reform should consider the separation between ownership and control. Intellectual monopolies control production and innovation networks beyond their legal ownership and have the capacity to trickle down the burden of taxes. However, the intertwined relationship between global intellectual monopolies and their home (core) states renders highly unlikely to accomplish such global tax reform without intense social pressure. Even the recent US corporate tax reform was not – at least so far – successful in this respect (Clausing, 2020). Then, as far as tax havens are not eliminated, there will still be room for tax avoidance and evasion (Zucman, 2015). Countries acting as tax havens will not comply with a global reform unless huge social disrupt forces them to do so.

Additionally, workers’ protests must be coordinated at the level of the global production network because the production unit is no longer the factory but the network. The same applies to global innovation networks. Intellectual monopolies’ recognized employees have greater bargaining power than workers in subordinate firms, which are precisely those that generally need a more urgent improvement in their salaries and working conditions. “Workers of the world unite, you have nothing to lose but your chains” (Marx & Engels, 1848) can and must become an everyday reality for the French Revolution motto to be more than aspirational.

### T Sherman---1NC

#### Core antitrust law means Sherman.

Northrop Grumman 01. “The U.S. Government's Decision on the Fate of Newport News: Unprecedented Merger to Monopoly, Cost Savings Without Reduced Competition, or the Status Quo”. Discussion Materials Regarding Alternative Outcomes in the Proposed Acquisitions of Newport News Shipbuilding for the Consideration of the U.S. Department of Defense and U.S. Department of Justice August 3, 2001. https://www.sec.gov/Archives/edgar/data/1025361/000095013001504050/d425.txt

The Sherman Act, enacted in 1890, is this country's original and core antitrust law and is a bulwark of this nation's commitment to free-market competition. Section 2 of the statute prohibits monopolization and attempts to monopolize. Central to the law is the notion that monopolies are bad. As the Supreme Court stated in its landmark decision in Standard Oil Co. v. United States "[t]he evils which led to the outcry against monopolies . . . may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation of production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable result of monopolistic control over its production and sale."/2/ In its decision, the Supreme Court condemned, among other things, Standard Oil's creation of a monopoly through acquisitions.

#### Vote negative for limits and ground---anything else allows the aff to expand ANY law and moots core legal education.

### Biz Con DA---1NC

#### Anti-trust law can’t be distinguished in specific industries. It’s enforced in generalist common law unlike regulation.

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

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

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable legal shifts wreck business confidence.

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Economic decline cascades and goes nuclear---their defense doesn’t assume post-COVID shifts.

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

### 14th Amendment CP---1NC

#### The United States federal government, without changing the scope of its core antitrust laws, should determine that naked restraints on peer-to-peer platform competition by private sector members of entities in which private market participants possess a controlling interest that are not compelled or given affirmative particularized authorization by the state, except those that serve a public good, violate the 14th Amendment.

#### Counterplan solves the case and reinvigorates the 14th Amendment by making it the exclusive basis for decision.

Robert M. Ahlander 17. J.D. candidate, April 2017, J. Reuben Clark Law School, Brigham Young University. “Undressing Naked Economic Protectionism, Rational Basis Review, and Fourteenth Amendment Equal Protection”. BYU L. Rev. 167 (2017). https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3084&context=lawreview

V. CONCLUSION

If the only plausible rationale for a law is to protect a certain group from economic competition, the law should not be upheld. The Fourteenth Amendment states that the government cannot deny to any person the equal protection of the laws. When the legislature denies one person certain economic liberties but grants those same economic liberties to another similarly situated person, and there is no rational basis for the classification, equal protection of the law has been denied, and the classification is a violation of the Fourteenth Amendment’s Equal Protection Clause. On the other hand, if there is some rational basis for the law, including some legitimate government interest, the law does not violate the Fourteenth Amendment, and should be upheld.

Finding some rational basis for economic legislation is a very low threshold; however, naked economic protectionism should not be a rational basis for law because (1) Supreme Court precedent is weak and untested when it comes to naked economic protectionism, (2) naked economic protectionism is virtually impossible to negate, and (3) a rational basis for a law should include a government interest that serves (to some extent) the public good, not simply the group receiving economic protection.

The Supreme Court has not explicitly endorsed naked economic protectionism as a rational basis under the Equal Protection Clause. In each decision where the Court upheld economic legislation that resulted in an economic benefit to a certain group, the Court upheld the law on other, legitimate rational bases—not naked economic protectionism. Even in the two circuit court decisions that explicitly legitimize naked economic protectionism, the courts relied on some rationale apart from mere economic protectionism of a certain group. Therefore, naked economic protectionism as a rational basis is, for the time being, a legal fiction that has not been tested as an exclusive basis for upholding a law.

Naked economic protectionism is virtually impossible to negate. Since every piece of legislation favors some group over another, and courts only need to find some possible reason that the legislature enacted the law, courts could simply hypothesize that the economic legislation was enacted to protect the benefited group. This protection does not even need to be the actual purpose for which the legislature enacted the statute, nor does the law need to show any sign of effectuating that purpose. Barring the potential for legislative animus against the disfavored group, naked economic protectionism is virtually impossible to negate.

Rational basis review should include a government interest that serves, at least to some extent, the public interest or the general welfare. In the decisions discussed in this Comment, there is no precedent established for upholding economic legislation that lacks some strand of public interest. Rational basis review provides a low threshold, and the possibilities for a legitimate public interest are many, including consumer protection, consumer safety, public health, economic development, neighborhood preservation, protecting reliance interests, historical preservation, and tourism attraction. While otherwise publicly minded laws may result in the economic protection of certain groups, economic protectionism should not stand as the sole basis for enacting a law.

Legitimizing naked economic protectionism as a rational basis for enacting a law may seriously harm the general public. For example, we may see occupational licensing requirements protect certain professions from economic competition in areas where the licensed professional is not specialized, the most skilled, or even qualified. These unfounded protections harm the public by reducing supply, choice, and quality. Courts should not uphold a law when the only basis for the law is naked economic protectionism.

#### Expanding equal protection is key to healthcare---alternatives collapse human rights.

Scott J. Schweikart 21. JD, MBE. “How to Apply the Fourteenth Amendment to the Constitution and the Civil Rights Act to Promote Health Equity in the US”. https://journalofethics.ama-assn.org/article/how-apply-fourteenth-amendment-constitution-and-civil-rights-act-promote-health-equity-us/2021-03

Abstract

Health equity in the United States requires elimination of differentials in access to health services according to race, ethnicity, sex, gender identity, comorbidity, or ability. To achieve health equity, governments can use a variety of tools, including civil rights legislation and constitutional jurisprudence. In the United States, 2 such examples are the Fourteenth Amendment to the Constitution’s Equal Protection clause and Title VI of the Civil Rights Act. While both have the capacity to reduce health disparities, in practice, neither has achieved its full potential because of how the judicial branch has interpreted and allowed these 2 laws to be enforced. How courts adjudicate health-related cases, especially those in which civil rights or other human rights legislation are at stake, is key to the successful promotion of legislative and jurisprudential approaches to motivating health equity and realizing justice for all.

What Is Health Equity?

Health equity has been widely defined as an “absence of socially unjust or unfair health disparities.”1 Equity is different than equality. While both equity and equality focus on notions of fairness, equality emphasizes giving people “the same resources or opportunities” while equity “recognizes that each person has different circumstances and allocates the exact resources and opportunities needed to reach an equal outcome.”2 Health equity in particular “focuses attention on the distribution of resources and other processes that drive a particular kind of health inequality.”1 Health equity is important because health is fundamental to the human experience. As Amartya Sen explains: “health is among the most important conditions of human life and a critically significant constituent of human capabilities in which we have reason to value.”3 Complete health equity is a theoretical ideal; in reality, different nations and governing structures have differing success in achieving health equity. The United States, for example, has stark disparities in health and access to care compared to peer nations like Canada.4 Hence, the drive to effectuate health equity in American society is paramount and key to achieving a more just society, while it would also enhance the quality of human life and its essence.

Legislative Action on Civil Rights

Either by acting “as a provider or guarantor of human rights” or by implementing “policy frameworks that provide the basis for equitable health improvement,” governments can contribute to effectuating health equity.5 With respect to human rights, the United States has no formally codified right to health, nor does it participate in a human rights treaty that specifies a right to health. A prime example of such a treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for a specific—though criticized as “vague” and “unrealistic”—right to health.6 The ICESCR has only been ratified and not signed by the United States, thus “making the treaty only morally rather than legally binding on the US.”6 However, as Paula Braveman et al have noted, the values underlying health equity are “rooted in deeply held American social values”7; hence there is scope for government action to effectuate health equity. The United States does have law in the domain of human rights. These laws—nominally known as civil rights—are, on the whole, designed to protect citizens from “discriminatory practices by governments and institutions” and also to “protect citizens from discriminatory practices by other citizens.”8 Indeed, Robert Hahn et al argue that civil rights laws are social determinants of health, as they “causally affect the societal distribution of resources that in turn affect disease, injury, and health.”8 While not as explicit as an international human rights treaty, both the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964 offer examples of civil rights law that attempt to achieve more equitable outcomes in American society. What follows is an exploration of how effective these aspects of American civil rights law are in promoting health equity in America.

Fourteenth Amendment. The Fourteenth Amendment of the US Constitution is famously known for its Equal Protection clause, which states that “nor shall any state … deny to any person within its jurisdiction the equal protection of the laws.”9 With regard to implementing health equity, the Fourteenth Amendment seems a natural place in US law on which to focus. Indeed, “the equal protection clause is generally thought to require government to treat similarly circumstanced individuals in a similar manner.”10 However, there is a history of US courts (the US Supreme Court in particular) not applying a heightened level of scrutiny to equal protection claims regarding unequal access to health care, which has allowed for inequities to continue.10 Throughout its jurisprudential history, the “Supreme Court [has] interpreted the Fourteenth Amendment far more narrowly than many of its drafters intended, most notably by holding that it did not apply to discrimination by private actors.”11 Additionally, the Supreme Court required the “exceedingly difficult” burden that “for a litigant to prevail” in an Equal Protection case, the plaintiff “must prove that the government acted with a ‘discriminatory purpose’” and that simply demonstrating that a “policy or practice has a disparate impact on people of a particular race is not sufficient to prevail on an Equal Protection claim.”11 Because of the narrow and restrictive legacy of court interpretation, the Fourteenth Amendment has been weakened and has not operated as an effective tool to implement civil and human rights. Ultimately, success and actual progress in enforcing civil rights came when the Supreme Court “upheld the Civil Rights Act of 1964, although it relied on Congress’s authority under the Commerce Clause, and not the Fourteenth Amendment.”11

#### Health access key to prevent disease and bioterrorism---extinction.

John Mecklin 17. Editor-in-chief of the Bulletin of the Atomic ScientistsHow the House health care bill undercuts bioterror and pandemic defenses http://thebulletin.org/how-house-health-care-bill-undercuts-bioterror-and-pandemic-defenses10752

For all sorts of reasons, **the US public health system**—as patchwork as it may be—**is absolutely vital to protecting the United States and the world from bioterrorism and natural disease outbreaks that could turn pandemic**. I could offer a long policy discussion here to support the previous sentence, but I think two words will do the job: Ebola. Anthrax.

According to a question-and-answer string generated by the Washington Post, the House health care bill “would eliminate funds for fundamental public health programs, including for the prevention of **bioterrorism and disease outbreaks**, as well as money to provide immunizations and heart-disease screenings” and gut a fund that provides almost $1 billion annually to the Centers for Disease Control and Prevention (CDC).

The panic that attended the anthrax letter attacks of 2001 and Ebola cases in 2014—incidents that claimed only a relative handful of victims each in this country—**would pale in comparison to the uproar accompanying a widespread outbreak of serious disease**, whether it were natural in origin or manmade. The systems needed to detect outbreaks early and **forestall pandemic** are exactly the programs that the House health care bill cuts. Many of those systems are run by state health departments, which would lose hundreds of millions of dollars because of cuts in funding for the CDC.

At the same time, it seems likely that if the Senate agrees to something close to the House health care bill, millions of Americans will also lose health insurance coverage. This combination—disinvestment in public health and large reductions in the number of people with access to timely medical care—could facilitate the type of pandemic that **causes mass casualties and threatens social order**. Such a level of risk demands an increased level of attention from the media, and from the Senate, as it decides how it will address—and, I hope, greatly change—the House version of health care “reform."

### States CP---1NC

#### The 50 states, territories, and DC should uniformly pass and strictly enforce

#### - occupational licensing laws and regulations that end anti-competitive preferences for incumbent firms,

#### - regulate instances in which incumbent regulatory schemes have allowed the incumbent firms to anticompetitively wield licensing requirements, collect monopoly rents, then there may be a sharp asymmetry of incentives between old and new firms,

#### - eliminate incumbent veto gates to reform legislation,

#### - prohibiting naked restraints on peer-to-peer platform competition by private sector members of entities in which private market participants possess a controlling interest that are not compelled or given affirmative particularized authorization by the state.

### Antitrust PIC---1NC

#### The relevant federal agency should prohibit naked restraints on peer-to-peer platform competition by private sector members of entities in which private market participants possess a controlling interest that are not compelled or given affirmative particularized authorization by the state. The United States federal government should clarify that such authorization does not violate antitrust law.

#### The counterplan PICs out of anti-trust and the DOJ as enforcer

Lawrence Fullerton et al. 08. Joel M Mitnick, William V Reiss, George C Karamanos and Owen H Smith. Sidley Austin LLP. Vertical Agreements The regulation of distribution practices in 34 jurisdictions worldwide. “United States.” https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through--vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf

5 What entity or agency is responsible for enforcing prohibitions on anticompetitive vertical restraints? Do governments or ministers have a role?

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DoJ) are the two federal agencies responsible for the enforcement of federal antitrust laws. The FTC and the DoJ have jurisdiction to investigate many of the same types of conduct, and therefore have adopted a clearance procedure pursuant to which matters are handled by whichever agency has the most expertise in a particular area.

Additionally, other agencies, such as the Securities and Exchange Commission and Federal Communications Commission, maintain oversight authority over regulated industries pursuant to various federal statutes, and therefore may review vertical restraints for anti-competitive effects.

### DOJ DA---1NC

#### DOJ is making moves towards the Random House suit .

Open Markets 11/5/21. "The Corner Newsletter: November 5, 2021 — Open Markets Institute". Open Markets Institute. 11-5-2021. https://www.openmarketsinstitute.org/publications/the-corner-newsletter-november-5-2021

Welcome to The Corner. In this issue, we take a closer look at the DOJ’s move to block Penguin Random House’s proposed takeover of Simon & Schuster, and how surveillance advertising has harmed user privacy. To read previous editions of The Corner, click here. The DOJ's Move to Block Takeover of Simon & Schuster Is Major Advance in Fight to Rebuild U.S. Market for Books On Tuesday, the Department of Justice sued to block Penguin Random House’s planned $2.18 billion acquisition of rival book publisher Simon & Schuster. The DOJ alleged that the merger would give Penguin — which is owned by the German corporation Bertelsmann and is already the world’s largest publisher — too great of an influence over the books being published in the U.S. and the pay for authors of the books. The Wall Street Journal noted that the lawsuit represents an effort to shift antitrust policy away from economic efficiency and consumer prices to broader attempts to protect economic opportunity. The action by the DOJ amounted to a major win for Open Markets, which has long focused closely on the dangers posed by consolidation of power over the U.S. marketplace for books by Amazon and by super-large publishers. In January, Open Markets submitted a letter to the DOJ opposing the merger — cosigned by the Authors Guild and other groups. After the decision, Open Markets Executive Director Barry Lynn issued a statement celebrating the move. Lynn also discussed the decision on Cheddar TV News.

#### DOJ 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.

#### Its key to challenge monopsony power.

Bryan Koenig 11/3/21. Senior Competition Reporter at Law360."DOJ Reads Up On Monopsony Law In Penguin Merger Fight". No Publication. 11-3-2021. https://www.law360.com/articles/1437128/doj-reads-up-on-monopsony-law-in-penguin-merger-fight

Law360 (November 3, 2021, 7:42 PM EDT) -- By challenging Penguin Random House LLC's bid to buy Simon & Schuster, the U.S. Department of Justice sent a strong signal the Biden administration will continue antitrust enforcers' recent emphasis on protecting sellers in a market, not just end consumers.

If successful, the DOJ's attempt to prevent Penguin Random House from gaining a stranglehold on the purchase of publishing rights could mark an important development in monopsony merger enforcement, which seeks to prevent a single buyer from dominating sellers in a market.

Monopsony cases have traditionally been far less frequent than enforcement actions aimed at preventing monopolies, which lead to a consolidation of sellers and ultimately can raise prices for buyers.

That may be changing, however, as U.S. antitrust enforcers increasingly focus on buyer-side consolidation, especially in labor markets. Antitrust professionals say Tuesday's D.C. federal court complaint could be an important milestone on that path.

"They put their money where their mouth is" when it comes to heightened concerns about protecting sellers, said Steven Salop, an antitrust law and economics professor at Georgetown Law.

#### That’s key to solve inequality and economic growth.

Eric A. Posner 8/13/21. Kirkland & Ellis Distinguished Service Professor at University of Chicago. How Antitrust Failed Workers. Oxford University Press, 2021.

In the United States, and much of the Western world, economic growth has slowed, inequality has risen, and wages have stagnated. Academic research has identified several possible causes, ranging from structural shifts in the economy to public policy failure. One possible cause that has received increasing attention from economists is labor market power, the ability of employers to set wages below workers’ marginal revenue product.1 New evidence suggests that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers, who use their market power to suppress wages. This phenomenon—the power of employers to suppress wages below the competitive rate—is known among economists as labor monopsony, or simply labor market power. Wage suppression enhances income inequality because it creates a wedge between the incomes of people who work in concentrated and competitive labor markets. Wage suppression also reduces the incomes of workers relative to those of people who live off capital, and the latter are almost uniformly wealthier than the former. Wage suppression also interferes with economic growth since it results in underemployment of labor and, while it may seem to raise the return on capital, actually depresses it, as capital must lie idle to take advantage of monopsony power. With wages artificially suppressed, qualified workers decline to take jobs, and workers may underinvest in skills and schooling. Many workers exit the workforce and rely on government benefits, including disability benefits that have become a hidden welfare system.2 This in turn costs the government both in lost taxes and in greater expenditures. One estimate finds that monopsony power in the U.S. economy reduces overall output and employment by 13% and labor’s share of national output by 22%.3

The claim that labor market power raises inequality and reduces growth mirrors another claim that has received attention lately—that the product market power of firms has contributed to rising inequality and faltering growth.4 A product market is a collection of products defined by frequent consumer substitution. When a small number of sellers or one seller of these products exist, we say that each seller has product market power, which enables it to charge a price higher than marginal cost, or the price that would prevail in a competitive market. When a small number of employers hire from a pool of workers of a certain skill level within the geographic area in which workers commute, the employers have labor market power.

One major source of market power in both types of markets is thus concentration, where only a few firms operate in a given market. Imagine, for example, a small town with only a few gas stations. Each gas station sets the price of gas to compete with the prices of the other gas stations. When a gas station lowers its price, it may obtain greater market share from the other gas stations—which increases profits—but it also receives less revenue per sale. If only a single gas station exists, it will maximize profits by charging a high (“monopoly”) price because the gains from buyers willing to pay the price exceed the lost revenue from buyers who stay away. If only a few gas stations exist, they might illegally enter a cartel in which they charge an above-market price and divide the profits, or they might informally coordinate, which is generally not illegal, though the social harm is the same. In contrast, if many gas stations compete, prices will be bargained down to the efficient level—the marginal cost—resulting in low prices for consumers and high aggregate output of gasoline.

Labor market concentration creates monopsony (or, if more than one employer, oligopsony, but I use these terms interchangeably) where labor market power is exercised by the buyer rather than (as in the example of gas stations) the seller. Employers are buyers of labor who operate within a labor market. A labor market is a group of jobs (e.g., computer programmers, lawyers, or unskilled workers) within a geographic area where the holders of those jobs could with relative ease switch among the jobs. The geographic area is usually defined by the commuting distance of workers. A labor market is concentrated if only one or a few employers hire from this pool of workers. For example, imagine the gas stations employ specialist maintenance workers who monitor the gas-pumping equipment. If only a few gas stations exist in that area, and no other firms (e.g., oil refineries) hire from this pool of workers, then the labor market is concentrated, and the employers have market power in the labor market. To minimize labor costs, the employers will hold wages down below what the workers would be paid in a competitive labor market—their marginal revenue product. Faced with these low wages, some people qualified to work will refuse to. But the employers gain more from wage savings than they lose in lost output because of the small workforce they employ.

Antitrust law does not distinguish monopoly and monopsony (including labor monopsony): firms that achieve monopolies or monopsonies through anticompetitive behavior violate antitrust law. But product market concentration has received a huge amount of attention by courts, researchers, and regulators, while labor market concentration has received hardly any attention at all.5 The Department of Justice (DOJ) and Federal Trade Commission’s (FTC) Horizontal Merger Guidelines, which are used to screen potential mergers for antitrust violations, provide an elaborate analytic framework for evaluating the product market effects of mergers. Yet, while the Merger Guidelines state that there is no distinction between seller and buyer power,6 they say nothing about the possible adverse labor market effects of mergers. Similarly, while there are thousands of reported cases involving allegations that firms have illegally cartelized product markets, there are few cases involving allegations of illegally cartelized labor markets.7

This historic imbalance between what I will call product market antitrust and labor market antitrust has no basis in economic theory. From an economic standpoint, the dangers to public welfare posed by product market power and labor market power are the same. As Adam Smith recognized, businesses gain in the same way by exploiting product market power and labor market power—enabling them to increase profits by raising prices (in the first case) or by lowering costs (in the second case).8 For that reason, businesses have the same incentive to obtain product market power and labor market power. Hence the need—in both cases—for an antitrust regime to prevent businesses from obtaining product and labor market power except when there are offsetting social gains.

#### Inequality drives diversionary nationalism and makes war inevitable.

Frederick Solt 11. Ph.D. in Political Science from University of North Carolina at Chapel Hill, currently Associate Professor of Political Science at the University of Iowa, Assistant Professor, Departments of Political Science and Sociology, Southern Illinois at the time of publication. “Diversionary Nationalism: Economic Inequality and the Formation of National Pride.” The Journal of Politics, Vol. 73, No. 3, pgs. 821-830, July 2011.

One of the oldest theories of nationalism is that states **instill the nationalist myth** in their citizens to **divert their attention from great economic inequality** and so forestall pervasive unrest. Because the very concept of nationalism obscures the extent of inequality and is a potent tool for delegitimizing calls for redistribution, it is a perfect **diversion**, and states should be expected to engage in more nationalist mythmaking when inequality increases. The evidence presented by this study supports this theory: across the countries and over time, where economic inequality is greater, nationalist sentiments are substantially more widespread.

This result adds considerably to our understanding of nationalism. To date, many scholars have focused on the international environment as the principal source of threats that prompt states to generate nationalism; the importance of the domestic threat posed by economic inequality has been largely overlooked. However, at least in recent years, domestic inequality is a **far more important stimulus for the generation of nationalist sentiments** than the international context. Given that **nuclear weapons**—either their own or their allies’—rather than the mass army now serve as the primary defense of many countries against being overrun by their enemies, perhaps this is not surprising: nationalism-inspired mass mobilization is simply no longer as necessary for protection as it once was (see Mearsheimer 1990, 21; Posen 1993, 122–24).

Another important implication of the analyses presented above is that growing economic inequality may increase ethnic conflict. States may foment national pride to stem discontent with increasing inequality, but this pride can also lead to more **hostility towards immigrants and minorities**. Though pride in the nation is distinct from chauvinism and outgroup hostility, it is nevertheless closely related to these phenomena, and recent experimental research has shown that members of majority groups who express high levels of national pride can be nudged into intolerant and xenophobic responses quite easily (Li and Brewer 2004). This finding suggests that, by leading to the creation of more national pride, higher levels of inequality produce environments favorable to those who would inflame **ethnic animosities**.

Another and perhaps even more worrisome implication regards the **likelihood of war**. Nationalism is frequently suggested as a **cause of war**, and more national pride has been found to result in a much greater demand for national security even at the expense of civil liberties (Davis and Silver 2004, 36–37) as well as preferences for “a more **militaristic foreign affairs posture** and a more interventionist role in world politics” (Conover and Feldman 1987, 3). To the extent that these preferences influence policymaking, the **growth in economic inequality** over the last quarter century should be expected to lead to more aggressive foreign policies and **more international conflict**. If economic inequality prompts states to generate diversionary nationalism as the results presented above suggest, then **rising inequality could make for a more dangerous world**.

The results of this work also contribute to our still limited knowledge of the relationship between economic inequality and democratic politics. In particular, it helps explain the fact that, contrary to median-voter models of redistribution (e.g., Meltzer and Richard 1981), democracies with higher levels of inequality do not consistently respond with more redistribution (e.g., Bénabou 1996). Rather than allowing redistribution to be decided through the democratic process suggested by such models, this work suggests that states often respond to higher levels of inequality with more nationalism. Nationalism then works to divert attention from inequality, so many citizens neither realize the extent of inequality nor demand redistributive policies. By prompting states to promote nationalism, greater economic inequality removes the issue of redistribution from debate and therefore narrows the scope of democratic politics.

### T Subsets---1NC

#### Core anti-trust laws refers to economic wide, not specific sectors.

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are always some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

#### Vote neg for predictable limits and ground. Infinite sectors and procedural exemptions and changes to make to each. Diminishes the quality of already non-existent disads.

## Certainty Advantage

### AT: Regulatory Innovation/Existential Risks

#### Regulatory innovation does not solve.

Charles 1AC Weiss 22, the first Science and Technology Adviser to the World Bank, serving in that position from 1971-86, became Distinguished Professor of Science, Technology and International Affairs (STIA) at the Georgetown University School of Foreign Service in 1997, was the director of the STIA program from 1997-2006, now Distinguished Professor Emeritus, and a Visiting Scholar at the American Association for the Advancement of Science, “13 Playing with Fire,” Survival Nexus: Science, Technology, and World Affairs, Oxford University Press, 2022, pp. 251-266

**[EMORY GK = BLUE]**

Some of these issues, like climate change, nuclear weapons, and global health, are governed by long-standing regimes, norms, and institutions that now need strengthening and refurbishing to meet new political, economic, and techno­ logical challenges. Nonproliferation and anti-missile agreements need to be restored and extended to limit or ban development and deployment of hyper­ sonic missiles, destabilizing weapons that are now under rapid development in many countries. Voluntary national limits on greenhouse gas emissions need to be urgently increased. Time is running out, and costs will be much greater the longer we take for effective action to mitigate and adapt to climate disruption. In the global health sphere, the system for emergency preparedness and pandemic control needs increased and sustained political and financial support to replace the long-standing pattern of crisis-to-crisis, feast-or-famine funding. Most low- income countries still need basic health infrastructure, both to provide health services to their population and to identify and control epidemic disease that could spread beyond their borders.

Cyberweapons, too, can quickly get out of control and wreak enormous damage on critical infrastructure, including the systems of command-and- control on which we would depend to prevent accidental escalation of a localized conflict to full-scale war. Like hypersonic missiles, the response to these weapons depends on artificial intelligence. Unlike hypersonic missiles, cyberweapons do not lend themselves to the type of verifiable arms control regime that has so far been successful for nuclear weapons. What is more, many governments op­ pose any limits on the use of cyberweapons, despite the risk they pose of acci­ dental escalation. Continued research and international discussion on how these weapons can be controlled are urgent priorities.

