### OFF

Regulation CP

#### The United States federal government should

#### enact a public option,

#### substantially increase it usage and enforcement of suitability petitions,

#### and ban pay-for-delay deals and acceleration clause agreements through non-antitrust regulations.

#### Public option solves costs.

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Injecting Competition by Offering a Public Option

In addition to protecting markets through better merger review and oversight of anticompetitive conduct, lawmakers are also considering increasing competition in health care markets by creating a public option. A public option is a health insurance plan offered by a government agency that competes with private health insurance companies.57 **By offering a public option, the government can drive down the cost of both premiums and health services, but only if it limits provider rates or other costs to apply competitive pressure**.58

With the federal public option facing what has been called “the biggest health care fight since Obamacare,”59 and without the votes in the Senate to overcome a filibuster, states may find it easier to create a public option plan than the federal government would. While the federal government has fewer legal constraints than state governments face when designing a public option, such as budget neutrality and waiver requirements, states have taken the lead in designing and prototyping public option plans.58 Specifically, Washington started selling a public option plan on its Health Benefit Exchange on January 1, 2021,60 and other states, including Colorado61 and Nevada,62 appear poised to follow Washington’s example.

While the initial premiums for Washington’s public option plan were higher than its proponents hoped,63 Washington may now experiment with lower provider rate caps or additional cost controls.58 The states that choose to offer public option plans may help refine provider caps and network requirements to ensure that public option plans can control costs and provide adequate networks. Lawmakers in the forerunner states recognize that they cannot wait for the federal government to implement new laws and policies and are forging ahead with public options designed to fulfill state goals like covering the remaining uninsured.

#### Suitability petitions solve---anti-trust is worse than regulation.

Arti K. Rai and Barak D. Richman 18. 5-22-18. Arti Rai, Elvin R. Latty Professor of Law and co-Director of The Center for Innovation Policy at Duke Law. Barak D. Richman, JD, PhD, is the Katherine T. Bartlett Professor of Law and Business Administration at Duke University. “A Preferable Path For Thwarting Pharmaceutical Product Hopping” <https://www.healthaffairs.org/do/10.1377/hblog20180522.408497/full/>

The recently announced White House blueprint to curb the high cost of pharmaceuticals addresses a policy problem that both ranks near the top of consumers’ health care concerns, and is a leading reason why US healthcare spending is the highest among OECD nations. Many critics attribute significant blame to pharmaceutical companies that engage in what is euphemistically called “life cycle management,” in which pharmaceutical firms manipulate U.S. Food and Drug Administration (FDA) processes and patent laws to extend their market exclusivity beyond an appropriate term. The FDA has held hearings seeking to restore generic drug competition, in which Commissioner Scott Gottlieb decried those who are “gaming our system,” and the agency continues to develop action s that combat strategies seeking to deter generic entry. One common strategy by firms that produce brand-name pharmaceuticals is called “product hopping.” A firm engages in product hopping when it moves its customers from one branded drug to another, very similar drug with a longer patent life, thus extending its market exclusivity by many years. The most common tool to combat product hops has been to sue branded firms under the antitrust laws, and many commentators view antitrust law as the best, or perhaps only, mechanism for addressing product hopping. However, antitrust actions have had mixed success. We contend that the FDA could implement a superior and more precisely tailored fix—**a “suitability petition”—that avoids the cost, delay, and imprecision of antitrust enforcement.** To our knowledge, this fix has not yet been suggested in the literature. **Product Hopping And Antitrust** In a typical product hop, a branded manufacturer faces patent expiry and generic challenge on one version of its branded drug (“Drug 1”). In response, it makes a small change to Drug 1, secures patents on that new formulation (“Drug 2”), and then discontinues Drug 1. Because this conduct channels physicians towards Drug 2, firms that produce a generic alternative of Drug 1 find that physicians have stopped writing prescriptions for Drug 1, even in branded form. Moreover, because the slight change means that the FDA does not currently consider Drug 2 “therapeutically equivalent” to Drug 1, state-level drug substitution laws that allow pharmacists to substitute generic drugs for therapeutically equivalent branded drugs prevent substitution of the generic version of Drug 1 for Drug 2 prescriptions. In short, patients must pay monopoly prices for a branded Drug 2 because there is no generic alternative, and the market for Drug 1 evaporates just as a generic becomes available. A prominent instance of product hopping featured a branded Alzheimer’s treatment produced by Actavis. In that case, Actavis sought to replace its twice-daily dosage of the memantine molecule (Namenda IR) with an extended release, once-daily version (Namenda XR). Namenda XR was covered by multiple patents that lasted over a decade longer than the patents over Namenda IR. Although the FDA had approved Namenda XR in 2010, Actavis chose not to introduce it into the U.S. market until 2013. Then, in late 2014, nine months before patents on IR expired in July 2015, Actavis sought to remove Namenda IR from the market. The New York State Attorney General sued Actavis under the antitrust laws, claiming that the product hop was an illegal extension of monopoly power. The Court of Appeals for the Second Circuit agreed, ruling that Actavis had to keep Namenda IR on the market for 30 days after the introduction of the generic. Although Actavis engaged in unquestionably problematic conduct, antitrust lawsuits are not reliable countermeasures against this kind of “evergreening” strategy. **Antitrust suits are expensive and time-consuming, and any remedy they provide typically emerges many years after the fact** (though the Namenda case represents an exception). The U.S. Supreme Court has also warned that, when antitrust operates against the backdrop of a complex regulatory regime, **it often produces inconsistent and mistaken rulings** since it relies on “dozens of different courts with different nonexpert judges and different nonexpert juries.” Policymakers and health policy experts should be wary of **asking courts** **to determine that a manufacturer must keep a particular product design on the market.**

### OFF

FTC DA

#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

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

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FTC’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

### \*OFF

States CP

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

### OFF

Politics DA

#### Infrastructure will pass now- Biden pressure and timing key

Shannon Pettypiece, 10-14-2021, "White House pushing Congress to reach deal on spending bill soon," NBC News, https://www.nbcnews.com/politics/white-house/white-house-pushing-congress-reach-spending-bill-deal-soon-n1281567

White House officials are signaling to Congress that the time is running short for negotiations over President Joe Biden's infrastructure and social spending packages and that they want a deal to get done quickly.

A person familiar with the White House's thinking said that while Biden believes good progress has been made in negotiations, he thinks it is crucial to pass the bills soon, and officials are pushing members to do so.

White House press secretary Jen Psaki said Thursday, "The time for negotiations is not unending, and we are eager to move forward, we are eager to deliver on what he promised to the American people." She said that the White House wasn't setting any deadlines but that "it is time to move forward with negotiations."

#### Antitrust reform requires PC and trades off with other legislative priorities.

Peter C. Carstensen 21, the Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, February 2021, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Infrastructure bill key to cyber security

Cat Zakrzewski, 8-14-2021, "The Senate’s $1 trillion infrastructure bill includes funding to secure Americans’ water systems and power grids from cyberattacks," https://www.washingtonpost.com/technology/2021/08/14/cybersecurity-infrastructure-senate-legislation/

A Senate bill intended to shore up the nation’s roads, pipes and electric grid includes billions to protect that aging infrastructure from cyberattacks.

With a series of high-profile ransomware attacks fresh in their minds, U.S. Senate negotiators wove cybersecurity investments throughout the bipartisan $1 trillion infrastructure proposal, which passed the Senate in a 69-to-30 vote on Tuesday and now moves to the House for a vote. The allocations are a reflection of the growing realization in Congress that a computer attack could leave Americans without water, power or other essentials.

“This is an incredibly serious threat to this country that’s only growing more serious,” said Sen. Angus King (I-Maine).

The Colonial Pipeline ransomware attack in May was a wake-up call that gave lawmakers and the public “a taste of what is potentially in store,” King said. The attack disrupted fuel supplies in the eastern United States, prompting gasoline shortages and panicked buying that affected millions for days.

The Colonial hack was just one in a series of attacks on lawmakers’ minds. King said he is particularly wary of attacks on the more than 100,000 public water systems in the United States, especially after a hacker in February took control of a water treatment facility in Oldsmar, Fla. The intruder raised the levels of sodium hydroxide to a hazardous point that could have sickened residents. An operator noticed the rising levels and was able to quickly intervene, but the incident highlighted the broader weaknesses at the facilities responsible for ensuring Americans have clean drinking water.

To King, one of the Senate negotiators, these incidents underlined that cybersecurity has to be a part of any work the government does on infrastructure, from broadband to power grids.

The bill directs the Federal Highway Administration to create a new tool to help transportation authorities better detect and respond to cyber attacks, which could range from ransomware attacks on transportation departments or hacks of traffic lights and road signs. It makes emergency funding available to respond to digital attacks on public water systems and makes grants available that can be used to help some water systems increase their ability to deal with cyberattacks as well as natural hazards and extreme weather.

It also calls on the Federal Energy Regulatory Commission to develop incentives to ensure that electric utilities are investing in cybersecurity and sharing data about potential threats.

The bill also authorizes nearly $2 billion in spending for specific cybersecurity initiatives, such as the creation of a $1 billion grant program to provide federal cybersecurity assistance to state and local governments, which experts say are among the most vulnerable institutions to ransomware attacks. The bill also would fund a new cyber director office, so that the federal government can better coordinate its response to major hacks, and would create a $100 million response and recovery fund, which the Department of Homeland Security could use to support both private companies and governments’ recoveries from cyberattacks.

The infusion of funding follows years of warnings from across the federal government of the vulnerability of U.S. critical infrastructure to cyberattacks. A year ago, the National Security Agency and the Cybersecurity and Infrastructure Security Agency warned that critical infrastructure systems, including energy, transportation and water systems, make “attractive targets for foreign powers attempting to do harm to U.S. interests or retaliate for perceived U.S. aggression.”

#### Cyberattacks go nuclear.

Michael T. Klare 19. Professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association. “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation.” https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation

Another initiative incorporated in the strategy document also aroused concern: the claim that an enemy cyberattack on U.S. nuclear command, control, and communications (NC3) facilities would constitute a “non-nuclear strategic attack” of sufficient magnitude to justify the use of nuclear weapons in response.

