# Round 3---Harvard 21

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#### Antitrust is capitalist---competition inevitably replicates market collapse.

Richard Wolff 19. Professor Emeritus of Economics at University of Massachusetts, Amherst. Transcript from YouTube video: “Economic Update: Competition and Monopoly in Capitalism”. Democracy at Work. 12-9-2019. <https://www.democracyatwork.info/eu_competition_monopoly_in_capitalism>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Cap causes extinction and structural violence.

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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.

Nick Rose 21. 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

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

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#### The United States federal government should:

#### - Maintain the current scope of its core antitrust laws and announce its intent to do so.

#### - Ban higher interconnection fees, data caps, contract terms in video programming agreements that harm downstream rivals, and input foreclosure through non-antitrust regulations.

#### - Increase investment in universal broadband.

#### Solves and competes---only the FTC and the DOJ enforce antitrust laws.

Michael Kades 19. Director for markets and competition policy at the Washington Center for Equitable Growth. “The state of U.S. federal antitrust enforcement”. Washington Center for Equitable Growth. 9-17-2019. https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true

Discussion about the current U.S. antitrust enforcement regime has been less systematic. Critics have pointed to where they believe federal enforcers have dropped the ball, such as the failure to challenge specific merger transactions or to attack the business practices of certain technology platforms. Defenders of the two federal agencies in charge of enforcement—the U.S. Department of Justice’s Antitrust Division and the Federal Trade Commission—have pointed to the areas where the agencies have been aggressive (such as the Department of Justice’s case against American Express Co.) or tenacious (such as the FTC’s enforcement agenda against hospital mergers).

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Sallet 19 (Jonathan, Benton Foundation Senior Fellow and former-Federal Communications Commission General Counsel (2013-2016) and Deputy Assistant Attorney General for Litigation, Antitrust Division, US Department of Justice (2016-2017).,  3-20-2019, "Three Important Points on Broadband Competition," accessed 08/16/2021, <https://www.benton.org/blog/three-important-points-broadband-competition>, NMC).

As the Federal Trade Commission considers the actions it can take to further broadband competition, I believe that it should consider three important points. The State of Competition: Few Americans Have Even Three Choices Among Fixed Broadband Providers According to one set of measurements, the average download speed of fixed broadband providers in the United States in the second and third quarters of 2018 was 96.25 Mbps, and the average upload speed was 32.88 Mbps. But according to Federal Communications Commission data, at a download speed of 100 Mbps, 11% of U.S. census blocks had no access to broadband, more than one-third had only one choice of a fixed broadband provider, and 37% had access to only two[[i]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn1" \o ") – and that FCC data overstates the presence of competition because even one household in a census block will count as demonstrating broadband presence in that census block, and two providers in the same census block will not necessarily reach the same customers. Even at lower download speeds, few census blocks contain three or more fixed broadband providers; at 50 Mbps the number is 21% and at 25 Mbps, the number is 28%. Language here is important. There is a tendency to call the construction of new networks in a locality “overbuilding” as if it were an unnecessary thing; a useless piece of engineering. But what some call “overbuilding,” the FTC should call by a more familiar term: “Competition.” New entrants may succeed, or they may fail, but antitrust views the ability to enter as critical to the restraint of market-power and the delivery of consumer benefits. For example, a report by Analysis Group found material price declines associated with the presence of a third broadband provider and that “[e]ach additional competitor offering broadband in a higher speed category will increase the probability that other broadband providers in the market will offer broadband at those higher speeds by 17% on an annual basis.”[[ii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn2" \o ") Similarly, according to Molnar and Savage, quality increases are associated with the entry of a third and fourth broadband competitor.[[iii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn3" \o ") The experience of individual municipalities provides more support. For example, the Federal Communications Commission found that the provision of municipal broadband in Chattanooga, Tennessee, led to lower rates, increased investment, and improved service from an incumbent broadband provider; that incumbent’s download speed increased from 8 Mbps in 2008, the year in which the Chattanooga municipal broadband network neared completion, to 106 Mbps in 2013.[[iv]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn4" \o ") An order of magnitude larger. Similarly, in Wilson, North Carolina, an incumbent cable company held rates in Wilson flat even as it raised rates in nearby areas for comparable offerings.[[v]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn5" \o ") That company also increased its top-tier speed when the municipal broadband network began service because, it explained, “of the competitive environment.”[[vi]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn6" \o ") By one measure, new competition saved residents more than one million dollars/year. None of this is surprising. Indeed, it would be more surprising if increased competition did not deliver lower prices, greater output, and higher quality. The Federal Trade Commission Should Carefully Consider the Application of Section 5 to Broadband Conduct That Threatens to Harm Competition A series of merger cases in the last decade illustrate the kind of harm that can arise in this sector. These harms include: Higher Interconnection Fees: In its review of the Comcast/TWC merger, the DOJ staff concluded that interconnection fees increase based on the size of a broadband provider and that higher interconnection fees “would raise the marginal cost of online video subscribers” and would also hamper new entry into local broadband/video markets.[[vii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn7" \o ") In the ATT/DirecTV merger, the Federal Communications Commission similarly found that “broadband Internet access providers have the ability to use terms of interconnection to disadvantage edge providers.”[[viii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn8" \o ") Data Caps: In its review of the AT&T/DirectTV merger, the Federal Communications Commission concluded that the integrated company, combining broadband provision with a very large video distributor, would have the incentive to hamper online video rivals by selective application of data caps on its own fixed broadband service. [[ix]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn9" \o ") Contract Terms in Video Programming Agreements That Harm Downstream Rivals: In its review of the acquisition of Time Warner Cable by Charter Communications, the Department of Justice obtained a consent decree barring the merged company from using its bargaining leverage with video programmers to inhibit the flow of video content to online video distributors.[[x]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn10" \o ") For example, the consent decree barred certain most-favored nation (MFN) clauses that permit the “cherry-picking” of contractual terms. Input Foreclosure: In its Comcast/NBCU decision, the Federal Communications Commission concluded that the integrated company could disadvantage downstream or online video rivals by withholding or raising the cost of its video programming.[[xi]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn11" \o ") An important question for the FTC is to consider the extent to which Section 5’s prohibition on “unfair methods of competition” reaches beyond the scope of the Sherman Act. To take just one example, Section 5 reaches invitations to collude even where there is no agreement reached (the existence of which is a requirement of Section 1). The Federal Trade Commission Has the Tools to Advance Broadband Competition Commissioner Chopra has suggested that the FTC consider the use of rule-making to establish the application of Section 5’s competition standard on a prospective basis.[[xii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn12" \o ") Indeed, I believe that the broadband sector meets key criteria enunciated by Commissioner Chopra: An extensive enforcement record exists from both merger and regulatory proceedings involving the FTC, the DOJ, and the Federal Communications Commission; and There is little, if any, reason to believe that private antitrust litigation has or will shape the conduct of the industry. Rather, given the history of bi-partisan agreement that some kind of limits should be placed on the ability of broadband providers to limit the competitive efforts of firms that use broadband to reach consumers (even as debate continues about the content of those limits), the FTC would be able to draw on a long and extensive record, in addition to whatever specific findings might be generated by a Section 6 report, as it considers the content of rules. At the same time, the FTC rightly places considerable importance on its role as a competition advocate. For example, it has argued for the removal of state licensing laws that have unduly limited access to professions on the ground that such restrictions “can impose real and lasting costs on both American workers and American consumers.”[[xiii]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn13" \o ") Now, the FTC should advocate for the repeal of state laws that limit the ability of municipalities to authorize entry of new broadband providers. This is not to say that every municipality should take such a step; merely that given the state of wireline broadband competition, consumers would benefit when municipalities can decide what forms of broadband competition would be helpful to their consumers and their labor force. The research that I noted above suggests, as does competition theory generally, that a third or fourth broadband competitor delivers lower prices and higher quality. And it is always important to remember that the benefits do not come only to the customers of the new entrant; competition inevitably induces incumbents to lower their prices, invest in their networks, and improve their services for the benefit of their customers as well. Consider, for example, the variety of public-private models that are proliferating: Most familiar perhaps are the cases of municipal electrical utilities or rural electric coops that are able to take advantage of network economies to provide broadband. In addition, municipalities like Ammon, Idaho, have established open-access networks that are available for companies to use to deliver broadband service; under the Ammon model the municipality itself does not deliver service to the end-user; several internet service providers compete over the Ammon network. On the Eastern Shore of Maryland, Kent County has constructed fiber linking governmental buildings; that fiber is available to private companies (and one is now in operation) to construct extensions from the county’s fiber network that reach residences, lowering the cost of investment. Again, the county is not the service provider. Earlier this month, the city of Tacoma, Washington, took a big step towards a new plan for use of its municipal broadband network under which it would lease its network to a private broadband provider to improve and operate its broadband service to residents and businesses. Two potential private partners have committed to net neutrality, to provide substantially lower-cost services to low-income residents, and to upgrade the system to gigabit speeds within three years, among other public-service commitments. As a competition advocate, it is important that the FTC enter the debate against state laws that force consumers to bear the higher prices and lower quality that antitrust tells us come from restrictive barriers to entry. This is not a new idea. In 2005, then-Commissioner Leibowitz told local governmental officials that it “was wrong to stifle competition in this manner”, saying that “local governments have long been laboratories of experimentation. If they want to give their residents affordable Internet access, they should be allowed to try without being foreclosed by federal or state laws”.[[xiv]](https://www.benton.org/blog/three-important-points-broadband-competition" \l "_edn14" \o ") That was right then, and it is right now. Thank you for the opportunity to appear today.

### Off

T

#### Interp---“core antitrust laws” means Sherman and Clayton.

Teo Spengler 19. J.D. Reviewed by: Michelle Seidel, B.Sc., LL.B., MBA. “Consumer Laws: California Consumer Rights & Responsibilities”. Legal Beagle. https://legalbeagle.com/13720462-consumer-laws-california-consumer-rights-responsibilities.html

Federal and State Antitrust Laws

Antitrust laws are intended to protect consumers by not letting any business corner the market in a way that precludes competition. These laws protect free trade from unfair restraints, monopolies and price fixing. Antitrust vigilance helps consumers by ensuring fair prices for goods and services, a range of products to choose from and innovative, quality goods and services.

The core antitrust laws are federal – the Sherman Act and the Clayton Act. California's complementary laws are found in the Cartwright Act, Business and Professions Code Section 16720 and following sections. These laws bar agreements among competitors that would fix prices or allocate customers or markets. California law offers a more detailed list of forbidden actions than that included in the federal law's general prohibitions against restraints of trade. The California Attorney General enforces antitrust laws by reviewing business mergers, investigating violations of the law and litigation.

#### Violation---the FTC Act is not a core antitrust law.

Carl Felsenfeld 93. Professor of Law, Fordham University School of Law. “The Bank Holding Company Act: Has It Lived Its Life?”, 38 Vill. L. Rev. 1. Accessed on Lexis.

E. The Antitrust Laws

1. Core Laws

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition," 480Link to the text of the note the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks. 481Link to the text of the note There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry." 482Link to the text of the note A proposal to remove the BHCA, however, is not a [\*94] suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect. 483Link to the text of the note

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable. 484Link to the text of the note In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws. 485Link to the text of the note He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce. 486Link to the text of the note Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today. 487Link to the text of the note

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates. 488Link to the text of the note The general [\*95] approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws' disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA's antitrust tests satisfied. 489Link to the text of the note For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department. 490Link to the text of the note In July 1991, the Justice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act. 491Link to the text of the note As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. Federal Trade Commission Act

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Com [\*96] mission Act (FTC Act). 492Link to the text of the note In its broad scope the FTC Act is inapplicable to banks. 493Link to the text of the note The FTC, however, may require banks to produce documentary evidence required during agency investigations. 494Link to the text of the note The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA 495Link to the text of the note - the perpetration of "unfair methods of competition." 496Link to the text of the note

Despite its limited applicability to banks in its major prohibitions, the FTC Act could have considerable significance to bank holding companies (which are generally not banks) and to their nonbank affiliates. One would think that an exclusion for banks would not exclude companies that are not banks. 497Link to the text of the note The author is unaware of any clear holding on this subject, although at least one FTC opinion letter and a District Court holding on the same case have reached opposite conclusions on the question. 498Link to the text of the note

#### Vote Neg:

#### 1. Limits---they delete the term “core” from the resolution and make anything related to antitrust and competition topical.

#### 2. Ground---they give the Aff access to FTC process advantages and eliminate “other legislation” CPs, which are core functional limits---that’s why we voted for “core antitrust laws.”

#### 3. Predictability---we have legal ev with intent to define and exclude.

### Off

States CP

#### The 50 states and all relevant subnational entities should:

#### - Enforce the Federal Trade Commission Act to allow the application of Section 5 to common carriers.

#### - Enact parallel statutes adopting the same principle.

#### Solves.

Juan A. Arteaga & Jordan Ludwig 21. \*Former Deputy Assistant Attorney General for the US Department of Justice’s Antitrust Division. JD, Columbia Law School. \*\*Partner in the Antitrust and Competition Group at Crowell & Moring LLP. JD, Loyola Law School. “The Role of US State Antitrust Enforcement”. Global Competition Review. 1-28-2021. <https://globalcompetitionreview.com/guide/private-litigation-guide/second-edition/article/the-role-of-us-state-antitrust-enforcement>

In the United States, competition laws have been implemented and enforced through a dual system where the state and federal governments play distinct, yet complementary, roles in regulating the competitive process. While the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) are widely viewed as the stewards of US antitrust laws, state attorneys general have long played an important, albeit varying, role within the United States’ antitrust enforcement regime. This has been especially true during the past 30 years because state attorneys general have become much more effective at coordinating their antitrust enforcement efforts to ensure that they have a meaningful seat at the table in any actions brought jointly with their federal counterparts or are able to bring their own actions when the DOJ and FTC decide not to do so.