Geoengineering and gene drivers also take the world into uncharted terri­ tory. Their governance is complicated by the fact that they are accessible not only to governments, but also to private businesses, NGOs, and individuals. It is far from clear how decisions should be made as to whether and under what circumstances these technologies should be developed, and what criteria should govern any such decisions. Advocates for these technologies have developed roadmaps for deploying them in a way that minimizes risks. Still, there are fundamental disagreements over whether geoengineering and gene drivers should be developed and implemented at all, and there is substantial support for the idea that one or both should be banned outright. Critics have called for moratoriums until the broader questions can be explored by a broad range of worldwide stakeholders, disciplines, and cultures. However, the disagreements we have outlined will probably never be totally resolved to everyone’s satisfaction, and deployment decisions will eventually have to be made one way or the other.

The governance of the Internet and social media involves measures to pre­ serve the global Internet and to address those issues of cybersecurity that are of common concern to countries with very different political systems and very different ideas concerning civil liberties and human rights. The competition be­ tween authoritarian and democratic governments over freedom of information and innovation is likely to go on for a long time, but both sides have a strong in­ terest in maintaining a functioning global Internet and in avoiding catastrophic damage to information and telecommunication systems.

Several academies of science, research institutes, NGOs, and religious organ­ izations have proposed codes of conduct and declarations of principle to deal with the difficult philosophical, ethical, and practical issues involved in all these issues. These represent a useful beginning, and one may hope that they will reach the level of consensus that would allow them to be codified into national legisla­ tion or international agreements.

Dealing with these issues will require respect for expertise in the fields to which we have often referred: science, technology, politics, economics, business, law, and culture. We will need to incorporate scientific advice into decision­ making processes, and to acknowledge and manage the risks and uncertainties in our understanding of the science and the technology we are trying to manage, as well as in their ramifications for the larger society. There is also a need to edu­ cate governments and the public, both on the underlying science and technology and on their links to the broader context. Finally, I would urge that there is a need for an international obligation to identify areas for scientific research and technological innovation that can help to resolve these issues and to support this research with adequate financial, human and institutional resources. This last re­ quirement should become a general principle that should become part of the ac­ cepted framework for thinking about global issues and incorporated into formal agreements on these matters as a matter of usual practice.

### AT: Algorithmic Bias

#### Their algorithmic bias internal link is about brutal dictatorship and surveillance globally which they can’t solve.

#### China and every other country thumps.

Steven Feldstein 19, 1-22-2019, "We Need to Get Smart About How Governments Use AI," Carnegie Endowment for International Peace, https://carnegieendowment.org/2019/01/22/we-need-to-get-smart-about-how-governments-use-ai-pub-78179

But AI can also be channeled maliciously and destructively. For one thing, AI’s surveillance capability offers startling new ways for authoritarian and illiberal states to monitor and control their citizens.

China has been one of the frontrunners in exploiting this technology for surveillance purposes. For example, in Xinjiang and Tibet, China is using AI-powered technology to combine multiple streams of information—including individual DNA samples, online chat history, social media posts, medical records, and bank account information—to observe every aspect of individuals’ lives.

But China is not just using AI to manage restive populations in far-flung provinces. Beijing is also rolling out what it calls “social credit scores” into mainstream society. These scores use big data derived from public records, private technology platforms, and a host of other sources to monitor, shape, and rate individuals’ behavior as part of a broader system of political control.

Second, AI can manipulate existing information in the public domain to rapidly spread disinformation. Social media platforms use content curation algorithms to drive users toward certain articles, in order to influence their behavior (and keep users addicted to their social media feeds). Authoritarian regimes can exploit such algorithms too. One way they can do so is by hiring bot and troll armies to push out pro-regime messaging.

Beyond that, AI can help identify key social-media influencers, whom the authorities can then coopt into spreading disinformation among their online followers. Emerging AI technology can also make it easier to push out automated, hyperpersonalized disinformation campaigns via social media—targeted at specific people or groups—much along the lines of Russian efforts to influence the 2016 U.S. election, or Saudi troll armies targeting dissidents such as recently murdered journalist Jamal Khashoggi.

Finally, AI technology is increasingly able to produce realistic video and audio forgeries, known as deep fakes. These have the potential to undermine our basic ability to judge truth from fiction. In a hard-fought election, for example, an incumbent could spread doctored videos falsely showing opponents making inflammatory remarks or engaging in vile acts.

WHICH COUNTRIES ARE INVESTING THE MOST IN AI?

Several countries are spending a lot of money to beef up their AI capabilities. For instance, French President Emmanuel Macron announced in March 2018 that France would invest $1.8 billion in its AI sector to compete with China and the United States. Likewise, Russian President Vladimir Putin has publicly stated that “whoever becomes the leader in this sphere [AI] will become the ruler of the world,” implying a hefty Russian investment in developing this technology as well. Other countries like South Korea have also made big AI investment pledges.

But the world leaders in AI are the United States and China. For Beijing, AI is an essential part of a broader system of domestic political control. China wants to be the world leader in AI by 2030, and has committed to spending $150 billion to achieve global dominance in the field.

HOW DO CHINA’S AI CAPABILITIES STACK UP AGAINST THOSE OF THE UNITED STATES?

There are three central components of AI—training data for machine learning, strong algorithms, and computing power.

Of those three, China has training data in abundance and an improving repertoire of algorithms. But the country’s ability to manufacture advanced computer chips—and tap the computing power they supply—lags behind U.S. capabilities.

By contrast, the United States has the world’s most advanced microchips and most sophisticated algorithms. Yet Americans increasingly trail behind their Chinese counterparts when it comes to the sheer amount of digital data available to AI companies. This is because Chinese companies can access the data of over one billion domestic users with almost non-existent privacy controls. And data increasingly makes all the difference when it comes to building AI companies that can outperform competitors, the reason being that large datasets help algorithms produce increasingly accurate results and predictions.

WHAT KIND OF AI IS CHINA EXPORTING TO OTHER COUNTRIES?

China sees technology as a way to achieve its grand strategic aims. Part of this strategy involves spreading AI technology to support authoritarianism overseas. The Chinese are aggressively trying to develop their own AI, which they can then vigorously peddle abroad.

As China develops its AI sector, it is promoting a digital silk road (as part of its Belt and Road Initiative, which involves Chinese investment in other countries’ infrastructure) to spread sophisticated technology to governments worldwide.

These efforts include plans to construct a network of “smart” or “safe” cities in countries such as Pakistan and Kenya. These cities have extensive monitoring technology built directly into their infrastructure.

In Latin America, China has sold AI and facial recognition software to Ecuadorian, Bolivian, and Peruvian authorities to enhance public surveillance.

Likewise, in Singapore, China is providing 110,000 surveillance cameras fitted with facial recognition technology. These cameras will be placed on all of Singapore’s public lampposts to perform crowd analytics and assist with anti-terrorism operations.

Similarly, China is supplying Zimbabwe with facial recognition technology for its state security services and is building a national image database.

Additionally, China has entered into a partnership with Malaysian police forces to equip officers with facial recognition technology. This would allow security officials to compare instantly live images captured by body-cameras with images stored in a central database.

WHY DOES CHINA WANT TO EXPORT ITS AI OVERSEAS?

China shrewdly assumes that the more it shifts other countries’ political systems closer to its model of governance, the less of a threat those countries will pose to Chinese hegemony.

Beijing also knows that providing critical technology to eager governments will make them more dependent on China. The more that governments rely on advanced Chinese technology to control their populations, the more pressure they will feel to align with Beijing’s strategic interests.

In fact, China’s AI strategy is blunt about the technology’s perceived benefits. A press release from the Ministry of Industry and Information Technology states that AI “will become a new impetus for advancing supply-side structural reforms, a new opportunity for rejuvenating the real economy, and a new engine for building China into both a manufacturing and cyber superpower.”

#### GDPR solves algorithmic bias.

Kristine Gloria 21, Ph.D., Aspen Digital, July 2021, “Power and Progress in Algorithmic Bias,” https://www.aspeninstitute.org/wp-content/uploads/2021/07/Power-Progress-in-Algorithmic-Bias-July-2021.pdf

Policymakers and regulators serve a critical function in countering bias in algorithmic systems to make them more fair, accountable, and transparent. For example, the General Data Protection Regulation (GDPR) poses several actions that require a better formulation for explainability, transparency, and accountability of automated decision systems. In the U.S., several state-level and municipal-level regulators have placed moratoriums on the use of facial recognition software in response to rising civil liberty concerns. In addition to establishing ethical principles, legal scholars are calling upon companies to follow an approach grounded in the Universal Declaration of Human Rights (UDHR). Human rights law provides a clear, legally binding strategy against discriminatory impacts, which may include algorithms.25

#### States solve algorithmic bias.

Jad Sheikali 21, Associate, CIPP/US, 4-28-2021, Recent State Biometric Privacy Bills Put Spotlight On Federal Regulation, No Publication, https://www.honigman.com/blogs-the-matrix,recent-state-biometric-privacy-bills

While the likelihood of a federal biometric privacy coming to fruition in the near term remains an open question, the introduction of such legislation—particularly with a private right of action, minimum statutory damages, and a statement of injury-in-fact—highlights the growing domestic and international trend towards recognizing the sensitivity and immutability of biometric data and equipping data subjects with the information necessary to make an informed decision.

Looking forward

Private entities of all sizes doing business in New York or Maryland should keep a close eye on these pending biometric privacy bills.

If Maryland House Bill 218 passes, it will take effect January 1, 2022. New York Assembly Bill 27 will take effect just ninety days (90) after passage.

Entities outside of New York and Maryland (and Illinois and Texas and Washington . . .) should not fall asleep at the wheel either. Other jurisdictions will undoubtedly follow suit to formally regulate biometric data, whether through standalone legislation or amendments to bring biometric data within the regulatory scope of existing laws. There is also the ever-present chance that regulation at the federal level—such as NBIPA—gains traction.

## Sharing Economy Advantage

### Rant---1NC

#### Their uniqueness for this advantage takes out the internal link for certainty---certainty tech internal link is about how states need more control, the first card is about how state regulations threaten innovation!

### AT: Populism

#### No impact to populism---institutional checks

Nicola Mai & Peder Beck-Friis 19, 2-13-2019, Nicola Mai is an executive vice president in the London office and a sovereign credit analyst in the portfolio management group; Dr. Peder Beck-Friis is a vice president and portfolio manager in the London office, "EU Elections: Populism’s Threat May Be Overstated," Pacific Investment Management Company LLC, https://www.pimco.com/en-us/insights/viewpoints/eu-elections-populisms-threat-may-be-overstated/

It is unlikely that the eurosceptic parties will form a united anti-establishment front. The eurosceptic parties are heterogeneous, ranging from extreme left to extreme right, and they have diverging views on how Europe should be reformed. We think the probability that these parties coalesce into one political group is low.

Support for eurosceptic parties should remain well below 50%. This is important because even if these parties manage to form a united front, they will face the opposition of moderate parties, which will likely coalesce against them in parliamentary votes and obstruct radical proposals that could involve the dismantling or weakening of the European infrastructure.

The key decision-making process in the EU remains inter-governmental. All key European decisions need the approval of the European Parliament as well as the Council, with the most important decisions requiring unanimity of the Council. It is true that the parliament could block key initiatives set out by the Commission. But that would require the support of moderate parties, given the minority representation of the eurosceptic parties. Finally, in emergency situations, the Council has the ability to make decisions on a purely inter-governmental basis, bypassing the need to change EU law.

Nominations of key EU positions remain ultimately in the hands of the Council. Even in the unlikely event that a populist coalition emerges as the largest group in the parliament, it does not necessarily follow that the European Council will propose a populist candidate for president of the Commission. The Spitzenkandidat process is only a convention; the European Council could in principle nominate any candidate, and importantly, the nominee will still need to be approved by the parliament as a whole.

#### US not key to European populism.

Azad **Zangana 20**. Senior European Economist & Strategist at Schroders. “Has Covid-19 killed off populism in Europe?” 9-28-2020. Schroders. <https://www.schroders.com/en/us/professional-investor/insights/economic-views/has-covid-19-killed-off-populism-in-europe/>

The Covid-19 crisis has changed many aspects of day to day life for billions around the world. As many struggle with restrictions, healthcare issues and the economic fallout, people’s preferences and priorities are changing. In recent times in parts of Europe, especially those that have experienced low growth and high unemployment since the Global Financial Crisis, centrist parties have been voted out in favour of radical populists. Even in better performing economies, liberal centrists have been challenged and put under pressure. Many voters were ready to take a gamble and give populist parties a chance to do things differently. However, it now appears that Europe may be close to peak populism. Priorities are re-aligning as **voters favour competence and safe hands over untested idealists.** In this note, we examine how the political landscape in Europe has changed since the start of the year for the four largest EU member states plus the UK, and the likely fallout for investors in the order of upcoming elections. Germany Next election date: by October 2021 Most elections in Europe are still some time away, but Germany will be first of the major countries, with its next federal election due between August and October 2021. At the last election in September 2017, the old guard of the Christian Democratic Union and Christian Social Union (CDU/CSU) coalition and the Social Democratic Party (SPD) held on to power, but not without suffering a bloody nose. Chancellor Merkel’s CDU/CSU lost more than 8 percentage points of the popular vote, while the SPD saw its worst result since the Second World War. Despite never being represented before, voters helped make the far-right Alternative for Deutschland (AfD) the third largest party in the Bundestag. The Green party also performed well, campaigning on environmental issues which the governing coalition was criticised over. Since the election, the Green party has seen its support surge. This is partly in reaction to the climate change emergency, but also as it gained credibility as an alternative to the mainstream parties that does not suffer the stigma of the AfD. The Greens overtook the AfD and SPD to move into second place around October 2018. Just as the Green party was on the rise, Merkel announced that she would step down as leader of her party but remain Chancellor until 2021. Following the party election, Annegret Kramp-Karrenbauer was made party leader, only to shortly after announcing that she would not run for the Chancellorship, following a blunder over freedom of speech ahead of parliamentary elections. Even now, the CDU does not yet have a candidate to stand in the next election. Meanwhile, the Greens continued to make gains, and by July 2019, they were polling slightly ahead of the CDU/CSU. At the end of February and before Covid-19 took its hold on Europe, opinion polls showed that the CDU/CSU coalition was about four percentage points ahead of the Green party, and another 10 points ahead of the AfD. Since then, and based on the last five opinion polls, the CDU/CSU coalition has gained over 9 points. Meanwhile, the Green party has lost about four points, the AfD has lost couple of points, all while the SPD picked up a point (see chart 1). The change in voter preferences appears to be **related to the pandemic**, with **most preferring to stick to the parties they know** well, rather than opt for an alternative. The nearly 18 point lead that Merkel has opened up against the Greens puts the party in a very comfortable position, and has reinvigorated Germany on the international scene – as it played a commanding and vital role in the creation of Next Generation EU (EU recovery fund) to help bail out struggling EU member states in the south. The key challenge for the government will be to elect a likeable and dependable candidate to stand for Chancellor at the next election, which will certainly be the beginning of a new era after Merkel’s 16-year tenure comes to an end. France Next election date: April 2022 The next French presidential election is not until the second quarter of 2022 and as a result, polling data is very poor. The two round process does not lend itself to regular polling, but there is some information available for us to take the political pulse. Emmanuel Macron stepped in to fill a void in 2018 as the old centre left and right parties lost the public’s confidence, while far right candidate Marine Le Pen was threatening to take power. Macron, the former cabinet minister under Prime Minister Valls and President Hollande quit his role and formed his own party, En Marche, later renamed La République En Marche. He then ran as the pro-European alternative to the old guard, but also the antithesis of Le Pen and the Front National, now known as Rassemblement National (National Rally). The last poll before Covid-19 was conducted by Ifop and published in November 2019. It showed Macron and Le Pen as the top two candidates in a first round contest, but Macron is slightly behind with 27%, compared to 28% for Le Pen. However, the second-round poll shows Macron being ahead by 55% to 45%. The latest two polls which were both conducted in early July still show the two candidates as the main contenders, but Macron now has an average four point lead in the first round, and a 16 point lead in the second – a significant improvement (see chart 2). Looking at the difference between only a handful of polls is very dangerous due to the small sample sizes. Another source to examine is Macron’s approval rating as president. These polls have been conducted regularly for many years. Interestingly, Macron’s approval rating picked up sharply at the start of the March, again as the virus spread through Europe (chart 3). It dipped back through April and May, but picked up again through the summer. This was as case numbers have increased, but also in reaction to the creation of the EU recovery fund, which Macron was a key figure building the consensus for its creation. Spain Next election date: by December 2023 In Spain, the centre left Spanish Socialist Workers party (PSOE) and the centre right People’s Party (PP) continue to dominate politics. However, the rise of populist parties in recent years such as far-right VOX and far left Podemos have weakened the establishment, forcing governments to work more with fringe parties in order to secure supply and confidence. As the PSOE minority government effectively lost the ability to govern in the spring of 2019, the government called a snap election in April. Supply and confidence arrangements were not working, and so a fresh mandate was required, especially as the PSOE had wrestled power away from the PP after its minority government collapsed in the wake of a corruption scandal. The snap election in April produced a very split outcome and despite intense talks, the country was forced to hold a second election in November. Eventually, an agreement was reached between the PSOE and Unidas Podemos – the left wing coalition including Podemos, the United Left and other smaller left wing and far left parties – to form the first coalition government since the Second Spanish Republic (1930’s). Since the start of this year, opinion polls suggest that support for PSOE has largely remained stable, but support for the PP is up about three points, compared to a two point drop for VOX and a three point drop for Podemos (chart 5). Spain, like Italy, has not seen large shifts in preferences, but the two centrist mainstream parties continue to attract most support, and it appears that the Covid-19 crisis has only helped solidify this position. Conclusions: populism is not dead yet It may be too soon to declare the death of populism in Europe, but the Covid-19 pandemic appears to have focused minds and re-aligned the priorities of households, leading to a fall in support for populist parties and a return to more familiar centrists.

#### If so, Trump losing collapses European populism.

Ivan **Krastev** 7-25-**20**. ECFR co-chair, chairman of the Centre for Liberal Strategies in Sofia, and a fellow at the Institute for

Were Trump to be re-elected, Washington would probably hew to this strategy as relations with countries such as Poland and Hungary flourished. For this US administration, to visit Central Europe is as inspiring as to campaign in the Midwest. Illiberal governments in Central Europe view Trump as an ideological ally, and some admire Vladimir Putin, Russia’s president. But can the US Habsburg strategy survive if Trump loses? Can a pro-US bloc in the EU, constructed in Trump’s time, outlast him? My hunch is: probably not. Paradoxically, Trump’s electoral defeat might become the best chance for realising the Berlin-Paris dream of a sovereign Europe. Not only would a Joe Biden **victory improve relations** between Washington and Berlin, and Washington and Paris, but it would impel illiberal governments in Warsaw and Budapest to seek reconciliation with Brussels. Three factors will define this post-Trump dynamic between the US and the EU, and internal European relations. A recent survey commissioned by the European Council on Foreign Relations revealed that Washington’s response to covid-19 has badly damaged America’s image in Europe. Seventy-one per cent of Danes, 68 per cent of French citizens, 65 per cent of Germans, and 38 per cent of Poles say that their view of the US has grown worse. Many Europeans started to question America’s capability even after Trump sought to play the part of a global leader. Deep concern that domestic problems will bog down the US forces many Atlanticists to seek a stronger role for the EU in the world. Secondly, the increasing reality of US-Chinese confrontation will change transatlantic relations. The US will need an EU strong enough to take care of itself against threats originating from its region. Neither a new administration’s anticipated focus on climate change nor Washington’s search for a common front against China, justifies putting the former Habsburg states at the centre of US relations with Europe. Weakening Germany cannot be the primary objective of any US administration that genuinely wants to co-operate with the EU. Thirdly, and most significantly, illiberal democracies such as Poland and Hungary, which have been **unabashed backers of Trump’s populist revolution**, and which openly or tacitly opposed the idea of EU strategic autonomy, would **view a Biden administration as an a priori political threat**. A Trump defeat in November would **empower liberal forces in Central Europe** at a time when recent events in Belarus are a clear sign that ageing is the worst enemy of populist strongmen such as Viktor Orbán, Hungary’s prime minister since 2010. Trump’s victory in 2016 made many liberal Europeans fantasise about the possibility of EU strategic autonomy. Ironically, it could be Trump’s electoral defeat that persuades his populist backers in Central Europe to **endorse the Franco-German demand for the same objective.**

#### But populism is structurally inevitable

Daron Acemoglu 11/6/20. Institute Professor at MIT. Trump Won’t Be the Last American Populist The Conditions That Produced Him Need to Be Understood to Be Addressed https://www.foreignaffairs.com/articles/united-states/2020-11-06/trump-wont-be-last-american-populist

Together with economic resentment has come a distrust of all kinds of elites. Much of the American public and many politicians now express a mounting hostility toward policymaking based on expertise. Trust in American institutions, including the judiciary, Congress, the Federal Reserve, and various law enforcement agencies, has collapsed. Neither Trump nor recent party polarization can be held solely to blame for this anti-technocratic shift. The almost complete rejection of scientific facts and competent, objective policymaking among many in the electorate and the Republican Party predates Trump and has parallels in other countries—Brazil, the Philippines, and Turkey to name a few. Without more deeply understanding the root of such suspicion, American policymakers can have little hope of convincing millions of people that better policies, designed by experts, will improve their lives enormously and reverse decades of decline. Nor can policymakers hope to put a lid on the discontent that fueled Trump’s rise.

POISONOUS SEEDS

Populist movements thrive on inequality and on resentment of elites. Yet these conditions alone don’t explain why American voters in 2016 turned right rather than left as inequality rose and the very wealthy benefited at ordinary people’s expense. In the United States, a right-wing populist movement stood ready to make itself the vehicle for the grievances of regular people and to marry those grievances to a stance that was anti-elite, nationalist, and often authoritarian.

Right-wing populism did not emerge in the United States because of Trump’s deranged charisma. Nor did it begin with the news media’s infatuation with his outrageous statements, or with Russian meddling, or with social media. Rather, right-wing populism resurged as a potent political force at least two decades before Trump’s takeover of the Republican Party—remember Pat Buchanan? And it has analogs all over the world, not just in mature democracies reeling from the loss of manufacturing jobs but in countries that have benefited economically from globalization, including Brazil, Hungary, India, the Philippines, Poland, and Turkey.

That the Republican Party would give itself over to such a movement—and to Donald Trump as its standard-bearer—was never a foregone conclusion. One can argue that Republicans supported Trump because he was willing to execute their agenda: cutting taxes, fighting regulation, and appointing conservative judges. Alas, this is only a small part of the story. Trump’s popularity surged based on positions diametrically opposed to Republican orthodoxy: restricting trade, increasing spending on infrastructure, helping and interfering with manufacturing firms, and weakening the country’s international role. One can point to skyrocketing rates of polarization before Trump or chide the role of money in politics. Yet these factors hardly explain the wholesale abandonment of many of the key policy tenets of a 150-year-old party. Before 2016, few would have believed that the Republican Party would try to dismiss and cover up meddling by a hostile government in a presidential election.

A GLOBAL UNRAVELING

Trump and Trumpism are American phenomena, but they arose within a context that is undeniably global. Under Boris Johnson in the United Kingdom, the Tory Party is transforming in a manner similar, if more benign, to that of the Republican Party. The French right has fallen behind the National Rally (the new name for the far-right National Front). And the Turkish right has remade itself in the image of a strongman, Recep Tayyip Erdogan. Together, these and other cases demonstrate not just polarization but a complete unraveling of the old political order.

How and why this unraveling has happened is not self-evident. The first place to look for an answer is in the major, crosscutting economic trends of the present era: globalization and the rise of digital and automation technologies, both of which have induced rapid social changes coupled with unshared gains and economic disruptions. As institutions proved unable or unwilling to protect those suffering from these transformations, they also destroyed public trust in establishment parties, the experts claiming to understand and better the world, and the politicians who appear complicit in the most disruptive changes and in cahoots with those who have stealthily benefited from them.

From this perspective, it isn’t sufficient to decry the collapse of civic behavior or even to defeat toxic populists and authoritarian strongmen. Those who seek to shore up democratic institutions must build new ones that can better regulate globalization and digital technology, altering their direction and rules so that the economic growth they foster benefits more people (and is perhaps faster and of a higher quality overall). Building trust in public institutions and experts requires proving that they work for the people and with the people.

### AT: Megacities---1NC

#### No mega-cities impact---asserts threats---doesn’t say megacities solve them or they’re existential.

### AT: Sharing Economy---1NC

#### No sharing economy solvency---their evidence is theoretical about alternative structures like the sharing economy. Even if they solve it, takes decades to emerge.

#### No internal link---Air B&Bs don’t solve mass poverty and environment.

#### No resources impact.

Agha BAYRAMOV 18. PhD candidate and lecturer at the department of International Relations and International Organization of the University of Groningen. “Review: Dubious nexus between natural resources and conflict.” *Journal of Eurasian Studies* 9(1): 72-81. Emory Libraries.

The arguments of scarcity adherents have been challenged by a number of scholars in terms of qualitative and quantitative findings. According to Stern (2016) the assumptions underpinning the scarcity notion are illogical due to the exaggeration of threats arising from oil ownership from misperceptions of market information. Furthermore, Koubi et al. (2013) explain that despite their strong empirical explanations, scarcity scholars have weak quantitative research results ones that fail to prove the link between resource scarcity and intrastate or interstate conflict. The reason for this is that some large-N findings contradict early results, which illustrate that the scarcity-conflict nexus is more complicated than scarcity scholars would have us believe. Dinar (2011), meanwhile, argues that natural resource scarcity may in fact be an important force for cooperation between states. However, scholars of natural resource scarcity have hitherto ignored the ways in which scarcity can spur cooperation (Deudney, 1999).

Considering these findings, three conclusions can be drawn from this section. First, scarcity is a complex term and it should not be equated with only natural resources. As it is explained by Kester (2016) some countries may suffer from scarcity of technical, knowledge and human capacity rather than natural resources. In light of this, without a proper capacity it is also possible to have scarcity within abundancy of resources. While supporting the scarcity argument, Andrews-Speed (2015) offer an alternative explanation that natural resources are not physically scarce but there are indeed economic, political, environmental and equity barriers that can lead to a scarcity of natural resources. Due to the strong rule of law, decent neighbourly relations and existence of strong norms for compromise and of multilateral institutions, the North Atlantic countries are highly unlikely to utilize force against or declare war to each other. However, these dimensions and buffers are currently lacking in the Middle East, Africa and Asia. As such, the U.S and Europe should work closely with these regions to prevent any resource disputes erupting (Andrews-Speed 15). Similarly, Gleditsch (1998) explains that some highly developed countries have population density, clean water, and land degradation problems but they still do not suffer from environmental violence. Thus the main issue might be that poor economic development, rather than environmental scarcity, leads to conflict. Kester (2016) names this situation as “second-order-scarcity” which refers to a lack of technology, economic capacity, and knowledge to stop resource scarcity. In this regard, it may be scarcity, itself, rather than natural resources that leads to conflict.

Second, conflict can be defined differently based on different dimensions. However, the common consensus is that conflict consists of multiple dimensions (political, economic, environmental, historical, cultural, and geographical etc.) rather than single factor. In this regard, scarcity of natural resources is not strong enough, by itself, to induce either interstate or intrastate conflict. It needs in fact to interact with other variables. Finally, related to the previous reasons, scarcity of natural resources might be a contributing or marginal reason for rather than the root cause of a given conflict. In other words, it needs to interact with non-resource factors in order to cause violence.

