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### T-Structural – 1NC

#### Interpretation – “prohibitions” are structural – otherwise, it’s a remedy

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

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

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

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

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

#### violation – plan only expands behavioral remedies – topical affs must prohibit practices

#### vote neg:

#### 1 – limits – there are infinite ways behavioral remedies to anticompetitive business practices – structural prohibitions are key to topic management and neg ground

#### 2 – ground – our interpretation ensures the aff has to “break up” industries – key to link uniqueness and core controversy on a topic with no disads

### Kritik – Cap (v2) – 1NC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Covid, labor surplus, automation, population collapse cap – attempts to resuscitate cause extinction.

David Neilson 21. Professor of Political Science and Economics, University of Waikato, New Zealand. “Reversing the catastrophe of neoliberal-led global capitalism in the time of coronavirus: Towards a democratic socialist alternative.” *Capital and Class* 2021. DOI: 10.1177/0309816821997114.

This competitive logic interacts both with the ‘third international division of labour’ and ‘relative surplus population’ driven (un)employment effects. Interconnected sets of mutually dependent firms located across geographically remote national localities produce parts of single commodities are brought together for final assembly (Taylor 2008). Global capitalist firms technologically enabled by advanced systems of information and communication command this global supply-side-chain form of production. Simpler parts of the production process are sub-contracted to firms located in the industrially developing countries where high ‘formal subordination’ of labouring populations facilitates ‘absolute surplus value’ strategies. In turn, conception and the more technically advanced parts of the production process that Marx identifies with ‘relative surplus value’ are located in industrially advanced countries. In sum, a contractual chain of global capitalist coordination connects specialised production units across nationally diverse locations that enable global corporations to optimise surplus value by combining absolute and relative surplus value accumulation.

However, the terms of locational competition across unevenly developing countries are actually more complex. To begin with, the second international division of labour still exists, most extensively in the form of China’s belt and road initiative. As well, developed and developing countries move somewhat towards more hybrid two-speed national economies that include both low tech or low pay peripheral, and high tech or high pay metropolitan, sectors. In sum, neoliberal globalisation has unleashed a complex competitive advantage logic for countries that has led to their reduced self-sufficiency, and thus integrally, to their dependence on the global mode of accumulation.

Second, this neoliberal-led competition-driven version of uneven development has been intensified by the zero-sum logic implied by capital scarcity caused by a growing ‘relative surplus population’ (Marx 1976; Neilson & Stubbs 2011). An increasing relative surplus population driven by redundancy of industrial production workers in the advanced capitalist countries is being intensified, not just by the transfer of material production to the recently proletarianised workers of newly industrialising capitalist countries, but also by rapid automation. Simultaneously, by extending the ‘coercive whip of competition’ to the countryside of the Global South, the first wave of the relative surplus population tendency driven by peasant dispossession has been brutally activated across previously protected peasant modes of agriculture. For newly industrialising competition states, a necessary but not sufficient source of competitive advantage has been low wages enabled by labour’s high ‘formal subordination’ driven by a growing relative surplus population. In general, growing demand to facilitate employment – but hastening ecological destruction – is prevented by the demand-depressing effects of global market competition that is intensified by labour’s increasing oversupply that inversely increases the scarcity of capital.

Moreover, ‘relative surplus population’ employment logic has particular relevance to the present virus-led crisis because labour made redundant by increasing productivity in agriculture and industry spreads to the service sector (Neilson & Stubbs 2011). Although outside the core necessary economy in Marx’s sense, the service sector has become a significant source of employment and economic viability for many countries. With this neoliberal-led zero-sum terms of international competition, a significant proportion of service sector employment has become dependent on nation states’ capacity, in competition with other nation states, to attract overseas tourists. In turn, this process has unleashed a global movement of people that now spreads the virus.

Especially for countries struggling to retain or achieve international competitiveness, which is central to local employment, there is entailed an international race to the bottom in wages, working conditions and, relatedly, in ecological standards (Olney 2013). In sum, the neoliberal model of development has activated a zero-sum international competition for scarce capital, including money coming in through overseas tourists.

Regressive nationalism and the rise of neo-fascism

Defenders of the neoliberal model of development do their best to cast the ‘regressive nationalism’ of the Alt. Right as the antithesis of its cosmopolitan project. Actually, regressive nationalism is the degenerate effect of the neoliberal project’s competition-driven globalisation logic (Neilson 2020c). However, the deep causes of regressive nationalism that lie with the effects of the neoliberal model of development are mystified both by neoliberals and Alt. Rightists (Gray 2018).

The volatility of national economic competitiveness under neoliberal globalisation implies employment insecurity and uncertainty for local populations, which is heightened further by importing overseas labour. In particular, both legal and illegal low-paid workers are imported from the relative surplus populations of competitively struggling countries into more economically successful countries. Both indirectly and directly, foreign forces and peoples can thus be cast as the cause of local economic insecurity and of undermining pre-existing cultural identities. Insecure local labouring populations are invited to release their anxiety as xenophobic anger towards scapegoated immigrant labour forces. In turn, the Alt. Right argue that the solution is to expel residing immigrant populations and halt further immigration.

In their aggressive pursuit of proactive regulation domestically, agents of the Alt. Right are degenerately vulgar neoliberals. However, they break more fundamentally with neoliberalism because they directly oppose both neoliberal cultural cosmopolitanism and neoliberal market globalisation. In particular, regardless of moral, legal or political implications, all strategies that may render a national advantage can be rationalised because there are no rules in their worldview of a primordial zero-sum war between warring nations fighting for survival. Therefore, they wilfully oppose and transgress the strictly prescribed and transparent rules of economic competition that define the project of the neoliberalised global market. As the world descends into recurring, escalating and viciously interacting crises, mistrust and economic competition fed by the primordial ideology and amoral practices of the agents of regressive nationalism threaten to spill over into direct forms of civil and international war.

The global pandemic

The global spread of COVID-19 is also related to limitations arising from the neoliberal model of development’s modes of regulation and accumulation. Its proactively capitalist mode of competitive regulation has been ideologically promoted, institutionally constructed and managed by key United Nations based regulatory agencies, and is now also embedded in the institutions and expectations of national agents. However, it is radically unsuited to the forms of international cooperation that are needed for controlling a global pandemic. Indeed, when such a global crisis occurs, the present mode of global regulation can trigger blaming, disorganisation and intensified competition. At the same time, national dependence on the global structure of the neoliberal mode of accumulation is highly destabilising. Specifically, because dependent on the global scale system of accumulation, nation states are in a weak position to be able to sustain themselves locally. This dependence manifests as a direct contradiction between maintaining national economic viability and stopping the pandemic’s spreading into a nation state from off-shore.

Directly contrary to the neoliberal ideology of self-sufficiency, national economic viability under the neoliberal mode of accumulation is dependent on achieving specialised export competitiveness within complex global commodity chains that now ‘are breaking in numerous places’ (Foster & Suwandi 2020: 9; Moody 2020). This dependence on their position within a disintegrating global system is in direct tension with the need to pursue economic localisation in order to stop COVID-19 entering the nation sate. A global crisis thus becomes a local crisis, but also a local economic crisis can have ripple effects across other countries.

The original breakout of a pandemic in one place is in-itself related to the destructive capitalism-led march of humanity into the wilderness (Wallace 2016; Wallace et al. 2020; WWF International 2020). The neoliberal model of development constitutes the perfect environment for the virus to spread rapidly from this particular locality to the whole of humanity because its forms of regulation and accumulation have generated unparalleled movement of people backwards and forwards across the planet. The global flow of things and people unleashed by the neoliberal model of development spreads the virus everywhere. Inversely, because of global market capitalist dependence and corresponding lack of local self-sufficiency, all nation states struggle to – but must – break from this global system if they are to avoid being overwhelmed by the contagion’s local invasion from off-shore.