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

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

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

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

### Off

FTC DA

#### The FTC is 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.

#### The plan drains finite FTC resources and personnel.

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 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 FT C’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 causes 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

Japan DA

#### The plan is applied extraterritorially---that offends Japan.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

#### It ends the alliance.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy. 2

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations ” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the American Banana case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, inter alia, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the American Tobacco case (221 U.S. 106 (1911)) and the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory. 3

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,” 4 while F.A. Mann argued that “the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.” 5 Neverthele ss, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. 6 The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.” 7 The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the Timberlane case (549 F.2d. 9 th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint’s interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity. 8 Furthermore, not all U.S. courts have consistently applied the test of balancing interests. 9

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because British law did not require defendants to act in a manner prohibited by U.S. law. 10

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. 11 In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. 12 Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

#### The alliance solves extinction.

Richard Armitage 16. \*\*United States Deputy Secretary of State. \*\*John Hamre, president and CEO of CSIS. \*\*Ryozo Kato, Japanese lawyer and career diplomat who served as the Japanese Ambassador to the United States from 2001 to 2008. “The U.S.-Japan Alliance to 2030 Power and Principle.” Report of the Commission on the Future of the Alliance. 2/29/2016. https://www.spf.org/topics/finalreportfinal.pdf

The U.S.-Japan Alliance has helped to provide security and prosperity to the Asia-Pacific region and the broader international community for more than half a century. The Alliance enabled the United States and Japan to prevail in the Cold War, based on the principles of deterrence, democratic values, and free market dynamism. Today, the U.S.-Japan Alliance is as strong as it has been at any time during its existence. The Commission believes the Alliance will need **all of its current strength** and more, since the international security environment over the next 15 years will be as **challenging** and **uncertain** as any the **U**nited **S**tates and Japan have faced. In addition to challenges from a rising **China** and aggrieved **Russia**, the **U**nited **S**tates and Japan both have vital interests in the **Middle East**, which is an increasingly unstable and violent region. **Global challenges** such as **terrorism**, **nuclear proliferation**, and **climate change** will also require wise policy and firm action. One central characteristic of this emerging strategic dynamic will be intensified competition for power and influence across ideological, economic, and security spheres between liberal democracies on the one hand and ambitious or aggrieved authoritarian regimes on the other. The Commission believes that this competition need not—and in fact is unlikely to—result in war. Moreover, there are many areas in which countries from across the ideological spectrum can and will increase mutual cooperation, including macroeconomic coordination, countering violent Islamic extremism, responding to climate change, and reversing nuclear proliferation by states such as North Korea. Nevertheless, there remain fundamental questions about international norms where **leading democracies** like the **U**nited **S**tates and Japan will hold starkly different views from more authoritarian states. These include: the rights of citizens to choose their own governments; the rights of minorities within nations; the independent role of the judiciary and the press; the role of the private sector in the economy; freedom of navigation and flight in international sea and air space; and freedom of the Internet. In Asia, the **U**nited **S**tates and Japan will have to **shape the strategic environment** by encouraging responsible Chinese behavior and imposing costs for destabilizing activities. To that end, the **U**nited **S**tates and Japan will have to build up their own power, and use it wisely and firmly, to **preserve a world order** that favors both allies’ shared values. The United States and Japan have taken a number of very important actions in the recent past to strengthen the Alliance. These include Japan’s issuance of its first national security strategy, establishment of a National Security Council (NSC) and an associated permanent staff organization, increases in the defense budget, and passage of security legislation authorizing closer cooperation with the United States. The United States has stated an intention to rebalance U.S. strategic attention and military forces towards the Asia-Pacific region. Both countries have concluded updated bilateral Defense Guidelines for closer security cooperation and have reached an agreement for wider and deeper economic cooperation through the Trans-Pacific Partnership (TPP). These achievements provide a solid foundation for the continued actions that the Commission recommends in this report. The **U**nited **S**tates and Japan have unmatched strengths for the competitive environment they will face. Together the two allies account for 28 percent of the world’s gross domestic product (GDP) and 43 percent of the world’s wealth. The economies of both countries use and produce the highest levels of technology, and have the **r**esearch and **d**evelopment systems to stay at the cutting edge of discovery and innovation. Their citizenries are well educated, hardworking, and innovative. Their armed forces are among the world’s most advanced and are well led and trained. Their values of freedom and democracy have a universal appeal that has been repeatedly demonstrated in all parts of the world and particularly in Asia. The U.S.-Japan Alliance has endured for 60 years and adapted to meet an array of new internal and external challenges. The Commission believes that the United States and Japan must develop a shared vision of the world both nations seek in the next 15 years. Democracies need a vision to inspire their own citizens and to synchronize the efforts of their governments and private organizations. As partners in an increasingly interconnected and competitive world, the United States and Japan must also offer a vision that will gain the support of other countries. The Commission proposes the following vision for the U.S.-Japan Alliance: The United States and Japan seek a world in 2030 in which all nations are secure, peaceful, prosperous, and free. Working to build this world, the United States and Japan will make national contributions that reflect each nation’s respective capabilities, legal obligations, and traditions, but will always remain united on shared goals. The United States and Japan are global powers with global responsibilities, but their Alliance will continue to focus as it always has on the peace and prosperity of the Asia-Pacific region. Peace and Security: The United States and Japan will work together to:  preserve peace and stability in the Asia-Pacific region based on the Mutual Security Treaty through bilateral efforts to maintain a favorable balance of power and to deter and, if necessary, to defeat armed aggression and attempts at coercion against their own interests, and those of their allies and friends;  defend and preserve the existing order based on established international rules and norms;  seek peaceful, negotiated resolution of issues between nations, free from military force or coercion;  support multilateral organizations in developing solutions to global challenges; and  lead and participate in international actions against state and non-state actors that use terrorist tactics and criminal actions or otherwise threaten the safety of their citizens and those of their allies and friends. Prosperity: The United States and Japan will work together to:  support the unimpeded international flow of investment, goods, and services to raise the prosperity of all nations, especially those at lower levels of development;  provide assistance both through international organizations and directly to developing nations to improve all the aspects of economic development and governance, private sector competence, and human capacity, including women’s empowerment;  strengthen existing institutions such as the World Bank and International Monetary Fund that provide development assistance and seek to promote principles of good governance; and  play leading roles in reducing environmental threats to the health, and potentially the safety, of their own citizens and others around the world. Freedom: The United States and Japan will work together to:  support advancement of the principles expressed in the United Nations (UN) Universal Declaration of Human Rights;  ensure the observance of these principles in their own countries;  speak out and take clear public stands in the support of those principles; and  work over the long term, and when opportunities arise in the short term, to advance those principles in authoritarian countries as well as failing states. In this report, the Commission recommends a set of coordinated policies that will move the Alliance closer to achieving its shared vision of a peaceful, secure, prosperous, and free world. As major economic powers and democracies, Japan and the United States should continuously stress two foundational pillars of the Alliance. First, leaders and opinion makers in the United States and Japan need to strengthen and sustain public support in both countries for active international leadership, using the full range of foreign policy tools, including military capabilities when necessary. In the United States, the wars in Iraq and Afghanistan have caused debates in both the Republican and Democratic parties about the utility of force, particularly with respect to the Middle East. In Japan, although security legislation was enacted in 2015 to allow the exercise of the right to collective self-defense, there is persistent and substantial opposition to a more active security role for the military, and misgivings about the use of military force—even for purely defensive purposes. The Commission recognizes that military power cannot be the sole or even the primary instrument of national security policy. However, the potential employment of military force is often necessary to support diplomacy, deter aggression, and keep the peace; and the utilization of the armed forces, whether in the form of advisers, peacekeepers, or combat units, will remain essential to deal with some threats to peace and security in the future. The United States and Japan must have fully-funded, modern, and highly capable military forces, and they must be willing to employ them in support of the peaceful, secure, prosperous, and free world that they seek. Leaders in both countries have a responsibility to explain these realities to their publics. Second, in order to provide the foundation for the policies outlined in this report, both countries need to take action to support their economies, to resume economic growth in the case of Japan, and to sustain recovery from the recession of 2008 in the case of the United States. Without higher rates of economic growth, the United States and Japan will face significantly greater difficulties managing the international challenges that are likely to emerge over the coming 15 years. Both countries have the fiscal and monetary policy tools necessary to stimulate growth, but both must also undertake structural changes that require continued political attention. In the case of Japan these include: growing the workforce in the face of a falling national birth rate; increasing productivity through more widespread adoption of information technology; and reversing the growth of the highest debt levels of any advanced country. In the case of the United States these include: modernizing the country’s aging physical and cyber infrastructure; containing the costs of medical care and social security payments for the large generation now retiring; and providing real energy security by coupling the increased production of domestic oil and gas with reduced dependence of the transportation sector on oil. Both countries must also improve their educational systems to create the digital workforce of the future. II. The Strategic Environment through 2030 For the first time in nearly a quarter century, **the world** is witnessing **multiple momentous challenges** to the international order. **China**’s emergence, **Russia**’s resurgence, and the Islamic State of Iraq and the Levant’s (**ISIL**’s) barbarity are forcing the **U**nited **S**tates and Japan to address simultaneous, diverse threats to the international order. Within Asia, increasing prosperity and economic interdependence coincide with intensifying **friction among the major powers**. Changes in relative power, rapid expansion in the military budgets of some states, **territorial disputes**, historical animosities, **irregular threats**, and **nuclear proliferation** all present **serious risks** to regional security. Managing these challenges will require an understanding of how long-term trends, such as demographics, technology, and climate change, are likely to affect the strategic environment. Asia is the world’s most dynamic region, so understanding current trends and potential future discontinuities is essential if the United States and Japan are to adopt an overall strategy that is capable of adapting effectively to rapid shifts in the security environment. While regional trends in the Asia-Pacific region favor continued growth and economic integration, there are pockets of uncertainty that could threaten both economic progress and political stability. These include: obstacles to China’s economic transition from its past export-led growth model to a domestically driven model; the shrinking working age population in Japan, South Korea, China, Taiwan, and Singapore; and the over-reliance of countries such as Taiwan, South Korea, Malaysia, Thailand, and Australia on Chinese momentum to drive their own growth. Economic growth and integration in Asia have been driven by intra-regional trade as well as global investment flows and production networks, underpinned by the international financial institutions established at Bretton Woods and sustained since then with the active support of Japan and the United States. However, as the international economy has diversified, the original managers of global financial governance, such as the G-7, have lost ground to more inclusive but less effective groupings, such as the G-20. Moreover, progress on global trade liberalization at the World Trade Organization (WTO) has stalled. China is challenging the existing international financial institutions with the Asian Infrastructure Investment Bank (AIIB) and its new “One Belt, One Road” initiatives. At the same time, the Trans-Pacific Partnership (TPP), led by the United States and Japan, has the potential to reboot international trade liberalization and governance. Passage of TPP in Japan, the United States, and the ten other participating countries would boost economic growth in Asia by reducing barriers, establishing standards for ensuring protection of intellectual property in new areas such as e-commerce, empowering China’s economic reformers as Beijing is drawn by preferential tariffs to join TPP, animating negotiations on the Transatlantic Trade and Investment Partnership (TTIP), and perhaps eventually helping to revitalize the pursuit of global free trade agreements through the WTO. Governance of global trade and finance is in flux, but the forces of liberalization and integration are still present. Beyond these economic concerns the dangers of **climate** change and **ecological degradation** threaten the region. The ability of the major Asia-Pacific economies to cooperate in the face of all these **transnational challenges** will have **important implications** for the future strategic environment. While China and the United States are the world’s leading emitters of greenhouse gases (in that order), Japan is the world’s superpower in clean technology and energy efficiency. There are encouraging signs of U.S. and Chinese initiatives to curb greenhouse gas emissions as well as the recent agreement at the 2015 Paris Climate Conference, but these promises remain aspirational and unenforceable, requiring further efforts at bilateral, regional, and global cooperation to reduce carbon emissions.

### Off

Politics DA

#### Infrastructure passes---PC is key.

Lisa Mascaro, 10-28-2021, "Biden announces 'historic' deal — but still must win votes," AP NEWS, https://apnews.com/article/joe-biden-congress-democrats-budget-framework-60a1bc276d0ab8eb3e0347fc54ee8c2c

President Joe Biden announced Thursday that he and Democrats in Congress have reached a “historic” framework for his sweeping domestic policy package. But he still needs to lock down votes from key colleagues for what’s now a dramatically scaled-back bill.

Eager to have a deal in hand before his departure late in the day for global summits, Biden made his case privately on Capitol Hill to House Democrats and publicly in a speech at the White House. He’s now pressing for a still-robust package — $1.75 trillion of social services and climate change programs — that the White House believes can pass the 50-50 Senate.

The fast-moving developments put Democrats closer to a hard-fought deal, but battles remain as they press to finish the final draft in the days and weeks ahead.

“Let’s get this done,” Biden exhorted.

“It will fundamentally change the lives of millions of people for the better,” he said about the package, which he badly wanted before the summits to show the world American democracy still works.

Together with a nearly $1 trillion bipartisan infrastructure bill, Biden claimed the infusion of federal investments would be a domestic achievement modeled on those of Franklin Roosevelt and Lyndon Johnson.

“I need your votes,” Biden told the lawmakers at the Capitol, according to a person who requested anonymity to discuss the private remarks.

But final votes will not be called for some time. The revised package has lost some top priorities, frustrating many lawmakers as the president’s ambitions make way for the political realities of the narrowly divided Congress.

Paid family leave and efforts to lower prescription drug pricing are now gone entirely from the package, drawing outrage from some lawmakers and advocates.

Still in the mix, a long list of other priorities: free prekindergarten for all youngsters, expanded health care programs — including the launch of a new $35 billion hearing aid benefit for people with Medicare — and $555 billion to tackle climate change.