Under the Obama administration’s NPR report, released in April 2010, the circumstances under which the United States would consider responding to non-nuclear attacks with nuclear weapons were said to be few. “The United States will continue to…reduce the role of nuclear weapons in deterring non-nuclear attacks,” the report stated. Although little was said about what sort of non-nuclear attacks might be deemed severe enough to justify a nuclear response, cyberstrikes were not identified as one of these. The 2018 NPR report, however, portrayed a very different environment, one in which nuclear combat is seen as increasingly possible and in which non-nuclear strategic threats, especially in cyberspace, were viewed as sufficiently menacing to justify a nuclear response. Speaking of Russian technological progress, for example, the draft version of the Trump administration’s NPR report stated, “To…correct any Russian misperceptions of advantage, the president will have an expanding range of limited and graduated [nuclear] options to credibly deter Russian nuclear or non-nuclear strategic attacks, which could now include attacks against U.S. NC3, in space and cyberspace.”1

The notion that a cyberattack on U.S. digital systems, even those used for nuclear weapons, would constitute sufficient grounds to launch a nuclear attack was seen by many observers as a dangerous shift in policy, greatly increasing the risk of accidental or inadvertent nuclear escalation in a crisis. “The entire broadening of the landscape for nuclear deterrence is a very fundamental step in the wrong direction,” said former Secretary of Energy Ernest Moniz. “I think the idea of nuclear deterrence of cyberattacks, broadly, certainly does not make any sense.”2

Despite such admonitions, the Pentagon reaffirmed its views on the links between cyberattacks and nuclear weapons use when it released the final version of the NPR report in February 2018. The official text now states that the president must possess a spectrum of nuclear weapons with which to respond to “attacks against U.S. NC3,” and it identifies cyberattacks as one form of non-nuclear strategic warfare that could trigger a nuclear response.

That cyberwarfare had risen to this level of threat, the 2018 NPR report indicated, was a product of the enhanced cybercapabilities of potential adversaries and of the creeping obsolescence of many existing U.S. NC3 systems. To overcome these vulnerabilities, it called for substantial investment in an upgraded NC3 infrastructure. Not mentioned, however, were extensive U.S. efforts to employ cybertools to infiltrate and potentially incapacitate the NC3 systems of likely adversaries, including Russia, China, and North Korea.

For the past several years, the U.S. Department of Defense has been exploring how it could employ its own very robust cyberattack capabilities to compromise or destroy enemy missiles from such states as North Korea before they can be fired, a strategy sometimes called “left of launch.”3 Russia and China can assume, on this basis, that their own launch facilities are being probed for such vulnerabilities, presumably leading them to adopt escalatory policies such as those espoused in the 2018 NPR report. Wherever one looks, therefore, the links between cyberwar and nuclear war are growing.

The Nuclear-Cyber Connection

These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage.

The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.4 Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern.

This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.5

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.”

Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.6

Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.7 Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states.

Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.8 Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation.

Pathways to Escalation

Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.9

The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to paralyze the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region.

Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”10

What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike.

“The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.11 Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

### OFF

Cap K

#### Anti-trust is a capitalist psy op to pacify the working class, buy time to mystify unsustainable accumulation, and map competition onto subjectivity – homo economicus devalues life.

Lebow 19 [David Lebow – Lecturer on Social Studies at Harvard University and lawyer, “Trumpism and the Dialectic of Neoliberal Reason,” Perspectives on Politics 18(2):380-398, doi:10.1017/S1537592719000434]

I. Neoliberal Reason

As Michel Foucault and others have argued, neoliberalism entails far more than an economic doctrine favoring deregulated markets.4 It is a novel form of governmentality—a rationality linked to technologies of power that govern conduct, not just through direct state action but through liberty itself.5 Not isolated to the traditionally demarcated sphere of economics, neoliberal society entails a whole economic-juridical order.

The central program of neoliberal **governmentality** is the absolute generalization of competition as a universal behavioral norm. Whereas in liberal thought, the root principle of capitalism was exchange of equivalents, for neoliberal reason it is competition entailing inequality. The key result of market processes goes from specialization to selection. The competitive market is the exclusive site of rationality. It processes information, indicated by price, and is the only mechanism of producing knowledge, defined as what is profitably utilizable. Because consumers are free to refuse inferior goods or services, the price mechanism of the market system ensures optimal solutions and maximal satisfaction of preferences.

Liberal capitalism, as Karl Polanyi argued, required the construction of “fictitious” commodities like land and labor.6 These abstract, exchangeable factors of production had to be disembedded from concrete non-market social relations, norms, and values. Instead of merely disembedding commodities, neoliberalism intervenes to make competitive mechanisms regulate every moment and point in society. It strives to build an empire of market choice that invades every domain of life, and deposes all other social, political and solidaristic institutions and values.

Neoliberalism does not allege that markets are natural; competition must be constructed. Rather than endorsing laissez-faire overseen by a night watchman, it stipulates a strong state engaged in permanent vigilance, activity, and intervention to maintain artificial competition. It must not plan outcomes, which would upset the market’s innate rationality, and must be insulated from political disturbances. Economic interventionism leads down the road to serfdom; fascism and unlimited state power are its necessary results. A “minimum of economic interventionism” on the “mechanisms of the market” must be accompanied by “maximum legal interventionism” on the “conditions of the market.”7 Fixed, formal rules make up an economic constitution that inhibits planning, repulses political disruptions, and impartially safeguards competition. The state is the executor of the market and growth is the basis of public legitimacy. Governance depoliticizes public power, promotes ostensibly post-ideological technical problem-solving by experts, and relies on “best-practices” that dissolve the distinction between public and private organization.8

Unlimited generalization of competition yields an enterprise society in which calculations of supply/demand and cost/benefit become the model of all social relations. Neoliberal reason renders homo economicus, based on this model of the enterprise, the exhaustive figuration of human subjectivity. The center of economic thought shifts from labor and processes of production, exchange, and consumption to human capital and rational decision-making under conditions of scarcity. Capital is everything that can generate future income; wages are reconceived as income from capital. Labor is no longer comprehended as a commodity exchanged for a wage, but as a combination of human capital (the worker’s education and abilities) and the income stream it generates. This neoliberal subject is an aggregate of human capital who invests in his own income-generating abilities.

Neoliberalism replaces the invariant identity of the moral person as a rights-bearing citizen with a formally empty receptacle filled up through enterprising choices. It brushes aside models of freedom as self-rule achieved through moral autonomy or popular sovereignty.9 In the neoliberal “democracy of consumers,” individual consumers together constitute the sovereign that monopolizes the issuance of legitimate commands.10 Sovereign will is expressed not through political channels, but by choices in the “plebiscite of prices.”11 Whereas producers have particular interests like protectionism, consumers have a consensual and common interest; all favor the impartial functioning of market processes. In the neoliberal free society, consumers exercise their right to choose in complete independence.

II. From Keynesian State Capitalism to Neoliberal Deregulation

Situating the 2008 crisis in a historical account of American political and economic development clarifies its broader significance. The early twentieth-century Progressives were disdainful of what they took to be the chaos and waste of fin de siècle laissez-faire society. They strove to build a new American state that would replace the structural and rights-based formalisms of the nineteenth century with direct democracy and expert administration. It took the Great Depression and New Deal to bring into full bloom the Progressive commitment to pragmatic rationality. Thereafter, the “policy state” was authorized to pursue designated social goals and develop the means to accomplish them.12 The slew of New Deal innovations included state oversight of labor negotiations, invigorated antitrust, Keynesian countercyclical deficits to stimulate demand and increase purchasing power, an expansive public sector sheltered from the business cycle, aggressive banking regulation, and social insurance. Regulation and redistribution ensured the conditions necessary for an economic system based on capital accumulation, private property, and corporate profit to endure.

To many, the differences between the New Deal and Nazi political economies appeared less significant than their common response to monopoly capitalism. Both erased boundaries between state and society by politicizing the private sphere and authorizing public bureaucracies to rationalize crisis-prone economies. Frankfurt School member Friedrich Pollock suggested that this common “state capitalism” had solved the contradiction between the forces and relations of production, and thus overcome the economy’s crisis tendencies. It seemed to him that management had become merely technical and “nothing essential” had been “left to the laws of the market.”13 Worries abounded that the private law sphere of property and contract was necessary for individual freedom. Despite salient differences between Nazi and New Deal state capitalism, many feared that intervention into society was a waystation to domination. Unease about the specter of American despotism motivated development of mechanisms to ensure that interventionism did not devolve into arbitrary rule.14 Expertise was one justification and limitation of the policy state. Authority could be safely delegated to a new corps of public-spirited administrators because their scientific knowledge would not only make them effective, but also counsel restraint. Enduring misgivings led later to new laws of administrative process. The procedural state was legitimated by its defenders as being a substantively value-neutral and instrumentally rational machine serving goals set by society. Regulatory decision-making was shunted into the abstruse procedures of courtrooms and bureaucracies. Defenders of the state emphasized that its processes of allocating authority were neutral, impartial, and open to all. The balanced accommodation of all interest groups seeking to exercise influence would yield an equilibrium corresponding to the public interest.15

The intermeshing of state and society through interest groups, agencies, and professionalized parties marginalized the public. The sovereign public opinion that Progressives had hoped would rationalize government gave way to the rationality supposedly inherent in processes of public law, public-private negotiation, and regulated markets. The state was endowed with a diffuse legitimacy in exchange for a growing economy, broad distribution, and ongoing household capacity to consume.16 The Keynesian welfare settlement pacified the working class, protecting the market economy from more radical political pressures. Newly available, mass-produced commodities encouraged leveled-down notions of citizenship as welfare clientelism and privatistic consumption. As the state expanded and routinized, the initial politicization of private property relations through public intervention developed into depoliticized economic management by lawyers and social scientists organized by administrative and judicial processes.