In sum, this viral-led crisis is centrally related to capitalism’s neoliberal-led global form. On one hand, its intensification of human movement across and within national borders that now engulfs the whole planet is also what spreads the virus everywhere. It only stops spreading when we stop moving. On the other hand, as we struggle to stop moving to halt the virus, the prevailing global form of the capitalist mode of production upon which basic human existence now depends cannot be maintained. The shocking immediate choice confronting political actors is thus between containing the virus’ spread and avoiding economic breakdown. The worst case scenario is where neither goal is achieved, that is, where the spread of the virus is reactivated every time countries are driven to return to ‘business as usual’ before it has been properly stamped out. Thus, economic breakdown follows when a country locks down, and the spreading of the virus follows when a country re-opens.

The extremely unstable and inflexible nature of this form of the capitalist mode of production spreads COVID-19 to the whole world in an uneven process of refracted diffusion. This complicated transmission logic has interacting international, political and class dimensions. The movement of the virus into and within nation states initially spreads most rapidly among industrially advanced capitalist countries where the frequency and distance of human movement is highest. In contrast, spread of the virus is delayed and reduced for the shorter and less frequent moving of people and things that occurs in the non-developed countries of the Global South. With fewer economic reserves and less developed national health systems, non-developed countries have the least structural capacity to respond to this double-headed economic or health crisis. However, they do have the pre-existing advantage of more localised economies and they have time to learn from other national experiences and thereby more chance to implement successfully lockdowns and social distancing rules. Furthermore, regardless of the economic stage of capitalist industrialisation, countries with strong state capacity, decisive political leadership and a collectively responsible citizenry may be able to stop the virus by reducing citizens’ movement outside of their immediate locations while at the same time promoting ‘social distancing’.3

Despite complexly overdetermined form, a class process of diffusion overlaid by cultural inequalities is discernible. The virus is internationally carried, first, by the cosmopolitan members of the capitalist class and middle class who move freely for business and pleasure back and forth across countries. Second, it is carried by low-paid labour forces imported from poorer countries to richer countries to do informal, temporary, unskilled work in the industrial and service sectors of richer countries. Once landing in a new national territory, through cosmopolitan classes and imported labour, the virus spreads towards the local labouring population. In particular, the cosmopolitan classes who tour the world transmit the virus to low-paid service sector workers. Thus, the virus moves towards the strata of the ‘relative surplus population’, which is also overrepresented by subaltern ethnic groups. These strata are very vulnerable due to insecure, close and impoverished living conditions around working, food and housing. In the advanced capitalist countries, the virus spreads towards workers located in vulnerable parts of service and manufacturing sectors, and from there to more desperate segments of the relative surplus population including the homeless and the incarcerated. In the Global South, it spreads towards the street dwelling inhabitants of the city slums.

When the economies of the countries of the Global South are closed to stop the spread of virus, there is rapid loss in the survival capacity of those in the relative surplus population with only daily stores to meet their basic material needs. In this situation, the poor and the dispossessed confront an increasingly precarious double effect. Both as breakdown of their precarious employment based material existence, because living in vulnerable material circumstances without adequate public health, and perhaps already having compromised physical constitutions, these groups become simultaneously exposed and vulnerable to the virus while lacking the means to combat it (Foster & Suwandi 2020: 12; Onyishi et al. 2020).

Descent towards the terminal crisis of western capitalism

In one concentrated conjuncture of viciously interacting crises, the coronavirus brings to the surface symptoms of the terminal stages of the western capitalist project. The global capitalist organisation of material existence spreads the virus while undermining viable local economic responses that can contain it. Simultaneously, closing national economies in response to the virus is bringing on the deepest and most comprehensive economic crisis in human history. These manifesting contradictions that now threaten the whole of Gaia, also bring to the surface the spectre of the original epistemological and ontological contradictions of the western capitalist project’s ‘primitive’ ascendancy that have been reproduced to this day.

Especially in the United States, the present global exemplar and leader of the western capitalist project, all these viciously interacting contradictions are concentrated. The capitalist expression of Enlightenment theories that have legitimated Western capitalism’s absolute exploitation particularly through the destruction of Indigenous civilisations and the brutal industrial scale absolute exploitation of enslaved African peoples, live on to the present. Racist mentalities are reproduced across the major institutional forms centrally including labour market, education and the repressive apparatuses of the state that are also reflected in COVID-19 vulnerabilities (Pirtle 2020). Thus, there is destructive intersection of class and race oppressions (Saad-Filho 2020: 480). The present (as I write) social uprising united under the banner ‘Black Lives Matter’ may lead to a fundamental break with the institutions and mentalities of systemic racism. However, a last gasp backlash White supremacy movement, led in this case by the President, is promoting deepening social division and conflict.

Even more fundamentally, the destructively expansive logic of the capitalist mode of production, legitimated by the western modernist meta-narrative that celebrates human-centred exploitation of the natural world and that has been extended and intensified under the neoliberal model of development, now expresses itself as a steady march towards ecocatastrophe. Today, dynamically expanding material capital accumulation unleashed globally by the neoliberal model of development threatens Gaia as capital scours all the world in search of dwindling raw materials, as species go extinct daily and as the manifold effects of global warming undermine the most basic conditions of life on the planet. At the same time, the human component of Gaia is suffering, more or less, as a result of this ecological destruction, and by the relative-surplus-population-led descent of human civilisation into a chaotically disorganised ‘planet of slums’ ravaged by global viruses and deep social dislocation (Davis 2006, 2020; Foster & Suwandi 2020). In sum, the present conjuncture condenses the manifold contradictions of the western capitalist project in a terminal cycle of interacting crises.

#### Vote neg for anti-capitalist commons – collectives should refuse commitments to competitive principle and the straitjacket of what’s “realistic.”

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

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

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

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

### Counterplan – 14A PIC – 1NC

**The United States federal government, without changing the scope of its core antitrust laws, should determine that anticompetitive filed rates violate the 14th Amendment.**

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

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

V. CONCLUSION If the only plausible rationale for a law is to protect a certain group from economic competition, the law should not be upheld. The Fourteenth Amendment states that the government cannot deny to any person the equal protection of the laws. When the legislature denies one person certain economic liberties but grants those same economic liberties to another similarly situated person, and there is no rational basis for the classification, equal protection of the law has been denied, and the classification is a violation of the Fourteenth Amendment’s Equal Protection Clause. On the other hand, if there is some rational basis for the law, including some legitimate government interest, the law does not violate the Fourteenth Amendment, and should be upheld. Finding some rational basis for economic legislation is a very low threshold; however, naked economic protectionism should not be a rational basis for law because (1) Supreme Court precedent is weak and untested when it comes to naked economic protectionism, (2) naked economic protectionism is virtually impossible to negate, and (3) a rational basis for a law should include a government interest that serves (to some extent) the public good, not simply the group receiving economic protection. The Supreme Court has not explicitly endorsed naked economic protectionism as a rational basis under the Equal Protection Clause. In each decision where the Court upheld economic legislation that resulted in an economic benefit to a certain group, the Court upheld the law on other, legitimate rational bases—not naked economic protectionism. Even in the two circuit court decisions that explicitly legitimize naked economic protectionism, the courts relied on some rationale apart from mere economic protectionism of a certain group. Therefore, naked economic protectionism as a rational basis is, for the time being, a legal fiction that has not been tested as an exclusive basis for upholding a law. Naked economic protectionism is virtually impossible to negate. Since every piece of legislation favors some group over another, and courts only need to find some possible reason that the legislature enacted the law, courts could simply hypothesize that the economic legislation was enacted to protect the benefited group. This protection does not even need to be the actual purpose for which the legislature enacted the statute, nor does the law need to show any sign of effectuating that purpose. Barring the potential for legislative animus against the disfavored group, naked economic protectionism is virtually impossible to negate. Rational basis review should include a government interest that serves, at least to some extent, the public interest or the general welfare. In the decisions discussed in this Comment, there is no precedent established for upholding economic legislation that lacks some strand of public interest. Rational basis review provides a low threshold, and the possibilities for a legitimate public interest are many, including consumer protection, consumer safety, public health, economic development, neighborhood preservation, protecting reliance interests, historical preservation, and tourism attraction. While otherwise publicly minded laws may result in the economic protection of certain groups, economic protectionism should not stand as the sole basis for enacting a law. Legitimizing naked economic protectionism as a rational basis for enacting a law may seriously harm the general public. For example, we may see occupational licensing requirements protect certain professions from economic competition in areas where the licensed professional is not specialized, the most skilled, or even qualified. These unfounded protections harm the public by reducing supply, choice, and quality. Courts should not uphold a law when the only basis for the law is naked economic protectionism.