There’s also a one-year extension of a child care tax credit that was put in place during the COVID-19 rescue and new child care subsidies. An additional $100 billion to bolster the immigration and border processing system could boost the overall package to $1.85 trillion if it clears Senate rules.

One pivotal Democratic holdout, Sen. Kyrsten Sinema of Arizona, said, “I look forward to getting this done.”

However, another, Joe Manchin of West Virginia, was less committal: “This is all in the hands of the House right now.”

The two Democrats have almost single-handedly reduced the size and scope of their party’s big vision, and are crucial to sealing the deal.

#### The plan trades off.

Peter C. Carstensen 21. Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. “The ‘Ought’ and ‘Is Likely’ of Biden Antitrust”. Concurrences. February 2021. https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#carstensen

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.

#### The bill is key to the grid.

Jennifer A. Dlouhy 21, Energy and Environmental Reporter at Bloomberg News, BA in Journalism and Political Science from the University of Missouri, and Ari Natter, Reporter at Bloomberg LP, BA in Journalism from American University, “Biden’s Plea to Remake Grid Gets a Boost on Texas Power Crisis”, Bloomberg Green, 2/17/2021, https://www.bloomberg.com/news/articles/2021-02-17/biden-s-plea-to-remake-grid-gets-a-boost-on-texas-power-crisis

The icy weather that left millions without power in Texas has critics of the Biden administration’s fight against climate change blaming renewable energy, but the failures have more to do with an ill-prepared power grid and shortfalls in traditional electricity sources.

Energy analysts and experts said the blackouts in Texas underscore the U.S. electric system’s need for more of almost everything, from additional power lines criss-crossing the country to large-scale storage systems that can supply electricity when demand spikes or renewable generation declines.

That could give at least a rhetorical boost to President Joe Biden’s plans for a “historic investment” in the nation’s electric grid, including better transmission systems and battery storage that would make the system more resilient amid extreme weather spurred by climate change. The investments broadly touted by Biden could help satisfy his 2035 goal of an emissions-free power system and help meet increased demand nationwide as more electric vehicles hit the roads and more buildings rely on power instead of natural gas for heat.

The administration is set to unveil a blueprint for infrastructure spending, including investments in the nation’s electrical grid, within weeks.

“There are parts of the country right now that have excess power, that have low prices, that are not struggling, where it’s a normal Tuesday, and yet in Texas, 4 million people are without power,” said Joshua Rhodes, a research associate at the University of Texas at Austin’s Webber Energy Group. “This should reignite a debate about some kind of connection between our disparate grids where we can move energy to places like Texas that are desperate for it right now.”

The nation’s grid evolved from a patchwork of local power systems that weren’t meant to serve distant customers. “So cities and even some times neighborhoods have their own systems,” Rhodes said.

The downside of that approach became apparent in Texas as temperatures plunged into single digits. Regional power sources weren’t able to meet the demand as residents cranked up thermostats, straining supplies of electricity in the state known as the energy capital of the U.S. Grid operators were forced to implement rolling blackouts as wind turbines in West Texas froze up and natural gas, coal and nuclear power plants went offline.

“No technologies were spared in this storm of the century,” said Suzanne Bertin, who heads the Texas Advanced Energy Business Alliance. The solution involves “not putting all of our eggs in one technology basket.”

It’s not the first time the nation’s grid has failed to provide energy where it’s needed. A heat wave across California last August caused a spike in energy demand as residents cranked up air conditioners, forcing rolling blackouts.

And in 2011, after a cold snap forced scores of Texas power plants offline federal regulators recommended installing insulation and heated pipes

Larry Gasteiger, executive director of WIRES, a trade group that advocates for more construction of high-voltage transmission, said the latest crisis in Texas shows the urgent need to build a more resilient grid.

“Climate change is continuing to have a serious impact on the electric system,” Gasteiger said in a phone interview. “We are seeing more and more frequent extreme weather events.”

#### Grid collapse causes extinction.

Alice Friedemann 16. Transportation expert, founder of EnergySkeptic.com and author of “When Trucks Stop Running, Energy and the Future of Transportation,” worked at American Presidential Lines for 22 years, where she developed computer systems to coordinate the transit of cargo between ships, rail, trucks, and consumers. 01-24-16. “Electromagnetic pulse threat to infrastructure (U.S. House hearings).” Energy Skeptic. http://energyskeptic.com/2016/the-scariest-u-s-house-session-ever-electromagnetic-pulse-and-the-fall-of-civilization/

Modern civilization cannot exist for a protracted period without electricity. Within days of a blackout across the U.S., a blackout that could encompass the entire planet, emergency generators would run out of fuel, telecommunications would cease as would transportation due to gridlock, and eventually no fuel. Cities would have no running water and soon, within a few days, exhaust their food supplies. Police, Fire, Emergency Services and hospitals cannot long operate in a blackout. Government and Industry also need electricity in order to operate. The EMP Commission warns that a natural or nuclear EMP event, given current unpreparedness, would likely result in societal collapse.

### Precision Ag Adv---1NC

#### Expand the scope of antitrust refers exclusively to formal law not enforcement---the plan is circumvented.

Sinisa Milosevic et al. 18. Commission for Protection of Competition, The Republic of Serbia. Dejan Trifunovic, Faculty of Economics, University of Belgrade, Belgrade, The Republic of Serbia. Jelena Popovic Markopoulos, Commission for Protection of Competition, The Republic of Serbia. “The Impact of the Competition Policy on Economic Development in the Case of Developing Countries”. Economic Horizons, May - August 2018, Volume 20, Number 2, 153 – 167. http://scindeks-clanci.ceon.rs/data/pdf/1450-863X/2018/1450-863X1802157M.pdf

The paper that analyzes the impact of the competition policy on the GDP growth in developing and developed countries in the Solow growth model framework is T. C. Ma’s (2011). The presence and scope of the competition policy is captured by the SCOPE variable that is defined in the paper by K. N. Hylton and F. Deng (2007). The overall effectiveness of the government’s application of policies, not only of the competition policy, is captured by the EFFICIENCY variable that is defined in the paper by D. Kaufmann, A. Kraay and M. Mastruzzi (2009). The results show that the SCOPE variable is not significant and the formal existence of the competition law cannot influence economic growth. The interacting variable of SCOPE x EFFICIENCY is named EFFLAW. For poor countries, the coefficient for this variable is 0.04 and is significant, whereas for rich countries the coefficient is 0.064 and is also significant. Therefore, the competition law must be complemented with the effective enforcement of this policy.

#### They have no ev that small businesses are capable of scaling up broadband---that means the plan can’t implement it.

#### Antitrust fails---expanding scope opens the floodgates to litigation and makes enforcement impossible.

Geoffrey Manne, 18. International Center for Law & Economics president & founder, Congressional Documents and Publications, “Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Hearing; "A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU."; Testimony by Geoffrey Manne, President and Founder, International Center for Law and Economics,” December 19, 2018. Lexis, accessed 6-1-21

II. The specious lure of excessively discretionary antitrust

Antitrust is an attractive regulatory tool for a number of reasons. As noted above, the vague, terse language of the Sherman Act readily lends itself to "interpretation" imbuing it with virtually limit-less scope. Indeed, the urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of the tech indus-try are framed in antitrust terms, even though they are mostly rooted in nothing recognizable as modern, economically informed antitrust legal claims or analysis. But that attraction is precisely why we should care about the scope, process, and economics of anti-trust and the extent of its politicization. Antitrust in the US has largely resisted the relentless effort to politicize it. Despite being rooted in vague and potentially expansive statutory language, US anti-trust is economically grounded, evolutionary, and limited to a set of achievable social welfare goals. In the EU, by contrast, these sorts of constraints are far weaker. Whether or not that is suitable for the particular political and historical circumstances of the EU is a separate question. But, undoubt-edly, applying a controversial legal regime to the United States -- a markedly different jurisdiction with a unique governance structure -- and upsetting more than a century of legal, technological, and social development, is deeply problematic. This conclusion is in no way altered by the fact that US antitrust law has become the outlier of global antitrust enforcement, compared to the EU's more "consensual" approach. n26 What matters is a policy's actual results, not whether it is widely adopted; the world is full of debunked beliefs that were once widely shared. And it is far from certain that the widespread adoption of the EU model is in any way indicative of superior results. It is equally (or even more) plausible that this model has proliferated because it naturally accommodates politically useful populist narratives -- such as "big is bad," robin hood fallacies and robber baron myths -- that are constrained by the US's more evidence-based and rational antitrust decision-making. n27 America's isolation might thus be a testament to its success rather than an emblem of its failure. But even if by some chance the European approach proved to be optimal for many other countries in the world, it is still dubious that its adoption would lead to improved economic performance in the United States. As has already been alluded to, the unique features of the US legal regime make it unlikely that the best policy for the EU would also happen to be the best one for America. The EU's more aggressive pursuit of technology platforms under its antitrust laws demonstrates many of the problems with its approach in general. I urge this subcommittee to consider not just whether the EU approach seems to permit the government to reach a preconceived outcome -- i.e., placing large tech platforms under increased antitrust scrutiny -- but whether it is truly desirable at all to emulate the EU's approach and to try to reach the goals of EU competition policy under US antitrust law. Endorsing the European approach to antitrust, in a naive attempt to bring high-pro-file cases against large Internet platforms, would prioritize political expediency over the rule of law. It would open the floodgates of antitrust litigation and facilitate deleterious tendencies, such as non-economic decision-making, rent-seeking, regulatory capture, and politically motivated enforce-ment. Bringing US antitrust enforcement in line with that of the EU would thus unlock a veritable Pan-dora's box of concerns that are currently kept in check. Chief among them is the use of antitrust laws to evade democratically and judicially established rules and legal precedent. When consider-ing this question, it is important to see beyond any particular set of firms that enforcement offi-cials and politicians may currently be targeting. An antitrust law expanded to consider the full scope of soft concerns that the EU aims at will not be employed against only politically disfavored companies, companies in other jurisdictions, or in order to expediently "solve" otherwise political problems. Once antitrust is expanded beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints**.**

#### Alt causes to lack of food production---increased droughts, market concentration in large ag companies---they don’t solve.

#### No food wars.

David Bier 11. Immigration policy analyst at the Cato Institute’s Center for Global Liberty and Prosperity. Citing Steven Pinker, Johnstone Family Professor of Psychology at Harvard University. “Steven Pinker: Resource Scarcity Doesn’t Cause Wars”. 11-28-2011. <http://www.globalwarming.org/2011/11/28/steven-pinker-resource-scarcity-doesnt-cause-wars/>

Once again it seems to me that the appropriate response is “maybe, but maybe not.” Though climate change can cause plenty of misery… it will not necessarily lead to armed conflict. The political scientists who track war and peace, such as Halvard Buhaug, Idean Salehyan, Ole Theisen, and Nils Gleditsch, are skeptical of the popular idea that people fight wars over scarce resources. Hunger and resource shortages are tragically common in sub-Saharan countries such as Malawi, Zambia, and Tanzania, but wars involving them are not. Hurricanes, floods, droughts, and tsunamis (such as the disastrous one in the Indian Ocean in 2004) do not generally lead to conflict. The American dust bowl in the 1930s, to take another example, caused plenty of deprivation but no civil war. And while temperatures have been rising steadily in Africa during the past fifteen years, civil wars and war deaths have been falling. Pressures on access to land and water can certainly cause local skirmishes, but a genuine war requires that hostile forces be organized and armed, and that depends more on the influence of bad governments, closed economies, and militant ideologies than on the sheer availability of land and water. Certainly any connection to terrorism is in the imagination of the terror warriors: terrorists tend to be underemployed lower-middle-class men, not subsistence farmers. As for genocide, the Sudanese government finds it convenient to blame violence in Darfur on desertification, distracting the world from its own role in tolerating or encouraging the ethnic cleansing. In a regression analysis on armed conflicts from 1980 to 1992, Theisen found that conflict was more likely if a country was poor, populous, politically unstable, and abundant in oil, but not if it had suffered from droughts, water shortages, or mild land degradation. (Severe land degradation did have a small effect.) Reviewing analyses that examined a large number (N) of countries rather than cherry-picking one or toe, he concluded, “Those who foresee doom, because of the relationship between resource scarcity and violent internal conflict, have very little support from the large-N literature.”

#### Their ev is only about growth in the ag sector---they have no ev broadband is key to the economy writ large.

#### No impact to slow growth.

Stephen M. Walt 20. Robert and Renée Belfer professor of international relations at Harvard University. "Will a Global Depression Trigger Another World War?" Foreign Policy. 5-13-2020. https://foreignpolicy-com.proxy.library.emory.edu/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

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

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

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

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

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

#### Alt causes to warming---they can’t solve international emissions from China or India---they implement no regulations restricting emissions---they have no ev broadband makes green tech cheaper than fossil fuels.

#### No impact to warming.

Zeke Hausfather & Glen P. Peters 20. \*Director of climate and energy at the Breakthrough Institute in Oakland, California. \*\*Research director at the CICERO Center for International Climate Research in Oslo, Norway. "Emissions – the ‘business as usual’ story is misleading". Nature. 1-29-2020. https://www.nature.com/articles/d41586-020-00177-3

In the lead-up to the 2014 IPCC Fifth Assessment Report (AR5), researchers developed four scenarios for what might happen to greenhouse-gas emissions and climate warming by 2100. They gave these scenarios a catchy title: Representative Concentration Pathways (RCPs)1. One describes a world in which global warming is kept well below 2 °C relative to pre-industrial temperatures (as nations later pledged to do under the Paris climate agreement in 2015); it is called RCP2.6. Another paints a dystopian future that is fossil-fuel intensive and excludes any climate mitigation policies, leading to nearly 5 °C of warming by the end of the century2,3. That one is named RCP8.5.