### Courts---1NC

#### Plan nukes regulatory certainty AND creates vagueness that monopolists exploit to dodge enforcement

D. Daniel Sokol 9, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Limiting Anticompetitive Government Interventions That Benefit Special Interests”, George Mason Law Review, 17 Geo. Mason L. Rev. 119, Fall 2009, Lexis

Antitrust litigation produces regulatory uncertainty because different courts may rule inconsistently with the same set of facts. Anecdotal evidence indicates that when courts do not understand complex antitrust issues, they rule based on a highly procedural formalism. 140 These problems of procedural formalism in antitrust decisions create particular concerns in conduct cases or with regard to penalties for conduct, regardless of the origin of the legal system. 141 For example, in New Zealand, telecommunications regulation focused on a general antitrust solution in conjunction with courts rather than with sector regulation. 142 In a case involving interconnection rates within telecommunications between the incumbent provider and a new entrant for access to the local loop, the case took five years to decide, with significant procedural delay. 143 The lack of the New Zealand judicial system's understanding of the complex pricing issues and methodologies for interconnection underlying the case meant that the conflicting court decisions left little certainty-none of the courts came up with a specific interconnection price. This enabled the incumbent Telecom Corporation to maintain its monopoly position, and it left the victims of its anticompetitive behavior without any effective means of redress. 144 A similar problem occurred in Chile, where the Chilean Supreme Court recently overruled the Chilean Competition Tribunal in cases regarding tacit collusion based on procedural rather than substantive grounds, and where it seemed apparent that the Supreme Court did not understand the antitrust issues. 145 [\*148]

#### Courts will mis enforce.

Thomas Leary 8. Hogan & Hartson Law Firm, Former Commissioner at the Federal Trade Commission; Antitrust, “Perspectives on the Future Direction of Antitrust,” vol. 22

About thirty years ago, antitrust jurisprudence began to focus on economics rather than populist slogans. After some initial resistance, this new approach gained wide acceptance. Unfortunately, some courts have not recognized that economics is still an evolving discipline, and have failed to apply William Baxter’s admonition that a “sensible antitrust policy” should be “based on whatever it is we know at any particular moment about the economics of industrial organization.”

This failure is illustrated by three recent FTC defeats in the federal courts. Each case had special factual issues, but a common thread was the inability of the courts to absorb unfamiliar economic ideas.

The Eleventh Circuit’s 2005 Schering opinion on litigation settlements between pioneer and generic drug manufacturers was dead wrong on the burden of proof when infringement is disputed and in its application of the substantial evidence standard. But the court also was unable to appreciate the unusual economics of the industry, which enabled generics to profit more from litigation settlement than from outright victory. The usual judicial preference for settlements will simply eviscerate the Hatch-Waxman Act, designed to encourage litigation to judgment in this particular area.

The D.C. District Court in Whole Foods (2007) focused on price effects, usually a traditional and sound approach. But price was not the only significant dimension of competition between the merging grocery chains. They were the two largest providers of an innovative and differentiated shopping experience for consumers of premium “organic” foods. Whole Foods was not interested in the Wild Oats stores or its cash flow; it wanted to eliminate a chain that presented a unique competitive threat. We know that because the CEO said so, in unusually candid statements that the court simply ignored.

The D.C. Circuit Court in Rambus (2008) ignored factual findings, applied a questionable evidentiary standard, and wrongfully concluded that Rambus might have merely exploited an existing monopoly. It also failed to fully appreciate that demand side distortions (in the “market” for competing technologies) are just as economically harmful as the supply side distortions with which antitrust is usually concerned, and that proof of deception can depend on the reasonable subjective expectations of an audience.

These decisions also indicate that many courts no longer recognize the FTC’s special mission to provide purely prospective antitrust guidance. An extensive body of judicial precedent may have undercut the importance of this mission, and private litigation realities diminish prospects for purely prospective guidance. Out of frustration, the FTC may begin to rely more on its Section 5 unfairness authority. This could lessen the risk of retroactive consequences in private litigation but could also awaken concerns about revival of less disciplined agency discretion. More aggressive deployment of Section 5 would not necessarily be a retrograde step, however, so long as the agency remembers that freedom to enter uncharted territory beyond precedent is not the same as freedom to ignore evolving economic principles.

#### Plan’s clarity doesn’t solve Court Circumvention.

Daniel Crane 21. Frederick Paul Furth Sr. Professor of Law at UMich (, Antitrust Antitextualism, 96 Notre Dame L. Rev. 1205 (2021). Available at: <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>

Limitations of Writing Clear Statutes This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation? The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

## States CP

### AT: Perm Do Both

#### Perm do both links to the net benefit. We didn’t read a politics DA which is their only link shields argument as of the 2AC!

### AT: Perm Do the CP

#### Perm do the CP is severance. CP might be an example of enforcement, but implementation must include USFG action---makes the Aff a moving target that sheds neg ground. Their evidence says state becomes “federal” i.e. in theory lean towards FEDERALISM—all of our PDCP answers on regs apply!

### AT: 50 State Fiat

#### 50 state fiat is good. 2AC warrant is 50 state fiat not uniformity so they don’t get new offense on that since the 1NC CP text clarified uniformity.

#### 1. Key to functional limits. Only check for tiny affs with no defense of a federal actor. Alternative is prolif of random prohibitions with no link to core DAs.

#### 2. It’s key to real world education. Non-uniform fiat zeroes solvency for the CP. 50 State action over antitrust has precedence.

Mark Totten 15. Mark Totten worked as an attorney with the [U.S. Department of Justice](https://ballotpedia.org/U.S._Department_of_Justice). He currently works as a criminal law professor at Michigan State University. He graduated from Yale University. “The Enforcers & the Great Recession” 06-22-2015. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2535109

In mid-October **all fifty AGs** announced a **joint investigation** of the mortgage servicing industry.219 A **fifty-state action has precedent** but is nonetheless rare. And yet the **coalition formed** with **ease**. 220 Although the Working Group had been a policy project, it provided the infrastructure for legal action. Iowa AG Tom Miller again led the effort,221 and California, Illinois, and New York joined the Executive Committee, among other leading states. 222

#### 3. Aff choice checks their offense. Reject the arg not the team.

#### 4. The judge has the power to compare the CP to the plan. Debate is a game of weighing different policy options, not a mirror of congress or the real world.

#### 5. It doesn’t force contrived advantages, just good ones that you don’t cut to massively overcorrect for the cap K! they can read disads to states, impact turn, or choose larger areas with preemption deficits.

### AT: Capture

#### No regulatory capture! This card is STATUS QUO descriptive! Their evidence says that SOME state constitutions protect economic liberty and others do not---it concludes that states FAIL at DE REGULATION, the CP is in the OPPOSITE direction!!

Gerald S. Kerska 17, J.D. Candidate 2017, University of Minnesota Law School, “Economic Protectionism and Occupational Licensing Reform,” 101 Minn. L. Rev. 1703, April 2017, Lexis

3. Federal Antitrust Law

Finally, the Supreme Court's decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission has opened up new and exciting possibilities for challenging licensing board activities. 199 The Court's decision requires states to actively supervise licensing boards when they are comprised of market participants. 200 At least one significant challenge has already relied heavily on North Carolina State Board. In Teladoc, Inc. v. Texas Medical, plaintiffs sued the Texas Medical Board under the Sherman Act when the Board adopted a regulation prohibiting the diagnosis of medical conditions via video conference. 201 The state of Texas did not raise antitrust immunity in the case. 202 Judge Pittman did, however, grant a preliminary injunction in favor of the plaintiffs based on antitrust law. 203 Ultimately, the ability of antitrust law to curb overreaching licensing boards is not yet clear, but if Teledoc is any indication, it is off to a promising start.

None of these alternative avenues of attacking occupational licensing laws is a silver bullet. Some state constitutions protect economic liberty; others do not. State administrative and federal antitrust laws are similarly narrow. Between these three possibilities, however, a fair number of restrictive licensing laws could be defeated. Both the difficulties in discerning economic protectionism and the existence of alternative solutions [\*1740] counsel against adopting heightened review of illegitimately motivated licensing laws. The final Part of this Note concludes by arguing that Congress needs to spur licensing reform efforts and lays out a plan describing how it might do so.

IV. REFORMING OCCUPATIONAL LICENSING LAWS WITHOUT FEDERAL JUDICIAL INTERVENTION: REVIVING THE INDIANA PLAN

This Note argues throughout that existing Supreme Court precedent does not support federal courts striking down occupational licensing laws and that heightened review should not be extended to reach such a result. 204 Closing the doors to federal courts does not also foreclose the possibility of licensing reform. Congress can encourage states to take action. This Part proposes a grant program wherein Congress would fund state sunset laws to study and eliminate occupational licensing requirements. First, Section A explains why federal intervention is necessary. Second, Section B introduces two current efforts at the national level and argues that neither will lead to significant changes. Third, Section C concludes by describing a grant program that would promote sunset commissions while leaving plenty of discretion to state governments.

A. Why Federal Involvement Is Needed To Solve the Occupational Licensing Problem

Congress should promote occupational reform not because federal intervention into state economic policy is desirable, but because it is the best of competing alternatives. States have had little success in solving this problem on their own; 205 interstate travel has not spurred a race to the top. 206 Nor is it desirable to charge judges with conducting the case-by-case cost-benefit analysis required. 207 A grant program that promotes reform [\*1741] efforts, while leaving a wide berth for state innovation, is the best of competing alternatives.

The states have created a mess of overly restrictive, inconsistent, and economically damaging licensing requirements. 208 Just as they have created the problem, state governments have failed to lead reform efforts. Indeed, only eight professions have ever had their licensing requirements removed. 209 Over the past five years, several efforts to enact broad reform bills have died in state legislatures. 210 States may be vulnerable to interest group capture, and for legislation involving occupational licensing, interest groups have strong incentives to fight against reform. 211 Making matters worse still, state governments collect substantial revenue from licensing fees, and thus deregulation can create short-term budget shortfalls. 212 Whatever the main barriers to deregulation efforts that engender bi-partisan support might be, they have thus far blocked any meaningful reforms.

Another possible solution would be to continue letting states compete for new entrepreneurs that arrive via interstate travel. As mentioned earlier, there is very little variation between states on practicing professions, but there is substantial variation in whether states license any particular profession. 213 Ilya Somin points out that forty-three percent of Americans have lived in two or more states, and that those with low incomes are twice as likely to move interstate. 214 Further, economic considerations are the most likely factor to motivate interstate movers. 215 Despite an environment that appears favorable to interstate migration putting pressure on legislatures to [\*1742] deregulate, however, there is little difference in how many low-income professions are licensed per state. According to the Institute for Justice's License To Work study, the average state licenses forty-three low-income professions, with a standard deviation of only ten. 216 Indeed, rather than leading to deregulation, the patchwork of licensing laws nationwide has given rise to a substantial increase in licensure over the past fifty years. 217

Judges - either state or federal - could be a third option for reforming licensing laws. This could come by way of legislatures creating an occupational licensing cause of action that permits courts to apply intermediate scrutiny, 218 or it could come via constitutional interpretation. This Note previously argued against the latter. But any cause of action requiring heightened scrutiny will also require both an economic estimation (how much public value) and a corresponding policy determination (how much regulation is appropriate). 219 Judges have limited resources, clogged dockets, and most of them are not labor economists. 220 All things being equal, it seems unobjectionable that it would be better for elected or appointed officials to conduct the required cost-benefit analysis. They are not limited to the record evidence presented by the parties and are politically accountable for the choices they make about the level of regulation that should be imposed.

Finally, Congress could pass an aggressive program that federalizes occupational licensing requirements or that gives a federal agency the power to preempt licenses on a case-by-case basis. A law like this would easily survive a Commerce Clause challenge based on the overall economic effects of licensing [\*1743] laws and their impact on interstate migration. 221 But states have long managed their own licensing regimes. The Supreme Court observed in Dent v. State of West Virginia: "It has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely… ." 222 States have always maintained their own licensing laws. Any national solution should thus respect federalism to the greatest extent possible. This counsels against aggressive federal intervention.

A grant problem avoids some of difficulties present in each of the alternatives rejected in this Section. A federal grant program respects federalism by allowing states to decide whether to participate and by allowing states to fashion their own reform efforts. Any such program would require cost-benefit analysis to be conducted by democratically accountable public officials. And finally, a grant program can be designed to counteract the political process failures at the state level that currently make reform impossible. Before turning to what such a federal program should look like, we will turn briefly to a discussion of why existing federal reform efforts are inadequate.

B. The Current Reform Proposals in Congress and the White House Plan Are Both Inadequate

There are two main proposals in place for reforming occupational licensing laws. The first is a program established by the Obama administration that gives independent groups money to work with state legislatures. 223 The second is a bill proposed by Mike Lee and Ben Sasse that operates primarily by [\*1744] reforming licensure in the District of Columbia. 224 Neither of these options show much promise.

The White House program is unlikely to be effective because it targets the wrong part of occupational licensing reform. In its current form, the grant program gives funds to non-profit organizations to work with state governments. 225 But the problem over the past several years is not getting licensing reform bills to legislatures; it is getting legislatures to pass them. 226 Indeed, the Bureau of Labor Statistics reports that collective reform bills made it to committee in nine states over the past five years, yet each time the bill either died or was passed without removing licensing requirements. 227 A program designed to send more bills into the dysfunctional political process seems doomed to run up against the same resistance that defeated past reform efforts in the first place.

Senator Mike Lee proposed the Allow Act in 2016. 228 This legislation would institute licensing reform measures in the District of Columbia. 229 It provides for increased state supervision of licensing board activities; creates a requirement that cost-benefit analysis be conducted on every licensing law every fifth year; and provides for a statutory cause of action, which imposes intermediate scrutiny on licensing requirements. 230 Lee's proposal is unlikely to change licensing practices nationwide. Widespread consensus about the economic benefits of deregulation and potential competition for interstate migration have not led to reform. 231 Why would reducing the licensing burden in the District be any different?

Both of these reform efforts are unlikely to precipitate needed changes at the state level. They both fail to account for factors that defeated past efforts to reform licensing laws. To make a non-trivial difference, the federal government needs to increase its commitment to this issue. The next and final Section of this Note proposes an alternative federal grant program.

[\*1745]

C. Letting the Sun Set on Licensing Laws by Taking the Failed Indiana Plan National

Congress should invest additional resources in occupational licensing reform through a more aggressive grant program than the one currently in place. Congress should encourage states by providing monetary incentives substantial enough to defray the costs of setting up reform commissions and to offset the short-term licensing fee losses. Morris Kleiner suggests that because reform committees do not run heavy administrative costs, take-up incentives for states would not need to exceed ten million dollars. He further notes that "every dollar spent on those incentives is likely to generate more than a dollar in new economic activity: the plan will more than pay for itself." 232 But what should such a grant program look like?

A failed effort in Indiana provides a model. In 2013, a bi-partisan group of senators introduced S.B. 520. 233 The bill created an appropriately titled Eliminate, Reduce, and Streamline Employee Regulation (ERASER) Committee to analyze occupational licensing laws. A number of low-income professional licenses in Indiana would be reviewed through cost-benefit analysis on a five-year cycle. 234 All licensing laws would automatically expire during their designated year unless reauthorized by the state legislature. 235 The bill put licenses for auctioneers, interior designers, and beauty culture on the chopping block; it passed the senate thirty-six to thirteen. 236 After moving to the house of representatives, the bill died in committee - where it remains buried today. 237

Congress should use the failed ERASER Committee as a model for a grant program. Sunset legislation provides important benefits. First, by setting an expiration date on a particular [\*1746] law, state legislatures force themselves to actually vote on reauthorization. By shifting the default rule from reauthorization to deregulation, politicians lose the ability to kill legislation in committee. 238 Second, by singling out each profession for an individual vote, sunset legislation stops interest groups from joining forces to defeat broader legislation. 239 Third, periodic review of many licenses promotes fairness. Professions should not be reviewed for deregulation based on the clout of their respective trade association.

To put this ERASER grant proposal into place, a federal agency - perhaps the Department of Labor - should be charged with administering the program. 240 Any such agency should conduct a study that recommends a set of professions that do not need licensing laws - identifying as well those professions where registration or certification would suffice. 241 Subject to a minimum requirement, states should be able to choose the professions to be put on sunset. States should also be able to propose the composition of their ERASER committees, subject to agency approval. 242 Finally, commissions should be required to conduct cost-benefit analysis and make the results public. This requirement helps reform-minded legislators argue in favor of deregulation. But public cost-benefit analysis would also help state and even federal courts conduct informed judicial review in the future if necessary. 243

[\*1747] Finally, the timing could not be more perfect for Congress to pass meaningful legislation addressing occupational licensing reform. Both Democrats and Republicans support deregulation. 244 State governments are trying and failing to pass comprehensive deregulation measures. 245 A grant program that promotes the Indiana model would be relatively inexpensive, easy to manage, and would force states to confront their most onerous licensing laws.

CONCLUSION

Occupational licensing laws enacted by state governments at the behest of special interest groups pose a serious problem in the United States. They are a drag on the economy. They push workers into unemployment and deny citizens their freedom to engage in their chosen profession. Three courts of appeals have decided that economic protectionism cannot support state action. Rather than engage with the soundness of that determination, this Note asks a different question: If economic protectionism is illegitimate, then what role should such a principle play under the Fourteenth Amendment?

Under Supreme Court precedent, a finding of economic protectionism cannot result in the invalidation of occupational licensing laws. The rational basis standard is simply too deferential to support that result; nor is economic protectionism the kind of bad motive, like animus, that supports heightened judicial review. This Note also argues that courts should not extend heightened review to laws motivated by economic protectionism. Such a principle would ask too much of the judiciary, encompass too much state action, and would stunt the development of other doctrinal areas that can already provide a remedy for restrictive occupational licensing laws. To be sure, compelling arguments exist for increased judicial protection of economic liberties, but a strong anti-economic protectionism principle is both pragmatically and theoretically unsound.

[\*1748] This Note concludes that Congress is the correct branch of government to solve the nationwide occupational licensing problem. State governments have failed and continue to fail in deregulation efforts. A federal grant program that encourages the adoption of sunset commissions could spur deregulation at the state level, while at the same time maintaining respect for the historical role of state governments in licensing their citizens. This would also take the pressure off of the federal judiciary. Democrats and Republicans agree on the importance of occupational licensing reform. Congress should transform that widespread agreement into meaningful legislation that breaks down unnecessary barriers to the American Dream.

#### It’s also not key to solve any of their advantages because NO 1AC card ties a solvency deficit to an impact!

#### Their Crane evidence says that states are enforcing anti-competitive regulations and then lists out exactly what those are (NONE! Of which NU can point to in 1AC cross ex) the CP stops the states from adopting them. Their author concedes that one “democratic” avenue is to do the CP and that there’s alt causes to the plan! [EMORY GK]

Daniel A. 1AC Crane 19, Frederick Paul Furth Sr. Professor of Law, University of Michigan, “Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses,” 60 Wm. & Mary L. Rev. 1175, Lexis

[\*1177] INTRODUCTION

This Article's intended audience holds a common view that state and local governments frequently adopt anticompetitive regulations for the benefit of economic special interests and that these acts of cronyism are pernicious to democracy, consumers, and economic efficiency. 1 In other words, the costs to society of these regulations far outweigh any reasonable benefits. A wise, beneficent, and all-knowing Platonic guardian of the state would have little trouble in striking down such regulations.

A further point of general consensus might relate to the particularly pernicious effect of anticompetitive state and local regulation in stifling new production innovation. In a variety of ways, our constitutional order is stodgy. Its conservatism lends a hand to the beneficiaries of incumbent technologies as they seek to deploy state power to block or to slow the advent of new technologies that may eventually displace the old, thereby preventing a realignment of wealth and position. In recent years, innovative technologies developed by companies such as Tesla, Uber, Lyft, and Airbnb have encountered determined opposition from purveyors of predecessor technologies, who have often used state and local regulation to thwart innovation. 2 So much for the common ground. Where consensus quickly fragments is on the question of what, if anything, to do about such regulations given that wise, beneficent, and all-knowing Platonic guardians of the state are in short supply. In the imperfect messiness that is liberal democracy, we frequently accept a host of comparatively petty inconveniences--political and economic--in order to preserve larger values. Just as we tolerate many market failures because the attempt at a regulatory fix might aggravate matters, we may have to tolerate some political failures on the same grounds. [\*1178] Much of the difficulty has to do with the fact that while there might be a broad consensus that state and local governments enact many unjustifiable anticompetitive regulations, there is not a clear consensus on which ones they are. The experience with economic substantive due process in the late nineteenth and early twentieth centuries, epitomized in Lochner v. New York, 3 has left the American political psyche gun-shy about permitting judges to strike down protectionist economic regulations on constitutional grounds. Shortly after getting out of the Lochner business, the Supreme Court announced that it would not get into the same business under the guise of the antitrust laws. 4 Over time, the development of the Parker state action doctrine allowed the courts to play a somewhat expanded role with respect to anticompetitive state and local regulations, but the zone of judicial review remains relatively constricted. 5 The purpose of this Article is to compare the deployment of constitutional and antitrust tools to scrutinize potentially anticompetitive state and local regulations against the backdrop of the ubiquitous concern about "Lochnerizing" under the auspices of either constitutional or statutory authority. Here is the question in a nutshell: If one believes that courts (or perhaps federal administrative agencies) should do somewhat more than they currently do to scrutinize and potentially invalidate anticompetitive state and local regulations, which lever should they pull--constitutional doctrines, antitrust preemption, or both? Because there are some overlapping, and some separate, institutional constraints and potential pathologies between constitutional and antitrust law, it is important to compare the two tools before deploying them. This Article is organized as follows: Part I diagnoses the underlying features of democratic government that produce anticompetitive regulation. Some of this story is quite familiar, but I present some new observations with respect to the role of technological incumbency as a strong factor in invoking regulation to thwart innovation. [\*1179] Part II explores the historical, ideological, and institutional foundations of the current legal doctrines with respect to constitutional and antitrust scrutiny of anticompetitive regulations. It shows that, despite the narrowing of Parker immunity in recent decades and some recent revival of equal protection and substantive due process as constraints on anticompetitive regulation, a good deal of anticompetitive state and local regulation remains impervious to legal challenge. Part III compares the potential efficacy and pitfalls of deploying constitutional or antitrust doctrines as checks on anticompetitive state and local regulations. It considers: (1) the reach and domain of constitutional and antitrust theories; (2) the ways in which each theory could accommodate genuine and sufficient justifications for the challenged regulations; (3) ways in which the antitrust and constitutional tools differ substantively and procedurally; and (4) ways in which the two theories might interact. I. WHY ANTICOMPETITIVE REGULATION SUCCEEDS This Article opened with the assumption that a wide universe of unjustified state and local anticompetitive regulation exists that a benevolent Platonic guardian of the state would instantly nullify. Given this conceit, the presence of such regulations necessarily represents democratic failures, as democracy should, in principle, strive for laws that confer positive, rather than negative, public benefit. What, then, accounts for the pervasive existence of these undesirable regulations? The answer comes in two parts--a generic (and largely familiar) story concerning anticompetitive regulations as a whole, and a more specific story concerning the battle between incumbent and innovative technologies. A. The Generic Story The generic story is largely familiar from public choice theory and the literature on the Parker state action doctrine. Democratic processes systematically fail to overcome two embedded hurdles to matching regulatory schemes to broad public preferences: (1) the asymmetrical distribution of costs and benefits of anticompetitive [\*1180] regulations, and (2) the externalization of costs on populations outside the boundaries of the relevant democratic unit. 6 In tandem, these hurdles to democratic correction of cronyistic dispensations of monopoly power by governmental regulators perpetuate regulatory schemes that a broad majority of citizens would vote to overturn if they understood the issue and were sufficiently motivated to invest political energy in correcting it. 7 The first democratic deficit, well documented in public choice literature, arises because producers typically receive a much more concentrated benefit from anticompetitive regulations in comparison to the relatively unconcentrated cost imposed on consumers. 8 A small band of producers may lobby aggressively to enact or maintain an anticompetitive scheme that permits the producers to collect significant monopoly rents. 9 Those rents, in turn, may be spread across thousands or millions of consumers, each one paying a relatively small increase in rent. 10 Collective action constraints--the cost of mobilizing consumer sentiment and action to oppose the regulation--give the producers a systematic advantage in maintaining the regulation. 11 As John Shepard Wiley explained in bringing public choice theory literature to bear on Parker immunity questions: [I]f the group [of consumers] is large, individual members have little incentive to participate because participation is personally costly and contributes little to the group's chances for successful joint action. Small groups encounter fewer of such problems. If group members behave in this rational self-interested manner, then "there is a systematic tendency for exploitation of the great by the small"; less numerous, more intensely concerned special [\*1181] interests can predictably outmatch more numerous, more mildly concerned consumer or "public" interests in legislative or regulatory fora--even though the actions of special interests impose a net loss on society. 12 The second deficit arises when governmental units--whether state or local--externalize the costs of the anticompetitive regulation outside their jurisdiction. The classic example is Parker itself, in which 90 percent of the raisins subject to California's agricultural cartel mandate were sold outside of California. 13 Out-of-state consumers could not be counted on to mobilize democratically to oppose the California regulation, as they had no political voice in California. 14 Many similar examples of jurisdictional cost externalization have been documented. 15 One arose in an important Supreme Court decision on state action immunity, Town of Hallie v. City of Eau Claire. 16 Hallie, Seymour, Union, and Washington were unincorporated towns adjacent to the city of Eau Claire, Wisconsin. 17 Their citizens could not vote in Eau Claire, but Eau Claire wanted to annex those territories into its boundaries, possibly through coercive means. 18 Eau Claire received federal funds to build a sewage treatment plant in its service area, which covered the four towns, then refused to supply sewage treatment services to the towns. 19 However, the city did agree to provide treatment services to certain homeowners in the towns if a majority of area voters voted by referendum to allow Eau Claire to annex their homes and to commit to use Eau Claire's sewage and transportation services. 20 The towns claimed this scheme was designed to keep the other towns from effectively competing with Eau Claire's sewage collection and transportation services. 21 The scheme also possibly allowed the [\*1182] city to raise costs for nonresidents while at the same time leveraging the higher prices to bring the nonresidents (and presumably their property taxes) into the city. 22 Although the city's motivation was ultimately political rather than narrowly economic, it used an anticompetitive strategy to dump monopoly costs on nonresidents who could not vote to rescind the regulations until they joined the city, at which point the question would be moot. 23 Together, these two deficits--asymmetrical costs and benefits to both producers and consumers and cost externalization--explain why democratic processes often fail to weed out anticompetitive regulations. Without concerted efforts by champions of consumer interests to overcome collective action problems and mobilize support for regulatory reform, the regulatory barriers to competition can linger indefinitely. As discussed next, these failures of democratic self-correction are exacerbated by regulations that entrench incumbent technologies at the expense of innovation. B. Additional Considerations Affecting Product Market Innovation Many of the contemporary regulatory battles between old and new technologies (particularly those involving the sharing economy) can be understood as follows. The incumbent regulatory scheme arose many decades ago and may well have been legitimately justified (in the sense of not imposing more costs than benefits) at the time of its adoption. 24 Our hypothesized Platonic guardian might even have approved of it at the time of its adoption. 25 The passage of time and advent of new technologies has now eroded the original basis of the regulation, and our Platonic guardian would therefore want the regulation rescinded or reformed. However, incumbent firms succeed in blocking or slowing innovative competition by circling the wagons around the incumbent regulatory schemes. 26 In [\*1183] these wars, the incumbents have a decisive advantage for at least three structural reasons.