#### 14th Amendment collapsing now – but the counterplan’s expansion of equal protection solves healthcare.

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

Abstract

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

What Is Health Equity?

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

Legislative Action on Civil Rights

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

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

#### That solves disease and bioterrorism – extinction.

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

For all sorts of reasons, **the US public health system**—as patchwork as it may be—**is absolutely vital to protecting the United States and the world from bioterrorism and natural disease outbreaks that could turn pandemic**. I could offer a long policy discussion here to support the previous sentence, but I think two words will do the job: Ebola. Anthrax. According to a question-and-answer string generated by the Washington Post, the House health care bill “would eliminate funds for fundamental public health programs, including for the prevention of **bioterrorism and disease outbreaks**, as well as money to provide immunizations and heart-disease screenings” and gut a fund that provides almost $1 billion annually to the Centers for Disease Control and Prevention (CDC). The panic that attended the anthrax letter attacks of 2001 and Ebola cases in 2014—incidents that claimed only a relative handful of victims each in this country—**would pale in comparison to the uproar accompanying a widespread outbreak of serious disease**, whether it were natural in origin or manmade. The systems needed to detect outbreaks early and **forestall pandemic** are exactly the programs that the House health care bill cuts. Many of those systems are run by state health departments, which would lose hundreds of millions of dollars because of cuts in funding for the CDC. At the same time, it seems likely that if the Senate agrees to something close to the House health care bill, millions of Americans will also lose health insurance coverage. This combination—disinvestment in public health and large reductions in the number of people with access to timely medical care—could facilitate the type of pandemic that **causes mass casualties and threatens social order**. Such a level of risk demands an increased level of attention from the media, and from the Senate, as it decides how it will address—and, I hope, greatly change—the House version of health care “reform."

### Counterplan – Advantage – 1NC

#### The United States federal government should: -        substantially increase its review of rates filed with the FERC through non-antitrust means -        grant the FERC authority to assign punitive measures, at least including trebled damages, in cases of anticompetitive conduct -        establish a private right of action to sue over anticompetitive rates -        reshape its cyber posture by modernizing the grid, increasing network visibility, and increasing information sharing with the private sector -        substantially increase access to telemedicine services

#### Solves the aff without antitrust

Jarod M. Bona 20. Bona is the founder and CEO of Bona Law PC; he graduated cum laude from Harvard Law School in 2001, then clerked on the United States Court of Appeals for the Eight Circuit for Judge James B. Loken in Minneapolis, Minnesota; he then practiced antitrust law for a dozen years at DLA Piper and Gibson, Dunn & Crutcher. "When is the Filed Rate Doctrine a Defense to an Antitrust Lawsuit?," Antitrust Attorney Blog, January 19, 2020. <https://www.theantitrustattorney.com/filed-rate-doctrine-defense-antitrust-lawsuit/>

What is the Filed Rate Doctrine?

The filed rate doctrine is simply a judicially created exception to a civil antitrust action for damages in which plaintiffs challenge the validity of rates or tariff terms that have been filed with and approved by a federal regulatory agency.

But what does that mean?

In some industries, notably insurance, energy, and shipping (or other common carriers), the participants must file the rates that they offer to all or most customers with a government agency. This regulatory agency must then, in some manner, approve those rates. This approach is an exception to a typical market and was more common in certain industries pre-deregulation.

#### the counterplan pics out of anti-trust legislation and the ftc and doj as enforcers

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

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

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

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

### Disad – FTC Tradeoff – 1NC

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

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

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

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

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

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

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

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

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

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

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

## Energy Adv

### Private Enforcement Fails – 1NC

#### Private enforcement fails – laundry list.

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law. “In Praise of Private Antitrust Litigation.” *Antitrust Chronicles, Competition Policy International*. 2019. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343798>.

A handful of situations exist where government enforcement does, and should, get priority in the competition law arena. Some of these situations arise because of the special status of the United States government in general civil litigation and a few are unique to competition law. However, such situations are few and far between. Any resulting tensions between public and private enforcement normally can be minimized, rather than exacerbated, as is the government’s current tendency.

First, the government as a plaintiff is presumed to meet the public interest requirement in seeking temporary and permanent injunctions.

To oversimplify, all forms of injunctive relief require proof of:

1) An imminent threat of harm from the defendant;

2) No adequate remedy at law (that an award of damages will fail to protect the plaintiff);

3) The balancing of equities which favors the plaintiff; and

4) The injunction serving the public interest, including the rights of third parties and public policy.14

Injunctive requests by the government are presumed to meet this fourth criteria. This is more a function of the general nature of injunctions rather than anything specific to competition policy. The rule played an important in high stakes government injunctive antitrust litigation such as the Microsoft case and certain mergers.15

Major structural relief will probably remain the province of public, rather than private, litigation. The Supreme Court has made clear that private parties can seek injunctive relief in Section 7 cases in addition or instead of whatever the federal government chooses to do.16 But there is a dearth of such cases. It appears that the first such case just occurred in October 2018.17 It would be similarly rare that a purely private injunctive case under Section 2 would (or should) result in the divestiture or restructuring of a firm or industry. Structural relief in a Section 2 case is a rarely sighted creature, even in the occasional government civil Section 2 litigation.

Such relief was overturned on appeal in Microsoft and abandoned (over the objections of the state attorneys general) in the settlement ultimately approved by the court.18 While there is no legal reason why such relief could not be sought or granted in a purely private case, it would bear a very high burden of satisfying the balance of equities and public interests tests of all injunctive relief. It seems likely that granting such relief would necessitate, as a practical matter at least, tacit support of the government to ultimately prevail in the district court and on appeal.