RCP8.5 was intended to explore an unlikely high-risk future2. But it has been widely used by some experts, policymakers and the media as something else entirely: as a likely ‘business as usual’ outcome. A sizeable portion of the literature on climate impacts refers to RCP8.5 as business as usual, implying that it is probable in the absence of stringent climate mitigation. The media then often amplifies this message, sometimes without communicating the nuances. This results in further confusion regarding probable emissions outcomes, because many climate researchers are not familiar with the details of these scenarios in the energy-modelling literature.

This is particularly problematic when the worst-case scenario is contrasted with the most optimistic one, especially in high-profile scholarly work. This includes studies by the IPCC, such as AR5 and last year’s special report on the impact of climate change on the ocean and cryosphere4. The focus becomes the extremes, rather than the multitude of more likely pathways in between.

Happily — and that’s a word we climatologists rarely get to use — the world imagined in RCP8.5 is one that, in our view, becomes increasingly implausible with every passing year5. Emission pathways to get to RCP8.5 generally require an unprecedented fivefold increase in coal use by the end of the century, an amount larger than some estimates of recoverable coal reserves6. It is thought that global coal use peaked in 2013, and although increases are still possible, many energy forecasts expect it to flatline over the next few decades7. Furthermore, the falling cost of clean energy sources is a trend that is unlikely to reverse, even in the absence of new climate policies7.

Assessment of current policies suggests that the world is on course for around 3 °C of warming above pre-industrial levels by the end of the century — still a catastrophic outcome, but a long way from 5 °C7,8. We cannot settle for 3 °C; nor should we dismiss progress.

Plan for progress

Some researchers argue that RCP8.5 could be more likely than was originally proposed. This is because some important feedback effects — such as the release of greenhouse gases from thawing permafrost9,10 — might be much larger than has been estimated by current climate models. These researchers point out that current emissions are in line with such a worst-case scenario11. Yet, in our view, reports of emissions over the past decade suggest that they are actually closer to those in the median scenarios7. We contend that these critics are looking at the extremes and assuming that all the dice are loaded with the worst outcomes.

Asking ‘what’s the worst that could happen?’ is a helpful exercise. It flags potential risks that emerge only at the extremes. RCP8.5 was a useful way to benchmark climate models over an extended period of time, by keeping future scenarios consistent. Perhaps it is for these reasons that the climate-modelling community suggested RCP8.5 “should be considered the highest priority”12.

We must all — from physical scientists and climate-impact modellers to communicators and policymakers — stop presenting the worst-case scenario as the most likely one. Overstating the likelihood of extreme climate impacts can make mitigation seem harder than it actually is. This could lead to defeatism, because the problem is perceived as being out of control and unsolvable. Pressingly, it might result in poor planning, whereas a more realistic range of baseline scenarios will strengthen the assessment of climate risk.

### China Adv---1NC

#### America wins the 5G race now.

Stella Soon 19. Former Intern Reporter for CNBC out of Asia Pacific Headquarters in Singapore. Here’s how the US can beat China in the race for dominance in next generation networks. CNBC. 11-26-2019. https://www.cnbc.com/2019/11/26/5g-race-how-the-us-can-beat-china-in-the-competition-for-dominance.html

While China has embraced next generation networks at a faster pace, experts say the U.S. still has some advantages in the competition for dominance.

China rolled out its 5G networks nationwide on Nov. 1, with three of its state-owned carriers offering plans for the service. One week later, Beijing said it launched research and development efforts into 6G networks.

5G refers to mobile networks with super-fast data speeds that can support technologies like driverless cars. While 6G refers to the next generation of networks, 5G is still in its early stages as much of the world still operates on 4G networks.

“There will be a tendency to cast these developments as another sign that the United States is losing the race for the next generation of communication technologies,” Adam Segal, director of the digital and cyberspace policy program at CFR, wrote in a separate note earlier this month.

“But the United States still has strengths to play,” Segal said. “U.S. companies can dominate the applications and services that run over 5G.”

Just because China switched on its networks first does not mean that the competition is over.

That’s where the United States’ innovative capacity could give it an advantage, said Paul Triolo, geo-technology practice head at Eurasia Group. U.S. technology companies have already been working on autonomous vehicles, augmented reality, and virtual reality, which he explained could be the first few killer applications of 5G.

“Even as China rolls out 5G a little faster, the U.S. will eventually roll out 5G in enough breadth and scope that U.S. will be able to innovate on top of it,” said Triolo.

Future generations of networks promise more bandwidth and faster internet speeds, which companies like Google and Facebook can leverage to develop more advanced services, said Eric Ross, chief investment strategist at Cascend Securities.

“Here in the U.S., Apple is very ubiquitous. It’ll basically be Facetime everywhere,” he added.

#### Antitrust stifles 5G innovation---kills our edge.

Alden Abbott et al. 3-10. Hon. Paul R. Michel. Adam Mossoff. Kristen Osenga. Brian O’Shaughnessy. Senior Research Fellow at the Mercatus Center. Member of Judicial Conference’s seven-judge Executive Committee. Professor of Law at Antonin Scalia Law School, George Mason University. Professor at University of Richmond School of Law. Past President, Licensing Executives Society, USA & Canada. “Aligning Intellectual Property, Antitrust, and National Security Policy,” released by the Regulatory Transparency Project of the Federalist Society. 03-10-2021. https://regproject.org/paper/aligning-intellectual-property-antitrust-and-national-security-policy/

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8  The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies.  U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE).  This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems.  This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10  Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11  U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12  Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however.  The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead.  While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### 5G race is telecom propaganda and exacerbates the digital divide.

Nilay Patel 19. AB in Political Science from the University of Chicago in 2003 and his J.D. from the University of Wisconsin Law School in 2006. Wait, why the hell is the ‘race to 5G’ even a race?. Verge. 5-23-2019. https://www.theverge.com/2019/5/23/18637213/5g-race-us-leadership-china-fcc-lte

Everyone — the wireless industry, Democrats, Republicans, the major media, you name it — frames the building of next-generation 5G networks as a “race” in which the United States needs to demonstrate “leadership.”

Here is The Washington Post declaring America has the lead in the race to 5G. Here’s CNN asking “Who’s winning the race to 5G?” Here’s AT&T CEO Randall Stephenson declaring that China isn’t beating the US to 5G “yet,” as some sort of ominous warning. Here’s T-Mobile CEO John Legere telling the House Subcommittee on Communications and Technology that merging with Sprint will let his company “win the race to 5G.” Here is an entire microsite from industry lobbying group CTIA titled “The Race to 5G.”

Let us never forget AT&T being so desperate to lead this “race” that it rolled out fake 5Ge logos on its phones.

But the stakes of this supposed race are wholly unclear. What happens if we win, besides telecom execs getting slightly richer? More importantly, what are the drawbacks to coming in second, or even third? Where is the list of specific negative outcomes of China building a 5G network a month, a year, or even five years before the United States? I’ve never seen it, and I keep asking about it.

NO ONE CAN SAY WHAT BAD THINGS WILL HAPPEN IF WE DON’T WIN THE RACE TO 5G

For example, here’s FCC Commissioner Geoffrey Starks on The Vergecast this week, when I asked why 5G is a race.

“I think it is important for us to continue to lead the race ... we obviously led to 4G and I think we get to set some of the standards that are ultimately going to be implemented worldwide, which is why there is a little bit of a race.”

Starks went on to say that China wants to be a global leader in supplying 5G equipment and that’s why Huawei has been so aggressively building and pricing its gear. But Huawei depends on American chip technology to make its products, and the US government has just put Huawei on a blacklist anyway. So... the race is so we can set some wireless standards? I suspect Apple, Google, Qualcomm, Verizon, and AT&T can fend for themselves when it comes to that process.

The other main argument for winning the “race” to 5G is that having the world’s best and fastest networks will create new economic opportunities for businesses of all kinds — we’ll enable self-driving cars and telemedicine and all the other stuff you hear about during interminable 5G slideshows at trade conferences. At a hearing before the Senate Committee on Commerce, Science, and Transportation earlier this year, Mississippi Sen. Roger Wicker confidently declared that “failing to win the race to 5G would not only materially delay the benefits of 5G for the American people, it would forever reduce the economic and societal gains that come from leading the world in technology.”

WE WON THE RACE TO LTE AND OUR LTE NETWORKS ARE AMONG THE SLOWEST AND MOST EXPENSIVE IN THE WORLD

Maybe. It is indeed true that better networks lead to better opportunities, and that widespread high-speed broadband is something everyone wants. But I sincerely doubt that all of these companies will pick up and move to China or Europe if the United States builds 5G networks slightly slower. After all, we already have some of the slowest and most expensive networks in the world, and Apple and Facebook have not yet relocated to South Korea.

The more I hear about the race, the more I don’t buy it. I think the “race” framing is there to make some big decisions seem urgent and important — to make it appear as though some serious trade-offs are worth it in order to “win.” And those trade-offs are indeed serious: 5G networks will require a serious rethinking of how we use wireless spectrum. There are incredible privacy implications around putting millions of IoT devices in a “smart city” on 5G. Investment dollars will naturally flow toward building 5G networks in cities instead of expanding our networks to rural areas, exacerbating the digital divide.

THE “RACE” IS TO THERE TO MAKE SERIOUS TRADE-OFFS SEEM WORTH IT SO WE CAN “WIN”

And once the “race” to build out 5G in big cities is “won,” the pressure to expand access to other places in the country will vanish, making that divide even worse. It is worth carefully considering all of these things before giving in to haste.

Oh, and it appears that some of the required 5G spectrum might interfere with important weather sensors, a concern raised by NASA, the Navy, and the NOAA in hearings before Congress last week. How did the wireless industry respond to these concerns? By writing a blog post accusing meteorologists from across three government agencies of “risking our 5G leadership.” The implication, of course, is that worrying about detecting major weather events could make us lose the race.

This race is imaginary bullshit. It’s being foisted on us by huge telecom companies that know internet access is fundamentally a commodity and want something new to sell at high prices instead of competing to improve service and lower prices on the networks they have. After all, the United States “won” the “race” for LTE, but it bears repeating: our LTE networks are among the slowest in the world, and our prices among the highest. What did winning that race accomplish for the millions of people across the country that still can’t get a reliable LTE signal?

All I’m asking is that the next time you hear a wireless industry person talk about the “race” to 5G, stop and ask them why it’s a race. Ask who the competitors are, and what happens if we come in second place. See if you buy the answer. I suspect you won’t hear anything convincing.

#### No heg impact.

Christopher J. Fettweis 17. Associate professor of political science, Tulane. “Unipolarity, Hegemony, and the New Peace.” Security Studies, 26:3, 423-451.

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace.

In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day.

The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

Conflict and US Military Spending

How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see.

During the 1990s, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace.

It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn.

Conflict and US Grand Strategy

The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.” 71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.” 73

Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy.

Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability.

Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.” 77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose.

Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence.

Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem

As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global policeman. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination.

The Political Psychology of Unipolarity

Evidence supporting the notion that US power is primarily responsible for the New Peace is slim, but belief in the connection is quite strong, especially in policy circles. The best arena to examine the proposition is therefore not the world of measurable rationality, but rather that of the human mind. Political psychology can shed more light on unipolarity than can any collection of data or evidence. Just because an outcome is primarily psychological does not mean that it is less real; perception quickly becomes reality for both the unipolar state and those in the periphery. If all actors believe that the United States provides security and stability for the system, then behavior can be affected. Beliefs have deep explanatory power in international politics whether they have a firm foundation in empirical reality or not.

Like all beliefs, faith in the stability provided by hegemony is rarely subjected to much analysis. In their simplest form, beliefs are ideas that have become internalized and accepted as true, often without much further analysis Although they almost always have some basis in reality, beliefs need not pass rigorous tests to prove that they match it. No amount of evidence has been able to convince some people that vaccines do not cause autism, for example, or that the world is more peaceful than at any time before, or that the climate is changing due to human activity. Ultimately, as Robert Jervis explains, “we often believe as much in the face of evidence as because of it.”

When leaders are motivated to act based on unjustified, inaccurate beliefs, folly often follows. The person who decides to take a big risk because of astrological advice in the morning's horoscope can benefit from baseless superstition if the risk pays off. Probability and luck suggest that successful policy choices can sometimes flow from incorrect beliefs. Far more often, however, poor intellectual foundations lead to suboptimal or even disastrous outcomes. It is worthwhile to analyze the foundations of even our most deeply held beliefs to determine which ones are good candidates to inspire poor policy choices in those who hold them.

People are wonderful rationalizers. There is much to be said for being the strongest country in the world; their status provides Americans both security and psychological rewards, as well as strong incentives to construct a rationale for preserving the unipolar moment that goes beyond mere selfishness. Since people enjoy being “number one,” they are susceptible to perceiving reality in ways that brings the data in line with their desires. It is no coincidence that most hegemonic stability theorists are American. Of the few hegemonic-stability theorists from elsewhere, most hail from the United Kingdom and counsel the United States to follow the lead of the British Empire. Perhaps the satisfaction that comes with being the unipolar power has inspired Americans to misperceive the positive role that their status plays in the world.

Three findings from political psychology can shed light on perceptions of hegemonic stability. They are mutually supportive, and, when taken together, suggest that it is likely that US policymakers overestimate the extent to which their actions are responsible for the choices of others. The belief in the major US contribution to world peace is probably unjustified.

The Illusion of Control

Could 5 percent of the world’s population hope to enforce rules upon the rest? Would even an internationally hegemonic United States be capable of producing the New Peace? Perhaps, but it also may be true that believers in hegemonic stability may be affected by the very common tendency of people to overestimate their ability to control events. A variety of evidence has accumulated over the past forty years to support Ellen J. Langer’s original observations about the “illusion of control” that routinely distorts perception.82 Even in situations where outcomes are clearly generated by pure chance, people tend to believe that they can exert control over events.83 There is little reason to believe that leaders are somehow less susceptible to such illusions than subjects in controlled experiments.