The terms of the social contract preserving the coexistence of capitalism and democracy had been set. In exchange for a pacified citizenry and depoliticized regulatory authority, the policy state promised to deploy instrumental reason to sustain both capital accumulation and widely distributed capacity to consume (supported, always, by the exclusion of African Americans). During the decades of postwar growth, these twin responsibilities seemed attainable and compatible. Capitalism functioned smoothly enough and potentially delegitimating inequality was clipped by inflation, tax-based welfare, and collectively negotiated wages. But in the late 1960s and early 1970s, weakening growth, stagflation, trade deficits, and the collapse of Bretton Woods revealed that state capitalism had not solved the problems of economics. As the Great Depression had enabled construction of the instrumentally rational policy state, economic disturbances in the 1970s opened the breach into which neoliberal reason entered to reconfigure the political economy. Rather than shielding rational policy-making from political pressure and assuring broadly distributed welfare, neoliberalism promised growth driven by depoliticized markets freed from regulation and downwards redistribution. Believing in the optimal rationality of competitive markets, neoliberals sought to reinvigorate capital accumulation through deregulation, lowered taxes, financialization, privatization, and market expansion.

Liberating accumulation from the restrictions and obligations incurred under state capitalism might have imperiled capitalism’s peace treaty with democracy. For deregulation to proceed without impairing the system’s legitimacy, the quid pro quo—depoliticization for consumption—had to continue. Over the ensuing decades, as Wolfgang Streeck explains, the state “bought time” by finding new ways to generate illusions of widely distributed prosperity that prolonged the capacity of the lower and middle classes to consume.17 Each successive attempt exhausted itself, leading to new and escalating disturbances. In the 1970s, inflation safeguarded social peace by compensating workers for inadequate growth until stagflation ended this mode of buying time. A subsequent reliance on public debt enabled the government to pacify conflict with borrowed money. Rising debt and balking creditors delimited this phase, which was brought to a definitive close with the Clinton administration’s social spending cuts and balanced budgets. In a final stage that dawned in the 1980s but grew increasingly paramount over time, debt-based support of purchasing power was privatized. Household spending was financed through mortgages, student loans, and credit cards. This “privatized Keynesianism” buoyed consumption up through 2008, despite cuts to social spending, falling wages, and tightening employment markets.18

Each device for upholding spending maintained the legitimacy of the depoliticized political economy, even as liberalization continued to strip the wage-dependent population of regulatory and redistributive safeguards. The end of the inflation era brought structural unemployment and weakened trade unions. The passing of the public debt regime meant cuts to social rights, privatization of social services, and a trimmed public sector. Growing private debt enabled people to hold on despite lost savings, and rising under- and unemployment. At every step, the neoliberal project was “dressed up” as a consumption project.19 Continuing consumption ensured legitimacy long enough to enact total transformation of the political economy.

The state could not buy time indefinitely. The 1970s had already witnessed the beginning of the transition from a manufacturing, production-oriented economy that exported surpluses to an import-based, finance and services economy focused on consumption. As the United States went from creditor to debtor, a system of “balanced disequilibrium” took hold.20 With impunity granted as the world’s reserve currency, the United States ran mounting budget and trade deficits. To finance them, it absorbed surplus capital from abroad, much of which wended its way to Wall Street. Banks used these profits to extend credit to the working- and middle- classes. Household debt funded consumption of imported goods, returning the surplus capital abroad, and completing the circuit of global trade. This system depended on the unsustainable condition of ever-increasing debt-based consumption. Consumption was notoriously reinforced by secondary markets in what was essentially private money (securitized derivatives and collateralized debt obligation) that was much riskier than assumed. Because increasingly irresponsible lending was integral to continuing the consumption that stabilized the macroeconomic system, it became a sort of vicious collective good that progressively magnified the scale of the inevitable crash.21 When in 2008 the debt finally proved unserviceable and the housing bubble burst, the private money disappeared and the disequilibrated global economic system fell into crisis.

Consumption based on private debt had provided an unstable bridge over the yawning inequality brought about by deregulation, financialization, globalization, and the diminished welfare state. When the 2008 crisis dried up credit, it revealed a divided “dual economy.”22 On one side is the primary sector of elite, highly-educated professionals who are collected in coastal urban centers and tied in to corporate management, technological innovation and oversight of global capital flows. On the other is the secondary sector of low-skilled workers primarily fixed in the heartland, for whom deregulated competition has brought under- or unemployment, job instability, depressed wages, exploding debt, and diminished prospects.

Unable to buy more time, the state’s breach of the postwar social contract has been exposed. The neoliberal system of capital accumulation was entrenched at the expense of broad and sustainable consumption. The results have been the politicization of defrauded citizens and a political economy plunged into legitimation crisis. Time has belied the premature conclusion that contradiction and crisis potential had been overcome by state capitalism. Contradiction was relocated into cross-cutting imperatives for the state to enable capital accumulation and distribute consumption. In hindsight, we find only a window of stabilization of an enduring crisis potential built into capitalist political economy. As Nancy Fraser puts it “on the one hand, legitimate, efficacious public power is a condition of possibility for sustained capital accumulation; on the other hand, capitalism’s drive to endless accumulations tends to destabilize the very public power on which it relies.”23 The political fallout from the 2008 crisis marks the end of the postwar social contract that had established conditions ensuring the continued coexistence of capitalism and democracy.

#### Capitalism drives extinction and structural violence

Allinson et al 21 [Jamie Allinson is 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 anti-capitalist commons – collectives should refuse commitments to competitive principle and the straitjacket of what’s “realistic”

Rose 21 [Nick. PhD in Political Ecology from RMIT University. Executive Director of Sustain: The Australian Food Network. From the Cancer Stage of Capitalism to the Political Principle of the Common: The Social Immune Response of “Food as Commons.” Int J Health Policy Manag 2021. 3-31-21. DOI: 10.34172/ijhpm.2021.20 //shree]

Silvia Federici provides a longer historical perspective, noting that ‘commoning is the principle by which human beings have organised their existence for thousands of years;’ and that to ‘speak of the principle of the common’ is to speak ‘not only of small-scale experiments [but] of large-scale social formations that in the past were continent-wide.’87 Hence a commons-based society is neither a utopia or reducible to fringe projects, and the commons have persisted despite the many and continuing enclosures, ‘feeding the radical imagination as well as the bodies of many commoners.’87 Federici acknowledges that commons and practices of commoning are diverse, that many are susceptible to cooptation and many are consistent with the persistence of capitalism; indeed some, such as charities providing social services (including foodbanks) during the years of austerity budgets in the United Kingdom (2010-2015), reinforce and stabilise capitalism.87 What matters to Federici is the character and intentionality of the commons as anti-capitalist, as ‘a means to the creation of an egalitarian and cooperative society…no longer built on a competitive principle, but on the principle of collective solidarity [and commitments] to the creation of collective subjects [and] fostering common interests in every aspect of our lives.’87

Federici’s analysis resonates with the political thought and proposals developed by Dardot and Laval in their 2018 work, ‘On Common: Revolution in the 21st century.’11 For Dardot and Laval, the common is likewise understood as a principle of political struggle, a demand for ‘real democracy’ and a major driving force behind the emerging articulation of a political vision and programme that transcends and overcomes the straitjacket logic of neoliberal ideological hegemony and its ‘policy grammar’ which appears to foreclose all alternatives and lock us forever into a capitalist realism in which ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism.’89 Eschewing Bollier’s ‘triarchy’ of a market/state/ commons coexistence, Dardot and Laval argue for a politics of the common based on an engaged citizenry that directly participates and deliberates in all decisions which impact it, and in the process not merely transforms the institutions responsible for the management of services and allocation of resources, but creates new institutions and new ways of being in the world.11

Dardot and Laval describe this form of politics as ‘instituent praxis’: the common, they argue, is ‘not produced but instituted.’11 This acknowledges the conventional understanding of Ostrom, Bollier and others of ‘the commons’ as residing in the rules – the laws – that a community establishes for the collective management and use of shared resources, but extends it much further and in a more radical direction. The essence of the commons, they argue, is not in the goods per se such as land or a forest or a seed bank ‘held in common,’ but rather in the process of their establishment as well as the ongoing negotiation that will surround their use and governance. Hence, Dardot and Laval distinguish the commons from the ‘rights’ tradition of property, arguing that ‘the commons are above all else matters of institution and government…the use of the commons is inseparable from the right of deciding and governing. The practice that institutes the commons is the practice that maintains them and keeps them alive and takes full responsibility for their conflictuality through the coproduction of rules.’90 To ‘institute’ in this context should not be misunderstood as ‘to institutionalise [or] render official;’ rather it is ‘to recreate with, or on the basis of, what already exists.’ 90 This messy, conflictual and evolving process is what Dardot and Laval insist will ultimately bring about a revolution, not in the form of a violent uprising or insurrection, but rather through the ‘reinstitution of society’ via the transformation of politics and economy from its current state of ‘representative oligarchy’ to full participatory and deliberative democracy.11 Such a vision is premised on a mass politicisation of society; in effect a return of mass popular political contestation and a turn away from the postpolitical era of the neoliberal consumer.91-92

### \*OFF

Rulemaking CP

#### Text: The United States federal government should delegate antitrust rulemaking authority to a new expert agency. The agency should begin notice-and-comment rulemaking to prohibit anticompetitive settlements related to pharmaceutical patents.

#### Solves the case, engages notice and comment.

Rebecca Haw 11. Climenko Fellow and Lecturer on Law, Harvard Law School. J.D., Harvard Law School, 2008; M. Phil, Cambridge University, 2005; B.A., Yale University, 2001."Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal." Texas Law Review, vol. 89, no. 6, May 2011, p. 1247-1292. HeinOnline.

Without the informational benefits of expertise and notice-and-comment rulemaking, the Court may be a poor choice to define the broad proscriptions of the Sherman Act. Framed this way, the problem has an obvious solution: give the power to interpret the Act to an expert agency.240 This idea has academic support already, 241 and the case for it is strengthened by this Article's observation that the Court has tried to approximate administrative decision making by relying on amicus briefs. The obvious candidates for reallocation are the two existing antitrust agencies: the Department of Justice's Antitrust Division and the FTC.

A. The Agency Solution

Using agencies to give specific meaning to American antitrust's most important statute means avoiding the problems with the Court's current quasi-administrative process for rulemaking. As adjudicators, agency experts would know what kind of economic evidence is necessary for an efficient solution and would be better able to understand it when it is presented by the parties. Repeat exposure to antitrust cases would only reinforce this advantage, while also giving the administrative judges a broader perspective on what kinds of conflicts commonly arise in competition law, a perspective necessary for efficient policy making in the first instance. A Supreme Court Justice hears about one antitrust case a year, hardly the cross section of controversies necessary to make efficient economic policy writ large.