### Court Clog Turn – 1NC

#### The plan wrecks the restoration process. Expanding the scope of antitrust law opens the floodgates of antitrust court cases, clogging the courts

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**.**

#### Courts are key to democracy – court overload prevents decision making

Michele Jawando & Sean Wright 15Michele Jawando is the Vice President of Legal Progress at the Center for American Progress. Sean Wright is the Policy Analyst for Legal Progress at the Center. “Why Courts Matter.” Center for American Progress, April 13, 2015, https://www.americanprogress.org/issues/courts/reports/2015/04/13/110883/why-courts-matter-2/

No matter the issue—whether it’s marriage equality, voting rights, health care, or immigration—the U.S. federal courts play a vital role in the lives of all Americans. There are two types of courts: state and federal. The federal courts are those established to decide disagreements that concern the Constitution, congressional legislation, and certain state-based disputes.¶ Although most Americans are familiar with the lifetime appointment of justices on the U.S. Supreme Court, many are surprised to learn that more than 900 judges have lifetime appointments to serve on lower federal courts, where they hear many more cases than their counterparts on the Supreme Court. Each year, the Supreme Court reviews around 100 of the most significant cases out of the nearly 30 million cases resolved by state and federal courts. These courts hear the majority of cases and, most of the time, they have the final say. ¶ That is why, along with the Supreme Court’s justices, the judges who sit on the nation’s federal district and circuit courts are so important.¶ At any given time, there are vacancies on U.S. federal courts that need to be filled. If they are not filled, federal caseloads get backlogged, and as a result, Americans’ access to justice is limited. As of March 9, 2015, there were 50 current vacancies on U.S. federal courts. These seats have been vacant for a total of 22,222 days, resulting in a backlog of 29,892 cases. ¶ The Administrative Office of the United States Courts has designated 23 of these pending vacancies as judicial emergencies, meaning that filling them is a critical task. As the Center for American Progress has noted, “in practical terms,” these are the judicial districts “where judges are overworked and where justice is being significantly delayed for the American public.”¶ The Constitution dictates that the president appoints federal judges while the Senate advises and consents on these appointments. The result is a delicate balance between the desires of the White House, deference to home-state senators, and the power of the party that controls the Senate.¶ Recently, politics has played a big role in the pace at which judicial nominees are confirmed. In an attempt to slow President Barack Obama’s effect on the federal courts, Senate Republicans have obstructed the president’s judicial nominees at unprecedented levels by attempting to prevent or delay a vote through filibustering a record number of nominees and making them await confirmation for long periods of time.¶ The reason many Senate Republicans have played politics with President Obama’s judicial nominees is because they know the dramatic impact the judiciary can have on policies, including marriage equality and reproductive choice. The fewer judges that President Obama appoints to fill federal judicial vacancies, the greater leverage the next president will have in deciding the make-up of these courts. ¶ Yet in the face of unprecedented obstruction, President Obama has made great strides to fill vacancies and to ensure that federal judges meaningfully reflect the dynamic diversity of the nation. A diverse federal bench improves the quality of justice and instills confidence that judges understand the real-world implications of their decisions. Americans have different backgrounds, as well as an assorted set of professional, educational, and life experiences. It is important that the federal courts reflect the diversity of the public they serve. As Supreme Court Justice Sonia Sotomayor once wrote, “The dynamism of any diverse community depends not only on the diversity itself but on promoting a sense of belonging among those who formerly would have been considered and felt themselves outsiders.”¶ Furthermore, scholars have found that judges often change their minds during the deliberative process. In one study, researchers concluded that having a woman on the panel affected “elements of both deliberation and bargaining—alternative perspectives, persuasive argument, and horse trading.” Not only do the federal courts play a vital role in preserving democracy, but who sits on the courts has an effect too.

#### Democracy solves war

Christopher Kutz, 2016. PhD UC Berkeley, JD Yale, Professor, Boalt Hall School of Law @ UC Berkeley, Visiting Professor at Columbia and Stanford law schools, as well as at Sciences Po University. “Introduction: War, Politics, Democracy,” in On War and Democracy, 1.

Despite Churchill’s famous quip—“Democracy is the worst form of government, except for all those other forms that have been tried from time to time”2—democracy is seen as a source of both domestic and international flourishing. Democracy, understood roughly for now as a political system with wide suffrage in which power is allocated to officials by popular election, can solve or help solve a host of problems with stunning success. It can solve the problem of revolutionary violence that condemns autocratic regimes, because mass politics can work at the ballot box rather than the streets. It can help solve the problem of famine, because the systems of free public communication and discussion that are essential to democratic politics are the backbone of the markets that have made democratic societies far richer than their competitors. It can help solve the problem of environmental despoliation, which occurs when those operating polluting factories (whether private citizens or the state) do not need to answer for harms visited upon a broad public. And democracy has been famously thought to help solve the problem of war, in the guise of the idea of the “peace amongst democratic nations”—an idea emerging with Immanuel Kant in the Age of Enlightenment and given new energy with the wave of democratization at the end of the twentieth century.

### Solvency – 1NC

#### Antitrust fails for electricity

Frank A. Wolak, ‘5. Professor in the Department of Economics at Stanford University. Managing Unilateral Market Power in Electricity. World Bank Policy Research Working Paper 3691, September 2005. https://web.stanford.edu/group/fwolak/cgi-bin/sites/default/files/files/Managing%20Unilateral%20Market%20Power%20in%20Electricity\_Wolak.pdf

The past two decades of international experience with wholesale electricity markets has demonstrated that significant consumer harm can result from firms simply engaging in unilateral profit‐maximizing behavior given the actions of their competitors. Different from other product markets, coordinated actions among suppliers or the concentration of production capacity in the hands of small number of firms is unnecessary for electricity suppliers to raise prices substantially above competitive levels. A number of wholesale electricity markets with Hirshman‐Herfindahl Indexes (HHIs) that would not raise market power concerns if they were from other industries have been subject to severe market power problems. In addition, for all of these market power episodes, the relevant competition authorities have not found evidence of coordinated actions among suppliers to raise prices in violation of the competition or antitrust law. These facts provide strong evidence that competition or antitrust policy as it is applied to other industries may be insufficient to protect electricity consumers.

### AT: Grid – 1NC

#### 1AC Weiss & Weiss is about an EMP attack – not gonna happen

Dave Majumdar 17. Former defense editor for The National Interest. "Expert: EMP Weapons Are a "Loony Idea"," National Interest, December 17, 2017. <https://nationalinterest.org/blog/the-buzz/expert-emp-weapons-are-loony-idea-23695\> \*\*we do not endorse the ableist language used by the author and their sources

On the specific issue of North Korea, Gunzinger said that an EMP would impact Pyongyang’s force too—but conceded that U.S. forces are probably more vulnerable to such effects.

“It is likely that NOKO's use of a relatively unsophisticated EMP weapon over the Korean Peninsula would affect their own forces and possibly their battlespace command and control infrastructure,” Gunzinger said.

Asked directly if U.S forces—which rely heavily on networks and advanced sensors are likely to suffer more—Gunzinger said that was a distinct possibility.

“Quite possibly, yes. Just didn't want to get into it too deeply,” Gunzinger said.

“It could have a crippling effect on military systems and networks that aren't appropriately hardened. Let's not forget the impact it could have on our allies...”

However, even if the North Koreans did not resort to using nuclear weapons to target cities and population centers—targeting only allied military forces or using an EMP blast, it is likely that the U.S. would resort to a nuclear counter-strike.

“If someone had a super-powerful EMP that fried the North American power grid, do you imagine that the President would just shrug and say, ‘Nothing we can do about that’?” Joshua H. Pollack, editor of The Nonproliferation Review and a senior research associate at the James Martin Center for Nonproliferation Studies, told The National Interest.

“I personally suspect that the concept is overblown—a 1.4 megaton bomb that went off with Honolulu in line-of-sight knocked out a few strings of streetlights—but especially if the worst fantasies of the EMP Commission are reality, I don't see how it would affect the workings of deterrence. If someone hits you with a nuclear weapon and it has devastating effects, well, that's the most natural circumstance for a devastating response.”

In any case, it is unlikely that North Korea would show any restrain if the United States intervened to overthrow the regime in Pyongyang.

“It is beyond me why we think an enemy would waste a perfectly good nuclear weapon to experiment with a hypothetical EMP when they could destroy an actual city,” arms control expert Joseph Cirincione, president of the Ploughshares Fund, told The National Interest.

“EMP is a loony idea. Once an enemy uses a nuclear weapon—for any reason—it crosses the nuclear threshold and invites a nuclear response. U.S. military commanders would not say ‘Well, it was only an airburst. We should just respond in kind.’ They would answer with an overwhelming, devastating nuclear counter attack. And our nuclear weapons and command and control are designed to operate in a nuclear war environment, not just some puny EMP blast.”