The extensive research on the illusion of control has revealed two further findings that suggest US illusions might be even stronger than average. First, misperceptions of control appear to be correlated with power: individuals with higher socioeconomic status, as well as those who are members of dominant groups, are more likely to overestimate their ability to control events.84 Powerful people tend to be far more confident than others, often overly so, and that confidence leads them to inflate their own importance.85 Leaders of superpowers are thus particularly vulnerable to distorted perceptions regarding their ability to affect the course of events. US observers had a greater structural predisposition than others, for example, to believe that they would have been able to control events in the Persian Gulf following an injection of creative instability in 2003. The skepticism of less powerful allies was easily discounted.

Second, there is reason to believe that culture matters as well as power. People from societies that value individualism are more likely to harbor illusions of control than those from collectivist societies, where assumptions of group agency are more common. When compared to people from other parts of the world, Westerners tend to view the world as “highly subject to personal control,” in the words of Richard Nisbett.86 North Americans appear particularly vulnerable in this regard.87 Those who come from relatively powerful countries with individualistic societies are therefore at high risk for misperceiving their ability to influence events.

For the United States, the illusion of control extends beyond the water’s edge. An oft-discussed public good supposedly conferred by US hegemony is order in those parts of the world uncontrolled by sovereign states, or the “global commons.” 88 One such common area is the sea, where the United States maintains the only true blue-water navy in the world. That the United States has brought this peace to the high seas is a central belief of hegemonic-stability theorists, one rarely examined in any serious way. Indeed the maritime environment has been unusually peaceful for decades; the biggest naval battles since Okinawa took place during the Falklands conflict in 1982, and they were fairly minor.89 If hegemony is the key variable explaining stability at sea, maritime security would have to be far more chaotic without the US Navy.

It is equally if not more plausible to suggest, however, that the reason other states are not building blue-water navies is not because the United States dissuades them from doing so but rather because none feels that trade is imperiled.90 In earlier times, and certainly during the age of mercantilism, zero-sum economics inspired efforts to cut off the trade of opponents on occasion, making control the sea extremely important. Today the free flow of goods is vital to all economies, and it would be in the interest of no state to interrupt it.91 Free trade at sea may no longer need protection, in other words, because it essentially has no enemies; the sheriff may be patrolling a crime-free neighborhood. The threat from the few remaining pirates hardly requires a robust naval presence, and is certainly not what hegemonic-stability advocates mean when they compare the role played by the US Navy in 2016 to that of the Royal Navy in 1816. It is at least possible that shared interest in open, free commons keeps the peace at sea rather than the United States. Oceans unpatrolled by the US Navy may be about as stable as they are with the presence of its carriers. The degree to which 273 active-duty ships exert control over vast common parts is not at all clear.

People overestimate the degree to which they control events in their lives. Furthermore, if these observations from political psychology are right about the factors that influence the growth of illusions of power, then US leaders and analysts are particularly susceptible to misperception. They may well be overestimating the degree to which the United States can affect the behavior of others. The rest of the world may be able to get along just fine, on land and at sea, without US attempts to control it.

#### No cyber impact.

James Andrew Lewis 20. Senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies. “Dismissing Cyber Catastrophe”. 8-17-2018. https://www.csis.org/analysis/dismissing-cyber-catastrophe

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

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

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

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

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

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

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

## 2NC

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#### A. Comprehensive reviews.

Sheila Jackson Lee 07. Congresswoman Sheila Jackson Lee, of Texas. Statement before the Committee on the Judiciary Antitrust Task Force Oversight Hearing: “findings and recommendations of the antitrust modernization commission ” MAY8, 2007. https://books.googleusercontent.com/books/content?req=AKW5QafEgImzQcwHXit8wh2JPvPV8zlpG856VX0-MwPdFWXIRb4E7fL-IvNv-gsvOtNTmNXh9fUNjDDQRMibQIDyFs2dYtQiYPtU\_MzLEdSwLF6cNFYQPTkC6XM3pXjvi6mJhgcM2qkGMBkpM8m5GPIb8W7vP7N6GOfksF\_J9XD65gseIn2uu9E5WHQR8KCpYRRdjQ-ry8IDgbsFcTbryFS6QPiX3Mg0Ue60nDj3RQYsu9ParLyJ2USNefXpF6g4E3bF6qyZi4l6klixsT3Hhn6brocCqRkj7g

Today's hearing provides the Task Force an opportunity to review the findings and recommendations of the Antitrust Modernization Commission (AMC) based upon its comprehensive review of U.S. antitrust laws, as well as the policies and practices of the Department of Justice's Antitrust Division and the Federal Trade Commission in implementing those laws. Based upon its review, the AMC offers three principle conclusions:

• Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is essentially that robust competition among businesses leads to better quality products and services, lower prices, and higher levels of innovation .

• The core antitrust laws - Sherman Act sections 1 and 2 and Clayton Act section 7 - and their application by the courts and federal enforcement agencies are sound and help to safeguard competition in today's economy.

#### B. Congressional testimony.

Committee on the Judiciary 09. 110th Congress, 2d Session - - - - - - - - - - - - House Report 110-941 REPORT ON THE ACTIVITIES of the COMMITTEE ON THE JUDICIARY of the HOUSE OF REPRESENTATIVES during the ONE HUNDRED TENTH CONGRESS pursuant to Clause 1(d) Rule XI of the Rules of the House of Representatives. https://www.congress.gov/congressional-report/110th-congress/house-report/941/1?s=1&r=1

The Antitrust Modernization Commission undertook a comprehensive, three-year review of the U.S. antitrust laws, as well as the policies and practices of the Department of Justice's Antitrust Division and the Federal Trade Commission in implementing those laws. The Commission reached three primary conclusions. First, free-market competition should remain the touchstone of the United States' economic policy. The Commission's conclusion in this regard is that robust competition among businesses leads to better quality products and services, lower prices, and higher levels of innovation. Second, the core antitrust laws--Sherman Act Sections 1 and 2 and the Clayton Act Section 7--and their application by the courts and federal enforcement agencies, are sound and help to safeguard competition in today's economy. Third, new or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. The Commission found that unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement.

#### C. It’s the Congressional definition

Sheila Jackson Lee 07. Congresswoman Sheila Jackson Lee, of Texas. Statement before the Committee on the Judiciary Antitrust Task Force Oversight Hearing: “findings and recommendations of the antitrust modernization commission ” MAY8, 2007. https://books.googleusercontent.com/books/content?req=AKW5QafEgImzQcwHXit8wh2JPvPV8zlpG856VX0-MwPdFWXIRb4E7fL-IvNv-gsvOtNTmNXh9fUNjDDQRMibQIDyFs2dYtQiYPtU\_MzLEdSwLF6cNFYQPTkC6XM3pXjvi6mJhgcM2qkGMBkpM8m5GPIb8W7vP7N6GOfksF\_J9XD65gseIn2uu9E5WHQR8KCpYRRdjQ-ry8IDgbsFcTbryFS6QPiX3Mg0Ue60nDj3RQYsu9ParLyJ2USNefXpF6g4E3bF6qyZi4l6klixsT3Hhn6brocCqRkj7g

The three principal antitrust statutes are sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. Section 1 of the Sherman Act prohibits concerted activity that produces restraints on trade, which are scrutinized under a per se or rule of reason analysis. Price fixing, output restrictions, and market allocations that always or almost always reduce competition are considered a per se violation of the antitrust laws. Anti-competitive conduct of a less onerous nature is judged according to the " rule of reason." This analysis focuses on whether the alleged restraint is justified by legitimate business purposes and whether its anti- competitive features are balanced by some tendency toward effective competition.

Section 2 of the Sherman Act prohibits the monopolizing of a market through restrictive or exclusionary conduct. It is sometimes used in conjunction with Section 7 of the Clayton Act, which prohibits mergers where " the effect . may be substantially to lessen competition, or to tend to create a monopoly." Effective merger enforcement is intended to arrest competitive problems in their incipiency, rather than waiting for the merger's anticompetitive effects to cause actual harm in the marketplace.

#### D. Enforcers.

DOJ 07. "#07-212: 04-03-07 Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report". No Publication. 4-3-2007. https://www.justice.gov/archive/opa/pr/2007/April/07\_at\_212.html

The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition. We look forward to reading the report in depth and considering all of the Commission's recommendations. The Antitrust Division appreciates the service and commitment of the AMC Commissioners.

#### E. Handbooks.

Robert A. Wade and Alex Krouse 14. Robert A. Wade, Esq. Lawyer. Alex Krouse, JD, MHA. The Compliance Officer’s Handbook. Strategies and Tools for a Comprehensive Healthcare Compliance Program.

These two agencies cooperate by releasing joint policy statements, such as the Horizontal Merger Guidelines, the Guidelines on Collaborations Among Competitors, and the Statements on Antitrust Enforcement in Health Care. These guidelines are not law, but antitrust enforcement agencies use them extensively when evaluating the antitrust implications of a healthcare transaction. The Sherman Antitrust Act and the Clayton Antitrust Act are the core antitrust statutes.

#### F. Legal experts and advisers.

Gilman Law LLP. "What is Antitrust Law? A Question for Whistleblower Attorneys". https://howtobeawhistleblower.org/what-is-antitrust-law-a-question-for-whistleblower-attorneys/

The core antitrust laws, the Sherman Act and the Clayton Act, were passed to combat the trusts or monopolies that dominated America’s free market economy in the late 1800s. For over a century, these antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality high.

#### G. They are the principal laws.

Bryan A. Garner 01. Black’s Law Dictionary editor-in-chief. Black’s Law Dictionary, Second Pocket Edition, “antitrust law”, p. 37-8

antitrust law. The body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination. • The principal federal antitrust laws are the Sherman Act (15 USCA §§ 1-7) and the Clayton Act (15 USCA §§12-27).

#### Its not even antitrust law.

U.S. District Court for the Eastern District of Louisiana 68. Laitram Corporation v. Deepsouth Packing Company, 279 F. Supp. 883 (E.D. La. 1968). https://law.justia.com/cases/federal/district-courts/FSupp/279/883/2346433/

The court's language makes it clear that it did not think that an FTC proceeding based only on the FTC Act would have the same result because that would be based on the use of unfair methods of competition or unfair or deceptive acts or practices, not on violation of the antitrust laws.[39] The same distinction was carefully and correctly drawn by Judge Lord in Y & Y Popcorn Supply Company v. ABC Vending Corporation[40] when he considered the effect of an FTC complaint bottomed on separate counts, one for violation of the Clayton Act (Count I) and the other for unfair methods of competition (Count II):

"There is likewise no question, at least in this Circuit, that as respects Count I, the FTC order is the product of a `civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws.' \* \* \* On the other hand, the charges contained in \*891 Count II stand on a different footing. Section 5 of the FTC Act, which was the asserted basis for liability in Count II, is not one of the `antitrust laws.' \* \* \* Therefore, no use could be made of a degree entered pursuant to that count."[41]

Since the FTC proceeding against Peelers was for violation of Section 5 of the FTC Act, not for violation of one of the antitrust laws within the meaning of Section 5 of the Clayton Act, the FTC proceeding does not toll the running of the statute of limitations.

#### Their evidence only uses the term colloquially.

United States International Trade Commission 16 – Independent, nonpartisan, quasi-judicial federal agency that fulfills a range of trade-related mandates

Complainant U.S. Steel's Response to the Written Submissions by Respondents and OUII Staff regarding the Commission's Determination to Review an Initial Determination Granting Respondents' Motion to Terminate Complainant's Price-Fixing Claim, Certain Carbon and Alloy Steel Products, Investigation No. 337-TA-1002, April 2016, LexisNexis

The Clayton Act and its “antitrust injury” limitation only apply to the specific “antitrust laws” identified by Congress. 15 U.S.C. § 15 (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . .”). In disregarding Section 337’s statutory language and legislative history, and just asserting that Section 337 is an “antitrust law,” Respondents fail to alert the Commission that Congress has expressly defined—in the Clayton Act—that the “antitrust laws” include only: the Sherman Act, the Clayton Act, and parts of the Wilson Tariff and Robinson-Patman Acts. See 15 U.S.C. § 12(a); Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375–76 (1958) (“In light of the much other so-called antitrust legislation enacted prior and subsequent to the Clayton Act, it seems plain that the rule expressio unius exclusio alterius is applicable, and that the definition contained in § 1 of the Clayton Act [15 U.S.C. § 12] is exclusive.”). [FOOTNOTE 2 STARTS] Section 5 of the FTC Act, the most similar statute to Section 337, also is not an “antitrust law” and does not require antitrust injury. Rader v. Balfour, 440 F.2d 469, 471 (7th Cir. 1971). [FOOTNOTE 2 ENDS] In Nashville Milk, the Supreme Court also expressly rejected any argument that statutes such as Section 337(a)(1)(A)(iii) should be treated as “antitrust laws” simply because they are described colloquially as “antitrust statutes.” Id. at 375–76 (“[I]t is of no moment here that the Robinson-Patman Act may be colloquially described as an ‘antitrust’ statute.”); see RBr. at 4–5 (citing colloquial references by the Commission). Thus, by definition, Section 4 of the Clayton Act and its “antitrust injury” limitation do not apply to Section 337, which is not an antitrust law and which has its own injury requirement.

#### The FTC agrees.

Jon Leibowitz 06. FTC Commissioner. “In the Matter of Rambus, Inc.,” Federal Trade Commission, 2006, LexisNexis

It would be equally apt, though, to characterize Rambus's conduct as an "unfair method of competition" in violation of Section 5 of the FTC Act. Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws

---FOOTNOTE 1 STARTS---

15 U.S.C. § 12 (a) (2006). The antitrust laws include the Sherman Act and the Clayton Act (as modified by the Robinson-Patman Act). The FTC Act is not an antitrust law.