First, if the incumbent regulatory scheme has allowed the incumbent firms to collect monopoly rents, then there may be a sharp asymmetry of incentives between old and new firms. 27 This is the same asymmetry that attends any struggle between incumbent monopolists and new competitive entrants: the monopolist is seeking to protect a large market share at a monopoly price, whereas the new entrant can only hope to gain a smaller market share at a competitive price. 28 Because the incumbent has more to gain than the new entrant has to lose, the incumbent will be willing to spend more to entrench the regulatory monopoly than the new entrant will be to challenge it. 29 This, in turn, discourages potential new entrants from investing in innovative new technologies and mounting political and market-oriented challenges to the incumbents. 30

Second, the incumbents have the advantage of status quo biases and fears about the consequences of technological change. 31 Costs of the existing system--to human safety, for example--may be seen as an inevitable baseline, whereas potential risks from the new technology may be seen as incremental threats. 32 Hence, risks and costs of the existing system may be undercounted or not counted at all, while risks and costs of the new system will be made to bear the full weight of their risks and costs.

For example, in recent months there have been widely reported stories of Uber drivers sexually abusing passengers. 33 These stories rarely report the base rate of abuse by taxi drivers or public transit [\*1184] workers, who might well present similar risks to passengers. 34 Similarly, the news media seem to wait with bated breath to report every accident involving a driverless vehicle 35 --even ones where the vehicle was stationary and hit by another at-fault vehicle--without reporting the base rate of nearly 40,000 deaths a year from human-driven vehicles. 36 The focus of news reporting seems to be on the incremental risks created by automated driving without regard to the baseline number of deaths that automated driving might diminish. 37 In principle, regulators should compare the likely risks of allowing new technologies to those of perpetuating the incumbent technology, but they often default to some version of the precautionary principle, insisting that new technologies prove their safety and efficacy in an absolute rather than comparative sense. 38 Given this baseline asymmetry, proponents of new technologies frequently must overcome significant regulatory hurdles not faced by incumbent technologies. Or, incumbent technologies may persuade regulators to force new technologies to play by rules that favor the incumbent technologies--a form of raising rivals' costs and creating regulatory entry barriers. 39

Finally, incumbents enjoy the generic benefits of incumbency in a structurally conservative constitutional and political system. The multiple "veto gates" to reform legislation--structural factors such as bicameralism, presentment, filibusters, and committee structures 40 --empower technological incumbents to ride the status quo for years or decades after our hypothetical Platonic guardian would have instituted public-minded reforms. 41

[\*1185] In combination, these three factors create additional barriers to the expected flow of democratic processes toward majoritarian equilibria--that is to say, equilibria that favor consumers' interests in competition and innovation over those of producers in capturing monopoly rents. In light of these factors and the collective action and cost externalization factors discussed earlier, 42 it is unsurprising that regulation serves as a barrier to innovation.

C. An Illustration from Automobile Distribution

The ongoing story of Tesla's efforts to break into the American automobile market illustrates the stickiness of incumbent regulations. 43 For a variety of business reasons, when Tesla entered the market in 2012, it decided that it would have to sell its all-electric vehicles (EVs) directly to consumers, meaning that it would have to open its own showrooms and service centers rather than outsourcing that function to franchised dealers. 44 Among other things, Tesla believed that traditional dealerships would be reluctant and ill-positioned to sell EVs and that Tesla therefore could not expect to convince already skeptical customers to buy EVs unless it opened its own retail facilities. 45 Since the mid-twentieth century, however, most states have adopted laws intended to protect dealers from unfair exploitation by manufacturers. 46 Among the provisions in many of these state statutes is a prohibition on a manufacturer opening its own showrooms and service centers. 47 In many states, manufacturers are required to distribute through independent dealers only. 48

Legislatures adopted these direct distribution prohibitions at a time when American car manufacturing was dominated by the "Big Three" (Chrysler, Ford, and General Motors) and many dealers were [\*1186] "mom and pop" businesses. 49 State legislatures were convinced that the dominant manufacturers were taking advantage of their franchisees by selling cars through their company-owned stores at lower prices than the dealers could afford to charge given the wholesale prices charged by the manufacturers. 50 The direct distribution prohibitions were justified as correcting a severe imbalance in bargaining power leading to contracts of adhesion and unfair exploitation in manufacturer-dealer relations. 51

Assuming that dealer protection rationale made sense in circa 1950, its basis has almost entirely vanished today. With the advent of competition from Europe and Asia, the Big Three are no longer dominant. 52 Dealers have many choices of automobile franchisors and hence considerably more power in negotiations over franchise terms. Further, the dealers are no longer mostly mom and pops. 53 Rather, most dealers are organized into multi-dealer groups, many with hundreds of millions or billions of dollars in annual revenue. 54 Indeed, some of the largest dealer groups have more annual revenue than Tesla. 55 Most significantly, the dealer protection rationale has nothing to do with a company such as Tesla that does not seek to distribute through dealers at all. 56 No dealers, no dealer exploitation.

Recognizing that the dealer protection rationale that justified the original statutes no longer works, the dealers have attempted to recast the direct distribution prohibitions as consumer protection decisions. 57 They have argued that forcing consumers to buy automobiles from dealers rather than from manufacturers will lead to more price competition, and hence lower prices, and prevent [\*1187] consumers from manufacturer exploitation. 58 These consumer protection arguments have been roundly rejected by economists, 59 the Federal Trade Commission (FTC), 60 and major proconsumer groups such as the Consumer Federation of America, Consumer Action, Consumers for Automobile Reliability and Safety, and the American Antitrust Institute. 61 Nonetheless, the dealers have succeeded in using the existing structure of dealer protection laws to block or slow Tesla's direct distribution program in a number of states. 62

The Tesla story evidences most of the factors that contribute to the persistence of anticompetitive regulations. The dealers have a concentrated interest in preserving their protected position, while the costs of that protectionism are spread out over millions of consumers. In the state with arguably the most pernicious record with respect to direct distribution reform--Michigan--there is a record of antireform advocacy by a leading incumbent--General Motors--and acquiescence by the political class to protect an in-state champion against an out-of-state challenger. 63 Even though consumers complain more about car dealers than about any other business, indicating the baseline system is not particularly attractive to them, 64 the dealers have invoked fears about the risks of direct distribution in opposition to legislative reforms. And legislative [\*1188] inertia has slowed the consideration of reform bills in some states, extending the incumbent regulatory scheme long past its reasonable expiration date. 65

The structural factors weighing against proconsumer and pro-innovation reforms will not block Tesla forever. The company has already seen significant successes in some state legislatures and courts and is progressively penetrating the market. 66 Yet it would be misguided to consider the company's eventual success a reason not to worry about the structural factors entrenching anticompetitive regulations, especially those foreclosing innovation. No monopoly is permanent--even the most persistent are eventually eroded. 67 Innovative technologies will almost always find a way out eventually, despite incumbent machinations. 68 What incumbents can buy is not monopoly in perpetuity but in extension. 69 Those years or decades of extension are costly to society. They represent significant overcharges to consumers, misallocations of social resources and, in the extreme, impairment to health and safety-- even lives lost. 70

Not every instance of anticompetitive state or local regulation exhibits the full set of explanatory factors discussed in this Article as cleanly as the ongoing Tesla saga does. Yet the Tesla story is more paradigmatic than idiosyncratic. Across the economy, incumbent technologies are structurally advantaged to deploy regulatory forces to stifle or slow innovation.

[\*1189] II. CONSTITUTIONAL AND ANTITRUST PRINCIPLES AS A CHECK ON ANTICOMPETITIVE REGULATION

If democratic processes fail to check anticompetitive state and local regulations on a systematic basis, then what can be done about it? Among the potential tools are institutional efforts to address the quality of legislation and regulation through democratic processes, such as creating governmental competition advocacy bodies within state and local governments or using federal purse strings to incentivize state and local governments to reevaluate their regulations. These democratic options are important, but they often fall prey to the pathologies of democratic decision making identified earlier. 71 Competition advocates--whether in government or in the private sector--often face formidable structural barriers to advancing the procompetition interest: entrenched incumbent monopolies, difficulties in mobilizing consumer support given the often diffuse nature of consumer harm, and institutional biases against change. 72

In addition to the democratic options, there are what could be styled counterdemocratic possibilities, insofar as they involve the use of courts or agencies to strike down anticompetitive statutes and regulations as inconsistent with some overarching norm of federal law, whether statutory or constitutional. 73 These counterdemocratic possibilities often do not run into the same structural status quo biases as the democratic possibilities do. For example, advocates of a legal theory for overruling an anticompetitive state or local regulation do not have to mobilize broad political support for their position or surmount the "veto gates" 74 built into ordinary political processes. Rather, they typically only have to persuade a small set of elite decision makers that their position is legally correct. It is with these counter-democratic possibilities that this Article is primarily interested.

[\*1190] The counterdemocratic or countermajoritarian quality of these deployments of judicial review is what places their use in some doubt, 75 even granting the assumption that they are targeting objectively undesirable regulations. 76 In the arc of American history, the courts have vacillated in their willingness to engage in such judicial review since the mid-twentieth century. Late nineteenth and early twentieth century courts were willing to engage in broad judicial review of economic regulation, 77 but the tide turned strongly against such review in the mid-twentieth century. 78 Only in recent years have glimmers of a return to some form of strong judicial review of anticompetitive regulations made a reappearance. 79

A. Lochner, anti-Lochner, and Parker

The stage for the current constellation of judicial doctrines and attitudes towards federal judicial review of anticompetitive state and local regulations was set through the progression of Lochner-era substantive due process, the anti-Lochner constitutional revolution of 1937, and the extension of anti-Lochner sentiment to federal antitrust law in the creation of Parker's state action immunity doctrine in 1943. 80 In 1905, the Supreme Court in Lochner struck down a New York law regulating bakeshop working hours on substantive due process grounds, 81 over Justice Oliver Wendell Holmes's famous objection that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." 82 During the Progressive and New Deal eras, Lochner and Lochnerism were broadly vilified for interfering with progressive reforms and substituting judges' economic views for those of legislatures. 83 In the New Deal constitutional revolution associated with the year 1937 (although spanning a few years in either direction), the Supreme [\*1191] Court announced it was getting out of the Lochner business--that it would not strike down economic legislation simply on the grounds that it was, in the judgment of the court, ill-considered. 84

Over time, it became clear that the anti-Lochner jurisprudence extended to nakedly anticompetitive regulations adopted to favor economic special interests to the detriment of the consuming public. In cases such as Williamson v. Lee Optical 85 and Ferguson v. Skrupa, 86 there was a fairly apparent record that the regulations in question had been adopted to stifle competition and benefit economic special interests, but the courts refused to create an exception to the anti-Lochner doctrine on those grounds. 87 In Williamson, the Court acknowledged that the "Oklahoma law may exact a needless, wasteful requirement in many cases," but insisted that the "day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 88 Rather, the Court held that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts." 89

In 1943, the Supreme Court in Parker v. Brown also made clear that it would not permit the federal Sherman Act to be used as an end-run around the anti-Lochner cases. 90Parker involved both dormant commerce clause and Sherman Act challenges to California's Agricultural Prorate Act, which forced farmers into a marketing plan that effectively operated as an output reduction cartel run by farmers. 91 The Supreme Court rejected both challenges. 92 Finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," 93 the Court created a doctrine of state action immunity for anticompetitive state [\*1192] and local laws. 94 The effect of this ruling was to restrict the Sherman Act's coverage solely to purely private conduct. 95 Anticompetitive schemes orchestrated by the state would be excluded from judicial review. 96 As Judge Merrick Garland has observed, Parker is best understood as a continuation of the post-1937 jurisprudence rejecting Lochner:

Parker v. Brown was much less a case about judicial faith in economic regulation than it was a case about judicial respect for the political process. Parker was indeed a child of its times, but the most salient element of that historical context was the Court's recent rejection of the Lochner-era doctrine of substantive due process, under which federal courts struck down economic regulations they viewed as unreasonably interfering with the liberty of contract. Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect Lochner in the garb of the Sherman Act. 97

B. The Potential for an Increased Level of Judicial Scrutiny

As of 1943, one would have been justified in believing that, at least from the perspective of federal judicial review, anticompetitive state and local regulations would receive a free pass unless they [\*1193] committed certain egregious violations, such as disadvantaging "discrete and insular minorities" 98 or discriminating against out-of-state commerce. 99 But the judicial impulse to cast a stern glance at perniciously anticompetitive regulations could not be forever stifled, and before long cracks began to appear in the courts' anti-Lochnerian resolve.

Antitrust law and its state action immunity doctrine were the first to move in a significantly more interventionist direction. By the time of the Midcal decision, the state action immunity doctrine had been narrowed to permit judicial scrutiny unless the state regulation met a two-part test: (1) clear and affirmative expression of the anticompetitive policy by the sovereign state itself, and (2) active supervision of the policy's implementation by state actors. 100 Under this structure, the courts have invalidated a number of anticompetitive state regulatory schemes--most recently the practice of delegating regulatory power to occupational licensing boards staffed with potentially self-interested industry participants. 101

The Midcal test invokes a democracy-reinforcement theory of antitrust judicial review. 102 States may enact anticompetitive regulations so long as they take conspicuous responsibility for them. 103 If the state can be obviously identified with the scheme, then perhaps citizens will "vote out the bums" if the costs to consumers are too high. 104 Alas, many anticompetitive regulations escape Midcal's net because of the systemic factors identified in the previous section. 105 Even when a state conspicuously takes ownership of an anticompetitive scheme, democratic processes may fail to provide a remedy because of the asymmetry of costs and benefits [\*1194] between producers and consumers, the externalization of costs outside the voting jurisdiction, and the entrenched advantage of technological incumbency. 106

In light of the limited efficacy of Midcal's regime, one could consider additional ways to increase the level of antitrust scrutiny of anticompetitive state and local regulations. Commentators have proposed various such doctrinal approaches to invigorate antitrust preemption. For example, courts might adopt a cost-externalization test, which would invalidate regulatory schemes that externalize a disproportionate share of monopoly overcharges outside the boundaries of the political district enacting the regulation. 107 Or, as I have proposed elsewhere, they might read the Parker doctrine as entirely inapplicable to enforcement actions by the FTC--a legal question that the Supreme Court has held is still open. 108 In the event that the courts hold Parker inapplicable to the FTC, the Commission might play a significantly enhanced role in checking anticompetitive abuses by state and local governments.

Despite calls for a broader use of federal antitrust law to police anticompetitive state and local regulations, the Supreme Court continues to refine the Parker doctrine with an eye on Lochner. Then-Justice Rehnquist once worried that the Court should not "engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that th[e] Court … properly rejected" in terminating Lochnerism. 109 In his dissenting opinion in Community Communications Co. v. City of Boulder, Justice [\*1195] Rehnquist warned about the risks of opening up antitrust review of municipal regulations in a way that would require cities to justify their regulations, and the courts, in turn, to weigh those justifications. 110 Rehnquist wrote:

If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the Lochner era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined. Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." The federal courts have not been appointed by the Sherman Act to sit as a "superlegislature to weigh the wisdom of legislation." 111

Also in the shadow of Lochner, recent years have shown glimmers of a reinvigoration of constitutional doctrines checking anticompetitive abuses by state and local governments. The negative or dormant commerce clause--limited by the Parker Court on anti-Lochner grounds--has occasionally been deployed to invalidate not only anticompetitive regulatory schemes 112 that discriminated against out-of-state interests, but also, on occasion, those that impose significant burdens on interstate commerce without a sufficient justification. 113 As of this writing, Tesla is testing the limits of these [\*1196] doctrines in its challenge to Michigan's direct distribution law. 114 Its complaint for injunctive relief asserts:

[Michigan's] [p]articularly egregious protectionist legislation … blocks Tesla from pursuing legitimate business activities and subjects it to arbitrary and unreasonable regulation in violation of the Due Process Clause of the Fourteenth Amendment; subjects Tesla to arbitrary and unreasonable classifications in violation of the Equal Protection Clause of the Fourteenth Amendment; and discriminates against interstate commerce and restricts the free flow of goods between states in violation of the dormant Commerce Clause. 115

Thus far, Tesla has survived a motion to dismiss in federal court and won a key discovery motion seeking automobile dealers' communications concerning the Michigan ban on direct distribution. 116

Perhaps even more significant have been a handful of court of appeals decisions applying equal protection principles to invalidate anticompetitive regulations designed solely to protect a discrete group of economic actors from competition--although there remains a circuit split over this practice. Morbidly, the most significant cases have all been related to funeral parlors and casket sales.

In 2004, the Tenth Circuit in Powers v. Harris rejected a constitutional challenge to an Oklahoma statute that limited casket sales to licensed funeral parlors. 117 The court accepted the premise that the statute had no genuine health and safety rationale and was "a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of business people--namely, Oklahoma funeral directors." 118 Nonetheless, the court held its hands were tied by the anti-Lochner cases--particularly [\*1197] Williamson and Ferguson, which also involved (arguably) nakedly parochial anticompetitive regulations. 119

On the other hand, in their own casket cases, the Fifth and Sixth Circuits invalidated the anticompetitive schemes on equal protection grounds, holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose" and therefore fails even rational basis review. 120 This exercise of what Judge Ginsburg calls "rational basis with economic bite" could grow into a significant check on anticompetitive state and local regulation if utilized more expansively. 121 If this Article's premise is valid--that regulations designed solely to protect "discrete interest group[s] from economic competition" 122 are pervasive--then the federal courts have their work cut out for them if they take up the casket maxim with seriousness.

However, it is far from certain that they will or should. Despite the movement towards enhanced scrutiny of anticompetitive economic cronyism just described, the ghosts of Lochner continue to loom large. Even judges unsympathetic to the casket regulations may be concerned about the prospect of unelected judges substituting their own economic preferences for those of democratically elected representatives. In Powers, the Tenth Circuit listed a series of classically anti-Lochner rationales (including a rejection of the role of the Platonic guardian hypothesized in this Article) for refusing to embrace the Sixth Circuit's antiparochialism principle:

First, in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to "try again." Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which [\*1198] we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns. 123

So here is the question for those who accept this Article's central premise regarding the prevalence of anticompetitive state and local regulation and yet worry, like the Powers court, about a return to Lochner: If one is interested in pulling additional judicial levers to scrutinize anticompetitive state and local regulations, but worried about returning to Lochnernism, how do the constitutional and antitrust levers compare? Are both equally susceptible to misuse and abuse, is one less risky than the other, and are there limits that could be placed on both to cabin their potential risks? This Article's final Part compares the constitutional and antitrust tools as potential foils to anticompetitive state and local regulation to help answer these questions.

III. COMPARING THE RISKS AND LIMITS OF THE CONSTITUTIONAL AND ANTITRUST TOOLS

A. Limiting the Scope of Judicial Review to Regulations Affecting Competition

The fear of a return to Lochnerism is in large part a fear that judicial review of economic regulatory decisions is a Pandora's box that, once open, would quickly unleash a full-scale movement toward a substitution of judicial economic philosophies for those of the democratically responsive branches. 124 Hence, in the current constellation of Lochner-phobia, it is important to explain how any doctrine that invites increased judicial scrutiny of economic regulation would be cabined or restrained by a workable limitation principle. Both the antitrust and constitutional tools under consideration embody such a limitation principle insofar as they do not propose universal federal scrutiny of all undesirable state economic regulation. Instead, they limit the scrutiny to regulations that harm [\*1199] competition for the benefit of identifiable special interests. In other words, the prima facie case in either event requires demonstration of competitive harm as opposed to merely social undesirability. 125

The "competitive harm" limitation principle excludes from judicial review a wide set of regulations and hence limits the range of judicial interference with state regulatory schemes. Many cronyist regulations line the pockets of politically connected special interests without necessarily impairing competition. Consider, for example, a city ordinance that required disposal of a certain kind of medical waste at a pharmacy. Assume further that the waste in question could be safely disposed of through ordinary garbage collection, and the sole purpose of the scheme in question was to provide pharmacies with an opportunity to charge a fee for collecting the waste. Our hypothesized Platonic guardian would wish to overturn that regulation but could not do so on the constitutional or antitrust grounds under consideration because the regulation in question does not limit competition in any important sense. Rather than stifling competition in a legitimate market, it creates a new market for an undesired and unnecessary service.

Lochner-phobes may wonder whether this limitation principle is limited enough. Although the limitation carves off a large swath of cronyist regulations from review, it still includes a relatively large universe of regulations, creating the possibility that judges will have a free hand to strike down many important state regulatory programs in the name of enhanced competition. Those less worried about Lochner and more willing to encourage judicial review of economic regulation may worry that the limitation principle is too limited and that it would allow a vast universe of cronyist regulation to escape judicial scrutiny on the same grounds that much cutthroat business behavior escapes antitrust scrutiny today--it may be unethical or undesirable, but does not fall within the purview of the antitrust laws because it does not impair general market competitiveness. 126

[\*1200] Limiting the scope of judicial review to economic regulations impairing competition also raises a question of legal principle. As to antitrust, it is easy to justify such a principle. Notwithstanding Oliver Wendell Holmes's protestation that the Sherman Act "says nothing about competition," 127 a century of judicial construction has oriented the antitrust laws towards a singular focus on competition. 128 On the other hand, it is not obvious that constitutional scrutiny should rise or fall on the effects a cronyist regulation has on competition. It may be true that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," 129 but it seems equally true that dispensing economic rents to favored discrete interest groups more generally is also not a legitimate government purpose. In either case, the argument for limiting judicial review is not that the set of targeted regulations is constitutionally legitimate, but that the process of separating sheep from goats is fraught with the potential for judicial usurpation.

B. Considering Governmental Justifications for Restraints on Competition

Assuming that judicial review of anticompetitive state and local regulations is to occur with some degree of bite, the fighting question may often become how to evaluate the state's proffered justifications for the restraint on competition. Both antitrust and constitutional tools would need to allow ample room for the state to demonstrate verifiable justifications for the challenged regulations. To put this point in antitrust parlance, there are no per se unlawful state restraints on competition--the state's reasons for regulating will always be up for review in judicial or administrative proceedings challenging their validity.

[\*1201] The critical question is how much interrogation into the state's proffered justifications a court or reviewing agency would, could, or should undertake. In conventional post-Lochner terms, economic regulations were subjected to no more than rational basis review--an exceedingly deferential standard of review. 130 The state did not have to advance any empirical support for its proffered justifications and, indeed, did not have to advance any justifications at all. 131 Judges were supposed to uphold the regulation if they could conceive of any justification that might plausibly support it:

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." 132

That sort of rational basis review is far from the sort of review conducted by the Craigmiles and St. Joseph Abbey courts in striking down the Tennessee and Louisiana casket rules. 133 Those courts required evidentiary support for states' claimed justifications and subjected the states' claims to rigorous cross-examination for logical consistency. 134 In the Sixth Circuit case--Craigmiles--the court rejected the state's arguments that the casket regulation protected casket quality and public health, made it more feasible for casket sellers to advise bereaved families about which casket was most suitable for their needs, and protected against sharp business [\*1202] dealing. 135 The court found these arguments inconsistent with the state's own regulatory practices and unsupported by any record evidence. 136 Similarly, in the Fifth Circuit case--St. Joseph Abbey--the court repeated the familiar proposition that "rational basis review places no affirmative evidentiary burden on the government," but quickly added that "plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." 137 The court then inquired into evidentiary support for the state's proferred "rational bases." 138 For example, on the ostensible consumer protection rationale for prohibiting casket sales except by licensed funeral parlors, the court observed that the FTC had largely rejected this argument as an empirical matter, noting that the FTC found "insufficient evidence that … third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices" and that the empirical "record [is] 'bereft of evidence indicating significant consumer injury caused by third-party sellers.'" 139

This form of review resembles antitrust litigation, where once a plaintiff raises a prima facie case of anticompetitive effect (outside of per se rules, where no justifications are allowed), the defendant typically can proffer procompetitive justifications but bears the burden of offering evidentiary support. 140 Although giving lip service to the norms of rational basis review, these courts were in fact taking a hard look at the states' proffered justifications once the regulation in question appeared prima facie to meet the description of a measure designed to protect "discrete interest group[s] from economic competition." 141

Inquiries into offsetting justifications for prima facie suspect conduct raise two doctrinal-analytical questions: (1) how tight must the fit between means and ends be in order for the conduct in question to survive scrutiny, and (2) once the conduct has been shown to advance legitimate ends, should its harms be balanced against its [\*1203] benefits, or should it simply be deemed lawful without any balancing? 142 Both constitutional and antitrust tools for addressing anticompetitive regulation would need to address these questions.

As to the first question--the required tightness of means-ends fit--both constitutional and antitrust law already contain suitable doctrines. Moving up the ladder of scrutiny from rational basis review, intermediate scrutiny in constitutional law (such as that applicable to content-neutral restrictions on speech) requires that the restriction in question advance important governmental interests and not burden the protected interest (speech in the speech cases, competition in competition cases) more than necessary to further these interests. 143 The fit between means and ends need be only "reasonable," not strictly necessary or essential. 144 Unless the constitutional limitation on anticompetitive cronyism should fall into the more stringent strict scrutiny category--a very doubtful possibility--this sort of fit between regulatory means and ends would seem applicable.

Antitrust law shares a similar approach to the less restrictive alternative analysis under the rule of reason, and it too would presumably apply to government restraints on competition under an expanded form of judicial review. 145 As explained in the Justice Department and FTC competitor collaboration guidelines, a reasonable, but not essential, fit between means and ends is required to credit proffered justifications for prima facie anticompetitive agreements:

The Agencies consider only those efficiencies for which the relevant agreement is reasonably necessary. An agreement may be "reasonably necessary" without being essential. However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not [\*1204] reasonably necessary to their achievement. In making this assessment, the Agencies consider only alternatives that are practical in the business situation faced by the participants; the Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities. 146

A potential difference between constitutional and antitrust analysis might arise on the second important means-ends question--whether to balance harms against benefits of the regulatory restriction. For example, suppose that a regulation limiting ride-sharing services resulted in some small safety benefit to customers but an arguably much greater harm to customers in the form of diminished choice of service options and higher prices. Should a reviewing court or agency balance the safety enhancements against the harms to competition, or should it rather conclude that, having shown a legitimate reason for its existence, the regulation should stand?

Although intermediate scrutiny in constitutional law is often described as a "balancing test," courts do not generally engage in explicit balancing after passing the less restrictive alternatives inquiry. 147 Some degree of value judgment must be embedded in the inquiry into whether the state's interest is sufficiently "important," but it is rare to see a court say, in effect, that although the state's interest is concededly important and the regulation at stake is reasonably related to it, the harms caused by the regulation outweigh its benefits. 148 For purposes of the principle against protecting "discrete interest group[s] from economic competition," it seems apparent that there is no room for balancing at all, as a state [\*1205] regulation that serves some legitimate end by definition is not "simple economic protectionism." 149

By contrast, antitrust law is, in principle, supposed to require open-ended balancing at this final step: "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." 150 If followed in state action doctrine cases, this sort of balancing could precipitate serious accusations of Lochnerizing, as it would put judges in the position of substituting their own preferences for market outcomes over the state's legitimate regulatory objectives.