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"--deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity-ex ante-that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

#### Key to democracy and court acquiescence---notice and comment engages participants and creates deference.

Harry First and Spencer Weber Waller 13. Harry First, New York University School of Law. Spencer Weber Waller, Loyola University Chicago School of Law. “Antitrust’s Democracy Deficit”. Fordham Law Review, Volume 81 Issue 5 Article 13. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4890&context=flr

Redressing antitrust’s democracy deficit on the procedural side can be done with the tools of administrative law. Administrative law is the body of law that controls the procedures of governmental decision making.151 It allows interested persons to participate in decisions that affect their interests. Normally, it requires appropriate notice, the right to be heard, fair procedures, protection of fundamental rights, and judicial review of the resulting decision. These basic features are present in the administrative laws of most foreign legal systems and are part of a growing international consensus.152 The tradeoff is that the decisions of administrative agencies that properly follow these strictures normally are granted a degree of deference as to the interpretation of the laws they enforce.153 Frequently, but not inevitably, private parties also have the right to proceed with actions for damages against private parties who violate their regulatory obligations and even against the government itself when it acts unlawfully, either substantively or procedurally. These tools of administrative law are available to make antitrust enforcement decisions more transparent and more responsive to the interests that the antitrust laws were meant to serve, thereby promoting both better decision making and greater democratic legitimacy.

CONCLUSION

Free markets and free people cannot be assured by the efforts of technocrats. Ultimately, both come about through the workings of democratic institutions, respectful of the legislature’s goals and constrained from engaging in arbitrary action. Antitrust has moved too far from democratic institutions and toward technocratic control, in service to a laissez-faire approach to antitrust enforcement. We need to move the needle back. Doing so will strengthen the institutions of antitrust, the market economy, and the democratic branches of government themselves.

#### US democratic retreat causes terrorism, great power war, famine, and poverty.

Garry Kasparov 17. Chairman of the Human Rights Foundation, founded the Renew Democracy Initiative. “Democracy and Human Rights: The Case for U.S. Leadership”. Feb 16 2017. U.S. Senate. http://www.foreign.senate.gov/imo/media/doc/021617\_Kasparov\_%20Testimony.pdf

The Soviet Union was an existential threat, and this focused the attention of the world, and the American people. There existential threat today is not found on a map, but it is very real. The forces of the past are making steady progress against the modern world order. Terrorist movements in the Middle East, extremist parties across Europe, a paranoid tyrant in North Korea threatening nuclear blackmail, and, at the center of the web, an aggressive KGB dictator in Russia. They all want to turn the world back to a dark past because their survival is threatened by the values of the free world, epitomized by the United States. And they are thriving as the U.S. has retreated. The global freedom index has declined for ten consecutive years. No one like to talk about the United States as a global policeman, but this is what happens when there is no cop on the beat. American leadership begins at home, right here. America cannot lead the world on democracy and human rights if there is no unity on the meaning and importance of these things. Leadership is required to make that case clearly and powerfully. Right now, Americans are engaged in politics at a level not seen in decades. It is an opportunity for them to rediscover that making America great begins with believing America can be great. The Cold War was won on American values that were shared by both parties and nearly every American. Institutions that were created by a Democrat, Truman, were triumphant forty years later thanks to the courage of a Republican, Reagan. This bipartisan consistency created the decades of strategic stability that is the great strength of democracies. Strong institutions that outlast politicians allow for long-range planning. In contrast, dictators can operate only tactically, not strategically, because they are not constrained by the balance of powers, but cannot afford to think beyond their own survival. This is why a dictator like Putin has an advantage in chaos, the ability to move quickly. This can only be met by strategy, by long-term goals that are based on shared values, not on polls and cable news. The fear of making things worse has paralyzed the United States from trying to make things better. There will always be setbacks, but the United States cannot quit. The spread of democracy is the only proven remedy for nearly every crisis that plagues the world today. War, famine, poverty, terrorism–all are generated and exacerbated by authoritarian regimes. A policy of America First inevitably puts American security last. American leadership is required because there is no one else, and because it is good for America. There is no weapon or wall that is more powerful for security than America being envied, imitated, and admired around the world. Admired not for being perfect, but for having the exceptional courage to always try to be better. Thank you

## Innovation

#### 1] 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]

#### 2] ABR won’t get close to extinction, intervening actors solve it, their internal link can’t

Ed Cara 17, science writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “The Attack Of The Superbugs,” http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here. Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives. For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty. Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess. “There has been a lot of work done the last couple of years, much of it spurned by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture. In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains. Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging. Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC. Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race. But barring the calvary showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability. The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

#### 3] COVID takes out solvency --- proves even if the aff innovates people are skeptical of doctors and won’t take advantage of the aff AND the aff globally fails because access to cures is isolated to wealthy nations.

#### 4] Burnout and geographic dispersion check disease.

Sebastian Farquhar 17. \*\*Project Manager at FHI responsible for external relations, M.A in Physics and Philosophy, Oxford. \*\*John Halstead, Global Priorities Project. \*\*Owen Cotton-Barratt, Research Associate in the FHI at Oxford, Lecturer in Mathematics at St. Hugh’s College. \*\*Stefan Schubert, PhD in philosophy, Researcher at the Centre for Effective Altruism. \*\*Haydn Belfield, Academic Project Manager, Centre for the Study of Existential Risk, Cambridge. \*\*Andrew Snyder-Beattie, Director of Research at FHI. “Existential Risk: Diplomacy and Governance.” *Future of Humanity Institute*. Oxford, Global Priorities Project. <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>.

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

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

## Access

#### 1] Expanded antitrust enforcement of anticompetitive practices causes backlash---turns the case.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### 2] Cartels are dead

Stewart 17 (Scott, Stratfor analyst of terrorism and security issues “Mexico's Cartels Will Continue to Splinter in 2017”, https://worldview.stratfor.com/article/mexicos-cartels-will-continue-splinter-2017)

Stratfor has tracked Mexico's drug cartels for over a decade. For most of that time, our annual forecasts focused on the fortunes and prospects of each trafficking organization. But as Mexican organized crime groups have gradually fractured and fallen apart — a process we refer to as balkanization — we have had to refine the way we think about them. The cartels are no longer a handful of large groups carving out territory across Mexico, but a collection of many different smaller, regionally based networks. So, rather than exploring the outlook of every individual faction, we now take them as loose gatherings centered on certain core areas of operation: Tamaulipas, Tierra Caliente and Sinaloa.

#### 3] There is no correlation between readiness and conflict and past declines disprove the impact

Mark F. Cancian & Seamus Daniels 18. \*\*Mark F is a senior adviser with the International Security Program at the Center for Strategic and International Studies (CSIS) in Washington, D.C. \*\*Seamus Daniels is a research assistant for defense budget analysis at CSIS. “The State of Military Readiness: Is There a Crisis?” Center for Strategic & International Studies. 04-18-18. https://www.csis.org/analysis/state-military-readiness-there-crisis

Q4: Has readiness declined? A4: **In 2013**, readiness took a hit as a result of sequestration. Because cuts had to be made late in the fiscal year, the services were forced to cut **facility maintenance**, **international exercises**, and most significantly, **training activities**. The services have been digging out of that hole ever since. Some commentators have raised concerns about a “readiness crisis” while others, like retired Gen. David Petraeus and Michael O’Hanlon, have argued that readiness is essentially sound. Part of the difficulty in assessing the state of the military’s readiness is the lack of publicly available data as measured by the DRRS. That problem is exacerbated by directives from the secretary of defense to limit public discussion of readiness shortfalls. Readiness discussions are further distorted by the opposing incentives to exaggerate shortfalls to defend budgets and to exaggerate capabilities to deter adversaries. The Trump administration emphasized readiness in its FY 2017 and FY 2018 budgets. Nevertheless, readiness data are conflicting. Some metrics, like Army rotations to Combat Training Centers, service flying hours, and Navy ship steaming days, have recovered from post-2013 lows, but others, like Navy and Marine Corps aircraft availability, remain depressed. With overall DOD budgets rising, targeted readiness increases, such as aviation spare parts, may be better investments than across-the-board increases. The services have worked hard to deploy forces at a high level of readiness because these forces are either going into conflicts (such as Afghanistan, Iraq, or Syria) or will be the first sent to a crisis or a new conflict (carrier battle groups and Marines afloat). Low readiness levels, therefore, typically affect nondeployed forces at their home bases. These forces would deploy if an emergency erupts that the forward-deployed forces cannot handle. The risk is that they would need to deploy before they can be brought up to a high level of readiness. Q5: Have low readiness levels caused an increase in accidents? A5: There would seem to be a connection here: lower readiness, less training, fewer skills, more accidents. However, it is **difficult to determine the direct connection** between readiness and recent incidents. Accidents have **continued to occur even as readiness funding has recovered**. What is clear is that the high tempo of current operations (optempo) has taken a toll on the readiness of forces.

#### 4] The threat of biodiversity loss is overhyped

G. Bailey 19. “Letters | ‘Mass species extinction’ headlines are overblown and ignore success in conservation efforts” South China Morning Post. 05-14-2019. <https://www.scmp.com/comment/letters/article/3010008/mass-species-extinction-headlines-are-overblown-and-ignore-success>

David Dodwell admits he may have exaggerated just a bit when lamenting the loss of life in the seas around his idyllic home, and is amazed at the wonderful diversity of natural life in Hong Kong (“Loud and clear alarm bell sounded on species extinction. What now?”, May 11). I share his amazement and wonder, but it’s a shame he wasn’t able to see that the United Nations IPBES’ (Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services) claim, that one million species are heading for extinction due to human activities, may have also been a bit of **an exaggeration** – just a bit. How exactly did this UN body arrive at such a huge and frightening figure? Apparently it was referring to one million species **out of eight million**, but all you see in yet **more doomsday headlines** is “one million species under threat”. In fact, **less than 2 per cent** of bird and mammal species have gone extinct over the last few centuries. The **success stories** about the revitalisation of nature and species is **completely ignored.** Humpback whales, for example, are flourishing after being under threat. Others do remain under threat, and many, like the orangutan, are under threat due to the demand for biofuels to replace fossil fuels to combat climate change. Sad, but true.