---FOOTNOTE 1 ENDS---

### Regs CP---2NC

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

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

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

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

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

#### 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.

#### 2. Regulations solve AND doesn’t get enforced thru the FTC so no LTNB.

Anna Read and Kathryn de Wit 8-25. Senior officer and project director at the Broadband Access Initiative. How Should Broadband Be Regulated?. No Publication. 8-25-2021. https://www.pewtrusts.org/en/research-and-analysis/articles/2021/08/25/how-should-broadband-be-regulated

Q: So, does any regulatory body have jurisdiction over broadband? A: The FCC has designated broadband as an interstate service, so it has the primary jurisdiction, which means that oversight of broadband takes place at the federal rather than state level. Q: Then, here’s the all-too-anticipated tough question: Based on your experience, should broadband be regulated as a utility? A: That’s definitely the all-too-anticipated tough question, and one to which I don’t have a definitive answer. What’s clear to me is that we need universally available, affordable, and reliable broadband at speeds that allow everyone to participate fully in the digital economy. This will take some level of oversight to ensure that companies that take federal or state funds to build or deploy broadband networks live up to their commitments and that consumers know what they’re buying and have somewhere to go if it doesn’t meet their needs or expectations.

#### 2.OR it Links to the AFF---*expanding the scope of antitrust causes regulatory capture.*

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris. ARTICLE: Antitrust Without Romance, 13 NYU J.L. & Liberty 326

Private and Pseudo-State Interests. Antitrust authorities can be captured by various outside groups that lead antitrust employees to please them so as to maximize their own future interest. 59 Public choice theorists have pointed out that special interest groups may capture regulatory authorities. 60 This issue cannot be overlooked and [\*344] a precise risk map should be drawn in this area as antitrust authorities' employees may please these groups for personal benefit, to the detriment of consumers. 61 The importance of this issue is growing as the scope of antitrust authorities is expanding, which increases the risk of regulatory capture by interest groups. 62

See, e.g., Bundeskartellamt prohibits Facebook from combining user data from different sources (Bundeskartellamt, Feb. 7, 2019), archived at https://perma.cc/B9S2-9659. For more on this extension of antitrust authorities' power, see Directive (EU) 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2019 O.J. L11 3 (Jan. 14, 2019). For risks this creates in terms of regulatory capture, see Michael E. DeBow, Social Costs of Populist Antitrust: A Public Choice Perspective, 14 Harv. J. L. & Pub. Pol. 205, 220 (1991) (explaining that as the government expands the scope and aims of antitrust enforcement, private parties invest more significant sums in manipulating this greater government intervention in the economy).

### Advantage 1---2NC

#### 2. Endless future cases and delayed rulings, clogging the courts

Dave Danforth, 7-25. Aspen Daily News columnist, A founder of the Aspen Daily News. “Danforth: Antitrust laws buried under layers of complexity.” Jul 25, 2021. https://www.aspendailynews.com/opinion/danforth-antitrust-laws-buried-under-layers-of-complexity/article\_aa9916fa-ecdf-11eb-a815-73afcf72ee6d.html

In 1981, David Palmer, a lawyer for the Aspen Skiing Co., had a problem. Back then, the “SkiCorp” didn’t own all four Aspen ski areas, but only three: Ajax (Aspen Mountain), Buttermilk, and Snowmass. The fourth — Aspen Highlands — was separately owned and was on the warpath against the Ski Corp. Its owner, Whip Jones, had convinced a Denver federal jury that the SkiCorp, was bent on a bold, bad-faith bid to monopolize the Aspen skiing market. To corner the market, the SkiCorp, led by D.R.C. “Darcy” Brown, had manipulated the pricing of an all-Aspen ticket to severely harm Highlands. The jury, on June 18, agreed. It awarded what today would seem chump change — $7.5 million to Highlands. To appeal the ruling, Palmer would need a novel argument: that the Aspen market couldn’t be monopolized. If he could show that, he could re-argue a case on its way to the U.S. Supreme Court. Palmer had to hope nobody in Aspen would read his words. The Aspen skiing world was built on the notion that Aspen was unique. There is only one Aspen. Nobody can copy it. Hogwash, Palmer argued in a brief only judges were supposed to read. Aspen ski services aren’t at all unique, he wrote. Services available to Aspen skiers “are neither unique nor in any way different from the services provided by Vail, Crested Butte, Steamboat Springs, Heavenly Valley, Jackson Hole and Lake Tahoe.” The argument wouldn’t win the case, but it advanced it to the highest court. It also showed how **antitrust laws get so complex** they’re hard to understand. The case illustrates the rough sledding that antitrust warriors will face as the Biden administration hopes to reawaken a Justice Department slumbering over the last four years. It sees a new frontier in high-tech titans. The Aspen case eventually reached the Supreme Court in March of 1985. The justices had no dispute, ruling 8-0 for Highlands. In later years, the Aspen Skiing Co. would “monopolize” the market the easy way: it simply bought Highlands. The case showed how **simple concepts of ­monopoly law can get bogged down when buried under years of subsequent court rulings**. They all sought to clarify what Congress meant in 1892 when it outlawed any “combination or conspiracy in restraint of trade.” The law has been used by trust-busters seeking to break up everything from industrial complexes to a phone company. Along the way, it has **spawned a flock of subsequent court rulings**, citing concepts from the “essential facilities doctrine” to “duty to deal” and “predatory pricing” as warning signs of where monopolies might lurk. The Aspen case stands out. Nobody doubted that the “SkiCorp” wanted to injure Highlands when it decided, around 1977, to change the “cut” of the court-ordered joint four-area ticket unilaterally. Highlands had traditionally received about 19 percent of sales when the SkiCorp decided to drop it to 15 percent. Highlands was bound to be hurt, but the SkiCorp was adamant. It resented Jones and Highlands for running an inferior ski area with clunky lifts, piggy-backing on slick marketing largely produced by the SkiCorp. Palmer and the SkiCorp argued to the Supreme Court that they had no duty to cooperate — a legal concept — with a lower-class competitor. Unfortunately, the SkiCorp sabotaged its argument with a series of “**dirty tricks”** aimed at Highlands. In one infamous example, it produced a batch of Aspen skiing maps from which Highlands was simply air-brushed away. Nobody doubted that the Ski Corp and the headstrong Darcy Brown were out to get Jones and Highlands. But they fumbled, and their arguments **were buried** by the finer points of antitrust law. A similar episode arose in 1993 involving another strong figure: Robert Crandall, then CEO of American Airlines. The company had been sued by Northwest and Continental — two competitors — for predatory pricing. Crandall, the competitors argued, had sharply cut fares in the summer of 1992 in a bid to hurt the competitors and force them under. A federal jury convened in Galveston, Texas to hear the case. As in the Aspen case, the facts seemed clear as a bell. Crandall, a legendary and fiery CEO, had cut fares to retaliate against competitors for irritating fare cuts of their own. Wagers popped up in the gallery. Would Crandall throw a temper tantrum in court? But the case got sidetracked by a judge who, in a bid to write a road map for the jury, embedded a roadside bomb. Which “city-pairs,” the judge demanded the jury answer, did American intend to monopolize? The jury, having spent a week on the case, was thrown by the judge’s question. It decided a few hours into deliberating that it couldn’t answer, thus ruling in American’s favor. The simple retaliation got buried by clouds of antitrust rulings.

#### No impact to economic decline---countries respond with cooperation not conflict. That’s Walt AND…

Christopher Clary 15. PhD in Political Science, MIT; Postdoctoral Fellow, Brown’s Watson Institute for International and Public Affairs. “Economic Stress and International Cooperation: Evidence from International Rivalries.” *MIT Political Science Department*. Research Paper 8: 4.

Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to austerity pressures, which in turn incent leaders to search for ways to cut defense expenditures. (2) Economic crises also encourage strategic reassessment, so that leaders can argue to their peers and their publics that defense spending can be arrested without endangering the state. This can lead to threat deflation, where elites attempt to downplay the seriousness of the threat posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to consider threat prioritization, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the political and economic benefit from international economic cooperation. Leaders seek foreign aid, enhanced trade, and increased investment from abroad during periods of economic trouble. This search is made easier if tensions are reduced with historic rivals. (5) Finally, during crises, elites are more prone to select leaders who are perceived as capable of resolving economic difficulties, permitting the emergence of leaders who hold heterodox foreign policy views. Collectively, these mechanisms make it much more likely that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this causal logic in greater detail, while also providing historical examples that these mechanisms recur in practice.

#### No extinction---new studies. That’s Peters AND…

Nordhaus 20**.** Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816)

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is **a real climate debate** bubbling along in **scientific journals**, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But **most pessimists** do not believe that **runaway climate change** or **a hothouse earth** are plausible scenarios, **much less** that **human extinction** is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. **A richer world** will also likely be **more technologically advanced**, which means that energy consumption should be **less carbon-intensive** than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that **global economic growth** over the last decade has **reduced** climate mortality by **a factor of five**, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But **recent forecasts** also suggest that many of **the worst-case climate scenarios** produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also **very unlikely**. There is **still substantial uncertainty** about how sensitive global temperatures will be to higher emissions over the long-term. But **the best estimates** now suggest that the world is on track for **3 degrees of warming** by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

### Advantage 2---2NC

#### Declining Huawei sales and sanctions prove they’re declining.

Hal Brands 9-19. Henry A. Kissinger Distinguished Professor of Global Affairs at the Johns Hopkins University School of Advanced International Studies and a Resident Scholar at the American Enterprise Institute. Huawei’s Decline Shows Why China Will Struggle to Dominate. Politics and Policy @ Bloomberg Opinion. 09-19-2021. https://www.bloomberg.com/opinion/articles/2021-09-19/huawei-s-decline-shows-why-china-will-struggle-to-dominate

America’s strategy, then, is about running faster as well as slowing its rival. Washington aims to break Huawei’s momentum until the U.S. and its friends can develop alternatives that will limit the Chinese firm’s global appeal.

The effects of U.S. policy are starting to accumulate. As of 2021, eight of the world’s 10 largest economies, countries representing over 60% of the world’s cellular equipment market, and nearly all members of the European Union, had either banned or restricted Huawei from their 5G networks.

Many countries that have not imposed formal restrictions, such as Germany and Canada, have subtly made it very difficult for Huawei. The company’s sales of network gear fell 14.2% between mid-2020 and mid-2021. Its overall revenue fell roughly 29% and earnings have slumped in regions from the Middle East to the Americas. Huawei’s founder, Ren Zhengfei, has declared that there is “no chaos within the company,” but the numbers tell a different story.

Huawei’s predicament could get much worse. Probably next year, the company will run out of the advanced semiconductors it stockpiled as U.S. hostility grew. That will force it to fulfill existing contracts with older, less efficient components — or not fulfill them at all. Huawei may be too important for the Communist Party to let it fail. But its global expansion will become increasingly problematic.

#### U.S. tech leadership is high.

Gad Levanon 20. Forbes manufacturing contributor. “Reports Of US Decline Are Greatly Exaggerated.” 08/27/20. https://www.forbes.com/sites/gadlevanon/2020/08/27/reports-of-us-decline-are-greatly-exaggerated/?sh=6253227b26f8

Despite what many suspect is an eroding US global standing, 2020 may be remembered as the year when the US became even more globally dominant economically.

Why? The tech sector’s share of the US economy is much larger than in most countries. And the pandemic-driven recession has greatly accelerated the shift to online activity and digital transformation by businesses and consumers, which would otherwise have taken years. That lead to faster growth in the global demand for technology. In addition, the US is especially dominant in the tech industries that are likely to grow the fastest in the coming years.

Stock prices certainly support this story. The S&P 500 is already above pre-pandemic highs despite the deepest recession in 80 years, and most of the stock prices’ strength comes from tech sector. The companies that have seen the strongest gains since the pandemic focus on online shopping and payments, cloud computing services, cyber security, business related software, social media, online advertisement, and on-demand entertainment content.

Stock prices are volatile and so are a treacherous guide for predicting the future, but there is a plausible explanation for the large tech gains – and why they might last.

[Chart omitted]

There are several objective and subjective reasons for why the US is so successful in technology compared with other countries. It has:

1The best universities, which attract many of the best students from all over the world – most of whom tend to stay in the US after completing their studies

2A large inflow of experienced talent from other countries

3 Unrivaled access to venture capital

4 Fluency in English, the global language in both business-dealing and content

5 An economy big enough to make achieving scale relatively easy

6 Silicon Valley, the home and heart of the tech revolution

7 A culture that welcomes innovation and disruption and strongly encourages entrepreneurial behavior

Given these factors, US tech leadership should continue.

What about the competition? One factor helping the US stand out is the weakness of the European tech sector. The market cap of the largest European tech company, SAP SAP -0.3%, is about one-tenth of Apple AAPL +1.6%’s. In other sophisticated industries like pharmaceuticals, motor vehicles and aircraft, European companies are strong competitors to their US counterparts. Europe’s relative technology weakness is perhaps as unusual as the US strength in the sector, and is only reinforced by the fact that US technology companies are already big players in European economies.

Most of the top tech companies from East Asia – places like Japan, Taiwan and South Korea – are in hardware and semiconductors manufacturing. They are serious competitors in these areas, but these technology sectors are not growing as quickly.

No discussion of the future of technology is complete without China. The Chinese internet companies are huge and growing rapidly, but their ability to expand beyond China and its periphery is questionable. In almost all sophisticated industries, Chinese companies are not yet major players in Western economies. Also, recent events suggest that Western countries will be more cautious in dealing with China, perhaps limiting its expansion. The latest developments with Huawei and TikTok are good examples. In addition, US companies are slowly moving their supply chain elsewhere, further weakening China.

So, the technology sector will perform well in the next several years, benefiting countries that are strong in that area. The US, more than any other country, has a large and successful tech sector that seems to be especially concentrated in the fastest-growing tech industries.