### Private Antitrust Turn – 1NC

#### Expanding liability to private plaintiffs causes over-deterrence, raising prices and wrecking competition

Jon Nuechterlein and Timothy J. Muris 21. JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, March. “Private Antitrust Remedies: An Argument Against Further Stacking the Deck.” <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

## Econ Adv

### AT: Energy Prices – 1NC

#### Energy prices are down AND alt causes

Talmon Joseph Smith, 12/7. Economics reporter for The New York Times based in New York. "Sinking natural gas prices are a sign of hope for household winter heating bills." New York Times, December 7, 2021. https://www.nytimes.com/2021/12/07/business/natural-gas-prices.html

After hitting their highest levels since 2014 mere months ago, natural gas prices have tumbled in recent weeks, falling more than 10 percent on Monday alone, a development that could bring much-needed relief to many Americans who had been bracing for high home heating bills this winter.

The latest drop came after the release of updated government weather forecasts projecting a warmer-than-expected winter. Prices for natural gas traded on the futures market are now back down to levels that prevailed last summer and are down about 41 percent from their peak in October.

After taking a sharp dive during the height of pandemic lockdowns as the economy slowed, energy and other commodity prices soared this year as the economic recovery accelerated and many goods and raw materials became snarled in tangled global supply chains.

Natural gas, used to heat almost half of U.S. households, almost doubled in price earlier this fall. Prices remain higher than they were during the depths of the pandemic, at about $3.75 per thousand cubic feet on the New York Mercantile Exchange. Those prices are up about 50 percent since January, but are far lower than in late October, when they exceeded $6 per thousand cubic feet.

Natural gas prices recently took a sharper turn down as the weather in much of the country was warmer than expected. Concerns about the supply of gas, which have been a much bigger problem in Europe, have also eased in the United States.

“We’ve still got January, February, March — but it’s certainly a good sign that its coming down,” said Mark Wolfe, the executive director of the National Energy Assistance Directors’ Association, a group of state officials that provide assistance to households in need. “If it’s a warmer winter, then our estimates about consumption will be down, and if consumption is down, that’ll reduce the price of the fuel. It’s a good sign.”

Even if the winter months are not as cold as on average, other factors, including limited supply and strong demand for gas from power plants and other users, could keep heating costs high, energy experts said.

Conversely, gas prices could drop further if the Omicron variant of the coronavirus proves more dangerous than expected, slowing the economy and sapping demand for goods and services.

Good news about energy prices has been uncommon for consumers lately. The broad gauges of inflation have been running at the highest rates in decades. The vagaries of the weather, and climate change, may now cut them at least a temporary break. Several states have experienced some of their warmest December days on record. The temperature in Central Park reached 61 degrees on Monday.

According to the National Oceanic and Atmospheric Administration’s Climate Prediction Center, above-average temperatures throughout the South and most of the East could predominate for most of this winter.

Jon Gottschalck, the chief of the operational prediction branch at NOAA’s Climate Prediction Center, said those milder conditions would be the result of the recent development of atmospheric conditions known as La Niña. But he warns that all forecasts are “probabilistic,” not certainties, and that “volatile” severe cold snaps should still be expected in the months ahead.

In its short-term energy outlook released Tuesday, the U.S. Energy Information Agency noted that “the evolving effects of consumer behavior on energy demand because of the pandemic present a wide range of potential outcomes for energy consumption.”

### Biz Con Turn – 1NC

#### Biz con is high now

Lloyds 12/21. Lloyds Banking Group. “Business confidence resilient as early signs of Omicron impact emerge.” Lloyds Banking Group, December 21, 2021. https://www.lloydsbankinggroup.com/media/press-releases/2021/lloyds-bank/december-2021-business-barometer.html

The latest Lloyds Bank Business Barometer shows business confidence remained unchanged at 40%. The survey captured responses between 26 November and 10 December, during which the Omicron variant emerged and before the Bank of England’s decision to increase base rate to 0.25%. While confidence remains above the long-term average (28%), during the second week of polling there was a fall back with sentiment (32%) dropping to similar levels seen during the spring and summer.

Overall, the business confidence level reflects a rise in trading prospects (up four points to 43%), offset by a marginal dip in economic optimism (down three points to 38%). While confidence remains significantly higher than a year ago, it suggests businesses’ concerns are growing about the full extent of the Omicron variant of the virus and the potential for further restrictions – a clearer picture will emerge in January’s survey results.

Despite these challenges, firms are looking to recruit with the Barometer showing a slight uptick in job prospects two months after the end of the furlough scheme. 49% (up one point from 48% last month) expect to increase their workforce in the next 12 months, while 16% (down two points from 18%) anticipate a reduction. This creates a net balance of 33% (up three points from 30%) in December, and while the second week of the survey was lower, hiring intentions still remained positive.

Pay expectations continue to show strength, reaching new highs of 48% and 26% for firms expecting average pay growth of 2% and 3% respectively. More than one in ten businesses (14%) anticipate pay growth of 4% or more which remains in line with the last three months.

#### The aff is an unpredictable legal shift that wrecks it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Defense

#### No wars

Walt 20. [Stephen, Robert and Renée Belfer professor of international relations at Harvard University and a columnist for Foreign Policy. Will a Global Depression Trigger Another World War?. Foreign Policy. 5-13-2020. https://foreignpolicy.com/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

## Federalism Adv

### No Internal Link – 1NC

#### Advantage starts at zero – no 1AC card says both ‘filed rates doctrine’ and ‘state immunity’ doctrine because they’re different exemptions – all of their internal links are in the context of state immunity which the aff doesn’t affect

### Telehealth Fails – 1NC

#### Telehealth fails – lack of uniformity, broadband access, and existing disparities

Lee et al 20. Dr. Nicol Turner Lee is a senior fellow in Governance Studies, the director of the Center for Technology Innovation, and serves as Co-Editor-In-Chief of TechTank; Jack Karsten was a Senior Research Analyst with the Center for Technology Innovation at The Brookings Institution; Jordan Roberts holds two Political Science degrees from Appalachian State University: a B.S. in American Government and an M.A. in American Politics. "Removing regulatory barriers to telehealth before and after COVID-19," Brookings Institute, May 6, 2020. https://www.brookings.edu/research/removing-regulatory-barriers-to-telehealth-before-and-after-covid-19/

GENERAL BARRIERS TO TELEHEALTH ADOPTION

Prior to the coronavirus outbreak, several major barriers existed for those who wanted to embrace telehealth alternatives. The list of hurdles expressed by both urban and rural health centers involved cost and reimbursement policies, licensure, equipment issues, incompatible electronic health records, and gaps in rural broadband.[33] Below, some of these barriers are outlined before describing, in some detail, the federal and state policies that either support or attempt to bypass these limitations.

Reimbursement

Because federal reimbursement policies are centered on Medicare, they are narrowly construed and have imposed limitations on where telehealth services may take place, both geographically and by facility, and what services are covered. Moreover, each state dictates separate Medicaid policies, creating a patchwork of telehealth laws and regulations across the nation. Over the last few years, states have begun to pass legislation to encourage private payers to reimburse telehealth-delivered services.[34]

However, telehealth laws have been written in such a way where they may be a parity in coverage services, in payment, or both. While payment parity acts as a strong incentive for more physicians to adopt telemedicine platforms, enforcing equal payment could also undermine telemedicine’s cost-effectiveness.[35] Legislative directives have long impacted the delivery of telehealth initiatives, largely because the meaningful adoption of telehealth often rests on statutory language.