## Econ

#### 1] The aff doesn’t solve healthcare costs---too many alt causes

Gabrielle Smith 21. Cites CMS, NCBI, CDC, KFF, BBC, 3/19/21. “Seven reasons for rising healthcare costs.” https://www.peoplekeep.com/blog/seven-reasons-for-rising-health-care-costs

However, despite this historic drop, economists at CMS expect the pandemic’s effects to be short term, with health spending projected to grow at an average annual rate of 5.4% and reach $6.2 trillion by 2028.

With no end in sight to rising healthcare costs, it’s important to understand what exactly causes these spikes in the first place. Let’s take a look at seven reasons for rising healthcare costs in the U.S.

Seven reasons for rising healthcare costs

1. Medical providers are paid for quantity, not quality

Most insurers—including Medicare—pay doctors, hospitals, and other medical providers under a fee-for-service system that reimburses for each test, procedure, or visit. That means the more services provided, the more fees are paid.

This encourages a high volume of redundant testing and overtreatment, including on patients that have questionable potential to improve their health.

On top of this, our medical system is not integrated. The World Health Association defines integrated health services as “the organization and management of health services so that people get the care they need, when they need it, in ways that are user friendly, achieve the desired results and provide value for money.”

So what does that have to do with cost? Integrated health means providers, management, and support teams are all in communication with one another on a patient’s care. On the other hand, in an unintegrated system, the lack of coordination can result in patients receiving duplicate tests and paying for more procedures than they truly need.

2. The U.S. population is growing more unhealthy

According to the National Center for Biotechnology Information, half of the U.S. population has at least one chronic condition, such as asthma, heart disease, or diabetes, which all drive up costs. A staggering 85% of healthcare costs in the U.S. are for the care of a chronic condition.

What’s more, recent data from the Center for Disease Control and Prevention finds that over 40% of adults in the U.S. are either overweight or obese, which also leads to chronic illness and inflated medical spending.

As the U.S. population gets sicker and more overweight, the risk involved in insuring the average American goes up. And in turn, the higher the risk, the higher the cost of insurance premiums. Data from the Kaiser Family Foundation (KFF) shows between 2015 and 2020 the average annual premiums for family coverage rose from $15,545 to $21,342—that’s a whopping 37%.

3. The newer the tech, the more expensive

Medical advances can improve our health and extend our life, but they also add to the cost of healthcare and the overutilization of expensive technology.

According to a study by the Journal of the American Medical Association, (JAMA) Americans tend to associate more advanced technology and newer procedures with better care, even if there’s little to no evidence to prove that they’re more effective.

This assumption leads to both patients and doctors often demanding the newest (read: most expensive) treatments and technology available.

4. Many Americans don’t choose their own healthcare plan

Data from the KFF finds that roughly 49% of the U.S. population gets their insurance through their employer. That means nearly half of Americans don’t actually make any true consumer decisions about the cost of their care or coverage, because it was already made for them by their employer.

Organizations have an incentive to purchase more expensive healthcare plans because the amount employers pay toward coverage is tax deductible for the organization and tax exempt to the employee. In addition, low deductibles or small office co-payments can encourage overuse of care, driving both demand and cost.

5. There’s a lack of information about medical care and its costs

Despite a wealth of information at our fingertips online, there’s no uniform or quick way to understand treatment options and the costs associated with them. We would never buy a car without comparing models, features, gas mileage, cost, and payment options—but yet, this is how we buy healthcare.

Kaiser Health News (KHN) reports that even when evidence shows a treatment isn’t effective or is potentially harmful, it takes too long for that information to become readily known, accepted, and actually change how doctors practice or what patients demand.

And in too many cases, even when hospitals make their service prices available, they are difficult to navigate and understand. Many of the chargemasters that have been legally required to be made public are written using codes that only medical care professionals can understand.

See our infographic to learn more about estimating your medical expenses

6. Hospitals and providers are well-positioned to demand higher prices

According to the Center for Studying Health System Change, mergers and partnerships between medical providers and insurers is one of the more prominent trends in America’s current healthcare system.

Increased provider consolidation has decreased the market competition, which normally allows for lower prices, improved productivity, and innovation. Without this competition, these near-monopolies created in some markets have both providers and insurers in a position to drive up their prices unopposed.

For example, a study done by the American Journal of Managed Care found that hospitals in concentrated markets were able to charge considerably higher prices for the same procedures offered by hospitals in competitive markets. The cost for a coronary angioplasty was found to be 25% higher, while a total knee replacement was 19% higher.

7. Fear of malpractice lawsuits

Oftentimes called “defensive medicine,” some doctors will prescribe unnecessary tests or treatment out of fear of facing a lawsuit. The cost for these treatments add up over time—a study done by JAMA estimates that an annual $46 billion are wasted in defensive medicine practices.

This is no surprise given that our current regulatory system is structured to support the fee-for-service model of healthcare delivery and payment. The Commonwealth Fund reports that the fear that healthcare providers will withhold important services in order to stay under budget is a bigger concern to Americans than the overutilization of services.

Sources: CMS, NCBI, CDC, KFF, BBC

#### 2] Pay-for-delay is policed now

AJMC 21. The Center for Biosimilars @ the American Journal of Managed Care, 6/23/21. https://www.centerforbiosimilars.com/view/industry-panelists-say-pay-for-delay-settlements-have-a-good-side

“Pay-for-delay” settlements between originator companies and biosimilar developers have a bad reputation that may not be wholly deserved, said an intellectual property attorney at the American Conference Institute’s 12th summit on Biosimilars & Innovator Biologics.

These agreements are now reviewed by the Federal Trade Commission (FTC), and there is evidence that they are better structured in recent years and play a constructive role in allowing competitor drugs to come to market sooner, said Karin A. Hessler, assistant general counsel for the Association for Accessible Medicines.

The FTC gets a copy of every single settlement agreement that occurs…and they put out a yearly report analyzing settlement agreements, and what has come out of the last 2 yearly reports that the FDC has issued is that Activis has been highly effective in policing these agreements.

Panelists also discussed recent changes to the Purple Book manual of patent information on biologics and various legislative developments that are intended to improve the competitiveness of the US biologics market.

Much alarm has been raised about settlements between originator and biosimilar developers that involve an exchange of royalties or agreements not to enter certain markets before a certain time. In exchange for these agreements, biosimilar companies may avoid costly litigation battles and bring their products to market sooner.

Hessler said an important 2013 Supreme Court decision, FTC v Activis, clarified when reverse payment patent settlements (pay for delay) are in fact acceptable and this, she said, has led to a gradual improvement in the quality of such agreements, such that pay-for-delay deals are in many cases playing a constructive role in facilitating patient access to lower-cost medicine.

“The FTC gets a copy of every single settlement agreement that occurs…and they put out a yearly report analyzing settlement agreements, and what has come out of the last 2 yearly reports that the FDC has issued is that Activis has been highly effective in policing these agreements,” Hessler said.

Quoting from the December 2020 FTC report, Hessler stated that despite a high number of such settlements, “those that include the types of reverse payments that are likely to be anticompetitive remain very low.”

## Regs

#### “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

#### 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.

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

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

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

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

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

7. CONCLUSION

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

#### Internal to advantage 2 is about generic shortages.

#### A. Suitability petitions in the FDA solve.

Arti K. Rai and Barak D. Richman 18. 5-22-18. Arti Rai, Elvin R. Latty Professor of Law and co-Director of The Center for Innovation Policy at Duke Law. Barak D. Richman, JD, PhD, is the Katherine T. Bartlett Professor of Law and Business Administration at Duke University. “A Preferable Path For Thwarting Pharmaceutical Product Hopping” <https://www.healthaffairs.org/do/10.1377/hblog20180522.408497/full/>

The Path Forward Many cases in which pharmaceutical firms have been accused of product hopping and sued under the antitrust laws have involved changes of dosage, strength, or route of administration. In cases that involve only cosmetic changes—that is, when there is no reason to believe that the change altered safety and efficacy—**the FDA could approve a suitability petition and allow a generic to enter the market, injecting much-needed price competition**. Additionally, the threat of a suitability petition would give originator manufacturers a strong incentive to abandon any plan to hop a drug with an expiring patent simply by making a cosmetic change. In some cases, the originator might produce comparative data showing that its new drug product is in fact safer or more efficacious than its prior product. **Such comparative data might give the FDA reason to reject a suitability petition**, **and thus presumably protect against the threat of a petition in the first instance.** But this activity would be socially valuable: the originator would have proved that its new drug represented a meaningful innovation. In the Actavis case, in contrast, Namenda XR was only tested against a placebo and was not compared to Namenda IR. It is precisely because the Namenda hop is so typical—that is, the new drug offers only a cosmetic change—that suitability petitions can be a meaningful tool to combat high pharmaceutical prices. The case illustrates an unfortunately common strategy that inappropriately extends monopoly pricing, but one that the FDA could readily thwart to offer patients immediate relief from high costs, **rather than asking lay judges and juries to try to redress the problem many years after the fact.** FDA Commissioner Gottlieb has asked the policy community to offer ideas to address unsustainable pharmaceutical prices. We applaud his decision to do so, but **to solve the costly problem of product hopping, the** **FDA need look no further than its own statutory authority.** **Without any further action on the part of Congress, the FDA could revise its agency rules and begin inviting suitability petitions.**

#### 3. Regs deter.

Michael L. Fialkoff 14. J.D., University of Michigan Law School (expected 2015). “Pay-For-Delay Settlements in the Wake of Actavis.” Michigan Telecommunications and Technology Law Review, Vol. 20:523. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1196&context=mttlr

A possible, though unlikely, solution to the issues raised in Part HI would be Supreme Court action to clarify and expand the holding of Actavis to encompass pernicious non-monetary settlement arrangements. Although the Supreme Court might eventually clarify its position on this issue, such a decision seems unlikely to occur in the immediate future. A second solution would be for Congress to pass antitrust-based legislation codifying and ex-panding the Actavis holding. This solution also seems unlikely. There have been several attempts made in Congress to legislate broadly against pay-for-delay settlements under antitrust law, but thus far these attempts have been unsuccessful.133

A more effective, and possibly more feasible, approach would be to alter the regulatory framework of the pharmaceutical industry to reduce the eco- nomic incentives for pay-for-delay arrangements involving both overt mone- tary reverse payments and non-monetary de facto reverse payments. This Note now proposes a solution in this vein: the FDA should make the 180- day Hatch-Waxman generic exclusivity period available to a subsequent ANDA filer if the first-filer settles its patent challenge.