What does this mean for the US economy overall? First, it is important to mention that the boost the US is getting from its tech sector has been larger than what most other advanced economies have gotten for quite a while, and is one of the reasons the US has been growing faster than them in recent years. But now, this trend is likely to accelerate.

Here is some back of the envelope math for the difference between the technology sector’s contribution to GDP growth in the US versus a typical advanced economy: Suppose in the US the tech sector is 12 percent of GDP and is growing at 10 percent a year. In another typical advanced economy the tech sector is 7 percent of GDP and is growing at 5 percent a year. That means that the annual contribution to GDP from the tech sector is 1.2 percent for the US versus 0.35 percent for the other country. That is 0.85 percent faster growth for the US every year. The net effect may be smaller because some of the growth in tech companies come at the expanse of companies from other sectors. But when the average annual GDP growth rate is 1.5-2 percent in advanced economies, even a 0.5 percent a year difference is meaningful.

The gains from the rapid growth in technology would disproportionately go to tech companies’ owners and workers. As most of these are high earners, this trend is likely to increase income inequality. But some of the gains will spread more widely. After all, owners and workers, and the companies themselves, spend a large share of their income in the communities they live and operate in. It will also increase geographic inequalities. Not surprisingly, within the US, areas close to Silicon Valley benefited the most from the technology demand-surge. Between 2013-2018, among the 382 metro areas in the US, San Jose and San Francisco metro areas had the fastest growth in personal income per-capita. During that time, personal income per-capita in the San Jose Metro area rose by 48 percent, more than twice as fast as the national rate (22 percent). The surrounding metro areas, Napa, Santa Rosa-Petaluma, Santa Cruz-Watsonville, Stockton, Vallejo, were all ranked in the top 40. Seattle, another technology Hub, is ranked 13.

All of these data points add up to an enduring strength. Despite concerns about US’s standing in the world, its tech sector may keep it at the forefront of the global economy in the foreseeable future.

#### The plan collapses the incentive for lead firms to innovate---low monopoly rents, legal costs, and disadvantaged negotiations.

Jonathan Barnett 20. Torrey H. Webb Professor of Law, Gould School of Law, University of Southern California. How and Why Almost Every Competition Regulator Was Wrong About Standard-Essential Patents. Competition Policy International. 12-21-2020. https://www.competitionpolicyinternational.com/how-and-why-almost-every-competition-regulator-was-wrong-about-standard-essential-patents/

A. What if the FTC Had Won in FTC v. Qualcomm?

To illustrate this argument, assume that the district court’s order in Federal Trade Commission v. Qualcomm had been upheld.  The court’s decision, and the regulatory consensus upon which it rests, implicitly assumes by fiat that firms such as Qualcomm would continue to invest in R&D under the same licensing-based business model but would simply enjoy lower monopoly rents, yielding a net efficiency gain by continuing to incentivize the same or greater amount of innovation while imposing a reduced deadweight-loss burden on intermediate and end-users.

This outcome seems implausible.  In a legal environment in which the wireless industry’s lead innovator must share its latest technological advances with direct competitors, it is unlikely to have any rational motivation to act as a public R&D utility for the remainder of the industry.  Moreover, given the success of the agencies in largely precluding SEP owners from seeking injunctive relief against infringers, the innovator firm would be disadvantaged in negotiating royalty rates with well-resourced intermediate users.  Absent the threat of an injunction, intermediate users would strategically shift the “negotiation” process to a federal district court, the Patent Trial & Appeals Board (in which patent validity can be separately contested), and multiple foreign courts and administrative venues.  The resulting burden of legal and other transactional costs might lead the innovator firm to reconsider whether a licensing-based business model is still the most efficient strategy for extracting value from its R&D portfolio.

#### No cyber impact---every scenario is empirically denied. That’s Lewis AND…

James Andrew Lewis 18 senior vice president at the Center for Strategic and International Studies, Ph.D. from the University of Chicago, January 2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/180108_Lewis_ReconsideringCybersecurity_Web.pdf>, p. 7-11

The most dangerous and damaging attacks required resources and engineering knowledge that are **beyond the capabilities of nonstate actors**, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect. State Use of Cyber Attack Is Consistent with Larger Strategic Aims Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations. Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the **risk of retaliation**—a risk they manage by **avoiding actions that would provoke** a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace. **The reality of cyber attack differs greatly from our fears**. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents' goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be **counted on one hand**. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War. Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. **Terrorists do not seek to inflict economic damage**. The difficulty of wreaking real harm on large, interconnected economies is usually ignored. Economic warfare in cyberspace is ascribed to China, but China's cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent's weapons, military information systems, and command and control. "Strategic" uses, such as striking civilian infrastructure in the opponent's homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China's strategic deterrence. Chinese officials seem more concerned about accelerating China's growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People's Liberation Army (PLA) "freelancing" against commercial targets. The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call "New Generation Warfare"). **Russians want confusion, not physical damage**. Iran and **No**rth **Ko**rea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction. None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers' intent is to extract money. There have been cases of service disruption and data erasure, but these have been **limited** in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but **do not have a major effect on the national economy**. In all of these actions, **there is a line that countries have been unwilling to cross.** When our opponents decided to challenge American "hegemony," they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. **Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts**. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless. It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are **very unlikely** to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States. There have been thousands of incidents of cybercrime and cyber espionage, but only a **handful** of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran's nuclear weapons facility (Stuxnet), Iran's actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U S. presidential elections. **Cyber attacks are not random**. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia's contest with the United States and NATO. There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state's policy objectives. **Only two caused tangible damage**; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. **In no instance were there deaths or casualties**. **In two decades of cyber attacks, there has never been a single casualty**. This alone should give pause to the doomsayers. **Nor has there been widespread collateral damage**.

## 1NR

### FTC DA---2NC

#### **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.

#### It’s an existential threat.

Mara Hvistendahl 19 – correspondent with Science magazine, 3/28/19. “Can we stop AI outsmarting humanity?” <https://www.theguardian.com/technology/2019/mar/28/can-we-stop-robots-outsmarting-humanity-artificial-intelligence-singularity>

Existential risks – or X-risks, as Tallinn calls them – are threats to humanity’s survival. In addition to AI, the 20-odd researchers at CSER study climate change, nuclear war and bioweapons. But, to Tallinn, those other disciplines “are really just gateway drugs”. Concern about more widely accepted threats, such as climate change, might draw people in. The horror of superintelligent machines taking over the world, he hopes, will convince them to stay. He was visiting Cambridge for a conference because he wants the academic community to take AI safety more seriously.

At Jesus College, our dining companions were a random assortment of conference-goers, including a woman from Hong Kong who was studying robotics and a British man who graduated from Cambridge in the 1960s. The older man asked everybody at the table where they attended university. (Tallinn’s answer, Estonia’s University of Tartu, did not impress him.) He then tried to steer the conversation toward the news. Tallinn looked at him blankly. “I am not interested in near-term risks,” he said.

Tallinn changed the topic to the threat of superintelligence. When not talking to other programmers, he defaults to metaphors, and he ran through his suite of them: advanced AI can dispose of us as swiftly as humans chop down trees. Superintelligence is to us what we are to gorillas.

An AI would need a body to take over, the older man said. Without some kind of physical casing, how could it possibly gain physical control?

Tallinn had another metaphor ready: “Put me in a basement with an internet connection, and I could do a lot of damage,” he said. Then he took a bite of risotto.

Every AI, whether it’s a Roomba or one of its potential world-dominating descendants, is driven by outcomes. Programmers assign these goals, along with a series of rules on how to pursue them. Advanced AI wouldn’t necessarily need to be given the goal of world domination in order to achieve it – it could just be accidental. And the history of computer programming is rife with small errors that sparked catastrophes. In 2010, for example, when a trader with the mutual-fund company Waddell & Reed sold thousands of futures contracts, the firm’s software left out a key variable from the algorithm that helped execute the trade. The result was the trillion-dollar US “flash crash”.

The researchers Tallinn funds believe that if the reward structure of a superhuman AI is not properly programmed, even benign objectives could have insidious ends. One well-known example, laid out by the Oxford University philosopher Nick Bostrom in his book Superintelligence, is a fictional agent directed to make as many paperclips as possible. The AI might decide that the atoms in human bodies would be better put to use as raw material.

Tallinn’s views have their share of detractors, even among the community of people concerned with AI safety. Some object that it is too early to worry about restricting superintelligent AI when we don’t yet understand it. Others say that focusing on rogue technological actors diverts attention from the most urgent problems facing the field, like the fact that the majority of algorithms are designed by white men, or based on data biased toward them. “We’re in danger of building a world that we don’t want to live in if we don’t address those challenges in the near term,” said Terah Lyons, executive director of the Partnership on AI, a technology industry consortium focused on AI safety and other issues. (Several of the institutes Tallinn backs are members.) But, she added, some of the near-term challenges facing researchers, such as weeding out algorithmic bias, are precursors to ones that humanity might see with super-intelligent AI.

Tallinn isn’t so convinced. He counters that superintelligent AI brings unique threats. Ultimately, he hopes that the AI community might follow the lead of the anti-nuclear movement in the 1940s. In the wake of the bombings of Hiroshima and Nagasaki, scientists banded together to try to limit further nuclear testing. “The Manhattan Project scientists could have said: ‘Look, we are doing innovation here, and innovation is always good, so let’s just plunge ahead,’” he told me. “But they were more responsible than that.”

#### Link turns case. Expanded antitrust enforcement of anticompetitive practices causes backlash.

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

#### Privacy is the focus now.

Bryan Koenig 10/4/21. “FTC Split Over 'Integrating' Data Privacy And Competition.” https://www.law360.com/articles/1427875/ftc-split-over-integrating-data-privacy-and-competition

According to the report, the FTC has been trying to target "the most egregious and substantial privacy and security abuses," with an eye toward mandating that consumers implicated in privacy violations and data breaches be notified and getting financial compensation for injured consumers, including through partnering with other agencies with the power to impose monetary penalties. The FTC further said it plans to increase its focus on dominant digital platform data practices and expand its understanding of how algorithms implicate both competition and consumer protection.

All four of the FTC's current commissioners expressed at least some support Friday for going after privacy and data security violations. A particularly common theme was the call for more funding from Congress.

#### Specifically, algorithmic bias.

Kyle R. Fath et al. 10/19/21. Counsel in the Data Privacy & Cybersecurity Practice at Squire Patton Boggs, with Kristin L. Bryan, Christina Lamoureux, and Elizabeth P. Helpling. “Data Privacy and Cybersecurity FTC Priorities Going Forward.” https://www.natlawreview.com/article/data-privacy-and-cybersecurity-ftc-priorities-going-forward

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

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

#### Most of the FTC’s limited resources are targeted toward privacy.

Jessica Rich et al. 10/3/21. Former director of the Federal Trade Commission’s (FTC) Bureau of Consumer Protection, OF Counsel at Kelley Drye, 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/

Last week, we wrote about FTC Chair Khan’s memo describing her plans to transform the FTC’s approach to its work. This week, she followed up with a no-less-ambitious statement laying out her vision for data privacy and security, which she appended to an agency Report to Congress on Privacy and Security (“report”). Together, these documents outline a remarkably far-reaching plan to tackle today’s data privacy and security challenges. As noted in the dissents, however, some of the stated goals may exceed the bounds of the FTC’s current legal authority.

Privacy/Competition Focus on Tech

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.

#### 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.”

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

Nathaniel L. Asker 21. Partner in the Antitrust Department. Bernard (Barry) A. Nigro Jr., Chair of Fried Frank's Global Antitrust and Competition Department, former Principal Deputy Assistant Attorney General at the DOJ. Aleksandr B. Livshits, special counsel in the antitrust department. 1-5-2021. “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.

#### 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.

#### **Khan knows FTC history and will avoid overstretch now.**

Ben Brody 10/5/21. Senior reporter at Protocol, formerly covered tech policy at Bloomberg News. “The FTC's next privacy move is a dangerous game years in the making.” https://www.protocol.com/policy/ftc-privacy-rules?rebelltitem=1#rebelltitem1

Litigation could tie up any new rules up for years, but from the commission's perspective it may be the lesser evil as compared to drawing ire from Congress. Critics of FTC inaction trace the agency's timidity to the 1980s. At the time, many saw the FTC's attempts to regulate children's advertising as the height of nanny-state overreach, in part thanks to a campaign by advertisers. In response to "kidvid," Congress reined in the agency's regulatory powers — and in the process taught generations of FTC staff to tiptoe around lawmakers.

It's a cycle that's recurred throughout FTC's existence, and Khan, who loves the agency's history, has made clear she's well aware of it.

Her colleagues, too, seem well aware that the clock is ticking: In a speech earlier in October, Slaughter discussed online ads and pushed the idea that companies should only collect data necessary for their offerings.

#### Current enforcement is streamlined to enable focus on algorithmic bias.

Jeffrey J. Amato and Jay R. Wexler 9/28/21. “United States: FTC Ramps Up Tech Investigations, Reduces Investigators' Hurdles.” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1115450/ftc-ramps-up-tech-investigations-reduces-investigators39-hurdles

At its September 14, 2021 open meeting, the Federal Trade Commission (FTC) announced the passage of eight "omnibus" resolutions by a 3-2 party-line vote to authorize quicker investigations into prioritized issues. The resolutions allow staff attorneys to use compulsory process demands, which are usually issued as civil investigative demands or subpoenas, with approval from only one commissioner. Previously, agency staff were expected to receive approval from the full commission prior to issuing demands for information from companies. The resolutions aim to facilitate investigations into: unlawful conduct directed at veterans and service members; unlawful conduct directed at children; bias in algorithms and biometrics enabling discriminatory practices; dark patterns and deceptive online conduct that lure users into making unwanted purchases; repair restrictions that allegedly harm competitors and consumers; abuse of intellectual property; common directors and officers and common ownership; and monopolization offenses.