Fortunately, although antitrust law nominally calls for balancing, courts typically do not engage in it. 151 Even in Microsoft--the case that most explicitly and authoritatively called for final-stage balancing--the D.C. Circuit engaged in very little, if any, true balancing. 152 Perhaps because of the incommensurability between anticompetitive or procompetitive effects or concern about chilling procompetitive conduct, courts tend to exonerate competitive behavior that is necessary to procompetitive effects without asking whether the harms outweigh the benefits. 153 In order to stave off Lochnerizing concerns, any expanded antitrust review of state and local regulations might need to formalize this practice doctrinally: Once a state demonstrates that the regulation in question is reasonably tailored to achieve some legitimate governmental objective, [\*1206] antitrust does not require balancing of the harms to competition against the legitimate governmental objectives.

A final question unique to antitrust review is whether, when it comes to means-ends review, the catalogue of permissible ends is limited to those recognized by antitrust law as "procompetitive." One of the important doctrinal and policy structures of antitrust law is a division of the world into virtues that are said to be "procompetitive" and those that are not. 154 To count as a legitimate virtue in the antitrust domain, an effect must be "procompetitive," meaning that it must work to enhance or improve market competition. 155 Supposed benefits of a restraint that assume that competition is itself the problem in need of curtailment are labeled with the epithet of "ruinous competition" theories and are dismissed as inconsistent with the Sherman Act's procompetition policy. 156

While this single-minded devotion to competition may make sense as to the world of private restraints, it is less clear that it can be applied sensibly to governmental regulation. Do governments not have the right to take the view that competition of certain types causes social evils that should be curtailed? For example, many regulatory restrictions on alcohol and tobacco distribution are designed to decrease competition and hence reduce output as compared to that which would be obtained in a competitive market. 157 While it may be undesirable for private actors to limit harmful output through private means, the state's police power surely includes the right to do so, including by limiting competition. 158 This suggests that the range of regulatory interests [\*1207] states might legitimately advance in support of challenged regulations would be broader than those deemed "procompetitive" in conventional antitrust analysis.

Opening the door to a wider scope of justifications in cases where the restraint on competition is imposed by governmental rather than private actors would appear on first impression to favor the government. Such a widening of the rule of reason, however, raises precisely the Lochnerizing concern raised by Justice Rehnquist in his previously quoted City of Boulder dissent. 159 If courts were called upon to balance health and safety benefits against traditional competition concerns around prices and innovation, then they might well slip into a Lochnerizing mold. But perhaps such concerns could be abated by limiting the reviewing court or agency's role to determining whether the regulation in question actually supported the state's proffered goals. As long as the goals were permissible (that is, not simply protecting discrete interest groups from competition as a form of political patronage) and the regulations were reasonably related to the goals, the reviewing court or agency would not inquire more broadly into the regulation's overall desirability.

C. Institutional and Procedural Distinctions

Antitrust preemption and constitutional review are differently situated in one significant way: Constitutional equal protection, substantive due process, and dormant commerce clause principles are privately enforceable by any party that meets the Article III standing requirements--which, in this context, means at least anyone directly affected by a regulation impairing competition. 160 Antitrust has its own private right of action standing rules, 161 as well as an additional institutional feature that might significantly limit some of the abuses associated with Lochnerizing. One proposed route for increasing the preemptive scope of federal antitrust law over anticompetitive state and local regulation is to hold the [\*1208] Parker doctrine inapplicable to the FTC. 162 This would give the FTC enhanced power to challenge anticompetitive state and local regulations. Not only would this limit the incidence of challenges to state regulation (the FTC Act is not privately enforceable and only the Commission can initiate an action under the Act), 163 but it would also put the Commission itself, rather than an Article III court, in the position of making an initial decision on the case. An Article III court could ultimately become involved, as adverse Commission decisions are appealable to any federal court of appeal in which the case could have been initially brought. 164 However, lodging the antitrust review function in the FTC would grant the Commission an initial regulatory review function and the power to make factual findings subject to "substantial evidence" review. 165

Whether lodging an enhanced review function in the FTC as opposed to private litigants would lessen concerns over Lochnerizing depends in large part on what one perceives to be the central evil of Lochner. Was Lochner problematic because judges usurped the decisions rightfully committed to more democratically representative branches of government? Or was the problem that they were ideologically committed to formalistic categories such as common law baselines, the existing distribution of wealth and entitlements, and an arbitrary distinction between government action and inaction? 166

The institutional concerns about judges substituting their own economic preferences for those of legislators and members of the executive branch might have less force in a context in which an administrative agency--here the FTC--reviewed state and local regulations for compatibility with federal antitrust law. Historically, the political coalitions that opposed economic substantive due process during the Progressive and New Deal eras were comfortable with delegating extensive regulatory powers to federal administrative agencies 167 and rejected Lochnerism because of the political character of judicial activism by unelected judges even while [\*1209] supporting activism by theoretically more democratically accountable institutions such as the FTC. 168 Though ostensibly designed to be technocratic and politically detached, the FTC is in fact politically responsive to the will of Congress, which holds its purse strings. 169 It is thus a more evidently "democratic" institution than the courts are and has a legislative mandate from Congress to make economic policy, 170 which might lend legitimacy to its review of anticompetitive state and local regulation.

Entrusting review to an agency rather than a court would not entirely dissipate concerns about potential Lochnerizing; there would remain judicial review of the agency decision in the federal courts of appeal and, potentially, the Supreme Court. 171 Still, judicial review of agency decisions is more restricted than direct judicial review of state or local regulations. For example, agency factual findings are upheld so long as supported by substantial evidence, and the courts accord a degree of deference (albeit not Chevron deference) to agency decisions on complex economic matters. 172 While opportunities remain for the appellate courts to substitute their own judgment for that of state and local regulators, they could only do so by siding with the FTC, because there would be no judicial review in a case in which the Commission had decided to uphold a regulation as consistent with federal law. 173

As to the objection that Lochner represented a formalistic classical ideology that entrenched antiredistributionist and laissez-faire baselines, simply handing off the review function to the FTC is not a complete answer to that concern. Enhancing the Commission's preemptive powers over state and local regulations would [\*1210] represent a shift toward deregulation, as the power could only be wielded to strike down regulations--not to require more regulation or to institute regulations of the Commission's own making. In ideological terms, state action immunity generally codes as a progressive doctrine designed to insulate regulatory schemes from challenge and, hence, many of the sharpest critiques of the Parker immunity doctrine have been aligned with the antiregulatory Chicago School 174 and probusiness Republican administrations. 175

At the same time, the FTC's preemptive agenda would be unlikely to focus on entrenching established economic interests and preserving the status quo in the distribution of property and income--the second vision of what is wrong with Lochner. To the contrary, as discussed earlier, the general tendency of anticompetitive state regulations is to entrench economic incumbents and incumbent technologies by denying entry to new firms and technologies. 176 In this context, enhanced antitrust preemption of state and local regulation would be a liberalizing force creating opportunities for new market entry--just the opposite of a set of doctrines protecting the status quo.

#### The CP solves every warrant in the Cooper evidence which is about how incumbents are wielding licensing requirements as an offensive shield. AND alt causes---their evidence says state licensing boards need to be an independent group of elected officials directly accountable to the public. [EMORY GK]

James C. 1AC Cooper 17, Associate Professor of Law and Director, Program on Economics & Privacy, Antonin Scalia Law School, George Mason University, “State Licensing Boards, Antitrust, and Innovation,” Regulatory Transparency Project, 11/13/17, https://regproject.org/paper/state-licensing-boards-antitrust-innovation/

Executive Summary

Every state has occupational licensing laws or regulations, which require individuals seeking to offer a certain service to the public first to obtain approval from the state. These laws and regulations raise numerous issues, including the economic freedom problems identified by the State and Local Working Group.1 This Paper focuses specifically upon the competitive implications of such regulations.

Occupational licensing requirements historically derive from a desire to protect unwitting consumers from bad actors. They were typically confined to professions where consumers struggled to ascertain the purported professional’s actual expertise and ability — and where the consumer’s misperceptions could have significant negative consequences. Thus, professions like medical and legal have long had self-imposed licensing regimes. The competitive concerns with occupational licensing generally do not arise at this fundamental level, when reasonable requirements directly tied to ensuring basic quality standards are established.

When, however, incumbents wield licensing requirements not as a defensive shield to protect consumers but as an offensive sword to exclude new entrants, serious concerns regarding the competitive implications of the licensing schemes arise. Self-interested incumbents have incentives that may differ from consumers, and these self-interested incumbents can — and sometimes do — impose requirements that do not enhance quality, but rather restrict output, increase prices, and hamper innovation. In other words, occupational licensing regimes can be contorted into schemes that exclude competitors and, in doing so, harm the very consumers they purport to protect. The likelihood of such abuses has increased tremendously in recent decades, as the number of licensed professions in the United States has skyrocketed:

Simultaneously, as new technologies and innovations have proliferated, these concerns have become increasingly pronounced.3 Today, incumbents relying upon older technologies frequently attempt to combat disruptive new entrants by imposing upon them licensing restrictions that are often outdated, irrelevant, or do not make sense to apply to the novel goods or services. For example, self-interested incumbents have established rules that would prevent the operation of innovative entrants and limit patients’ access to board-certified physicians in the state of Texas — a result particularly harmful in Texas, where there is a severe physician shortage.4

Given the proliferation of such undesirable results today, the U.S. Federal Trade Commission (FTC or Commission) recently established an Economic Liberty Task Force to further build upon the Commission’s longstanding, bipartisan work on occupational licensing and to discern additional ways to better protect consumers from harmful licensing requirements.5 Likewise, the U.S. Senate is considering a bill that would “combat the abuse of occupational licensing laws by economic incumbents.”6

This Paper explores the competitive implications of state occupational licensing regimes. Part I analyzes the historical development and justification for occupational licensing. Part II reviews the empirical evidence regarding the effects of occupational licensing on factors such as quality, price, innovation, and availability. Part III summarizes how antitrust law, and particularly the state action doctrine, treats state board-enacted occupational licensing. Part IV explores the interplay of occupational licensing and antitrust laws in the United States, delving into a particularly striking case at the intersection of occupational licensing and innovation: Teladoc, Inc. v. Texas Medical Board. Part V provides some suggestions for agency engagement in monitoring the effective use of occupational licensing.

I. The Anticompetitive Impetus for State Occupational Licensing Restrictions Today

Occupational licensing restrictions were traditionally enacted to protect consumers from unsavory fraudsters — think “quacks” with no medical training holding themselves out to be legitimate physicians, or similarly untrained individuals masquerading as lawyers. By establishing basic educational and training requirements, occupational licensing rules can accordingly serve very important functions.

The problem is that, today, occupational licensing requirements often fail to focus upon the goal of enhancing consumer outcomes and, instead, perversely seek to protect incumbents from competition. Consider, for instance, that the country has seen a dramatic increase in occupational licensing over the last several decades. Less than five percent of jobs in the American economy required a license in the 1950s. But today, economists estimate that between 25 and 30 percent of American occupations now require a license to operate.7

Exacerbating the sheer increase in scope is the problem of self-interested regulators. In many instances, the governing entity is not an independent group of elected officials directly accountable to the public, but rather a board of appointed practitioners whose primary job remains operating in the very same market they are regulating. Although licensing in some occupations may benefit the public by reducing information asymmetry and/or ensuring a minimum quality level for a particular service, the significant growth in the number of occupations governed by some form of licensing requirements, often enacted by self-interested incumbents, is a threat to consumer welfare.

### Advantage 2

#### Certainty---there is not an impact attached to this.

#### 1. This is a card about the downsides of turning the states and letting them figure out shit on their own! It assumes states try to create their own independent supervision boards which is not what the CP does. The CP passes all of the state licensing board reforms needed.

#### States can bring federal and state claims and win in NC dental grounds.

**HLR 20**. The Harvard Law Review is a law review published by an independent student group at Harvard Law School. According to the Journal Citation Reports, the Harvard Law Review's 2015 impact factor of 4.979 placed the journal first out of 143 journals in the category "Law". "Antitrust Federalism, Preemption, and Judge-Made Law." Harvard Law Review. 6-10-2020. <https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/>

Even when it is not a constitutional hurdle, federalism is still a relevant constitutional value. The Framers embraced federalism for its policy virtues,**11**× and contemporary judges and scholars laud federalism for its modern-day policy perks.**12**× The Supreme Court often invokes federalism in the form of a presumption that Congress does not lightly intrude on state sovereignty.**13**× One example is the Court’s presumption against preemption: a party alleging federal preemption of state law faces a judicial presumption that Congress did not intend to make that choice.**14**× That presumption is validated by Congress’s choice to refrain from preempting state law in the antitrust arena: state and federal antitrust laws have coexisted since the federal government’s first steps into the arena in 1890.**15**× This congressional restraint is controversial, and likely to grow more so. Some scholars have argued powerfully that Congress should preempt state antitrust laws.**16**× These arguments may gain renewed prominence, as antitrust as a whole has recently achieved greater political salience than it has enjoyed in a century.**17**× In the state context, attorneys general have increasingly taken antitrust action in high-profile matters the federal government has declined to pursue. In 2019, states opposed the merger between Sprint and T-Mobile,18× and many began to investigate potential antitrust violations in Big Tech.19× While some recent, high-profile state antitrust actions have been brought under federal antitrust laws,20× others have been brought under state law.21× Moreover, a number of the current state antitrust actions are at the investigatory stage22× — states could potentially bring federal claims, state claims, or both. Newsworthy state involvement in antitrust policing is bringing attention to the states’ antitrust role more generally, and that attention will likely bring scrutiny to the oddity of America’s competing antitrust systems.

#### State laws can be stricter than federal statutes.

Clark Hildabrand 14. B.A. from Washington & Lee University, J.D. candidate, Yale Law School. “Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now.” The Tennessee Journal of Business Law. 16.1, 67-90.

Despite criticism of state antitrust enforcement as overly punitive and often ineffective,23 Congress initially allowed states to play a key role in the enforcement of both state and federal antitrust laws, including the Sherman Act and subsequent federal antitrust legislation.' This type of dual enforcement regime is not unique to antitrust laws and enables respect for the dual sovereignty of the states and the federal government.' Dual antitrust enforcement results in more consistent application of antitrust penalties when either the state or federal government is unable to effectively enforce antitrust laws on its own.26 Jurisdictional, financial, and political restrictions act as checks on inefficient over-enforcement of state and federal antitrust laws and placate the concerns of critics of state antitrust enforcement.'

On one hand, some critics of state antitrust enforcement focus on the interstate character and impact of state antitrust litigation.' Due to the nationalization and increased interconnectivity of the country's economy, a broader reading of the Interstate Commerce Clause and other federal antitrust laws, that at one time simply precluded state enforcement of activities with interstate effects, would, today, effectively render state antitrust laws useless.' However, the U.S. Supreme Court has consistently held that federal antitrust laws do not preclude or preempt application of similar or more far-reaching state antitrust statutes.' As long as the state law or policy in question reflects a legitimate state public interest and is not excessively discriminatory or protectionist, state antitrust enforcement does not run afoul of the Dormant Commerce Clause.' State antitrust enforcement thus overcomes one potential barrier for situations in which the regulated activity has interstate effects.

#### Court has recognized federal antitrust don’t displace state enforcement.

Richard Samp 14. Chief Counsel at the Washington Legal Foundation. “The Role of State Antitrust Law in the Aftermath of Actavis.” Minnesota Journal of Law, Science & Technology. 15.1, 149-166.

Many states have also adopted antitrust statutes. While those laws tend to be similar to federal law, their language is not identical, and state courts routinely interpret state antitrust laws in ways that diverge sharply from federal law.7 For example, California’s antitrust statute, the Cartwright Act,8 diverges in a number of respects from federal antitrust law. The California Supreme Court recently cautioned, “[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act . . . .”9 The U.S. Supreme Court has rejected claims that state antitrust law is preempted whenever it diverges from federal antitrust law. For example, the Court permitted the Attorneys General of Alabama, Arizona, California, and Minnesota to file antitrust claims under their respective state laws against a group of cement producers even though those state governments, because they did not purchase cement directly from the producers but rather purchased only through intermediaries, would not have been proper plaintiffs under federal antitrust law.10 Under federal law, when producers conspire to fix prices, only direct purchasers, and not subsequent indirect purchasers, are permitted to sue to recover losses incurred as a result of the conspiracy.11 In contrast, antitrust laws from the four states permitted recovery by indirect purchasers.12 The Supreme Court rejected the defendant cement producers’ assertion that federal antitrust law was intended to serve as a ceiling on businesses’ liability for engaging in anticompetitive conduct.13 It stated, “Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. And on several prior occasions, the Court has recognized that the federal antitrust laws do not preempt state law.”14 On the other hand, state antitrust laws—like all state laws—are subject to the restrictions imposed by the Supremacy Clause of the U.S. Constitution,15 and are impliedly preempted to the extent that they conflict with federal law.16 Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,”17 or when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”18 On a number of occasions, the Supreme Court has concluded that state antitrust law is preempted because it conflicts with a federal statute other than federal antitrust law.19

#### 2. Lande concedes that several different states are already doing the aff! New Plank: The 50 states, territories, and DC should uniformly pass and strictly enforce that they will not overreact, crush budgets, or regulatory flexibility. We don’t need the plank, but they do not have impact to this beyond that! [EMORY GK = BLUE]

Robert H. 1AC Lande & Neil W. 1AC Averitt 14, Robert H. Lande, Counsel of Record; Neil W. Averitt practiced antitrust law for over forty years, thirty-seven of them on the career staff of the Federal Trade Commission, worked on a number of state-action cases, and was a member of the agency's State Action Task Force, whose report provides part of the background for the present litigation, “Brief of Amicus Curiae Neil Averitt in Support of Respondent,” The North Carolina State Board of Dental Examiners, Petitioner, v. Federal Trade Commission, Respondent, 2014 WL 3908426, WestLaw

NO MAJOR PRACTICAL OR ADMINISTRATIVE PROBLEMS STAND IN THE WAY OF REQUIRING ACTIVE SUPERVISION OF FINANCIALLY INTERESTED STATE BOARDS

This brief addresses just one single question. The Court may conclude that, in principle, financially interested boards should be subject to active supervision. However, it may be concerned about the practical consequences of such a principle. This brief therefore discusses that issue. It examines the administrative procedures that several different states have already put in place to provide active supervision, and shows that a number of workable and tested options are available. It also examines the legal principles that have already clarified just which particular kinds of a board's activities, out of \*3 all the actions that a board takes, are most in need of supervision. The law on both these points is sufficiently developed to let the present case be decided without concern for unanticipated consequences. Moreover, the Court has the opportunity to provide further clarification if need be.

Throughout this case, the best approach to the practical mechanics of supervision will involve balancing valid but conflicting interests, rather than starkly choosing one interest over another. Certainly the fundamental dispute in the case involves such a conflict between valid truths. On the one hand, unsupervised, self-interested boards are always under a temptation to limit competition for the financial benefit of their profession. The public needs to be protected from those obvious risks. On the other hand, states need to have some discretion to organize their affairs as they please. In particular, they need to have the option of including active members of a profession on a regulatory board in order to take advantage of their expertise. The question is how to balance these goals. The answer is that once supervision is found necessary in principle, the best methods of supervision will try to find the least-cost, greatest-benefit accommodation between them. Fortunately, developments in individual states, and in individual litigations, have shown that there are many practical ways to go about this balancing.

\*4 A. States Have Identified Many Forms of Active Supervision, Which Shows That It Is Practical to Provide Sufficient Oversight of Interested Boards

### 2NC CPs Good---2NC

#### 2NC CPs are good:

#### 1. Key to prevent 2AC sand bagging. It’s the neg’s first chance to respond. Alternative is bad advantages in the 2AC.

#### 2. Conditionality justifies it.

#### 3. It’s a constructive – proves the Aff’s interpretation is self-serving and arbitrary which forces a substance tradeoff.

#### 4. Aff choice limits the potential number of 2nc CPs.

#### 5. Evaluate what we did and default to quantifiable abuse.

#### Doesn’t link to NB---the CP does not do federal anti trust law!

## Regs CP

### AT: Perm---Do Both

#### 2. “Do both” is antitrust duplication---the disputes collapse resources, effectiveness, and signaling.

Carl W. Hittinger and Tyson Y. Herrold 19. Carl W. Hittinger (LAW ’79) is a senior partner and serves as BakerHostetler’s Antitrust and Competition Practice National Team Leader and the litigation group coordinator for the firm’s Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. Tyson Y. Herrold is an associate in the firm’s Philadelphia office in its litigation group. His practice focuses on complex commercial litigation, particularly antitrust and unfair competition matters, as well as civil rights litigation. "Antitrust Agency Turf War Over Big Tech Investigations". Temple 10-Q. https://www2.law.temple.edu/10q/antitrust-agency-turf-war-over-big-tech-investigations/

Disputes over clearance can have tangible adverse effects on enforcement. First, some have commented that delays caused by clearance disputes can narrow the efficacy of remedial options, particularly with mergers. As Sen. Richard Blumenthal has commented, “The Big Tech companies are not waiting for the agencies to finish their cases. They are structuring their companies so that you can’t unscramble the egg.” Structural remedies are favored by Delrahim, who has commented that alternative, behavioral remedies should be used sparingly: “The division has a strong preference for structural remedies over behavioral ones. … The Antitrust Division is a law enforcer and, even where regulation is appropriate, it is not equipped to be the ongoing regulator.”

Second, disputes over clearance and, more so, duplicative investigations waste agency resources, threaten to blunt their effectiveness, and can lead to inconsistent and confusing governmental positions. In the Sept. 17 oversight hearing, Simons and Delrahim were both criticized for requesting an increase in funding: “As you both acknowledged, both of you could use, and desperately need, more resources. That being the case, it makes no sense to me that we should have duplication of effort, when that has a tendency inevitably to undermine the effectiveness of what you’re doing.” Duplicative investigations dilute the specialization that is a principal goal of the agencies’ clearance agreement and raise the risk that one agency will take legal positions that undercut the other. No doubt the DOJ’s amicus brief in the Qualcomm case influenced the U.S. Court of Appeals for the Ninth Circuit’s decision to issue a stay pending appeal.

So how will the FTC and DOJ resolve their latest turf war? Perhaps they will revisit their clearance agreement and decide to split their authority by company or the business practice being investigated, based on prior agency experience, rather than by industry as Appendix A currently does. Or maybe Congress will decide to consolidate civil antitrust enforcement jurisdiction under one agency. That seems like a long shot considering the political implications. However, during the Senate’s antitrust oversight hearing, Sen. Josh Hawley proposed “cleaning up the overlap in jurisdiction by removing it from one agency” and “clearly designating enforcement authority to one agency.” One thing is sure—the agencies should not be duplicating civil antitrust investigations. Stay tuned.

#### 3. Allowing both regimes on the books produces false positives, chills lawful activity, and turns the case. *AND no net benefit to the perm.*

Richard M. Brunell 12, Director of Legal Advocacy, American Antitrust Institute, Washington, D.C, “, In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity,” Antitrust Law Journal, Vol. 78, 2012, pg 279-312.

B. CREDIT SUISSE CONTINUES THE TREND

In Credit Suisse, the Supreme Court applied the substance of Trinko's "soft immunity" analysis in determining that conduct was immune from antitrust challenge even if it violated both the antitrust laws and the federal securities laws." A class of investors sued ten large investment banks engaged in joint underwriting, alleging that the banks had conspired not to sell shares in hundreds of initial public offerings unless the customers also committed to make aftermarket purchases of the shares at inflated prices (a practice called "laddering") and to purchase other less desirable securities from the underwriters (a practice referred to as "tying").' In an opinion for seven Justices written by Justice Breyer, the Court found that the "securities law and antitrust law are clearly incompatible," even though the alleged conduct violated both laws, because the risk of false positives in this area was unusually high and threatened to chill lawful joint underwriting activities.72 At the same time, "any enforcement-related need for an antitrust lawsuit [was] unusually small" because the SEC actively enforced the rules prohibiting the conduct at issue, the agency was required to take into account competitive considerations, and injured investors could bring lawsuits and obtain damages under the securities laws.73 While the Court purported to apply the "clear repugnancy" standard in its implied immunity analysis, many commentators justifiably argue that the standard has implicitly been overturned.7 4

Once again the Bush DOJ did not support the approach followed by the Court. Rather, in a brief to the Court of Appeals the Antitrust Division took the position that immunity was appropriate "for conduct expressly or implicitly approved by the securities laws or SEC regulations," but "the allegations of tying and laddering-practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit-should not be dismissed on implied immunity grounds."" The Antitrust Division emphasized that "the enforcement of the antitrust laws as to [this proscribed conduct] does not interfere with the SEC's ability to regulate or exempt from regulation."' 6

In the Supreme Court, the Solicitor General proposed a position that was a compromise between the Antitrust Division and the SEC. The Solicitor General rejected the "view that anticompetitive conduct that is and always has been forbidden under the securities laws is nonetheless categorically immune from liability under the antitrust laws," and noted that "the antitrust laws ... address, in a way that the securities laws do not, the distinct evil of a conspiracy across underwriters and across IPOs."n7 At the same time, the Solicitor General would have extended implied immunity to conduct that, although not permitted by the SEC, is "inextricably intertwined" with permitted conduct, and would have precluded plaintiffs from relying on such conduct to prove their antitrust violation.78 The Supreme Court rejected the Solicitor General's proposal as insufficient to avoid "the serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter syndicate practices important in the marketing of new issues."7

### Theory---2NC

#### 2. Antitrust laws are enforced by the DOJ and FTC.

DOJ and FTC 16. Antitrust Guidance for Human Resource Professionals Department of Justice Antitrust Division Federal Trade Commission. https://www.justice.gov/atr/file/903511/download

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust Division (DOJ or Division) and Federal Trade Commission (FTC) (collectively, the federal antitrust agencies) jointly enforce the U.S. antitrust laws, which apply to competition among firms to hire employees. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decisionmaking with regard to wages, salaries, or benefits; terms of employment; or even job opportunities. HR professionals often are in the best position to ensure that their companies’ hiring practices comply with the antitrust laws. In particular, HR professionals can implement safeguards to prevent inappropriate discussions or agreements with other firms seeking to hire the same employees.

#### 3. DOJ and FTC.

DOJ. “Business Resources”. https://www.justice.gov/atr/business-resources

The antitrust laws are enforced by both the Antitrust Division and the FTC’s Bureau of Competition. All criminal antitrust enforcement is handled by the Antitrust Division.

#### 4. They are alternatives not subsets.

Stephen G. Breyer 87. SCOTUS Justice since 1994. California Law Review Volume 75. Issue 3. Article 15. “Antitrust, Deregulation, and the Newly Liberated Marketplace”.

On this view, antitrust is not another form of regulation. Antitrustis an alternative to regulation and, where feasible, a better alternative.3To be more specific, the classicist first looks to the marketplace to protectthe consumer; he relies upon the antitrust laws to sustain market compe-tition. He turns to regulation only where free markets policed by anti-trust laws will not work-where he finds significant market "defects"that antitrust laws cannot cure. Only then is it worth gearing up thecumbersome, highly imperfect bureaucratic apparatus of classical regula-tion. Regulation is viewed as a substitute for competition, to be usedonly as a weapon of last resort-as a heroic cure reserved for a seriousdisease.

#### 5. It is a jurisdictional question---antitrust authorities don’t intervene in regulatory concerns.

Babette E. Boliek 11. Associate Professor of Law at Pepperdine University School of Law. J.D., Columbia University School of Law; Ph.D., Economics University of California, Davis. FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries, 52 B.C.L. Rev. 1627 (2011). <http://lawdigitalcommons.bc.edu/bclr/vol52/iss5/2>

As argued in this Article, the recent Comcast decision should not be dismissed as an inconvenient hurdle to be sidestepped by reclassification; rather it marks a pivotal invitation to Congress to redefine the boundaries between the FCC and antitrust authorities. In the long wake of assorted jurisdictional tugs of war between the two regimes, and amidst a legacy of accusations of regulatory capture and administrative overreach,29 the net neutrality debate accentuates historic preferences for antitrust versus regulation, a subject which should be revisited and squarely addressed. Before that can be done, however, the rules of the road—the issue of jurisdiction—must be clearly decided.