This proposal modiﬁes two elements of the existing regime. First, if the ﬁrst ANDA-ﬁler settles its patent challenge by agreeing to delay entry into the market, then that manufacturer should forfeit the 180-day period of ge-neric exclusivity provided by the Hatch-Waxman Act. As noted in Part LA, the forfeiture provision is difﬁcult to trigger in the event of settlement—forfeiture requires a ﬁnal appellate judgment that the proposed settlement violates antitrust law.134 Hemphill and Lemley have argued, and this Note agrees, that the forfeiture provision of the Hatch-Waxman Act should be augmented to reach those instances where the first-to-file generic manufac-turer settles without obtaining a judgment of non-infringement or patent invalidity.135

Second, in the event that the ﬁrst-ﬁler forfeits the ISO-day period of exclusivity, the exclusivity window should be made available to the next-in- line ANDA-ﬁler. This is the crux of the current proposal. Recall that under the current regulatory regime, the period of generic exclusivity attaches only to the ﬁrst-ﬁler.I36 In the event that the ﬁrst ANDA-filer forfeits the 180-day window, the period of exclusivity does not cede to any subsequent ﬁler.I37 Allowing subsequent ANDA-filers the beneﬁt of this period of ex-clusivity in the event that the ﬁrst-ﬁler settles would make anticompetitive arrangements like those in Actavis and Lamictal less feasible for the both the brand-name manufacturer and the generic manufacturer.

The proposed modification to the regulatory regime addresses the issue of pay-for-delay settlements at a different level than a judicial decision or new antitrust law. Rather than simply declaring a particular genus of settle- ment illegal or subject to heightened antitrust scrutiny, this modification works to reduce the incentives for anticompetitive pay-for-delay settlements. Additionally, as discussed below, the proposed modification to the regula- tory regime is more adaptable in dealing with different forms of anticompeti- tive arrangements between brand-name and generic manufacturers. The following subsections describe how this proposed rule would operate under the facts of Actavis and Lamictal to reduce incentives for anticompetitive settlement.

#### 4. CP encourages compliance.

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

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

CONCLUSION

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

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

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

#### 5. Patent law solves via enforcing rights---avoids stifling innovation.

Steve Brachmann 8-25. Professional freelance journalist for over a decade covering antitrust. FTC’s Antitrust Complaint Against Facebook Highlights Another Missed Opportunity to Address Big Tech’s Anticompetitive Activities Through Patent Reform. IPWatchdog. 8-25-2021. https://www.ipwatchdog.com/2021/08/25/ftcs-antitrust-complaint-against-facebook-highlights-another-missed-opportunity-to-address-big-techs-anticompetitive-activities-through-patent-reform/id=137070/

Big Tech Antitrust Enforcement Wouldn’t Be Necessary with Strong Patent Rights

The blind eye that antitrust regulators have been turning toward Big Tech’s patent killing activities would be laughable if it wasn’t so frustrating. The recent legislation introduced in Congress to reduce Apple’s anticompetitive app store practices? That probably would never have been needed if Smartflash, the inventor of data storage and access systems that Apple’s App Store was found to willfully infringe and whose patent rights were obliterated by Apple through questionable machinations at the PTAB, had its patent rights respected. Last December, 10 state attorneys general filed an antitrust suit against Google targeting its anticompetitive practices in online search advertising. Google didn’t invent search advertising, but the Internet giant did leverage PTAB trials to knock out seminal online search advertising patent claims owned by B.E. Tech, preserving many billions in Google’s corporate value while destroying the business interests of an innovative competitor. Earlier this month, B.E. Tech and inventor M. David Hoyle filed a Bivens action lawsuit naming several former USPTO officials, including Google’s former Head of Patents and former USPTO Director Michelle K. Lee, for rigging proceedings at the PTAB on behalf of Google, one of the agency’s largest stakeholders.

Antitrust suits may eventually be successful at splitting Big Tech giants into smaller firms, but none of these efforts does anything to actually ensure that the resulting markets will allow smaller competitors to protect their innovations against market incumbents that, while smaller, will still have market caps dwarfing small innovators and independent inventors. The sad truth of the matter is that Apple wouldn’t dominate app stores, Google wouldn’t dominate online search advertising, and Facebook wouldn’t dominate social media if the entire U.S. federal government hadn’t completely turned the patent system on its head over the past two decades.

## Innovation

#### Courts will water down new and past precedent

Matthew Sipe 18. JD Yale Law, 2017-2018 Supreme Court Fellow, Current Professor of Law at the University of Baltimore. "The Sherman Act and Avoiding Void-for-Vagueness." Florida State University Law Review, vol. 45, no. 3, Spring 2018, p. 709-762. HeinOnline

Consider the case law governing boycotts. In Klor's, Inc. v. Broadway-Hale Stores, Inc., the Court examined a group of appliance manufacturers and distributors boycotting a particular retail store.8 2 The Court unambiguously stated that such boycotts were per se Sherman Act violations: Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned.... It clearly has, by its "nature" and "character," a "monopolistic tendency."83 Without explicitly overruling this seemingly bright-line and straightforward per se rule, the Court has blurred its boundaries significantly. 84 For example, in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., the Court reversed the Ninth Circuit's application of the per se rule against boycotts to a purchasing cooperative's boycott of a certain retailer.8 5 Although reaffirming that "group boycotts are so likely to restrict competition . . . that they should be condemned as per se violations of § 1 of the Sherman Act," the Court warned that "[e]xactly what types of activity fall within the forbidden category is, however, far from certain."8 6 The Court's analysis provided a number of threshold factors to be considered prior to application of the per se rule, which the Ninth Circuit later summarized as whether: "(1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition." But these threshold inquiries-market structure, efficiency, and market power-are classic components of the more flexible and amorphous rule of reason. In other words, the case law dictates that ''courts must apply the rule of reason in order to determine whether the per se rule applies" in the first place.88 To the extent that the ambiguities inherent in the rule of reason are effectively imported into per se analyses as a step-zero inquiry, the latter category is no less vaguely defined.

#### ABR doesn’t get close to extinction --- vast majority of treatments will still be effective, no huge death tolls.

Drew SMITH 16. Former R&D director, MicroPhage and SomaLogic. “The Myth Of The Post-Antibiotic Era.” Forbes. June 14. <https://www.forbes.com/sites/quora/2016/06/14/the-myth-of-the-post-antibiotic-era/#db027696fa83>.

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

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

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

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

## Access

#### Backlash kills all FTC enforcement.

Adam Speegle 12. J.D. Candidate, May 2012. “Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process”. Michigan Law Review. March 2012, Vol. 110, No. 5 (March 2012), pp. 847-873. https://www.jstor.org/stable/23216802

Another major concern with bringing cases under an independent Section 5 is that, as the application of the provision expands and the bounds of its flexibility are tested, the FTC risks eventual backlash from the courts or Congress similar to the backlash it experienced in the 1980s.129 The FTC relies on Section 5 in both antitrust and consumer protection actions. A negative holding on Section 5's use in the standard-setting context may not only bear on future patent holdup enforcement efforts but may also severely impede the FTC's efforts in other areas. If the FTC fails to limit the application of Section 5, it risks subjecting Section 5 to the same or more severe judicial and congressional treatment than it experienced in the past.130 Additionally, many states have their own statutes that are modeled after the FTCA. These state statutes are interdependent with the federal FTCA, and state courts interpret them using federal FTCA precedent.131 Because holdings related to the FTCA at the federal level can, for better or for worse, impact these state statutes, unfavorable Section 5 precedent could also undermine actions at the state level.

#### Turns case---causes Congress to strip funding and authority from the FTC.

J. Howard Beales 03. Former Director, Bureau of Consumer Protection. “The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection.” https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection

The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media . Even the Washington Post editorialized that the FTC had become the "National Nanny."(16) Most significantly, these concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days. Entire industries sought exemption from FTC jurisdiction, fortunately without success. Eventually, Congress acted to restrict the FTC's authority, including legislation preventing the FTC from using unfairness in new rulemakings to restrict advertising.(17) So great were the concerns that Congress did not reauthorize the FTC for fourteen years. Thus chastened, the Commission abandoned most of its rulemaking initiatives, and began to re-examine unfairness to develop a focused, injury-based test to evaluate practices that were allegedly unfair.

#### The Link is magnified by lobbying.

Alison Jones 20. Professor of Law at King's College London, with William E. Kovacic, March, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy.” The Antitrust Bulletin. https://journals.sagepub.com/doi/full/10.1177/0003603X20912884

D. Political Backlash

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

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility,

and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

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

#### And yes diversification - Cartels don’t need drugs --- avocados are a bigger source of income---drugs aren’t key.

KATE LINTHICUM 19. Staff writer at the Los Angeles Times, 11/21/19. “Inside the bloody cartel war for Mexico’s multibillion-dollar avocado industry.” https://www.latimes.com/world-nation/story/2019-11-20/mexico-cartel-violence-avocados

Homicides are at an all-time high in Mexico, which has long been home to the world’s most powerful and violent narcotics traffickers. Yet much of the killing today has little to do with drugs.

Organized crime has diversified.

In Guanajuato state, the homicide rate has nearly tripled over the last three years as criminals battle for access to gasoline pipelines, which they tap to steal and sell fuel.

In parts of Guerrero state, cartels control access to gold mines and even the price of goods in supermarkets. In one city, Altamirano, the local Coca-Cola bottler closed its distribution center last year after more than a dozen groups tried to extort money from it. The Pepsi bottler left a few months later.

In Mexico City, bar owners in upscale neighborhoods must pay taxes to a local gang, while on the nation’s highways, cargo robberies have risen more than 75% since 2016.