While fully embracing telehealth under existing state and federal policies should be priority, new policies must address evolving concerns related to reimbursement policies and licensing laws. Payment models that reward value in the remote delivery of services, rather than paying providers at capped rates (regardless of the service) may encourage providers to utilize telehealth as a service, particularly in a redefined approach.[36] Further, streamlining the credentialing process with standard requirements would also allow physicians to apply for credentials at multiple hospitals at once, which leads into the next barrier to adoption.[37]

Licensure

Federal and state licensing laws have inhibited the adoption of telehealth since its inception. Policies vary across states, and these often require providers to obtain some form of licensure in each state that they wish to practice in. One of telehealth’s most impactful benefits is to connect patients and doctors at a distance. Licensure laws may limit the geographic footprints of physicians, while giving patients access only to doctors who have a current license in the state where they reside. Some states have tried to knock down the artificial barriers erected at the state boundary lines by joining the Interstate Medical Licensure Compact. In 2019, the Florida legislature passed a new law to authorize out-of-state health-care professionals to deliver telehealth services to local patients.[38]

Rural broadband gaps

Successful implementation of telehealth among rural communities requires the expansion of broadband internet access. Almost all forms of telehealth initiatives require an internet connection. While the lack of broadband access disproportionately affects rural areas, urban and suburban areas may also have subscribers who experience challenges getting online, like the cost of service. Without access to high-speed broadband networks, a large portion of rural populations will be challenged to partake in virtual medical care.

Existing health disparities

Along the same line, health disparities, especially among low-income populations and communities of color, may make it more difficult to access telehealth services. These phenomena often correlate with poverty, geographic isolation, and the likelihood of far less healthy alternatives for food and diet. Health disparities are also emboldened by disproportionate access to quality health-care facilities or the fragility of household economic resources, which deters vulnerable populations from seeking initial and follow-up care. Among medically marginalized communities, the hospital emergency room or urgent care centers tend to be the first options for treatment, resulting in exorbitant patient expenses which are reasons not to see a doctor in the future.

Removing barriers to telehealth adoption and use may be effective for members of vulnerable populations who also have exponential access to smartphones. Moreover, by waiving copayments for telehealth visits or implementing waivers to purchase the necessary prerequisites to support telehealth use (i.e., data plans, smartphones, or internet access), quality care would be available to an entire population who may have previously not considered telehealth as a viable platform to receive medical care.[39] Enhancing consumer education of telehealth platforms among these groups also plays a role in reducing the distrust often associated with these modes of service.

Generally, states have attempted to provide relief to all or some of these barriers, but the efforts of their regulators alone are not enough to persuade providers and health systems to invest the time, energy, and money to offer telehealth services. Consequently, state or federal public policies must incentivize providers and health-care systems to be more favorable to telehealth adoption. For example, offering financial incentives for providers to adopt telehealth may increase usage—much like the recent waivers granted under COVID-19. While health centers can motivate providers to adopt telehealth by providing financial incentives, organizational culture shifts are fundamental in embracing telehealth.

### Aging Crisis Defense – 1NC

#### No modeling claim in the 1AC – aging crisis is worldwide, not in the US [Emory = Blue]

1AC Vladev ’20 [Ivaylo and Rositsa Vladeva; July 1; Konstantin Preslavsky University of Shumen, Faculty of Natural Sciences; Sciendo, “The Demographic Problem – One of the Main Problems of Contemporary,” vol. 7, no. 2]

Conclusions

Based on the report we can formulate the following results:

- The processes in the globalizing world are generating the global problems of today. They act as driving forces in the development of the world system.

- On the basis of their relevance and significance, in order to prove the trinity of nature – man – society, fourteen global problems are formulated in three large groups, depending on the spheres in which they manifest.

- Problems related to the dynamics of the human population affect the whole world and in some parts of the planet there is overpopulation, which can lead to depletion of natural resources as well as poverty and malnutrition.

- Global efforts to resolve the global demographic problem are contrary to the interest of countries that have unfavourable demographics including Bulgaria.

- There are countries with decreasing birth rates and increasing life expectancy everywhere in the world. The aging population leads to higher healthcare and pensions costs, and the number of workers and tax payers is steadily decreasing. As a result, these countries are at risk to become „demographic bombs“ which means a crisis due to too few people working.

- The demographic picture of the world is highly contrasting and moves between the two extremes - a demographic explosion and a demographic crisis. The factors that determine it affect the socio-economic development, income distribution, employment, unemployment, social security, health care, education, housing and the sources of water, food, energy, raw materials as well as environmental conditions and climate change.

- Stabilizing the population of our planet and resolving the demographic problem in the future is not an end in itself but a means of improving the lives of the present and future generations.

# 2NC – Fullertown Doubles

## Counterplan

### Solvency---T/L---2NC

#### Embarrassing when first 1AC card is a regs solvency advocate---FERC can ensure rates are just and reasonable.

Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

Today, these “zombie energy laws” entrench incumbent market power and prevent the deployment of renewables.15 The filed rate doctrine, for example, continues to shield energy companies from civil antitrust suits even though most energy companies no longer formally file rates with regulators.16 The requirement that regulators assess the financial viability of transmission projects before issuing a certificate of public convenience and necessity to site new transmission lines is a vestigial remnant of a rule that was once needed to prevent new entry into a utility’s exclusive service territory.17 In these ways, courts and regulators have clung to many of the rules that were created to protect customers in the public utility era but have since outlived their useful purpose.18 Footnote 16: 16. See Rossi, supra note 11, at 1646 (noting how courts have “allow[ed] the filed tariff doctrine to become an independent, firm-specific antitrust defense”). In twin cases decided in 1956, the Supreme Court instructed the Federal Power Commission (the regulatory predecessor to the Federal Energy Regulatory Commission (“FERC”)) to presume that any freely negotiated wholesale transaction was “just and reasonable” for purposes of the Federal Power Act and the Natural Gas Act. See Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 372 (1956) (holding that contract rates freely negotiated between sophisticated parties meet the just-andreasonable standard required by the Federal Power Act, even if they are unprofitable to the public utility); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344–45, 347 (1956) (same, but for the purposes of the Natural Gas Act). The presumption that freely negotiated energy contracts are “just and reasonable” applies even if FERC did not have an initial opportunity to review the contract. See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n, 558 U.S. 165, 167 (2010) (“Under this Court’s Mobile–Sierra doctrine, FERC must presume that a rate set by ‘a freely negotiated wholesale-energy contract’ meets the statutory ‘just and reasonable’ requirement.”); Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 530 (2008) (“The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.”). Article continues: These zombie energy laws are now seriously degrading energy markets. They allow incumbents to raise prices and, worse, prevent clean energy companies from competing with incumbent fossil fuel generators. For example, Arkansas regulators recently blocked a multibillion dollar transmission line that would have enabled more than $7 billion of investment in renewable energy facilities after finding that only incumbent utilities are eligible to receive a certificate of public convenience and necessity in the state of Arkansas.19 Although the project would have reduced electricity prices in the southeast and provided enough clean energy to power over a million homes a year, it has been repeatedly delayed in part because state energy regulators have determined that only incumbent utilities were legally authorized to construct new transmission lines.20 The certificate of public convenience and necessity was originally designed to ensure that rate regulated utilities were able to honor their service obligations. Today, the requirement that regulators assess market demand before granting a certificate of public convenience and necessity entrenches incumbent market power and impedes the development of renewable suppliers. Numerous scholars and policymakers have questioned the usefulness of these doctrines.21 This Article’s contribution is therefore not to provide a novel critique of these zombie energy laws. It is instead to point out that many of the seemingly diffuse problems that pervade modern electric power markets can be attributed to the historical origins of electricity regulation. All of these laws emerged to mitigate market power abuses under a regulatory system that has largely been abandoned. Their continued application is now facilitating market power abuses and blocking the development of cleaner and cheaper energy sources.