The analysis of the relevant jurisdiction is broken into two rival camps: (1) regulatory jurisdiction and (2) antitrust jurisdiction. The first camp, regulatory jurisdiction, the more complex of the two, is further divided into two subparts of particular concern (a) legacy-based regulation and (b) “satellite jurisdiction.” The first subpart of regulatory jurisdiction, legacy-based regulation, refers to the FCC’s congressionally designated core industry. The concern with legacy-based regulation is that the FCC will engage in procedural opportunism: that is, the agency may exploit the service classification process to extend its own regulatory authority.

#### IF antitrust agencies can regulate, it’s not via prohibitions.

Giovanna Massarotto 15, PhD from Bocconi University, Adjunct Professor of Competition Law there, currently Academic Fellow at the Center for Technology Innovation and Competition (CTIC) at University of Pennsylvania, “Antitrust Agencies: Watchdogs or Regulators,” George Mason University School of Law Journal of International Commercial Law, Vol. 7 No. 1, Fall 2015, http://www.georgemasonjicl.org/wp-content/uploads/2015/11/Fall-Issue-.pdf

C. How to Diverge Commitment Decisions/Consent Decrees from Prohibition Decisions

As the AT&T case shows, antitrust agencies can impose market rules in place of a regulator. But what are the concrete differences between commitment decisions/consent decrees and prohibition decisions? To clarify this distinction, I analyze some recent antitrust decisions. In Europe, the recent decisions on the payment sector are fitting to show such differences. In this sector, the Commission opened several investigations, all of which ended with both commitment decisions and prohibition decisions.

In particular, in September 2003 and June 2006, the European Commission sent two Statement of Objections on intra-European Economic Area (EEA) interchange fees, also known as multilateral interchange fees (“MIFs”), to Mastercard Europe SPRL and Mastercard International Inc.61The MIF is an interbank payment that concerns each transaction realized with a payment card. Mastercard, for example, adopted a business model for MIFs, which established a mechanism that effectively identified a minimum price merchants had to pay for accepting Mastercard cards. In practice, Mastercard’s MIF is a charge imposed per payment at merchant outlets. Similarly, in April 2009, the Commission sent a Statement of Objection to Visa Europe Limited, Visa Inc., and Visa International Services Association. In this proceeding, the antitrust issue also concerned the MIF applied by Visa and the assumption that such interchange fee could harm competition between merchants’ banks.62

Although the antitrust issue in both cases was almost identical, the antitrust decision adopted by the enforcement agencies differed. In Mastercard’s proceeding, the Commission identified an antitrust violation in adopting MIFs for cross-border payment card transactions; therefore, prohibiting Mastercard MIFs. The Court of Justice in September 2014 upheld the Commission’s Mastercard decision.63 Conversely in Visa’s proceeding, the Commission made Visa’s commitments legally binding. Similar to the Mastercard case, in the Visa proceeding, the Commission was concerned about “i) [r]ules on ‘cross-border acquiring’ in the Visa system that limit the possibility for a merchant to befit from better conditions offered by banks established elsewhere in the internal market. . . ii) All inter-bank fees set by Visa for transactions with consumer credit cards in the EEA.”64 The Commission identified these concerns and made the commitments legally binding in December 2010, establishing that: i) Visa must allow from 1 January 2015 acquirers “to apply a reduced cross-border inter-bank fee (0.3% for credit and 0.2% for debit transactions) for cross border clients;”65 ii) “Visa Europe agrees to cap its credit card MIFs at 0.3% for all consumer credit card transactions in the EEA where Visa Europe sets the rate.”66 Finally with regard to transparency, Visa offered to “simplify its inter-bank fee structure and make the invoicing of card acceptance services more transparent to merchants.”67

In sum, in the Mastercard case, after having investigated for four years, the European Commission concluded that Mastercard violated Article 81 of the Treaty (namely Art. 101 of the TFUE) and ordered it “to withdraw its intra-EEA cross-border MIFs within six months, or to adopt a MIF that fulfilled Article 101(3) TFEU Mastercard to apply its MIFs.”68 In the Visa case, the Commission accepted Visa’s commitments, according to which Visa would reduce cross-border inter-bank fees and cap its credit card MIFs. The differences between the two antitrust decisions are evident. The duration of the Mastercard EU antitrust proceeding was longer than that of Visa and ended with a discovery of an antitrust violation. This implied that Mastercard could no longer apply its MIF and that its clients, and competitors who were harmed by such MIFs could claim damages for this antitrust violation. In addition to the claims produced for damages and bad advertising, the Mastercard decision represents a precedent, according to which imposing MIFs for cross-border payment card transactions is illegal.

In contrast, no antitrust violation was found in Visa’s proceeding. According to Recital 13 of Regulation 1/2003, “[co]mmitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement.”69 Thus, Visa could continue to apply MIFs, respecting the terms of the commitment decisions. In contrast to the Mastercard prohibition decision, Visa’s commitment decision does not constitute a precedent, but only a settlement by which Visa agreed to take specific actions without admitting fault or guilt for the antitrust concerns that led to the Commission’s investigation.

Further, in July 2013, the European Commission proposed to the European Parliament and Council to implement European legislation that would cap, similar to the terms of Visa’s decision, the level of interchange fees payable by merchants.70 On December 17, 2014, the European Parliament and Council reached a political agreement on this Commission Proposal for a Regulation to cap inter-bank fees for card-based payments. Hence, in the Visa proceeding, the commitment decision seems to anticipate legislator intervention. The same Commission’s proposal on interchange fees legislation appears to be a result of the decision of the Visa case. Thus, the latter antitrust decision again shows the concrete regulatory effect of a commitment decision, as well as the main difference between such decision and the prohibition decision. Commitment decisions regulate the market, whereas prohibition decisions create case law.

IV. CONCLUSION

The U.S. AT&T consent decree and the EU Visa commitment decision are only a couple of examples of how antitrust agencies can compete or, more precisely, collaborate with the regulator to impose rules on markets. Consent decrees and commitment decisions are important antitrust devices that compete with prohibition decisions in drawing antitrust policy and in defining antitrust agency roles. Is the widespread use of consent decrees and commitment decisions appropriate in antitrust enforcement? Similar to a doctor in an emergency room, antitrust enforcement needs a tool to rapidly intervene to correct market failures, especially in dynamic markets where time is crucial. As with individuals suffering a health crisis, quick care is needed, and waiting is not opportune. Especially in Europe, commitment decisions often represent a painkiller. Commitment decisions and consent decrees can address the problem superficially, like a painkiller that alleviates symptoms but does not fight the disease.

### AT: Certainty Deficit

#### It just says that states and companies need to know what is “legally sufficient” and mentions that antitrust is unpredictable on this issue---the CP establishes what is legally sufficient through non-antitrust laws!

Emory reads blue

Robert H. Lande & Neil W. Averitt 14, Robert H. Lande, Counsel of Record; Neil W. Averitt practiced antitrust law for over forty years, thirty-seven of them on the career staff of the Federal Trade Commission, worked on a number of state-action cases, and was a member of the agency's State Action Task Force, whose report provides part of the background for the present litigation, “Brief of Amicus Curiae Neil Averitt in Support of Respondent,” The North Carolina State Board of Dental Examiners, Petitioner, v. Federal Trade Commission, Respondent, 2014 WL 3908426, WestLaw

NO MAJOR PRACTICAL OR ADMINISTRATIVE PROBLEMS STAND IN THE WAY OF REQUIRING ACTIVE SUPERVISION OF FINANCIALLY INTERESTED STATE BOARDS

This brief addresses just one single question. The Court may conclude that, in principle, financially interested boards should be subject to active supervision. However, it may be concerned about the practical consequences of such a principle. This brief therefore discusses that issue. It examines the administrative procedures that several different states have already put in place to provide active supervision, and shows that a number of workable and tested options are available. It also examines the legal principles that have already clarified just which particular kinds of a board's activities, out of \*3 all the actions that a board takes, are most in need of supervision. The law on both these points is sufficiently developed to let the present case be decided without concern for unanticipated consequences. Moreover, the Court has the opportunity to provide further clarification if need be.

Throughout this case, the best approach to the practical mechanics of supervision will involve balancing valid but conflicting interests, rather than starkly choosing one interest over another. Certainly the fundamental dispute in the case involves such a conflict between valid truths. On the one hand, unsupervised, self-interested boards are always under a temptation to limit competition for the financial benefit of their profession. The public needs to be protected from those obvious risks. On the other hand, states need to have some discretion to organize their affairs as they please. In particular, they need to have the option of including active members of a profession on a regulatory board in order to take advantage of their expertise. The question is how to balance these goals. The answer is that once supervision is found necessary in principle, the best methods of supervision will try to find the least-cost, greatest-benefit accommodation between them. Fortunately, developments in individual states, and in individual litigations, have shown that there are many practical ways to go about this balancing.

\*4 A. States Have Identified Many Forms of Active Supervision, Which Shows That It Is Practical to Provide Sufficient Oversight of Interested Boards

First of all, there are a number of procedures that states can use to provide active supervision while still allowing the boards to provide the benefits of their expertise. The Dental Board and its amici have contended that supervision will lead to immense waste and paralysis. That is surely too dire a view. This is suggested by the approaches already being used:

1. A board might be supervised by a single employee of the state government, who possesses the necessary specialized knowledge of the profession involved. Something of this sort is done in Rhode Island, where a single “dental administrator” is named to supervise the investigatory and other activities of the board. This individual is named through a selection process that ensures that he or she is acceptable to a variety of stakeholders, including the dental profession, the governor, and the state department of health. See R.I. General Laws § 5-31.1-5(1).

2. A still simpler variant might also permit sufficient supervision. A single individual in the governor's office could be authorized to oversee the actions of a group of substantively related boards - for example, boards in the health professions - under a suitable standard of review. Even this simple measure \*5 would serve to clarify the political responsibility for the board's actions, which is one of the chief goals of the state action doctrine. See FTC v. Ticor Title Insurance Co., 504 U.S. 621, 636 (1992) (federalism “serves to assign political responsibility, not to obscure it”).

3. A board might be housed in the relevant substantive state executive agency, and the head of that agency would need to review and sign off on its actions. This is the broader context of the Rhode Island approach. There the board, acting under the dental administrator, may develop proposed rules and regulations, but adopting them requires the approval of the director of the department of public health. See R.I. General Laws § 5-31.1-4(1), (9).

4. All of a state's boards could be housed within a single general umbrella agency, which provides common administrative support services, and also exercises some limited substantive supervision on important policy issues. This is the approach taken by California. There the Department of Consumer Affairs was established in 1970, building on predecessor organizations dating back to the 1920s. It is presently made up of most of the major professional boards in the state, including those regulating dentistry, medicine, optometry, accountancy, architecture, and barbering. Cal. Bus. & Prof. Code § 101. For the most part each of these boards continues to exist as a “separate unit.” Id. at § 108. Their decisions on licensing standards are specifically not subject to review by the department's director. Id. § 109. Nonetheless, the \*6 director has control or influence on certain topics. A board may not sue another agency of government without the permission of the director, id. at § 132 (subject to a limited override); and the director may review the disciplinary system of a board, and make recommendations for changes to the board or the legislature, id. at § 116.

5. A state's boards might be still more tightly consolidated, and folded into a central agency that oversees all the licensed occupations, where they will make recommendations to the agency, but where the agency head will be the one to take the formal action. Utah has adopted this model. There the Division of Occupational and Professional Licensing was established to “administer and enforce all licensing laws of Title 58.” Utah Code Ann. § 58-1-103. The duties assigned to the division include adopting rules, investigating possible violations, initiating lawsuits, and seeking injunctions. Id. at § 58-1-106. The role of the boards is to make recommendations on these actions - on appropriate rules and suitable approaches on policy and budget matters. Id. at § 58-1-202.

In all these ways the state can take advantage of the knowledge of practicing members of the profession, but can exercise control of the resulting actions.

It is worth noting that any of these approaches could be put in place fairly easily through a single statute specifying the procedures applicable to all of a state's boards.

\*7 We do not yet know which if any of these approaches will be legally sufficient. But there are clearly many practical models to work from. And there are no doubt other forms of supervision that would also pass muster for state action purposes. All that is needed is a sufficient indication that the final decision that comes out of this process is truly the state's own.

B. Practical Supervision Does Not Require That All Actions of an Interested Board be Overseen

To keep supervision a practical exercise, there should also be limits on the number of board actions that must be reviewed. It is neither necessary nor practical for every routine action to be reviewed by an independent bureaucracy.

Some such limits already exist. To begin with, courts will reach the questions of supervision and sufficient review only as to board actions that are - or are alleged to be - violations of the antitrust law. Only then will the board need to defend itself. This fact sets an initial limit on the kinds of actions subject to the supervision requirement. Only actions that potentially raise antitrust issues will need to be supervised.

However, reliance on this one principle is not a fully satisfactory response to the question. Sometimes the scope of antitrust liability is unpredictable, and sometimes allegations of antitrust liability might be \*8 made too broadly. Almost by definition, governmental actions control and limit the business conduct that would otherwise take place, and so almost by definition any governmental action is open to the charge that it has unduly lessened competition. That open-ended risk may have an inhibiting effect on board decisions, and may prompt the state to create an overly elaborate supervisory bureaucracy to compensate for it. It would be desirable to introduce greater clarity.

State legislation and federal case law have therefore already begun to identify more specific lists of topics to be supervised. These principles will at least provide useful guidance to the states, focusing the efforts of state supervisors on the areas most likely to produce antitrust problems, while in other respects limiting their intrusions on the boards:

1. A state might concentrate its supervision on certain named kinds of particularly important actions, such as regulations, lawsuits, or litigation threats. All of the states named above have made these kinds of distinctions. In California, the boards retain their discretion over licensing standards, but are supervised on the initiation of inter-agency lawsuits. Cal. Bus. & Prof. Code at §§ 109, 132. In Utah, boards retain their power to establish a passing score on examinations, even while they can only make recommendations on rules and budgets. Utah Code Ann. § 58-1-202. In Rhode Island, the dental board can direct the director of the department of health to issue licenses to qualified applicants, even while it \*9 needs the director's approval to issue regulations. R.I. General Laws § 5-31.1-4.

2. Supervision might be required for actions that directly affect entry into the business that the board regulates. Supervision of this kind has been required, for example, for the actions of private physicians who participated in a state's peer review system, and who allegedly voted to deny hospital privileges to a doctor who had opened a competing practice. See Patrick v. Burget, 486 U.S. 94, 100-01 (1988).

3. Alternatively, affirmative approval might not be required for any defined set of actions, but instead the reviewing official might be routinely informed of all the board's actions by being given copies of minutes and agendas. He or she might review these under a “negative option,” with the power to inquire more closely into any particular matter that raises questions. Because all board actions will be open to state scrutiny under a negative option plan, all will have been duly supervised in that sense. If the reviewing official selects a reasonable proportion of matters for further inquiry, that could be sufficient to show that all of them had been actively considered. Cf. Ticor Title Insurance, 504 U.S. at 638 (criticizing negative option programs only where it appeared that no critical review at all had taken place).

It is possible - not certain, but possible - that some robust forms of focused supervision will count as supervision of a board's activities overall. In other \*10 words, they may let the board be counted as “supervised” even with respect to decisions on which specific active review is not shown. This is a novel issue, involving the question of just what it means to supervise a board, which in turn leads to fundamental questions of federalism and statutory construction. As the Court explained in Parker, Congress chose to exempt certain forms of state action from the Sherman Act, both as a matter of judgment that the risks to competition were less in that context, and in recognition of the fact that the federal structure of the country requires preserving certain areas of state discretion. Parker v. Brown, 317 U.S. 341, 350-51 (1943). These same factors may tell us something about the likely intent of Congress with respect to state professional boards. Congress did not defer to private action, but it did give measured deference to state governments. Financially interested boards should be treated as private parties, and made subject to supervision, but their governmental aspects may still be relevant in determining the exact scope of the necessary supervision. If such an intent exists, it should be implemented in the kinds of simple practical terms that are appropriate to a quasi-constitutional principle. We can be confident that a financially-interested board acts for the state if it is sufficiently supervised. And it is arguably supervised closely enough to reflect state policy as long as certain key functions and decisions are overseen.

\*11 Here again, we cannot be sure which of these approaches to defining the relevant areas of supervision will be found sufficient in a particular case. But it is clear that there are a substantial number of options for states to choose among, including some safe ones that will suit those states that wish to avoid problems.

C. The Court Has the Opportunity to Further Clarify the Standards Applicable to the Two Previous Issues If It Wishes

This case can be decided without getting deeply into any of these complexities. The Dental Board's action here was completely unsupervised. Once the Court determines that supervision in some form was needed, then it can simply affirm the decision of the Fourth Circuit. Before doing so the Court may wish to satisfy itself that a supervision requirement will not create truly serious administrative problems. The precedents and experience recounted under the previous headings should provide the necessary level of assurance. They show that states and the lower courts will have sufficient tools and options available as they work through the implications of the decision here.

However, the Court might wish to do something more than that. This case touches on basic issues of national rights, legislative intent, and federalism. The Court may wish to provide guidance for the further development of the law, to provide greater \*12 assurance that state oversight and lower court decisions will develop within a range that is both useful and legally sufficient.

#### The CP solves advantage 2---their ev

William Boyd & Ann E. Carlson 16, Boyd is Professor and John H. Schultz Energy Law Fellow, University of Colorado Law School, and Fellow, Renewable and Sustainable Energy Institute; Carlson is Shirley Shapiro Professor of Environmental Law, UCLA School of Law, and Faculty Co- Director, Emmett Institute on Climate Change and the Environment, “Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law,” UCLA Law Review, vol. 63, no. 4, 2016, pp. 810–893

Any serious effort to reduce greenhouse gas (GHG) emissions in the United States will require a dramatic transformation of the nation's electric power system. The electricity sector currently accounts for nearly a third of U.S. GHG emissions, the largest single source in the economy.' A decarbonized electric power system is also critical to reducing emissions from transportation, the nation's second largest source of GHG emissions, given the need to replace much of the existing fleet with electric vehicles.2 Put simply, decarbonizing the electric power sector is far and away the most important component of any effort to meet ambitious U.S. GHG reduction targets by 2050 and beyond.'

Transitioning to low-carbon electricity will require overhauling what has been called the most complex machine ever built.' We will need to see changes across the machine, from the sources of energy used to generate electricity, to the means of transmitting and distributing that electricity, to the way in which end users interact with the grid. Not only is the machine complex, but the regulatory system that governs it is multilayered, messy, complicated, and technical. Understanding and grappling with both the complexity of the machine and its regulatory overlay will not be easy.

Policymakers and legal academics have appropriately focused much of their attention to date on how the government can best reduce GHG emissions. Debates about whether to adopt a cap-and-trade system or a taxs or whether the U.S. EPA has legal authority to use various sections of the Clean Air Act6-including Section 111(d), the basis for the Clean Power Plan regulations for existing power plants7- are important and difficult ones. So are questions about the role of various policy instruments to promote re- newable energy, such as Renewable Portfolio Standards (RPSs) and tax cred- its.' But not enough attention has been given to the structure and practice of electricity regulation in the United States and the tools available under public utility law to promote decarbonization.'

Despite significant changes in the electricity sector over the past twenty years as the federal government has opened up wholesale electricity markets to competition and as some states have embraced retail competition, Public Utility Commissions (PUCs) and state public utility law more generally continue to play fundamental roles in determining basic features of our electricity system. In part, this is by design, but in part it is also by accident. Because the push to create competitive electricity markets never took complete hold across the country-a reflection of the commitment in the Federal Power Act" (FPA) to a strong state role in electricity regulation-states have enjoyed considerable leeway in deciding whether they will participate in wholesale and retail electricity markets, continue with the traditional model of utility regulation, or pursue a mix of the two. 2 Although the goal of electricity restructuring was to fully deregulate the sector, the result has been messier, with three basic models of electricity regulation emerging across the country: a filly restructured model that combines competition at wholesale and retail levels; a traditional model that con- tinues to employ the basic cost-of-service approach to regulating vertically inte- grated Investor Owned Utilities (IOUs); and a hybrid model that combines competitive wholesale markets with regulated retail service.13 Notwithstanding the introduction of wholesale and retail competition in a number of states, PUCs retain important power in designing and setting electricity rates under each of these regulatory models. It is this ratemaking power across a diverse group of states-and the role it can and is playing in developing a greener, nimbler, more distributed grid-that is the focus of this Article.

Our focus on electricity ratemaking and its role in decarbonizing the grid has several aims. First, we argue that the need for innovative ratemaking is crucial to promoting technological innovation and deployment in the power sector. 4 As the traditional distribution system shifts from a one-way network that provides power to end users to a multi-directional grid where some users generate their own electricity and feed excess power back to the grid, individual actors and tech- nologies are interacting with the system in new and dynamic ways. Still more change is occurring in response to the need for low- and zero-carbon generation, with policies aimed at producing more solar, wind, and nuclear power, and even new coal generation from plants equipped with the ability to capture and store carbon emissions. Making this greener grid a reality will require substantial new investments across all aspects of the machine. We will need innovation and investment in everything from generation to transmission to local distribution to end use, which will in turn require new rate designs to accommodate cost recovery, promote and reward the proliferation of different energy resources and services, and encourage consumer behavior to take advantage of technology that creates a more dynamic and more efficient grid. Given their jurisdiction over decisions about generation, the use of local distribution systems, and the design of retail rates, PUCs will be at the center of these changes.

Second, we demonstrate that the United States is, in fact, seeing interesting examples of policy innovation and the use of ratemaking powers in each of the three models of electricity regulation (traditional, restructured, and hybrid) that have emerged out of electricity restructuring. To be sure, there are numerous states that are not innovating, and some that are innovating in ways that are inhibiting rather than facilitating decarbonization. But our focus here is on states that are pushing forward with potentially important experiments for the broader effort to decarbonize the grid. To that end, we describe and analyze four areas of ratemaking that are driving investments and changing behavior in ways that could be crucial to decarbonizing the grid: 1) promoting low- or zero-carbon baseload generation; 2) modernizing the grid; 3) promoting distributed energy resources; and 4) using time-variant pricing to encourage more efficient customer behavior. In examining each of these, we find that the nature of the policy exper- iments and the use of ratemaking appear to differ, at least in part, depending on the particular model of electricity regulation. In states operating under the tradi- tional model, which still retain the most regulatory authority over the develop- ment and funding of large-scale generation sources, we see PUCs using their ratemaking powers to promote the development of coal-fired power plants with carbon capture and sequestration and nuclear power plants. In states operating under a restructured or hybrid model, by contrast, we see utility commissions fo- cusing more heavily on the distribution side of the grid, which is the portion of the grid that delivers electricity directly to customers. Some states are experi- menting with performance-based rates to encourage utilities to make large-scale investments in distribution system infrastructure while others are allowing distri- bution utilities to recover the costs of these investments in advance through ex ante prudency determinations and accelerated cost recovery. These investments are crucial to integrating distributed generation into the grid, optimizing perfor- mance, and using rate design to promote more efficient consumer behavior. These states are also using their ratemaking powers to encourage distributed gen- eration by imposing storage mandates, developing infrastructure to incorporate large numbers of electric vehicles into the system, and compensating customers for providing excess generation from rooftop solar and other local generation sources, while simultaneously devising policies to eliminate cross-subsidies from traditional customers who continue to receive electricity from utilities. And in hybrid and restructured states we see PUCs developing more robust time- variant pricing policies, including opt-out rather than opt-in designs for residential programs, to align customer pricing with the actual cost of elec- tricity generation and to encourage more efficient energy use.

Third, we suggest that this diversity of experimentation is in part the result of what we call "accidents of federalism."5 The three models of U.S. electricity regulation can hardly be considered the rational result of intentionally designed federal policy. To the contrary, they might even be viewed as the result of policy failure as the Federal Energy Regulatory Commission (FERC)'s vision of fully restructured wholesale energy markets (endorsed in broad terms by the U.S. Congress) never took complete hold and as the move to introduce competition into retail electricity faltered after the California energy crisis. Numerous com- mentators decry the current system for its lack of national coherence, and more than a few have called for a larger federal role in electricity regulation.16 Never- theless, despite the messy and complex federal system, or maybe because of it, some states and PUCs are deploying new and innovative approaches to ratemaking as a means of promoting investment in low-carbon technologies and practices across the sector. Taken as a whole, we argue that this mix of innovative ratemaking, and the range of technological innovations that it enables, is different than the innovation that might emerge from a more uniform system. As we demonstrate, traditional states that still regulate the generation side of the grid through cost-of-service regulation have different powers and are innovating in different ways than states in fully restructured markets that have largely residual power over the distribution side. Thus an important result of the failure to establish a uniform national system of electricity regulation is the production of a diverse set of regulatory experiments that would likely not have arisen otherwise. We should be dear that our claim is not that the current sys- tem is superior to an alternative system with a more centralized approach to elec- tricty regulation (or decentralized through markets). Instead, our argument is that innovative use of ratemaking powers is occurring in the current system, that such innovation is different from what would have occurred had the push for wholesale and retail competition taken hold across the whole country, and that legal scholars have largely ignored these developments.

The innovations in ratemaking we identify are not, however, only the unin- tentional byproduct of a lack of a uniform national policy. Instead, we also show that through a variety of mechanisms, the federal government has used more intentional policy nudges and subsidies to push states to innovate. These include statutory changes, FERC rulemakings, and federal spending, each of which has helped encourage states to use their ratemaking powers to promote low-carbon technologies and practices by reducing some of the risk of these experiments. This more directed federal policy, combined with the three-model system, is helping to drive low-carbon investments across the whole sector in a manner that might not occur under a more uniform system. We also suggest, however, that federal policy could be used in a more systematic way to encourage and learn from the kinds of policy experiments that are underway in the three different regulato- ry models.

#### FERC rate regulation solves certainty.

Lee Boughey 20. spokesman for Tri-State Generation and Transmission Association, 3/20/20. “FERC accepts Tri-State rate filings as cooperative’s board approves greater member contract flexibility.” https://tristate.coop/ferc-accepts-tri-state-rate-filings-cooperatives-board-approves-greater-member-contract-flexibility

The Federal Energy Regulatory Commission (FERC) today issued orders accepting Tri-State’s tariff filings, ensuring consistent wholesale rate regulation for the cooperative’s member distribution utilities across four states. Tri-State’s market-based rates and open access transmission tariff were accepted by the FERC.

“This is a significant moment for our members, whose goals for cleaner energy and increased contract flexibility are greatly advanced by having FERC as Tri-State’s wholesale rate regulator,” said Rick Gordon, chairman of Tri-State and director of Mountain View Electric Association in Limon, Colo. “FERC regulation of our wholesale rates ensures greater certainty in our contracts and rate setting, as we increase members’ self-supply and local renewable energy opportunities.”

# 1NR Semis

## Cap K

### Kick---1NR

#### Concede the perm, just a test of competition---not going for it. Their answers create tensions with the aff---the first advantage is about sharing as a model for the economy---that would obviously undermine markets---that collapses sustainability per their Hsu evidence and turns resource shortages! The alt fails evidence proves people are selfish and don’t’ want to share.