Compared with drug trafficking, a complex venture that requires managing contacts across the hemisphere, these new criminal enterprises are more like local businesses. The bar to entry is far lower.

This new approach to organized crime was pioneered by the notorious Zetas cartel and spread in response to the government’s 2006 declaration of war on drug traffickers.

Mexican forces, with strong U.S. support, focused on capturing or killing cartel leaders. But that strategy backfired as the big cartels fractured into smaller and nimbler organizations that sought criminal opportunity wherever they could find it.

“For many of those smaller groups, it’s far easier to just prey on local populations,” said Falko Ernst, a Mexico-based analyst with the International Crisis Group, which promotes nonviolent solutions to conflicts. “It’s a myth that it’s only about drugs.”

In Michoacan, where there have been dozens of cartel splits over the last dozen years, organized crime’s invasion of the avocado industry is a microcosm of what is happening elsewhere in the country — and a potent illustration of how the government has unintentionally fueled more violence.

## FTC

#### **Algorithmic bias risks nuke war.**

Elsa B. Kania 17. Adjunct fellow with the Technology and National Security Program at the Center for a New American Security, 11/15/17. “The critical human element in the machine age of warfare.” https://thebulletin.org/2017/11/the-critical-human-element-in-the-machine-age-of-warfare/

Today, however, the human in question might be considerably less willing to question the machine. The known human tendency towards greater reliance on computer-generated or automated recommendations from intelligent decision-support systems can result in compromised decision-making. This dynamic—known as automation bias or the overreliance on automation that results in complacency—may become more pervasive, as humans accustom themselves to relying more and more upon algorithmic judgment in day-to-day life.

In some cases, the introduction of algorithms could reveal and mitigate human cognitive biases. However, the risks of algorithmic bias have become increasingly apparent. In a societal context, “biased” algorithms have resulted in discrimination; in military applications, the effects could be lethal. In this regard, the use of autonomous weapons necessarily conveys operational risk. Even greater degrees of automation—such as with the introduction of machine learning in systems not directly involved in decisions of lethal force (e.g., early warning and intelligence)—could contribute to a range of risks.

Friendly fire—and worse. As multiple militaries have begun to use AI to enhance their capabilities on the battlefield, several deadly mistakes have shown the risks of automation and semi-autonomous systems, even when human operators are notionally in the loop. In 1988, the USS Vincennes shot down an Iranian passenger jet in the Persian Gulf after the ship’s Aegis radar-and-fire-control system incorrectly identified the civilian airplane as a military fighter jet. In this case, the crew responsible for decision-making failed to recognize this inaccuracy in the system—in part because of the complexities of the user interface—and trusted the Aegis targeting system too much to challenge its determination. Similarly, in 2003, the US Army’s Patriot air defense system, which is highly automated with high levels of complexity, was involved in two incidents of fratricide. In these stances, “naïve” trust in the system and the lack of adequate preparation for its operators resulted in fatal, unintended engagements.

As the US, Chinese, and other militaries seek to leverage AI to support applications that include early warning, automatic target recognition, intelligence analysis, and command decision-making, it is critical that they learn from such prior errors, close calls, and tragedies. In Petrov’s successful intervention, his intuition and willingness to question the system averted a nuclear war. In the case of the USS Vincennes and the Patriot system, human operators placed too much trust in and relied too heavily on complex, automated systems. It is clear that the mitigation of errors associated with highly automated and autonomous systems requires a greater focus on this human dimension.

#### Algorithmic bias turns the economy---drains business profitability.

Kalinda Ukanwa 21. Assistant professor of marketing at the University of Southern California’s Marshall School of Business, 5/23/21. “Algorithmic bias isn’t just unfair — it’s bad for business.” https://www.bostonglobe.com/2021/05/23/opinion/algorithmic-bias-isnt-just-unfair-its-bad-business/

These moves respond to growing concerns that algorithms have been reproducing discrimination in situations such as home lending, the allocation of health care, and decisions about who deserves parole. While many people hoped machines could help us make fairer decisions, as the use of AI has exploded it’s become clear that all too often they simply replicate and even amplify our existing prejudices.

An important part of the story has been missing, however. It’s one that might make businesses more amenable to regulation or even preclude the need for it by motivating them to act on their own. Algorithmic bias is not only a pressing ethical and societal concern — it’s also bad for business.

My research shows that over time, word of mouth about algorithmic bias among customers will hurt demand and sales and cut into profits. This damage won’t just hit a few unlucky companies that find themselves embroiled in public controversy around algorithmic discrimination. It can occur even if the inner workings and biases of an algorithm remain invisible to the public.

To understand how this can happen, consider one tech giant’s failed attempts at algorithmic design. In 2014, Amazon launched an internal tool to evaluate resumes. Although the algorithm was not programmed to look at the gender of the job applicants, it was trained using data from the company’s previous decade of hiring decisions, and the applications in that period mainly came from men. Based on past patterns, the algorithm learned to downgrade resumes that mentioned certain women-only colleges or women’s sports or clubs.

Amazon dropped that tool once these biases were discovered, but companies still widely use algorithms for recruiting and hiring. Not only are employers potentially missing out on valuable candidates, but over time these losses will compound through word of mouth. People learn about opportunities from members of their social circles, who often have race, age, gender, and other demographic characteristics in common. When women hear that their female friends and colleagues have been passed over for jobs at a particular company, they are less likely to apply, even if they know nothing about why these other candidates were rejected.

Using group characteristics to make decisions about whether and how to provide services to individual consumers may seem logical in some cases and may even be profitable in the short term. For example, a property manager might believe there are legitimate business reasons to choose tenants based on their age or education level. But my research, which uses computational methods to simulate consumer behavior, shows that these types of “group-aware” algorithms will tend to become less profitable over time.

In a study I conducted with Roland Rust, we simulated how customers would respond to two banks. One bank is “group-aware” and has various loan-approval thresholds for members of different groups. For example, women might have to meet a higher standard than men to get a loan. The other bank in the model is “group-blind”: It has the same approval threshold for every applicant.

Our model indicates that most members of the favored group meet the loan threshold at both banks, so they are likely to apply to either. But members of the group being discriminated against learn from one another to avoid the group-aware bank in favor of the group-blind one. Furthermore, members of the group experiencing discrimination also influence some members of the favored group to avoid the group-aware bank. As time passes, there is a net movement of customers toward the group-blind bank, hurting the profitability of the group-aware bank.

In short, when consumers learn from one another that a company is less likely to serve them, even if the discrimination is unintentional, they’ll avoid that company and it’ll lose revenue.

Algorithms often become group-aware when they aren’t intended to be. AI teases out correlations in the data that serve as stand-ins for group membership. For example, in our geographically segregated society, ZIP codes and other location data are a common proxy for race. Ride-sharing companies discovered the problem when a study revealed that their location-based pricing algorithms charge customers more for rides to or from neighborhoods primarily occupied by people of color. In other words, programming an AI system to ignore people’s gender or race or leaving this information out of the data set entirely isn’t enough to ensure an algorithm is group-blind.

What can companies do to make algorithms treat people fairly? Here are three key steps they can take:

1. Rather than removing group identifiers, businesses should include demographic characteristics in their data so they can continually audit their algorithms to determine whether they inadvertently discriminate against certain groups. There are a number of tools to evaluate whether bias is creeping in. IBM’s AI Fairness 360 is an open-source tool kit that helps detect bias in machine learning models. Microsoft’s FATE research group produces reports and tools aimed at reducing bias and increasing transparency and accountability in AI.

2. Companies can model how their systems’ decisions will affect demand over the long run among consumers who learn that some groups are treated differently. For example, if a bank used a model similar to the one in my study, it could easily see the long-term impact of a group-aware algorithm for making loans.

3. Whenever possible, algorithms should be designed to make decisions using context-specific data about individuals — looking at someone’s bill payment frequency in loan decisions, for example, or a patient’s cholesterol levels in health care, or a student’s grades in education — rather than trying to infer such information from other data points like their education level or where they live. The data used to train the algorithm is important too. Increasing the variation among and representation of different kinds of consumers allows algorithms to better evaluate individuals on their own merits.

Algorithms can lead to fairer outcomes, but only if they are designed and managed carefully. As computers increasingly make influential decisions about our lives, from the health care and financial services we receive to our educational and career prospects, we must remain alert to the potential for bias. There are strong ethical and moral reasons to do so, but there is also a business case to be made. We need to make sure companies understand how algorithmic bias can hurt their bottom lines.

#### 1. FTC focusing its resources on privacy now.

Jessica Rich et al. 10/3/21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection (BCP), with Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod. “FTC Chair Khan’s Vision for Privacy – and Some Dissents.” https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/

First, Khan’s statement reiterates her commitment to address privacy through a “cross-disciplinary” approach that uses the tools of competition law, not just consumer protection law, to address privacy harms. She states that “concentrated control over data has enabled dominant firms to capture markets and erect entry barriers while commercial surveillance has allowed firms to identify and thwart emerging competitive threats,” resulting in reduced privacy.

To address these concerns, as outlined further in the report, the agency intends to focus “most” of its limited resources against the “data practices of dominant digital platforms,” including through additional compliance reviews and order modifications and enforcement, “as necessary,” against, for example, Facebook, Google, Microsoft, Twitter, and Uber.

The Report adds that (with more resources from Congress), the FTC also will prioritize:

Adtech and “Walled Garden” Advertising Practices, including:

“[B]usiness models that depend on expansive and potentially illegal data collection to fuel targeted advertising and user engagement,” and

“Exclusionary or predatory conduct by dominant digital platforms to defend their data troves, resulting in lower levels of privacy and data protections and more intrusive ads.”

Children’s Tech: “Platforms and other online services that are potentially violating COPPA, an area of particular importance given that many children may be increasingly relying on online services for both educational, entertainment, and social purposes during the pandemic.”

Other Privacy Considerations, such as data uses involving health, biometric, or other sensitive data, discriminatory algorithmic practices, or other deceptive or unfair data practices.