---THEIR EVIDENCE ENDS HERE---

Moreover, this Article argues that the Federal Power Act (“FPA”) can plausibly be interpreted to make it illegal for regulators to apply some zombie energy laws in competitive markets when those laws serve no useful purpose and allow incumbents to abuse their market power. The FPA instructs the Federal Energy Regulatory Commission (“FERC”) to make sure that wholesale electricity rates are “just and reasonable” and not “unduly discriminatory.”22 Rate regulation of vertically integrated utilities, the certificate of public convenience and necessity, and the filed rate doctrine may have once protected consumers and mitigated market power abuses. Insofar as these zombie energy laws have the opposite effect today, they are incompatible with FERC’s statutory obligation to maintain “just and reasonable” wholesale rates.23 This Article thus argues that the transition to competitive power markets renders “unjust and unreasonable” many of the very laws and regulations that had supported “just and reasonable” wholesale rates when energy markets were rate regulated.24

#### Solves better---private antitrust fails and regulators have to take charge---their 1AC author

Sandeep Vaheesan 13. Special Counsel, American Antitrust Institute. "Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity," University of Michigan Journal of Law Reform 46, no. 3 (Spring 2013): 921-974. HeinOnline.

With the limits of private antitrust enforcement in wholesale power markets, state and federal regulators must play the lead role in creating competitive market structures. They should apply greater scrutiny to generation mergers and extant market power, promote the construction of new transmission lines, and encourage the deployment of real-time pricing for ratepayers. The first two policies would address two supply-side factors-high market con- centration and small geographic markets-that have made power markets susceptible to the exercise of unilateral and collective mar- ket power by generators. The third policy would help remedy the inelastic demand that makes the exercise of market power so profit- able for generators. Although many skeptics view the creation of electricity markets as a failed experiment, regulators could still cre- ate markets conducive to competition and redeem the once-great promise of industry restructuring.

#### 1. The CP restores the previous regulatory regime---solves pricing [Emory = Blue]

1AC Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Legislative and regulatory action have transformed the governance of gas and electricity industries since the 1970s. For much of the twentieth century, comprehensive public utility regulation governed the production and sale of gas and electricity. Federal and state regulators treated both industries as generally monopolistic and subjected firms to price regulation. Under this cost-of-service regulation, federal and state regulators established rates that allowed sellers of gas and electricity to recover their costs and earn a reasonable rate of return on their capital investments. Over the past 40 years, Congress and the Federal Energy Regulatory Commission (FERC) have curtailed the public regulation of prices in natural gas and electricity and introduced market competition in both industries. These legislative and regulatory actions have replaced regulator-approved rates with market-based prices in one or more levels of the gas and electric supply chains. Richard J. Pierce, Jr., The Evolution of Natural Gas Regulatory Policy, 10 Nat. Res. & Env. 53 (1995); Paul L. Joskow, Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector, 11 J. Econ. Persps. 119 (1997).

#### 2. It obfuscates the need for antitrust [Emory = Blue]

1AC Vaheesan ’19 [Sandeep; October 25; Legal director at the Open Markets Institute. Vaheesan previously served as a regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans; “MOTION OF OPEN MARKETS INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT,” <https://static1-squarespacecom.proxy.lib.umich.edu/static/5e449c8c3ef68d752f3e70dc/t/5eaa1d9d2790182e187cc171/1588207017816/19-1678_Documents-as-filed.pdf>; KS]

Under a system of market-based pricing, full and robust antitrust enforcement is vital to protect the public from the collusive, exclusionary, and unfair practices of producers and traders of electricity and natural gas. See Alfred E. Kahn, Deregulatory Schizophrenia, 75 Calif. L. Rev. 1059, 1059 (1987) (“While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”). In this case, however, the Court expanded the filed rate doctrine, which was created to protect the integrity of regulatorapproved rates, to immunize Eversource Energy and Avangrid’s manipulation of market prices for electricity and gas from a private antitrust lawsuit. In broadening the filed rate doctrine to dismiss the plaintiff-appellant’s lawsuit, the district court granted a de facto license for sellers of gas and electricity to use their market power to transfer millions or even billions of dollars from the public into their own coffers.

#### 3. In fact, their evidence says that antitrust is ill-suited to change rates just before where their card starts---must be regulatory change to be effective [Emory = Blue]

1AC Gorodetsky ‘9 [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; Tulane Environmental Law Journal, “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6]

Last, it is critical to understand that antitrust law is poorly suited to resolve the policy issues which deregulation necessarily entails.39 The role of antitrust law is confined to remedies and deterrence, not to repairing anticompetitive harms.40 Antitrust law is best suited to "preserv[e] competitive incentives that are consistent with the regulatory regime . . . whatever the regime's internal merits."41 The role of curing market defects should be assumed by the legislature, not the courts. The courts are poorly suited to determine proper rates and prices.42 Antitrust law takes the market as it is, "warts and all, and tries to prevent injuries to competition that the regulatory process leaves untended."43 Antitrust law's role is most efficient where regulation stops short due to various impediments, such as limited legislative authority to grant retroactive compensation.44

**[Michigan’s card starts]**

B. The Unique Nature of the Electricity Market and the Greater Potential for Market Abuse

The electricity market is different from any other competitive market in a way that makes it hard to control. This makes the electricity industry particularly prone to market power abuse by individual utilities.45 The wholesale electricity market is currently under FERC's jurisdiction.46 That means that private utilities are required to file their tariffs with FERC for its review and approval.47 During the approval process, FERC reviews the market share of the utility in order to determine whether the utility possesses the market power necessary to manipulate the market.48 Market power means the power of a single firm to drive prices upwards without losing its consumers.49 In its extreme form, market power leads to monopoly.50 Monopolies hurt consumers because they produce too little and charge too much.51

Currently, FERC employs the Federal Guidelines developed by the DOJ and the FTC for nonelectricity markets as a benchmark for the critical market share under which the utility is incapable of exercising market power.52 This market set by DOJ and FTC stood at twenty percent.53 What FERC does not account for is that the unique characteristics of the electricity market "directly translate into enhanced market power for generators and traders holding much smaller market shares than 20%."54 The nature of the electricity market is such that when the right conditions are met, even a utility with as little as one percent of the market share can exercise significant market power by withholding capacity and driving the prices upwards.55

The electricity market is unique in several ways. First, the demand for electricity is highly inconsistent over time.56 Second, electricity cannot be stored.57 That means that "[e]ach unit consumed must be produced at exactly the nanosecond it is consumed."58 Thus, unless consumers are responsive in their demand for electricity, the only way to stabilize prices is to add more generators because the future capacity cannot balance out the present capacity.59 The demand for electricity is fairly inelastic due to the lack of price information among consumers.60 Price elasticity of demand describes "the extent to which quantity demanded decreases in response to an increase in the price of a good or service."61 Therefore, consumer demand does not act as a constraint upon market power because consumption will continue at the same rate regardless of the price charged.62 Further, the number of generating facilities is relatively fixed due to the substantial entry barriers for production of electricity.63

Thus, varying demand for electricity and the inability to store electricity may result in tremendous price volatility in the electricity market.64 Further, these characteristics open the door to potential market power abuse by making it possible for one firm to artificially inflate prices by withholding its electricity generation capacity or raising its prices with impunity.65 The fact that the exercise of market power in the electricity market does not demand collusion makes the electricity market particularly vulnerable to abuse.66 In case of collusion, however, the price of electricity can soar even higher.67

Third, electricity is transmitted through an integrated transmission grid which may include several regions in the United States and Canada.68 Consequently, individual states can impact the market significantly yet have very little power to control it.69 Further, because electricity cannot be stored, the only way to operate the grid without causing blackouts is to balance generation and demand carefully in order to avoid surplus in the wires.70