## Business Confidence DA

### Kick---1NR

#### Concede business confidence is not key to the economy---thumpers will be answered on the DA. They don’t get offense for solving the economy---the counterplan solves the card sent out after the 2AC---it was marked too soon. The diasd best accesses labor market inequality---dropped the Court case solves monopsony power which is the largest internal link to growth so it solves the turn!

#### Their card is an advocate for the states! Emory = blue.

Ben **Wilterdink 20**, director of programs at the Archbridge Institute, a Washington-based think tank focused on economic mobility, “Prioritize licensing reform for health and economic recovery,” Washington Examiner, 6/4/20, <https://www.washingtonexaminer.com/opinion/op-eds/prioritize-licensing-reform-for-health-and-economic-recovery>

For months, the **COVID**-19 pandemic has **upended** daily **life** and inflicted **enormous** human and **economic costs**. However, amid this unprecedented challenge, there have been a few **bright spots** worth highlighting, from neighbors volunteering to help one another to local organizations stepping up to meet the needs of their community.

One of the most encouraging responses to the pandemic has been the willingness of policymakers at every level of government to **suspend unnecessary regulations** that made it harder for medical professionals to serve or for businesses to operate. Now, as communities begin to reopen and seek to recovereconomically, it is **more important than ever** to **remove** the **barriers** that would inhibit those efforts while still protecting the public if the virus reemerges in the fall. Though there are **many** examples of unnecessary **reg**ulation**s** that would **hinder** **an economic** **recovery**, **occupational licensingrestrictions** should be at the **top** of **the list**.

**Suspension** or **relaxation** of occupational licensing restrictions was among the **first** action policymakers took to ensure a **quick and effective response to the pandemic**. So far, 35 states have allowed out-of-state medical personnel to receive temporary licenses to work in their jurisdictions. Furthermore, 31 states waived or modified certain licensing requirements, and 25 states allowed inactive or retired licensees to practice legally.

These were **commonsense reforms** that **boosted** healthcare **capacity** across the country at a time when it was **most needed** and should be **continued** for the duration of the pandemic. In addition to the changes for medical professionals, states should now consider broader reforms to occupational licensing restrictions as businesses reopen and people return to work.

An essential component in ensuring the **swiftest possible** **economic** **recovery** will be allowing the **labor market** to **bounce back** as **quickly** as possible. **Occupational licensing** restrictions affect **nearly** **25% of workers** and already cost

## T Sherman

### Kick---1NR

#### Concede we meet---they are the Sherman Act---means the plan is the DOJ.

Legal Match. “Penalties for Violating Antitrust Laws Lawyers”. https://www.legalmatch.com/law-library/article/penalties-for-violating-antitrust-laws.html

Who Has the Authority to Enforce Antitrust Laws?

The authority to enforce antitrust laws is shared between the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ). The FTC can file antirust lawsuits in either federal court, or in an administrative hearing. Only the DOJ can bring charges under the Sherman Act, the main antitrust law. Also, under the Hart-Scott-Rodino Act, state attorney generals can file antitrust lawsuits in state or federal court.

## DOJ DA

### Democracy Impact---2NC

#### The merger collapses democracy---alternatives concentrate political views.

Barry Lynn et al. 21. Executive Director, Open Markets Institute. Mary Rasenberger CEO, The Authors Guild. John Palisano President, Horror Writers Association. Candy Moulton Executive Director, Western Writers of America. Edward Hasbrouck Book Division Chair, National Writers Union. “Letter”. https://www.authorsguild.org/industry-advocacy/authors-groups-raise-concerns-over-prh-and-ss-merger-in-letter-to-doj/

With decisions about what gets published and marketed widely (and so becomes discoverable) in the hands of so few, there is no doubt that many important books won’t get published, or even written. Every time a publisher is acquired by another, we ensure there will be less diversity in the kinds of books read and the ideas exchanged. Every publisher has different tastes, sensibilities, political interests, and levels of risk averseness. A diversity of publishers is the only way to ensure that well curated books representing the fullest variety of interests, perspectives and taste will be made available to the public.

Such a diversity is also vital to the protection of our democracy. It is widely accepted in the industry that some publishers have a greater appetite than others for the risk of publishing books that cover sensitive topics that might expose them to a lawsuit. Simon & Schuster is an example of a publisher that has been especially willing to publish books that expose the company to a high degree of risk. Just last year this included bestsellers such as Mary L. Trump’s memoir “Too Much and Never Enough,” Sean Hannity’s “Live Free or Die,” former national security adviser John Bolton’s “The Room Where It Happened: A White House Memoir,” and Bob Woodward’s “Rage.” In the words of the Wall Street Journal, these Simon & Schuster books “dominated the political conversation in 2020.”

#### Democratic backsliding in the US spills over.

Larry Diamond 21. Senior Fellow at the Hoover Institution and the Freeman Spogli Institute for International Studies at Stanford University. "A World Without American Democracy?". Foreign Affairs. 7-2-2021. https://www.foreignaffairs.com/articles/americas/2021-07-02/world-without-american-democracy?utm\_medium=referral&utm\_source=www-foreignaffairs-com.cdn.ampproject.org&utm\_campaign=amp\_kickers

Aprolonged global democratic recession has, in recent years, morphed into something even more troubling: the **“third reverse wave” of democratic breakdowns** that the political scientist Samuel Huntington warned could follow the remarkable burst of “third wave” democratic progress in the 1980s and the 1990s. Every year for the past 15 years, according to Freedom House, significantly more countries have seen declines in political rights and civil liberties than have seen gains. But since 2015, that already ominous trend has turned sharply worse: 2015–19 was the first five-year period since the beginning of the third wave in 1974 when more countries **abandoned democracy**—twelve—than transitioned to it—seven. And **the trend continues.** Illiberal populist leaders are **degrading democracy** in countries including Brazil, India, Mexico, and Poland, and **creeping authoritarianism** has already moved Hungary, the Philippines, Turkey, and Venezuela out of the category of democracies altogether. In Georgia, the dominance of the Georgian Dream Party has led to the steady decline of electoral processes and a breakdown in the rule of law. In Myanmar, the military overthrew the elected government of Aung San Suu Kyi, ending an experiment in partial democracy. In El Salvador, president Nayib Bukele staged an executive coup by removing the attorney general and Supreme Court justices who were obstacles to his consolidation of power. In Peru, democracy hangs from a thread as the right-wing autocrat Keiko Fujimori advances vague claims of election fraud in a bid to overturn her narrow electoral defeat to left-wing opponent Pedro Castillo. What is especially striking about this last case is that Fujimori’s gambit bears a grim resemblance to the lie perpetuated by former U.S. President Donald Trump and his followers about the 2020 presidential election. This is no coincidence. As the journalist and historian Anne Applebaum has observed, fictitious claims of fraud and “stop the steal” tactics are becoming a common means by which autocratic populists try to obstruct democracy. Such tactics have long been a source of instability in countries struggling to develop democracy. But the fact that the most recent iteration of the antidemocrat’s playbook draws heavily on precedents in the **world’s most important and powerful democracy** marks the start of a **dangerous new era.** Today, the United States confronts a **growing antidemocratic movement**, not just from the ranks of fringe extremists but also from a substantial group of officeholders—a movement that is challenging the very foundations of electoral democracy. Should this effort succeed, the United States could become the first ever advanced industrial democracy to fail—that is, to no longer meet the minimum conditions for free and fair elections as political scientists and other scholars of democracy define them. The **failure of American democracy would be catastrophic** not only for the United States; it would also have **profound global consequences** at a time when freedom and democracy are already **under siege**. As Huntington noted, the diffusion of democratic movements and ideas from one country to another has helped drive positive democratic change. Antidemocratic norms and practices can **spread in a similar fashion**—especially when they emanate from powerful countries. That is why the acceleration of a democratic recession into a democratic depression happened largely on Trump’s watch. And it is why no development would **more gravely damage the global democratic cause** than the democratic backsliding of its **most important champion.**

#### Extinction.

Larry Diamond 19. PhD in Sociology, professor of Sociology and Political Science at Stanford University. “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of selfdoubting democracies. These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled. The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

### AT: Not DOJ---2NC

#### 2. DOJ enforces law against anticompetitive practices.

Kevin Taglang 15. Executive Editor at the Benton Institute for Broadband & Society, 8/21/15. “What Is ‘Unfair’ Competition?” https://www.benton.org/blog/what-unfair-competition

Chairwoman Ramirez explained that the FTC generally has and will use its standalone Section 5 authority to deal with antitrust problems for which there would be little or no relief to consumers if the FTC did not intervene. The Department of Justice also investigates anti-competitive behavior. But the FTC's powers are broader and it can bring cases that don't "necessarily rise to the antitrust level, but threaten competition," said Richard Feinstein, who was head of the FTC's Bureau of Competition from 2009 through 2013 and is now a partner at the law firm Boies, Schiller & Flexner.

#### 3. DOJ enforces Sherman.

Cooley 16. Cooley LLP, Cooley Alert, 10/24/16. “DOJ to Criminally Pursue Anticompetitive Employment Violations.” https://www.cooley.com/news/insight/2016/2016-10-24-doj-to-criminally-pursue-anticompetitive-employment-violations

Perhaps most striking, the DOJ put companies on notice that the agency now "intends to criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers." DOJ's announcement signals a marked shift from past treatment of these kinds of agreements. While both the FTC and the DOJ have civilly enforced against employers for entering agreements with competitors that limited employee wages and benefits, this is the first indication that the DOJ intends to pursue criminal enforcement.2 [Footnote 2 Begins] The FTC pursues actions against employers under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition; the DOJ pursues actions under Section 1 of the Sherman Act, which prohibits contracts or agreements that unreasonably restrain trade. Criminal charges can only be brought under the Sherman Act provision. [Footnote 2 Ends] The stakes are now much higher, with both companies and individual employees facing potential criminal felony convictions for this same conduct.

### UQ Overview---2NC

#### DOJ is going after Random House acquisition now---that’s Open Markets.

#### DOJ will win but Bertelsmann will fight.

\*Note---Bertelsmann is the company that owns Penguin Random House.

Slate Money with Felix Salmon 11/6/21. A weekly roundup of the most important stories from the worlds of business and finance, hosted by Felix Salmon (financial journalist) and Emily Peck. “Twelve Gallons of Milk”. https://www.stitcher.com/show/slate-money-with-felix-salmon/episode/twelve-gallons-of-milk-88092214

\*Transcribed by Brian Klarman on 11/14/21. Starting around minute 42:00 in the episode. [speaker one:]/[speaker two:] added in transcription to clarify that two different people are speaking.

[Speaker one:] For the time being, looks like the DOJ is coming out hard against Bertelsmann buying Simon & Schuster. I am sure that-well I mean if you look at the press release that Bertelsmann put out-they are going to fight this very hard. They say that some of the facts in the complaint are wrong. And while the anti-monopsony statute is 100% right there in the statute and it is 100% something that can be upheld by a judge, it really hasn’t been used much in the past 40 years in antitrust cases. So… I guess on one level like Betelgeuse has that on its side. That will a judge really say I am going to block this gazillion dollar merger on the basis of this monopsony thing that no one can even spell?

[Speaker two:] I think so because people actually understand the stakes in a in this case about book publishing. Everyone gets it.

#### The government will likely win but maintaining resources

The OASG 21. Krystallina, Organization of Anti-Social Geniuses. "Simon & Schuster Can't Go to Its New House Just Yet". TheOASG. 11-10-2021. https://www.theoasg.com/articles/please-save-my-money/simon-schuster-cant-go-to-its-new-house-just-yet/27265

United States v. Bertelsmann SE & Co KGaA

In December 2020, I talked about ViacomCBS selling its Simon & Schuster publishing division to Penguin Random House, which is owned by German conglomerate Bertelsmann. Penguin Random House is already the largest publishing firm by far, and adding Simon & Schuster would just increase their dominance even more. This led to some opposition among industry insiders and trade groups, but others (including the two firms) argued fears of lesser author pay were overblown. In fact, they said the merger would actually be beneficial, like to better pressure Amazon’s pricing methods.

Post-merger, which was expected to close sometime this year, most manga would be distributed by Penguin Random House. Out of the biggest manga names, only Yen Press would not be under their umbrella along with smaller companies like DENPA.

Anyway, from the start were musings about whether the US government would challenge the deal. Well, they have.

Attorney General Merrick Garland explained the rationale for the lawsuit:

“IF THE WORLD’S LARGEST BOOK PUBLISHER IS PERMITTED TO ACQUIRE ONE OF ITS BIGGEST RIVALS, IT WILL HAVE UNPRECEDENTED CONTROL OVER THIS IMPORTANT INDUSTRY. AMERICAN AUTHORS AND CONSUMERS WILL PAY THE PRICE OF THIS ANTICOMPETITIVE MERGER — LOWER ADVANCES FOR AUTHORS AND ULTIMATELY FEWER BOOKS AND LESS VARIETY FOR CONSUMERS.”

Penguin Random House and Simon & Schuster have stated they will still operate independently after the sale, including bidding against each other for titles and the deal is a “pro-consumer, pro-author, and pro-book seller transaction”.

However, groups like the Authors Guild are applauding the US government for stepping in.

The two publishers will be going to court, hiring the same lawyer who prevented the previous administration from blocking the AT&T-Time Warner deal.

Although, to be fair, it’s not like President Biden has a known personal grief with ViacomCBS, Bertelsmann, or any other of the companies involved here, so I imagine this case will be at least a bit more difficult. Especially when, according to the government’s complaint:

“ALTHOUGH DEFENDANTS HAVE PUBLICLY SUGGESTED THAT THE MERGER IS NECESSARY TO CREATE A STRONGER COUNTERWEIGHT TO AMAZON, PENGUIN RANDOM HOUSE’S GLOBAL CEO PRIVATELY ADMITTED THAT HE ‘NEVER, NEVER BOUGHT INTO THAT ARGUMENT’ AND THAT ONE ‘[G]OAL’ AFTER THE MERGER IS TO BECOME AN ‘[E]XCEPTIONAL PARTNER’ TO AMAZON.”

In addition, there’s also a quote from Simon & Schuster’s CEO who wrote to a top author, “I’m pretty sure that the Department of Justice wouldn’t allow Penguin Random House to buy us, but that’s assuming we still have a Department of Justice.” He now says this was a joke.

So, yeah, when you have records of two executives from these publishers saying this deal isn’t likely unless the US just gave up on law and countering one of their biggest public arguments, the lawsuit to prevent the deal has a high chance of being successful.

Of course, the government could always settle with the publishers. Like, perhaps Penguin Random House has to sell some of its divisions or be transparent about any bidding between its division and Simon & Schuster. Or they could lose completely, with the judge finding the deal okay since the Penguin and Random House merger was fine and that new publishers are still popping up. The judge hearing the case was nominated by President Biden in March and confirmed in September.

Monopsony

The government’s main argument is rather unusual, at least for modern times: the suit is focusing on the monetary changes for authors (advance payments) rather than book buyers.

So this isn’t an anti-monopoly case, it’s an anti-monopsony case. According to Investopedia, a monopsony is “is a market condition in which there is only one buyer, the monopsonist”.

The gist is that readers will still have plenty of options to buy books from, but authors will have fewer options to sell their books to (i.e. “get hired” with advance payments). Consumers will be hurt, but only because lower author salary means less people can make a living writing — and fewer books.

This, according to some analysts, may be the stronger argument, and it’s why the Authors Guild and big names like Stephen King support blocking the sale. In an interview with Bloomberg Law, a former principal deputy assistant attorney general in the Antitrust Division at the Department Justice also pointed out that if Penguin Random House and Simon & Schuster are still going to be bidding for rights as they claim, then there seems to be little point in them merging.

If the Department of Justice successfully prevents Penguin Random House from buying Simon & Schuster, the latter would still get some money from the deal. ViacomCBS will likely put the company back up for auction, although a new sale price will likely be closer to the original high-end estimates of around $1.7 billion versus the almost $2.18 billion Penguin Random House agreed to.

Penguin Random House’s Future

But what will happen is probably a long way off. The AT&T-TimeWarner case took over two years before the government gave up appealing again, so it’s easy to see this lawsuit taking just as long. And this is a different sort of case, so it could go either way.

### AT: Morale Turn---2NC

#### 3. Morale argument is irrelevant---doesn’t disprove the Random House case, their evidence doesn’t say the plan solves, AND morale doesn’t impact work.

John Newman 21, associate professor with the University of Miami School of Law, “Morale At the DOJ’s Antitrust Division Has Plummeted. Here’s How to Fix It,” ProMarket, 3/17/21, https://promarket.org/2021/03/17/doj-antitrust-division-morale-biden-pay-funding/

Even as overall morale has dropped precipitously, the OPM’s annual survey shows that Division staff can—and do—continue to work extremely well together. Despite a slight downturn over the past few years, “teamwork” has been a consistent bright spot at the Division.

#### 4. Link outweighs the turn on timeframe---changing culture takes years BUT the case is coming now.

#### 5. It’s from an intern!

John Newman 21, associate professor with the University of Miami School of Law, “Morale At the DOJ’s Antitrust Division Has Plummeted. Here’s How to Fix It,” ProMarket, 3/17/21, https://promarket.org/2021/03/17/doj-antitrust-division-morale-biden-pay-funding/

The US Department of Justice Antitrust Division faces one of the most critical junctures in its long and storied history. A landmark case against Google, high concentration levels across a variety of industries, a projected wave of merger-driven consolidation, and an increasing likelihood of legislative reforms—amidst all of these, a healthy and robust Antitrust Division has never been more necessary.

So it’s been especially troubling to see the drastic decline in Division morale over the past four years. In 2010, when I was a summer intern there, the Antitrust Division prided itself on being one of the best places to work in the entire federal government. That year, the Division ranked 22nd out of over 400 federal agency components included in the Office of Personal Management’s (OPM) annual Federal Employee Viewpoint Survey.

But per the OPM’s latest results, morale at the Antitrust Division has plummeted, dragging the Division all the way down to 404th place out of the 420 agency components surveyed.

Let that sink in: morale at the Antitrust Division dropped from a consistent top 10 percent ranking to a bottom 10 percent ranking in less than a decade.

This can’t be explained away by an overall drop in morale at the Justice Department. It is specific to the Antitrust Division. The blue line below represents the Division; the gray line DOJ more broadly.

After a temporary drop during 2011–12 (likely due to an internal restructuring effort), a marked divergence began in 2017. Over that time period, as highlighted by the New York Times, the Division was among the ten agencies experiencing the worst declines in employee morale.

At the same time, antitrust law itself has skyrocketed in visibility. A well-functioning Antitrust Division is always important—these days, it’s crucial.

What’s to Be Done?

The Biden administration faces both challenges and opportunity. Citing interagency dysfunction between the Division and the FTC over the past four years, a number of observers have proposed stripping antitrust jurisdiction from one of the agencies. But why not fix existing structures instead of simply tossing them aside? Practicing with the Antitrust Division should be a positive, fulfilling experience. And, just as importantly, a re-energized Division will translate into more effective, innovative enforcement efforts.

### AT: Thumpers---2NC

#### Kanter is focused on labor.

Janice Johnson 10/29/21. Associate at Constantine Cannon. Former judicial clerk for Judge Jon P. McCalla in the U.S. District Court for the Western District of Tennessee. "Biden’s Pick for Top Antitrust Enforcer is Likely to Continue DOJ’s Increasing Focus on Labor Markets". Constantine Cannon. 10-29-2021. https://constantinecannon.com/2021/10/29/bidens-pick-for-top-antitrust-enforcer-is-likely-to-continue-dojs-increasing-focus-on-labor-markets/

President Biden’s nominee for his administration’s top antitrust enforcer appears likely to continue the trend of increased enforcement efforts in labor markets.

At his Senate confirmation hearing on October 6, 2021, Jonathan Kanter testified that, “If the antitrust laws are not working to protect competition to the benefit of workers, then the antitrust laws are not working.” Kanter is President Biden’s pick to be the next Assistant Attorney General for the Antitrust Division at the U.S. Department of Justice (“DOJ”) and his testimony reflects the Biden administration’s focus on labor market collusion as an antitrust enforcement priority.

#### Assumes “big tech” thumpers

Janice Johnson 10/29/21. Associate at Constantine Cannon. Former judicial clerk for Judge Jon P. McCalla in the U.S. District Court for the Western District of Tennessee. "Biden’s Pick for Top Antitrust Enforcer is Likely to Continue DOJ’s Increasing Focus on Labor Markets". Constantine Cannon. 10-29-2021. https://constantinecannon.com/2021/10/29/bidens-pick-for-top-antitrust-enforcer-is-likely-to-continue-dojs-increasing-focus-on-labor-markets/

Although Kanter is widely known for his criticism of the Big Tech companies, his nomination hearing testimony demonstrates that his views are also in line with the administration’s focus on labor markets as a target of antitrust enforcement. He identified competition for workers as a “critical mission” of antitrust law and stated that he is “eager… to ensure [the DOJ has] a vigorous and comprehensive antitrust program that protects workers from anticompetitive abuses.” Employers can expect Kanter and the Biden administration to continue to prioritize the labor market in their antitrust enforcement efforts.

#### Thumpers are minor--- this is the first major antitrust action

Brian Stelter 11/2/21. Cnn Business. "Justice Department sues to stop Penguin Random House's purchase of Simon & Schuster". Henry Herald. 11-2-2021. https://www.henryherald.com/news/business/justice-department-sues-to-stop-penguin-random-houses-purchase-of-simon-schuster/article\_7d44f1c9-3a09-5ae0-a149-eebd959b3098.html

The Justice Department is suing to block Penguin Random House's proposed acquisition of Simon & Schuster, arguing that the combination of the two book business giants "would likely harm competition in the publishing industry."

Tuesday's complaint in United States District Court is one of the first major antitrust actions by the Biden administration.

#### Thumpers aren’t major---their ev must say “the DOJ has brought suit”.

Jacob Knutson 11/2/21. Writer @ Axios. "DOJ sues to stop Penguin Random House's acquisition of Simon & Schuster". No Publication. 11-2-2021. https://www.yahoo.com/now/doj-sues-stop-penguin-random-162916195.html

The Department of Justice filed a lawsuit Tuesday to prevent Penguin Random House's more than $2 billion acquisition of Simon & Schuster, alleging that the merger would violate antitrust law.

Why it matters: The DOJ said Penguin Random House, America's largest book publisher, would have "outsized influence" over which books are published in the U.S. and how much authors are paid if it's allowed to absorb Simon & Schuster.

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* It's one of the Biden administration's first major antitrust challenges and comes after President Biden signed a sweeping executive order over the summer that limits corporate consolidation.

#### Thumpers are speculation---this is the first enforcement issue.

Annika Barranti Klein 11/2/21. Writer @ Book Riot. “Justice Department Sues To Block Penguin Random House Acquisition Of Simon & Schuster.” https://bookriot.com/justice-department-sues-to-block-publisher-acquisition/

The United States Department of Justice (DOJ) agrees with that speculation and has sued to prevent the acquisition/merger. While antitrust laws typically protect consumers from corporate monopolies — e.g. preventing a corporation such as Penguin Random House from setting book prices at unattainable highs — this lawsuit is to prevent a monospony, which is an economic market with only one buyer, and therefore seeks to protect authors specifically.

From the complaint filed today:

The merger would give Penguin Random House outsized influence over who and what is published, and how much authors are paid for their work. The deal […] would likely harm competition in the publishing industry and should be blocked.

Authors are the lifeblood of book publishing. Without authors, there would be no stories; no poetry; no biographies; no written discourse on history, arts, culture, society, or politics.

Today, Penguin Random House and Simon & Schuster compete vigorously to acquire publishing rights from authors and provide publishing services to those authors. This competition has resulted in authors earning more for their publishing rights […] and receiving better editorial, marketing, and other services that are critical to the success of their books.

The full complaint can be read here.

This lawsuit is the public’s first insight into how the Biden administration will handle antitrust enforcement, something the Trump administration was very hands-off with — in 2017 and 2018 the DOJ did not open a single investigation, the longest gap in 50 years of antitrust laws.

### Link Overview---2NC

#### 3. It turns the case.

Rory Van Loo 18, Associate Professor, Boston University School of Law and Affiliated Fellow, Yale Law School Information Society Project, “Making Innovation More Competitive: The Case of Fintech,” UCLA Law Review, 232, 2018, hein.

The DOJ and FTC options have several shortcomings. Unlike the CFPB, they lack substantial financial expertise. Both entities cover many other industries. If a financial bureau were housed within the existing competition agencies, financial competition might receive inadequate internal independence. Cuts to antitrust resources, or shifts in policy, would affect financial competition. If other industries needed attention, financial competition resources could be redirected. In the alternative, if the financial competition bureau were completely independent of the current competition offices, the co-location synergies would be less, reducing the benefits of housing it in those agencies. Nor do either of these agencies have strong rulemaking cultures,275 which could inhibit even a separate financial bureau’s rulemaking activities.

### Tradeoff---2NC

#### Yes tradeoff---scarce resources means the DOJ can’t stop other anticompetitive practices.

Leemore Dafny 21. Bruce V. Rauner Professor of Business Administration at the Harvard Business School and the John F. Kennedy School of Government, and former Deputy Director for Healthcare and Antitrust in the Bureau of Economics at the Federal Trade Commission. "The Covid-19 Pandemic Should Not Delay Actions to Prevent Anticompetitive Consolidation in US Health Care Markets". ProMarket. 6-10-2021. https://promarket.org/2021/06/10/covid-pandemic-consolidation-pandemic-monopoly/

However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts.

To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses.

The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices.

#### Resource constraints force the DOJ to choose which antitrust actions to pursue.

Nicol Turner Lee 21. Senior Fellow - Governance Studies Director - Center for Technology Innovation, Brookings, with Caitlin Chin – Research Analyst, Center for Technology Innovation - The Brookings Institution, 7/8/21. “The debate on antitrust reform should incorporate racial equity.” https://www.brookings.edu/blog/techtank/2021/07/08/the-debate-on-antitrust-reform-should-incorporate-racial-equity/

Last year, then-acting FTC Chair Rebecca Kelly Slaughter put forward an argument that U.S. enforcement agencies should consider antitrust statutes as “a tool for combatting structural racism” by prioritizing competition enforcement in highly concentrated industries where people of color are marginalized. These enforcement decisions are especially consequential given the resource constraints that federal antitrust agencies face. According to Michael Kades of the Washington Center for Equitable Growth, appropriations for the FTC and Antitrust Division of the Department of Justice (DOJ) decreased 18% from 2010 to 2018 when adjusting for inflation. These constraints force federal enforcement agencies to choose which antitrust actions to pursue or abstain from; each active choice potentially impacts marginalized communities within the related sector.

#### New antitrust cases shift staff and resources away from big-tech investigations.

Juan A. Arteaga et al. 20. Partner @ Crowell Moring, with Alexis J. Gilman, William Randolph Smith, and Rosa M. Morales, 8/25/20. “DOJ Antitrust Division Announces Organizational Changes Focused On Increasing Prosecution of Consent Decree Violations and Civil Conduct Offenses.” https://www.crowell.com/NewsEvents/AlertsNewsletters/all/DOJ-Antitrust-Division-Announces-Organizational-Changes-Focused-On-Increasing-Prosecution-of-Consent-Decree-Violations-and-Civil-Conduct-Offenses

While reports indicate that the Antitrust Division specifically and DOJ more generally have dedicated significant resources to the ongoing “Big Tech” antitrust probes, the Division’s civil conduct investigations have traditionally taken somewhat of a backseat to its merger investigations because conduct investigations are not subject to any deadlines. Consequently, when faced with a significant increase in the number of merger investigations or the demands of such investigations, the Antitrust Division has often shifted staffing and resources away from its civil conduct matters to its merger matters, which must be completed within the statutory or negotiated timeframe. This resource strain creates the risk that civil conduct investigations will unnecessarily linger for extended periods, thereby subjecting companies to the uncertainty, costs, and stress associated with having a DOJ investigation hanging over their heads. Conversely, this resource strain creates the risk that potentially meritorious civil conduct investigations will be closed prematurely or unnecessarily narrowed in scope.