#### 2. FTC currently implementing Biden’s XO to focus on privacy.

Crowell & Moring 9/1/21. Law firm. “FTC Rulemaking Pursuant to Biden’s Executive Order and Beyond: What is Settled, Not Settled, and What to Expect Going Forward.” https://www.crowell.com/NewsEvents/Events/FTC-Rulemaking-Pursuant-to-Bidens-Executive-Order-and-Beyond-What-is-Settled-Not-Settled-and-What-to-Expect-Going-Forward

On July 13, President Biden signed the sweeping Executive Order on Promoting Competition in the American Economy, which contained 72 directives to multiple federal agencies aimed at establishing a “whole-of-government” effort to promote competition across broad swaths of the American economy. Many recommendations within that Executive Order called upon the FTC to issue new rules relating to consumer protection, privacy, and competition issues. Even before the Executive Order, several Commissioners and other commentators were calling upon the FTC to exercise its rarely-used independent rulemaking authority to issue new rules to address a broad range of issues.

This webinar will focus on how the FTC and other federal agencies may seek to implement these recommendations and directives to engage in new rulemaking. It will focus on the scope of FTC’s rulemaking authority and the rulemaking process, opportunities companies may have to participate in the rulemaking process, and how to prepare for the challenges new FTC rules may create.

#### 2. The FTC’s changing their approach to allow them to focus on enforcement cases

Lauren Feiner 21. News Associate at CNBC, 8/3/21. “FTC struggles to keep up with merger filings, tells some businesses to merge at own risk.” https://www.cnbc.com/2021/08/03/ftc-tells-some-businesses-to-merge-at-own-risk.html

By law, regulators have a set amount of time to review pre-merger filings before parties consummate their deals. Regulators can issue a so-called second request to halt the process and ask for more information, but after receiving those documents, they have a set period of time to review and choose whether to block the deal before parties can again move forward.

While declining to block a merger doesn’t count as a rubber stamp or preclude the regulator from seeking to unwind it in the future, it often provides businesses some reassurance to move forward in the process.

But due to constrained resources, Vedova said there are some deals the FTC simply cannot investigate fully within the timeframe set by law. As a result, the FTC has begun sending letters to parties in such deals that basically say the agency hasn’t completed its review but can’t hold up their merger any longer, so the parties should proceed at their own risk.

“Accordingly, even if the parties consummate the above-referenced transaction, the Commission may still take further action as the public interest may require, which may include any and all available legal actions and seeking any and all appropriate remedies,” a sample letter to such businesses says.

The FTC’s new approach will likely create more uncertainty for businesses whose deals remain under review outside of the standard timeline.

The FTC splits oversight of HSR merger review with the Department of Justice Antitrust Division. Still, both agencies have pleaded with lawmakers for years for more resources to deal with greater demands on their agencies. Both, for example, have filed within the last year major antitrust lawsuits against two of the largest businesses in the world: Facebook and Google.

Merger reviews can often take precedence over misconduct cases within the agencies due to the tight timeline regulators are bound to by law for M&A. The FTC’s new approach could give staff more room to work on non-merger cases even as the agency is faced with a surge in HSR filings.

#### 4. Other enforcement is all talk

JED GRAHAM 9/16/21. Writes about economic policy for Investor's Business Daily.

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

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

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

#### the FTC can handle what it’s currently doing, not an expansion. Proves the staffing link.

Kiran Stacey 8/10/21 – Washington Correspondent for the Financial Times, 8/10/21. “Washington vs Big Tech: Lina Khan’s battle to transform US antitrust.” https://www.ft.com/content/eba8d3d7-dba7-4389-858c-5406c31b413d

Even if Khan does win some of the landmark cases she is likely to bring, some worry the FTC will not have the capacity to write new competition rules and rewrite merger guidelines at the same time. “The FTC can put together legal teams that can match the best in the bar, punch for punch, in a major case,” says Kovacic. “But the number of those teams is a couple, it is not 10.” For years the commission’s budget and staffing levels have been chipped away. It now has roughly 50 per cent of the staff it had in 1980 and is currently trying to review a record number of mergers. In the first nine months of this fiscal year, the FTC received 2,573 notifications ahead of a large merger — already 50 per cent more than were received in the whole of last year. Last week, the commission published a statement warning that it would not be able to review all mergers within 30 days of a notification being made, as required by law. Instead, the FTC said, if it had not had time to review a merger before it took place, it would reserve the right to take action even after it had been completed. “This year, the FTC has been hit by a tidal wave of merger filings that is straining the agency’s capacity to rigorously investigate deals ahead of the statutory deadlines,” the commission said in a statement. The commission is also facing an uphill battle to retain staff. Some people say they feel demoralised by the pace of change and irritated they have not yet met their new chair — something Khan’s allies say is an unfortunate result of the pandemic. “There are only so many times you can hear that your institution has failed for years before you start to doubt your place in it,” says one staff member. But a bigger problem is that companies and private law firms are gearing up for a more aggressive FTC by trying to poach its talent. “I usually have to place a couple of FTC people in any given year,” says Lauren Drake, a partner at the Washington-based recruiting firm Macrae. “So far this year I have had 10.”

#### 1. FTC is cash-strapped---the plan destroys other enforcement priorities.

Nicolás Rivero 21. Technology reporter at Quartz. “Biden’s antitrust crusaders can’t crusade without Congress.” 3/11/21. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

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

#### 2. Limited resources force tradeoffs in enforcement decisions.

Bernard (Barry) A. Nigro Jr. et al., 21 – Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ, with Nathaniel L. Asker and Aleksandr B. Livshits, 1/5/21. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert. 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.

#### 3. It directly undermines privacy enforcement.

David Hyman 19 – Professor at Georgetown University Law Center, with William E. Kovacic, “Implementing Privacy Policy: Who Should Do What?” 29 Fordham Intell. Prop. Media & Ent. L.J. 1117 (2019). https://ir.lawnet.fordham.edu/iplj/vol29/iss4/3

The case for making an enhanced FTC the national privacy regulator is straightforward. Of all U.S. privacy implementation institutions, the FTC has unequaled capacity in the form of expert case handling and policy teams and physical resources (including the development, over the past decade, of an internet laboratory to do high-quality forensic work, and the hiring of technology experts to assist in that effort). The agency’s capacity also is the product of extensive experience in applying its UDAP authority and enforcing statutes such as the FCRA and COPPA. The FTC has a broad portfolio of policy instruments (litigation, rulemaking, consumer and business education, data collection, the preparation of reports, the convening of conferences), and it has demonstrated its ability to use all of them to good effect in the privacy domain. The FTC’s stature as an independent agency gives it additional credibility in the eyes of foreign officials, who generally distrust the vesting of privacy powers in an executive department.

Within an enhanced FTC, privacy policy implementation also would be informed by the Commission’s larger experience with consumer protection. The FTC’s privacy unit is one part of its Bureau of Consumer Protection, rather than being a self-contained bureau. This reflected the institution’s reasonable view that the effort to safeguard consumer interests in “privacy” was one dimension of “consumer protection,” rather than a wholly distinct policy realm. Our impression is that many matters that involve privacy issues also raise problems that fit within other areas of the FTC’s consumer protection program. The analysis of the “privacy” issue often benefits from perspectives developed in the course of applying the agency’s deception and unfairness authority in other cases. The intertwining of privacy issues with other consumer protection concerns in many scenarios has important implications for how the mandate of a privacy agency should be defined. In whatever setting one ultimately might place a “privacy” mandate, we would expect that the host agency would have a mandate that incorporates powers that traditionally have been associated with the FTC’s broader consumer protection program.83

The FTC’s expertise in antitrust should also help it develop and enforce privacy policy. Enforcing antitrust law has given the FTC ongoing involvement in multiple high-tech markets—as well as an understanding of how competition can motivate companies to offer better privacy protections. The FTC’s work in both consumer protection and antitrust draws upon a Bureau of Economics with over 80 PhDs in economics.84 The Bureau of Economics has developed considerable skill in sub-disciplines (including behavioral economics) with special application to privacy issues.

Of course, inputs are not the same thing as outputs. The FTC has not always achieved the full integration of perspectives that the combination of these institutional capacities would permit. And, although there are policy complementarities across the domains of antitrust, consumer protection, and privacy, this combination of functions is not an unmixed blessing. An agency with all three functions might seek to use its position as a gatekeeper with respect to one policy domain to leverage concessions from firms over which it exercises oversight in another domain.85 Such temptations have been present when the FTC has applied its antitrust powers to review mergers involving companies in the information services sector.86

Finally, there is the possibility that any one of these functions might be diminished if all three are contained in the same agency. An agency focused solely on privacy will make privacy policy its single concern. An agency responsible for antitrust, consumer protection, and privacy is likely to find itself making tradeoffs as it sets priorities for how to use its resources.

#### FTC enforces the plan.

Jacqueline LaPointe 19. Editor at Xtelligent Healthcare Media, 5/16/19. “FTC Official Calls for More Aggressive Healthcare Merger Approach.” https://revcycleintelligence.com/news/ftc-official-calls-for-more-aggressive-healthcare-merger-approach

The FTC is responsible for enforcing antitrust laws in healthcare markets to prevent anticompetitive conduct that would increase costs, decrease care quality, and/or stifle innovation for consumers. To live up to its mission, the agency has been busy challenging several recent healthcare merger proposals such as the Penn State Hershey Medical Center-PinnacleHealth System deal in Pennsylvania and the DaVita-Renal Ventures Management LLC deal.

#### More ev.

Enrico Böhme et al. 21. School of Business and Economics, Research Group Institutional Economics, Philipps-University Marburg, with Jonas Severin Frank & Wolfgang Kerber. “Optimal Incentives for Patent Challenges in the Pharmaceutical Industry.” Review of Industrial Organization (2021). https://link.springer.com/article/10.1007/s11151-021-09815-0

Since the prices of pharmaceutical products sharply decrease after the entry of generics, any unjustified delay in generic firms’ entry can lead to high additional health costs for consumers and society. For that reason, the U.S. Federal Trade Commission (FTC) has challenged patent settlements with reverse payments in the pharmaceutical industry since 1999 (FTC 2002). In particular, patent settlements in which the (patent-holding) originator firms pay large sums to generic firms—‘reverse payments’—and agree on future entry dates of generics have been the object of competition and antitrust law proceedings.