#### FTC’s scaling back new obligations---but there’s no margin for error

Leah Nylen & Betsy Woodruff Swan 21. Staff writers at POLITICO, 7/6/21. “FTC staffers told to back out of public appearances.” https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386

Less than a week into Lina Khan’s tenure as Federal Trade Commission chair, her chief of staff ordered the agency’s staff to cancel all public appearances, according to internal agency emails viewed by POLITICO.

In a June 22 email to more than two dozen of the FTC’s top staffers, Khan’s chief of staff, Jen Howard, announced a “moratorium on public events and press outreach.”

“For the time being I am putting a moratorium on staff participating in external events,” Howard wrote. The message was sent to the head of the FTC’s major offices, including those who oversee all of the agency’s economics, antitrust lawyers and consumer protection attorneys.

In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances.

“I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due to pressing matters at the FTC,” she wrote.

An FTC spokesperson confirmed that the agency has called off all staff public appearances for the time being.

"The FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment,” Howard said in a statement to POLITICO. “So the agency pushed pause on public speaking events that aren't focused on educating consumers to ensure staff time is being used to maximum benefit and productivity. The American public needs this agency solving problems, not speaking on panels."

The FTC, which enforces antitrust and consumer protection laws, has about 1,100 staffers, fewer employees than the agency had at the beginning of the Reagan administration. Only about 40 of the agency's lawyers are devoted to privacy and data security issues, the agency's former chair told Congress in 2019, in contrast to the United Kingdom, which has an agency of roughly 500 employees focused on privacy.

As recently as December, the FTC was discussing steps to deal with a possible cash shortage including freezing pay and cutting back on the number of lawsuits the agency files.

Since taking over three weeks ago, Khan has swiftly begun advancing her priorities, holding the FTC’s first open meeting in decades last week. In her opening comment, Khan pledged to provide transparency for the agency’s work and host open meetings “on a regular basis.”

#### Only the FTC solves algorithmic bias---it has the expertise and history.

Sara Collins 21. Policy Counsel at Public Knowledge, former Policy Counsel on Future of Privacy Forum’s Education & Youth Privacy team, 10/13/21. “21st Century Snake Oil: The Consequences of Unregulated, Unproven AI.” https://techpolicy.press/21st-century-snake-oil-the-consequences-of-unregulated-unproven-ai/

There is growing evidence that assigning algorithms the responsibility to make significant decisions about people is causing harm. Much has been written about the biases algorithms can codify and steps to mitigate the damage. However, detecting bias is difficult. If we could shift the burden to companies to demonstrate that their algorithms are safe and effective, we could greatly reduce the likelihood that biased algorithms enter the market at all.

For example, facial recognition’s trouble with detecting Black faces has been well documented. But facial recognition is not just used in surveillance cameras. It is also used in online hiring platforms, student proctoring software, and even for unemployment verification. Misidentification in these contexts has grave consequences. While this problem has often been framed in terms of bias, it also demonstrates a lack of effectiveness. If your software has trouble working on almost 15% of the population, your algorithm doesn’t do what you say it does. If you have an algorithm that is designed to allocate healthcare, but Black patients have to be significantly sicker than white patients in order to get the same level of care, your algorithm doesn’t work.

Unfortunately there is no requirement that companies demonstrate an algorithm’s effectiveness before putting it to use. The Algorithmic Justice and Online Transparency Act, introduced this year, has a requirement that algorithms used by online platforms be “safe and effective,” but that would only apply to sites like Facebook or Youtube, according to the proposed bill. Congress should consider expanding such protections to all products and services.

But even if Congress does not act, that doesn’t mean nothing can be done. Fortunately, the Federal Trade Commission (FTC) has a long history of prosecuting snake oil salesmen. Under Section 5 of the FTC Act, the commission has broad authority to go after companies that engage in unfair or deceptive acts or practices. This is why the FTC just sent a warning letter to purveyors of fake coronavirus cures, and how the FTC was able to fine companies that made scam weight loss products. In each instance these companies made claims about their products that weren’t backed by evidence. This same approach should be used for algorithms.

#### Actualizing scrutiny to bias is key.

K.C. Halm 21. Partner at Davis Wright Tremaine LLP, with Nancy Libin, 4/26/21. “FTC Warns of Greater Scrutiny Over Biased AI, Offers Best Practices to Mitigate Potential Harm.” https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2021/04/ftc-ai-bias-best-practices-guidance

Building on prior guidance issued in 2020, the Federal Trade Commission (FTC) recently warned in a new blog post that it will use its authority under existing laws to take enforcement action against companies that sell or use algorithms or artificial intelligence (AI) technology that results in discrimination by race or other legally protected classes. The agency urged companies developing or using AI to ensure their AI tools or applications do not result in biased outcomes because a failure to do so may result in "deception, discrimination—and an FTC [] enforcement action." The agency's latest pronouncement leaves no doubt that the FTC will be actively reviewing the market for potential bias or discrimination when AI-enabled applications and services are used to provide access to housing, credit, finance, insurance, or other important services. As our readers know, AI is emerging as a transformative technology that is enabling new systems, tools, applications, and use cases. At the same time, perceived risks arising from potential bias, discrimination, or other negative outcomes is leading regulators to look more closely at both the benefits and potential risks of the technology. To that end, the FTC is moving quickly to assert itself as a leading regulator with authority to oversee a broad range of AI providers, systems, and applications on the market. Basis of Potential AI-related FTC Enforcement Actions Three statutes provide the FTC significant authority to act in this area. Specifically, Section 5 of the FTC Act prohibits unfair or deceptive practices. The FTC's latest statement suggests that the agency believes it can use Section 5 authority, for example, to penalize entities selling or using "racially biased algorithms." Further, the agency also has authority to act under the Fair Credit Reporting Act (FCRA), which could be applied when an algorithm is used in a process that results in the denial of employment, housing, credit, insurance, or other benefits. Similarly, the Equal Credit Opportunity Act (ECOA)—which prohibits a company from using a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance—could be another basis for the agency to act. Thus, for example, if your algorithm results in credit discrimination against a protected class, you could find yourself facing a complaint alleging violations of the FTC Act and ECOA. Notably, the FTC's blog post is framed as both guidance and a reaffirmation that the FTC has been policing issues around AI and big data for many years and sends a clear signal that it intends to do so going forward. This reinforces Acting Chair Rebecca Kelly Slaughter's recent speech on algorithmic discrimination in which she cited a study demonstrating that an algorithm used with good intentions—to target medical interventions to the sickest patients—ended up funneling resources to a healthier, white population, to the detriment of sicker, patients of color. She asked the FTC staff "to actively investigate biased and discriminatory algorithms" and expressed an interest "in further exploring the best ways to address AI-generated consumer harms." Indeed, as we explained in recent blog posts, recent FTC enforcement actions reflect increased scrutiny of companies using algorithms, automated processes, and/or AI-enabled applications. The FTC's recent settlement with Everalbum is instructive in that it illustrates the agency's latest remedial tool: the so-called "disgorgement" of ill-gotten data. In the recent enforcement case, the FTC alleged that Everalbum, an app developer that used photos uploaded by users to train its facial recognition technology, failed to properly obtain users' consent. The agency also alleged that Everalbum made false statements about the users' ability to delete their photos upon deactivating their accounts. On these facts, the FTC secured a settlement and consent decree that required Everalbum to delete algorithms that used the data obtained without consent—a remedy that is akin to the "fruit of the poisonous tree" concept—and obtain consent before using facial recognition technology on user content. The FTC's latest reaffirmation of its authority to act in this area demonstrates that the agency will hold businesses accountable for using AI that may result in biased outcomes or for making promises that the technology cannot deliver. Its message is clear: "Hold yourself accountable – or be ready for the FTC to do it for you."

#### FTC enforcement key to check algorithmic bias.

Heather Landi 21 – senior editor at Fierce Healthcare, 4/22/21. “FTC issues warning that using biased AI could violate consumer protection laws.” https://www.fiercehealthcare.com/tech/ftc-issues-warning-using-biased-ai-could-violate-consumer-protection-laws

The Federal Trade Commission issued a warning to businesses and health systems this week that the use of discriminatory algorithms could violate consumer protection laws.

It could signal that the agency plans to take a hard look at bias in artificial intelligence technologies.

"Hold yourself accountable—or be ready for the FTC to do it for you," Elisa Jillson, an attorney in FTC’s privacy and identity protection division, wrote in an official blog post.

The FTC Act prohibits unfair or deceptive practices. That would include the sale or use of—for example—racially biased algorithms, Jillson wrote.

Using biased AI technology also could potentially violate the Fair Credit Reporting Act, which comes into play in certain circumstances where an algorithm is used to deny people employment, housing, credit, insurance, or other benefits and also the Equal Credit Opportunity Act, according to the FTC. The ECOA makes it illegal for a company to use a biased algorithm that results in credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because a person receives public assistance.

"Under the FTC Act, your statements to business customers and consumers alike must be truthful, non-deceptive, and backed up by evidence," Jillson wrote in the blog post. "In a rush to embrace new technology, be careful not to overpromise what your algorithm can deliver. For example, let’s say an AI developer tells clients that its product will provide “100% unbiased hiring decisions,” but the algorithm was built with data that lacked racial or gender diversity. The result may be deception, discrimination—and an FTC law enforcement action."

Jillson cited the example of using AI for COVID-19 prediction models to help health systems combat the virus through efficient allocation of ICU beds, ventilators, and other resources. But a recent study in the Journal of the American Medical Informatics Association suggests that if those models use data that reflect existing racial bias in healthcare delivery, AI that was meant to benefit all patients may worsen healthcare disparities for people of color, according to Jillson.

One study that has been widely cited found that a commonly used healthcare algorithm that helps determine which patients need additional attention was found to have a significant racial bias, favoring white patients over blacks ones who were sicker and had more chronic health conditions. The algorithm used health costs to predict and rank which patients would benefit most from extra care that could help them stay on their medications or keep them out of the hospital. But researchers said that using health costs as a proxy for health needs is biased because black patients, facing disproportionate levels of poverty, often spend less on health care than whites.

The authors of the study, which was published in the journal Science, estimated that this racial bias reduces the number of black patients identified for extra care by more than half.

Citing that study, Jillson wrote that businesses need to test their algorithms—both before you use it and periodically after that—to make sure that it doesn’t discriminate on the basis of race, gender, or other protected class.

In a tweet, University of Washington School of Law professor Ryan Calo called the FTC's strong language a "shot across the bow."

The blog post signals "a shift in the way the FTC thinks about enforcing the FTC Act in the context of emerging technology. The concreteness of the examples coupled with repeated references to statutory authority is uncommon," Calo wrote.

The FTC outlined a number of recommendations for businesses and health systems to address bias in AI technology including being more transparent about the data being used and using independent researchers to evaluate the algorithms.

"As your company develops and uses AI, think about ways to embrace transparency and independence — for example, by using transparency frameworks and independent standards, by conducting and publishing the results of independent audits, and by opening your data or source code to outside inspection," Jillson wrote.

If an AI model causes more harm than good—that is, in FTC parlance, if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or to competition—the FTC can challenge the use of that model as unfair, she wrote.

The stern warnings about selling and using discriminatory AI technology and overpromising on their capabilities suggest the FTC might be eyeing stricter enforcement.

#### FTC enforcement keeps the AI industry in line.

Ryan Calo 21. Professor of Law, University of Washington, 4/27/21. “FTC warns the AI industry: Don’t discriminate, or else.” https://theconversation.com/ftc-warns-the-ai-industry-dont-discriminate-or-else-159622

The U.S. Federal Trade Commission just fired a shot across the bow of the artificial intelligence industry. On April 19, 2021, a staff attorney at the agency, which serves as the nation’s leading consumer protection authority, wrote a blog post about biased AI algorithms that included a blunt warning: “Keep in mind that if you don’t hold yourself accountable, the FTC may do it for you.”

The post, titled “Aiming for truth, fairness, and equity in your company’s use of AI,” was notable for its tough and specific rhetoric about discriminatory AI. The author observed that the commission’s authority to prohibit unfair and deceptive practices “would include the sale or use of – for example – racially biased algorithms” and that industry exaggerations regarding the capability of AI to make fair or unbiased hiring decisions could result in “deception, discrimination – and an FTC law enforcement action.”

Bias seems to pervade the AI industry. Companies large and small are selling demonstrably biased systems, and their customers are in turn applying them in ways that disproportionately affect the vulnerable and marginalized. Examples of areas where they are being abused include health care, criminal justice and hiring.

Whatever they say or do, companies seem unable or unwilling to rid their data sets and models of the racial, gender and other biases that suffuse society. Industry efforts to address fairness and equity have come under fire as inadequate or poorly supported by leadership, sometimes collapsing entirely.

As a researcher who studies law and technology and a longtime observer of the FTC, I took particular note of the not-so-veiled threat of agency action. Agencies routinely use formal and informal policy statements to put regulated entities on notice that they are paying attention to a particular industry or issue. But such a direct threat of agency action – get your act together, or else – is relatively rare for the commission.

What the FTC can do – but hasn’t done

The FTC’s approach on discriminatory AI stands in stark contrast to, for instance, the early days of internet privacy. In the 1990s, the agency embraced a more hands-off, self-regulatory paradigm, becoming more assertive only after years of privacy and security lapses.

How much should industry or the public read into a blog post by one government attorney? In my experience, FTC staff generally don’t go rogue. If anything, that a staff attorney apparently felt empowered to use such strong rhetoric on behalf of the commission confirms a broader basis of support within the agency for policing AI.

Can a federal agency, or anyone, define what makes AI fair or equitable? Not easily. But that’s not the FTC’s charge. The agency only has to determine whether the AI industry’s business practices are unfair or deceptive – a standard the agency has almost a century of experience enforcing – or otherwise in violation of laws that Congress has asked the agency to enforce.