#### They cause the DOJ to walk away from the Random House case.

Bernard (Barry) A. Nigro Jr. et al 21. chair of the Global Antitrust and Competition Department for Fried Frank, Principal Deputy Assistant Attorney General for the DoJ’s Anitrust Division (2019-2020), former Deputy Director for the Federal Trade Commission's Bureau of Competition, and Nathaniel L. Asker, partner in the Antitrust Department, resident in Fried Frank's New York office, and Aleksandr B. Livshits, special counsel in the Antitrust Department, resident in Fried Frank's New York office, where he is a member of the Antitrust and Competition Practice, “Managing Antitrust Risk in the Biden Administration.” Fried Frank. 1/5/2021. <https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf>

Further, despite a record number of litigated cases, the budget at the antitrust agencies is insufficient to match the rhetoric of more enforcement. The DOJ had 25% fewer full-time employees in 2019 than it had 10 years earlier9 and the FTC recently imposed a hiring freeze. With limited resources, the agencies are forced to make important tradeoffs in deciding what matters to challenge, settle, or walk away from. Indeed, Commissioner Wilson reportedly voted against bringing a lawsuit to block CoStar’s acquisition of RentPath, in part, because of limited FTC resources.10 Although the agencies will receive a modest budget increase for the current fiscal year,11 it is far short of what some think is needed.12 As antitrust enforcement has become a bipartisan issue, a significant increase in the antitrust agencies’ budgets in the future is likely.

#### The plan forces them to drop other investigations

David Mccabe 18. Writer @ Axios. "Mergers are spiking, but antitrust cop funding isn't". Axios. 5-4-2018. https://www.axios.com/antitrust-doj-ftc-funding-2f69ed8c-b486-4a08-ab57-d3535ae43b52.html

Why it matters: A wave of mega-mergers touching many facets of daily life, from T-Mobile’s merger with Sprint to CVS’s purchase of Aetna, will test the Justice Department's and Federal Trade Commission’s ability to examine smaller or more novel cases, antitrust experts say.

What they’re saying: “You have finite resources in terms of people power, so if you are spending all of your time litigating big mergers … there might be some investigations where decisions might have to be made about which investigations you can pursue,” said Caroline Holland, who was a senior staffer in DOJ’s Antitrust Division under President Obama and is now a Mozilla fellow.

### AT: Klar 21

#### Big Tech legislation won’t pass.

Jacob Silverman 21. Staff writer and Author, The New Republic. “Biden Wants to Tame Big Tech with a Thousand Paper Cuts,” July 9. <https://newrepublic.com/article/162940/biden-executive-order-big-tech-monopoly>

On Friday, the White House [announced](https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/) a potentially important, if modest, effort to further tamp down the power of the technology industry. This time the instrument is an executive order—the kind of wide-ranging declaration that often gets called “sweeping” or “major,” though its efficacy may take years to gauge—that covers everything from competition in the economy to drug prices to reforming a tech sector that is defined by a handful of seemingly unstoppable titans. Offering a mix of general recommendations, requests for action from other government agencies, and new administration policies, the Executive Order on Promoting Competition in the American Economy may be just what our overconsolidated economic system needs. But in tackling the power of a tech sector that has not only wrested control of the economy but remade it in its own data-hungry image, the Biden administration is still throwing pebbles at its enemy’s parapets. The tech industry has had 20 years to establish a stranglehold over our personal data, attention, and consumer choice. To tackle these problems, we need more, much more.

Despite promising to take on the power of Big Tech, President Joe Biden and his administration have so far taken a cautiously incrementalist approach. He’s [appointed tough industry critics](https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html) like Lina Khan to be commissioner of the Federal Trade Commission, but he has yet to name a head of the Justice Department’s antitrust division, a key role for any future enforcement action. In Congress, Democrats have introduced six smallish antitrust bills, but their path out of the House is [murky](https://www.cnbc.com/2021/06/24/-big-tech-antitrust-debate-odd-alliances-form-and-party-fractures-show.html), as ongoing disputes between [Republicans](https://www.cnbc.com/2021/07/07/house-republicans-lay-out-tech-antitrust-agenda.html) and Democrats over how to fight this legislative battle mean that the final bills could look much different than they did in committee—if they make it to a floor vote at all. (It doesn’t help that some Silicon Valley–adjacent Democratic politicians, like Representative Ted Lieu and Representative Ro Khanna, have been less than supportive of the bills.)

As federal and congressional leadership lag, states have forged ahead, with dozens of attorneys general coming together in lawsuits like one, filed this week, accusing Google of [anti-competitive practices](https://www.vox.com/recode/2021/7/7/22567656/google-play-store-states-antitrust-suit-letitia-james-utah-new-york-north-carolina). Other ongoing antitrust suits include one [against Amazon](https://www.washingtonpost.com/technology/2021/05/25/dc-ag-antitrust/) over pricing issues; another lawsuit (this one with DOJ participation) [against Google](https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws); and two others against Facebook that a judge recently threw out. In this proliferating legal war against Big Tech—premised on a lack of competition and companies’ abusing their monopoly status—any of these cases could yield billion-dollar fines for one of the tech giants. But fines are easily paid. Whether these suits can lead to meaningful reform, to breaking up companies and redirecting business practices away from the current dominant model of user surveillance and bulk data collection—that is far less clear. As with proposed legislation in the House, bipartisan legal efforts may be sundered on the altar of competing partisan priorities, with Republicans focusing on [alleged censorship](https://newrepublic.com/article/162299/josh-hawley-gops-fake-war-big-tech) and Democrats more focused on [economic competition and user rights](https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting).

With the stage set for legislative gridlock, drawn-out lawsuits, and [bickering](https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386) over the FTC’s legitimacy, a small opening has emerged for the Biden administration to take meaningful action on its own. And there are some measures in the executive order worth celebrating. One section aims to improve internet service by eliminating early termination fees and providing transparent pricing to help drive competition. Another proviso calls for gadget users—from farmers working on tractors to people tinkering with their own cell phones—to have what’s often [referred to](https://www.theverge.com/2021/7/9/22569869/biden-executive-order-right-to-repair-isps-net-neutrality) as “the right to repair,” a right that tech companies have suppressed by discouraging DIY or third-party work on broken items. (Forcing customers to take their doddering laptop to Apple’s Genius Bar helps the company maintain control over its products and ensures that repairs, and the money they generate, stay in-house.) Other relevant orders call for the restoration of net neutrality and applying more scrutiny to corporate mergers, which may prevent a tech giant from swallowing up the next WhatsApp or Slack, formerly insurgent chat/social media platforms that were absorbed by Facebook and Salesforce.

In the last year, tech companies have shifted their rhetoric, [claiming](https://newrepublic.com/article/162509/facebook-big-tech-nick-clegg-regulation-policy) that they are in favor of regulation—just on their terms. To that end, they’ve deployed armies of lobbyists to woo elected officials, making companies like Google and Facebook some of the most profligate spenders on K Street. With the potential for major legislative action still up in the air—a divided Senate doesn’t augur well, unless tech-critical Republicans like Senator Josh Hawley line up behind the Democratic legislative agenda, which seems unlikely—executive action may be the most promising way forward. Call it death by a thousand regulations. It’s also—as the executive order’s many prompts for action by the Federal Communications Commission, the FTC, and DOJ show—a plea for the government to do its damn job.

Even sympathetic observers may survey this latest initiative with some well-earned cynicism. [Regulatory capture](https://newrepublic.com/article/149438/big-pharma-captured-one-percent), in which regulatory agencies become beholden to the companies and industries they oversee, is a well-known feature of the land, and the families of leading politicians like Representative Nancy Pelosi periodically trade stocks based on what appears to be insider information. And as demonstrated by the measure to treat all internet traffic equally by restoring net neutrality (something that the Trump administration [did away with](https://newrepublic.com/article/146305/loses-war-net-neutrality)), the Biden administration is still playing catchup, fighting many of yesterday’s battles. For instance, the order “calls on the leading antitrust agencies, [the DOJ and FTC], to enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge.”

While divesting WhatsApp and Instagram from Facebook are worthwhile efforts, there’s also a sense that would-be tech reformers are struggling to deal with the mistakes and oversights of a previous generation of politicians (i.e., pushing for the enforcement of existing laws is yet another call for the government to do its job). Even the order’s directive that the FTC “establish rules on surveillance and the accumulation of data” seems incredibly belated. We are 20-odd years into a surveillance economy, in which consumers have become the main source to be mined for value. The resulting inequities are vast, as the tech giants have had decades to strengthen their positions. It will take far more than an executive order to undo all this, much less to ensure a more equitable future. The question is: Does the Biden administration understand this grim state of play, or is this the best we’re going to get?

#### No antitrust over Big Tech.

Joshua D. Wright 21. Executive Director of the Global Antitrust Institute at the Antonin Scalia Law School, former commissioner of the U.S. Federal Trade Commission from 2013 to 2015, interviewed by James Pethokoukis, senior fellow at AEI, “Will US antitrust law break up Big Tech? My long-read Q&A with Joshua D. Wright,” 2/9/21, <https://www.aei.org/economics/will-us-antitrust-law-break-up-big-tech-my-long-read-qa-with-joshua-d-wright/>

[Italics denote questions from Pethokoukis]

*Do you think that, if we have this conversation in four years, we will have seen any major action against any of the largest technology companies that involves them selling off a significant business?*

That’s a great question. I bet the under, and here’s why. The US antitrust doctrine is what it is right now, and we still have meaningful judicial review. And on the left and the right, you see all of the attention paid to legislative change — they’re not going to win in the court. The DOJ will bring its case against Google, the FTC has a Facebook case where they might be able to convince a court to spin off WhatsApp or Instagram. I’m skeptical that those are good cases, but neither of them are the big-breakup, affect-the-business-model case that proponents of a new antitrust are looking for. For what it’s worth, my money is that the government loses both of those cases, but those cases exist. But overall, I think that the hope for the antitrust reformers lies, not in the courts, but in Congress.

Maybe I’ve been in DC too long, but I always bet the under if someone tells me that the revolution is coming from Congress. I don’t think we’re going to see legislation that undoes the consumer welfare standard. I do think that you’ll see some antitrust legislation. You’ll get bigger budgets for the agencies, and maybe you’ll get tinkering around the margins with the presumption here or presumption there. But I don’t think that you’re going to see a regulatory antitrust revolution via Congress.

I think it’s going to have to be done through the courts, and I’m skeptical. My silver lining of hope when watching some of these discussions happen is that you’ve got to win in the Article III courts, and that means you’ve got to have proof, not just political grievances. I don’t think they’ve got that.

### AT: Can’t Solve Monopsony

#### Solves monopsony power---DOJ win on Random House is key to challenge monopsony power---the case is being argued on the grounds it’s terrible for authors labor market power---rising monopsony power heightens inequality---suppresses wages and results in workers quitting---that’s Posner. No 2AC warrant.

#### The case is key to a new approach.

Joseph Miller and Tinny Song 11/10/21. Writers @ Mintz - Antitrust Viewpoints. "Stop the Presses: DOJ Sues to Prevent Monopsony Resulting from Penguin Random House Acquisition of Simon & Schuster". JD Supra. 11-10-2021. https://www.jdsupra.com/legalnews/stop-the-presses-doj-sues-to-prevent-4882948/

The government alleges that the combination would eliminate head-to-head competition between Penguin Random House and Simon & Schuster which would provide the combined firm with “outsized influence” over which books are published and how much authors are paid. The complaint also alleges that the acquisition would facilitate coordination between the combined firm and the remaining “Big Five” publishers.

* With respect to the elimination of head-to-head competition between Penguin Random House and Simon & Schuster, the complaint notes that the combined firm would account for nearly half the market for the acquisition of U.S. publishing rights to anticipated top-selling books, with its nearest competitor less than half its size. The complaint notes that Penguin Random House and Simon & Schuster compete closely to acquire the rights to anticipated top-selling books, as they are often the top two bidders and frequently lose to one another. As a result of this head-to-head competition, authors of anticipated top-selling books have been able to secure higher advances and other favorable terms. The government’s complaint alleges that the elimination of this head-to-head competition would create a monopsonist that could use its dominance to pay lower prices to the authors.
* The government also alleges that the acquisition would facilitate coordination between the combined firm and the remaining Big Five publishers. The complaint alleges that the U.S. publishing industry is already conducive to coordinated behavior given the concentration of large firms, and noted examples of terms of author contracts, such as royalty rates, being fairly standardized across the industry over time. Furthermore, the complaint highlighted the Big Five’s history of collusion, citing to its 2012 complaint filed in the Southern District of New York against the five publishers alleging a price-fixing conspiracy with Apple Inc. to increase the prices of e-books. The district court found that the defendants had engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act, a judgment that was affirmed by the Second Circuit.

Takeaways

The government’s complaint is notable in that it challenges a transaction that may result in upstream anticompetitive effects instead of the usual harm to consumers of a product. While the government frequently challenges mergers that might result in a monopoly—a market condition which raises prices for buyers—here the challenge seeks to prevent a monopsony, or a market condition in which dominant buyers will charge anticompetitive prices from sellers. This case could be a significant development in how the antitrust agencies approach monopsony merger enforcement

#### It’s the first monopsony case---sets a new future.

Eriq Gardner 11/10/21. Legal Editor at Large @ Hollywood Reporter. "In Targeting ViacomCBS’ Simon & Schuster Sale, Biden’s Antitrust Team Makes First Bold Move". Hollywood Reporter. 11-10-2021. https://www.hollywoodreporter.com/business/business-news/viacomcbs-simon-schuster-sale-bidens-antitrust-team-makes-first-bold-move-1235045112/

The lawsuit launched by the Department of Justice on Nov. 2 to block Penguin Random House from acquiring Simon & Schuster is undoubtedly bold. As the first government case to explicitly challenge the creation of a “monopsony” — where a single buyer controls the market — this antitrust case is destined for business books and law review articles regardless of the judge’s determination. But those attempting to decipher what the lawsuit means for Warner Bros. Discovery and other proposed mergers may be thinking too narrowly.

For decades, influenced by legal scholars led by Robert Bork, antitrust cops were mainly focused on one thing — consumer welfare, and in particular, the cost of products and services. There was an emphasis on preventing monopolies — where the market is controlled by a single seller — and stopping naked price fixing. Through that time, many left-leaning scholars and top union officials believed that regulators could do much more to ensure greater job opportunities and higher wages by concerning themselves with how corporate consolidation impacted the labor market.

With the Biden administration’s recent action, that’s exactly what’s happened. The DOJ’s complaint discusses how Penguin and Simon & Schuster “compete vigorously to acquire publishing rights from authors” and how such competition results in “higher advances, better services and more favorable contract terms for authors” and that “if consummated, this merger would likely result in substantial harm to authors of anticipated top-selling books and ultimately, consumers.”

The government’s new view of consumer welfare through the lens of a market’s workers is, unsurprisingly, earning rapturous reviews among some in Hollywood’s talent community, such as its guild of screenwriters who can easily imagine themselves as a future beneficiary of this approach.

“We are highly encouraged by DOJ’s action against the Penguin Random House-Simon & Schuster merger,” says Laura Blum-Smith, director of research and public policy for Writers Guild of America, West. “The government’s complaint echoes concerns WGAW has raised for decades in the entertainment industry, showing how the loss of a key content buyer would make it harder for authors to earn a living and result in both fewer books and decreased variety. This is precisely the reality in our industry, where unchecked consolidation has given the major media companies oligopoly power over creative labor, pushing down compensation and exerting almost complete control over whose stories are told. We hope that DOJ’s action here portends a new future.”

### Extra---1NR

#### Resources key---Publishers will fight it

The Journal 11/3/21. “Why the Feds Want to Stop a Major Publishing Merger”. WSJ. 11-3-2021. https://www.wsj.com/podcasts/the-journal/why-the-feds-want-to-stop-a-major-publishing-merger/4e953539-5793-4cf7-b4ce-7c91a54941a2

FULL TRANSCRIPT

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Ryan Knutson : Back in 2020, the biggest consumer book publisher in the world, Penguin Random House, offered to pay more than $2 billion for one of its rivals, Simon & Schuster.

Jeffrey Trachtenberg : They want Simon & Schuster. They feel they need it, it will secure their legacy for many, many years going forward. Owning Simon & Schuster puts them in a position unlike any other publisher in the world.

Ryan Knutson : The acquisition would solidify Penguin Random House as the world's largest consumer publisher and further consolidate an industry that's been consolidating for decades. But yesterday ...

Speaker 3: The US Justice Department sued today to block a giant merger in book publishing.

Speaker 4: The suit alleges that Penguin Random House's proposed $2 billion acquisition of Simon & Schuster would allow it to exert "outsized influence" over which books are published in the United States and how much authors are paid.

Ryan Knutson : If the Justice Department's lawsuit succeeds, it would blow up the deal. But Penguin Random House doesn't plan to back away, which is setting up a showdown between the world's biggest consumer publisher and the US government. Welcome to The Journal. Our show about money, business and power. I'm Ryan Knutson. It's Wednesday, November 3rd. Coming up on the show, a massive merger in the book publishing industry and the government's fight to stop it. Our colleague, Jeffrey Trachtenberg has been covering the publishing industry for about two decades. Do you read lots of books yourself?

Jeffrey Trachtenberg : I do unfortunately. My wife's bane of her life, because they're piled up everywhere.

Ryan Knutson : Can I ask what you're reading right now?

Jeffrey Trachtenberg : No. I'm reading a Lawrence Osborne novel.

Ryan Knutson : Like a lot of books, the one Jeff is reading is published by Penguin Random House. The publisher's authors include big names like John Grisham and Dan Brown.

Jeffrey Trachtenberg : Anytime you look at a best seller list anywhere in the country, you're going to see many titles published by Penguin Random House. They have their wherewithal to buy any book they want to buy. For example, when they wanted to buy President Obama's memoirs and the First Lady's memoirs, they went out and paid over $60 million and they bought them. They have the largest array of authors under one house so they have the most content. They have the most revenue and they're very efficient and they have, because of their size, they have data and they have people on their payroll who can interpret data and that gives them a competitive advantage.

Ryan Knutson : Penguin Random House came to dominate the book publishing industry mostly by buying other publishers. It's part of a long running trend.

Jeffrey Trachtenberg : Well, back in the 80s, we had many, many family owned publishing companies. And as people got older, maybe they decided there wasn't anybody in their family who they wanted to take over, maybe they were beginning to lose out in terms of they were no longer gaining the sort of, signing up the types of authors they once did so they would sell their businesses. And some certain companies such as Random House began to get a lot larger. And over the 20 year period, we saw a constant acquisition spree.

Ryan Knutson : Penguin Random House is a big part of this acquisition spree. It actually used to be two separate companies, Penguin Group and Random House. But they merged in 2013. What's driving all this consolidation?

Jeffrey Trachtenberg : So that's a good question. And in part it has to do a cultural shift. How do we spend our free time? Do we go home right away and open a new novel, or do we turn on our TV and watch Netflix, or go to Amazon Prime, we get hooked on a streaming series? Every time we do that, reading time is diminished. In other words, how do you get larger if people are spending more and more time doing things other than reading? So one avenue would be acquisition. If you want to grow, you have to buy.

Ryan Knutson : Another factor behind this consolidation is the rise of huge retailers like Amazon. Amazon has changed not only the way people buy books, but also how they get promoted. It drives discovery. Book publishers have said that having more control of more titles gives them more negotiating power over things like sales or promotions. And there are other advantages of being a big publisher too like when it comes to paying authors.

Jeffrey Trachtenberg : Well to start with, you can afford to spend more. So if we're competing for a book that we think is going to be a top seller and I'm bigger than you are, and I think this book is going to blow up, I'm willing to take a risk and I have more money in my wallet to spend than you do.

Ryan Knutson : I suppose you can also take more risks because if you've got more books to sell, you have a higher likelihood that one of them will be a hit and can offset some of the other ones you've taken a gamble on.

Jeffrey Trachtenberg : That's very true. One of the things in publishing that is crucial is the ability to break out authors each year. In addition, our country, in terms of reading, we tend to read the same authors over and over and over again. So the best solo lists are dominated by pretty much the same names year after year after year. Those authors are expensive. The larger you are, means the more opportunity you have to either keep the authors you have or perhaps gain new ones.

Ryan Knutson : This trend of consolidation has meant that there are now five publishers controlling the majority of the industry. They're known as the big five.

Jeffrey Trachtenberg : Well, first you have Penguin Random House, and you have Simon & Schuster, and you have Macmillan, and you have Hachette. How many are we up to at this point?

Ryan Knutson : That's four, I think. And then Harper Collins. Is that the last one?

Jeffrey Trachtenberg : And we have Harper Collins would be in the big five.

Ryan Knutson : And what does the fact that there are only five big publishers mean first of all, for customers?

Jeffrey Trachtenberg : The big publishers would argue that it's good for customers, that they're the ones who are able to operate most efficiently, they are the ones who are able to support the largest authors, they're the ones who are able to take risks on emerging authors and they're the ones who keep retailers in stock.

Ryan Knutson : And what about for authors?

Jeffrey Trachtenberg : Authors want to be published by the big five because they're viewed as the most efficient and because they can pay the most. Also, let's not forget after you write your book, what happens to it? Who's going to find it? Who's going to see it? Who's going to promote it? How are people going to know it's out there? In theory, the big five have more marketing muscle. They have all sorts of online advertising programs. They can promote it on Amazon. They have hundreds of people on staff trying to get their books noticed by readers. So when you're a big five author, in theory, you've got that army behind you.

Ryan Knutson : For years, big publishers have been gaining heft by buying up smaller publishing houses, but it's rare that a major player comes on the market. And so in 2020, when Simon & Schuster went up for sale, it got a ton of interest.

Jeffrey Trachtenberg : It was put up for sale because its parent company, ViacomCBS decided it wanted to sell the business and invest in streaming, video streaming services. And it also saw that there was a demand, that the marketplace appeared to be hot for publishers and they must have decided that they could get a good price.

Ryan Knutson : Tell me about Simon & Schuster. What kind of books and authors are they known for?

Jeffrey Trachtenberg : So Simon & Schuster publishes every type of book. But in 2020, they really dominated the political book landscape. They had the Trump memoir by Mary L. Trump; they had the John Bolton White House Memoir and they have the latest Bob Woodward book. They dominated the political bookshelf in 2020.

Ryan Knutson : Multiple companies kicked the tires on Simon & Schuster. Then Penguin Random House came in with a massive offer.

Jeffrey Trachtenberg : They offered basically nearly $2.2 billion, and I think many people looked at that price and said, oh my gosh, that is so much more than we anticipated that they would pay. $300, $400, $500 million more perhaps than bidders anticipated.

Ryan Knutson : Why were they spending so much?

Jeffrey Trachtenberg : Well, you'd have to ask Penguin Random House. But this is my view and only my view, but I think it was a once in a lifetime opportunity to tap themselves as the perennial champs in book publishing. It would've put so much space in terms of titles, market share revenue between them and the second largest publisher. It would've made them pretty much untouchable. I don't think anyone could have ever overtaken Penguin Random House, Simon & Schuster. They would've capped themselves as the largest publisher in the world and it would've been unchallengeable for many, many years.

Ryan Knutson : Penguin Random House currently employs about 10,000 people across 20 countries. If they added Simon & Schuster and it's 1500 employees, the two combined would make up more than a quarter of print book sales in the US. And according to regulators, the combined company would have a huge influence over how the industry operates which is why they're suing. That's after the break. Yesterday, the Department of Justice filed an antitrust lawsuit to stop Penguin Random House from buying Simon & Schuster and the feds focused on one potential impact of the deal.

Jeffrey Trachtenberg : They focused on author opportunities. And they said basically that if Penguin Random House and Simon & Schuster merge, authors, especially authors of top selling books, hotly anticipated books, are going to suffer. That there will be less competition for their books and that their advances will eventually shrink. And that's an important issue because relatively few books are giant best sellers and enable their authors to earn royalty payments. So your advance, the amount of money that you're given ahead of publication, is crucial.

Ryan Knutson : Explain more about how that works. Why does that matter so much?

Jeffrey Trachtenberg : Well, the more money you're given as an author upfront, the more money you have in your bank account, and you're less dependent on the performance of your book. It may be that your book, even though people thought it was going to do great, it may not quite sell enough copies to allow the publisher to earn back the advance that it paid to the author. And until your advance has been repaid, you don't get royalty payments.

Ryan Knutson : So what is the DOJs argument about how this merger would hurt authors?

Jeffrey Trachtenberg : Their argument basically, if you look through the lawsuit, it says that often in many auctions, Simon & Schuster and Penguin Random House are pitted against each other. And that when they want a hot book, they really go at it. And the concern is that if they were both under one roof, there would be some competition, but it wouldn't be as intense. And there would be a cap. For example, you've written a new mystery novel, and it's a good one. And your agent calls five publishers and says, "Here's this fantastic upcoming manuscript. We're going to have an auction. What are your bids?" Maybe all five jump in and maybe various imprints of the big five jump in. So they're all competing against each other. So you're the writer and you're thinking "This is great. Eight, nine, ten people are fighting for my book. I'm going to get what it's really valued at." Maybe there's less of that competition.

Ryan Knutson : Have you heard from authors about how they feel about this merger?

Jeffrey Trachtenberg : Well, I spoke to several authors, including Stephen King, who was published by Simon & Schuster. Stephen King said he was delighted by the DOJ action.

Ryan Knutson : He was delighted by the lawsuit, right?

Jeffrey Trachtenberg : And the Author's Guild had opposed the merger because they felt to be anti-competitive.

Ryan Knutson : Penguin Random House and Simon & Schuster disagree. They say the suit is unwarranted and that even after the sale book publishing would still be a competitive environment. They say they have no plans to acquire fewer books or pay authors less money. Is this type of DOJ antitrust lawsuit unusual to focus on the market for authors instead of consumer prices for books?

Jeffrey Trachtenberg : Right. That's what we thought was the twist. We hadn't anticipated that. I think many people were surprised by the action because antitrust law seemed to be based recently, in least in the last 10 years, on the impact on consumer pricing. In other words, would the result of a merger or acquisition lead to higher prices for you and me? And I think if you step back and look at the publishing landscape, it would be hard to argue that Penguin Random House and Simon & Schuster merging would lead to higher prices for consumers. Suddenly the rights of authors, the larger economic impact on authors, is brought to the fore instead of focusing on consumers. So now we're looking at the people who actually create the books and whose creativity is on display and saying, we're going to think about the economic impact on these people instead of on the broader consumer population.

Ryan Knutson : The publishers vow to fight the Justice Department. The suit is expected to go to court.

Jeffrey Trachtenberg : So now the battle lines have been drawn. DOJ says you can't merge and Penguin Random House, Simon & Schuster say, "Yes we can. We're going to go to court and we're going to prove our right to merge."

Ryan Knutson : Do you think there's any chance that Penguin Random House just walks away from the deal?

Jeffrey Trachtenberg : I would say, no. This is a grand prize for them. I don't think they're going to give up easily. I think they're going to fight. They have the funds to fight. They think they're in the right here. So, no, I don't think they walk away.