#### Grid – modernization solves.

Buchanan and Sulmeyer ’16 (Ben and Michael; 12/13/2016; post-doctoral fellow at the Belfer Center’s Cyber Security Project, director of the Belfer Center’s Cyber Security Project; “Russia and Cyber Operations: Challenges and Opportunities for the Next U.S. Administration,” <http://carnegieendowment.org/2016/12/13/russia-and-cyber-operations-challenges-and-opportunities-for-next-u.s.-administration-pub-66433>; Date Accessed: 7/10/2017; DS)

To better position the United States against increased Russian cyber operations, an approach designed to improve American operations in three areas is essential: defense, detection, and deterrence. Implementing these recommendations in these areas will enable U.S. policymakers to have greater confidence in the baseline level of security in key networks, a better chance of quickly identifying and thwarting Russian intrusions when they do occur, and a clearer posture for limiting Russian behavior. The standard of baseline defenses must improve, both in government networks and in privately operated critical infrastructure. Network defenders should prioritize deploying audited code—software that has been checked for vulnerabilities—and applying security updates in order to minimize the opportunities for intrusion as much as possible. Ideally, such efforts will minimize the percentage of successful intrusion attempts, enabling defenders to focus their time on more sophisticated threats, such as those potentially posed by Russia. This will likely involve replacing older so-called legacy systems that were not built with security in mind. In the case of federal networks, Congress should authorize the modernization of important information technology infrastructure; the 2016 budget request from President Barack Obama contains initiatives that are a useful starting point.21 A related component of defense is detection. The faster adversaries can be spotted and removed from a network, the less damage the adversaries will be able to do. Better perimeter defenses are a fundamental part of cybersecurity, but they are not by themselves sufficient. Within both the private and public sector, networks should be designed or, where applicable, redesigned to increase the visibility defenders have into all activity taking place. With better network visibility, defenders should monitor their own networks for anomalous activity that could indicate the presence of an intruder.22 Older systems will likely have to be replaced over time in order to achieve this; President Obama’s proposal for information technology modernization in government is also a good start.23 To aid this effort, the United States government should increase its information sharing with the private sector. It should prioritize efforts to declassify as much as possible threat intelligence on sophisticated foreign actors, including Russian operators, and share this data with the relevant sector-specific information sharing and analysis organizations. When this threat intelligence is married with better network architecture, ongoing detection of malicious activity becomes a more tractable problem. Where appropriate, the United States should increase its intelligence collection in order to inform this effort. In addition, the U.S. government should lead or encourage a widespread effort to detect adversaries already lurking in American critical infrastructure. This mission, which will likely involve a private-public partnership in some areas, should seek to identify intrusions that have already taken place and remove them from the affected networks. The goal should be to reduce, as much as possible, the Russian ability to perform ongoing collection and to hold key U.S. targets at risk. Decontamination of networks is a challenging and resource-intensive undertaking, but it is vital. The last recommendation relates to deterrence. The United States should make it clear that there are costs for intrusive cyber operations, especially when those operations exceed acceptable norms of behavior. In order to make this deterrent credible, the United States must be prepared to retaliate for activities it deems inappropriate. But this response does not need to be limited to cyber operations. Indeed, there is already a precedent for non-cyber-operation responses to intrusions, a concept known as cross-domain deterrence. In response to cases like the hacking of campaign officials and the leaking of their personal emails, the United States should identify the perpetrators and consider an unambiguous public rejoinder. The Department of Justice has obtained indictments against Chinese and Iranian cyber operators; where appropriate, it should consider using that tool against Russian actors. This naming and shaming, combined with the possible restrictions on travel—due to fear of arrest—that accompany indictments indicates to operators that the United States is capable of doing attribution and that there perhaps will be consequences for their actions. In addition, sanctions in response to cyber activity may also be merited. The 2015 executive order signed by President Obama enables the United States to impose sanctions on other nations for their behavior in cyberspace. With Russia, there are already sanctions in place due to the conflict in Ukraine, but additional targeted sanctions for cyber activity may be warranted.24

#### Telehealth – federal uniformity solves.

Lee et al 20. Dr. Nicol Turner Lee is a senior fellow in Governance Studies, the director of the Center for Technology Innovation, and serves as Co-Editor-In-Chief of TechTank; Jack Karsten was a Senior Research Analyst with the Center for Technology Innovation at The Brookings Institution; Jordan Roberts joined the Locke Foundation in the summer of 2018 as Health Care Policy Analyst. "Removing regulatory barriers to telehealth before and after COVID-19," Brookings, May 6, 2020. https://www.brookings.edu/research/removing-regulatory-barriers-to-telehealth-before-and-after-covid-19/

FEDERAL VERSUS STATE EXECUTION OF TELEHEALTH

The exertion of authority at the various levels of government can exacerbate some or all these barriers. While the federal and state governments have their hands in regulating the use of telehealth in some capacity, a lack of uniformity between these entities can create hesitation among patients, providers, or insurers to adopt telehealth. Moreover, within branches of government, the absence of consensus further stalls implementation.

Generally, federal laws have either been permissive or dismissive of telehealth provisions. Historically, the federal government has been involved in regulating telehealth initiatives within the Medicare program. But Medicare has been slow to change restrictive standards for the use of telemedicine. For example, following outdated standards created before the rise of telehealth, Medicare restricts reimbursement of this practice to those in rural areas and only to be performed at authorized “originating sites,” which excludes a patient’s home.[40] More recent guidance from the federal government attempted to extend the use of telemedicine to more patients by expanding services that could be reimbursed within Medicare to include kidney care and acute stroke. Furthermore, accountable care organizations were provided with more flexibility to pay for telehealth services in additional locations such as one’s home. But overall, restrictions on what Medicare can pay for continues to hinder the usage telehealth practices.

Realizing the cost-savings and quality-of-care benefits from telehealth requires targeted policies at the appropriate levels of government. To this end, it is instructive to review the history of health-insurance markets to understand how their regulation and administration are divided between state and federal government. The federal government runs health-insurance programs for specific groups, including employees, veterans, and senior citizens, among others. Programs run exclusively by federal agencies include Tricare for military service members and their families, the Veterans Health Administration for veterans, and Medicare for senior citizens aged 65 and older, younger individuals with disabilities, and those with end-stage renal disease. These groups represent only 15% of the American population, and their health needs may not generalize to a broader population.[41] Federal telehealth rules can also conflict with state-run programs, as in the case of Medicare limiting its use to rural areas while most state regulations contain no such geographic coverage limitations.[42]

In some cases, states share responsibility with the federal government for health-insurance programs, particularly those targeted to low-income households. States regulate private insurance markets besides mean-tested programs. The matter of state regulation of insurance was settled in 1945 by the McCarran-Ferguson Act, which effectively created 50 state markets for private health insurance after adoption by Congress. By then, the IRS had declared employee health-care benefits tax exempt, incentivizing the purchase of private insurance in statewide markets.[43] The establishment of Medicaid in 1965 empowered states to extend health insurance to certain low-income groups, and the ACA expanded Medicaid eligibility to adults earning up to 138% of the poverty line. Between Medicaid and private insurance, over three-quarters of Americans purchase health insurance regulated at the state level.[44] But these initial laws, in many respects, have led to the observed fragmentation in health-care regulation, which are points made in the next section.

INCONGRUENCIES IN STATES’ TELEHEALTH ADMINISTRATION

State telehealth laws frequently note that no two states have the same regulations when it comes to coverage and payment.[45] States range from having no telehealth parity laws that specify which telehealth services are covered and their reimbursement rate, to having full coverage and payment parity for telehealth services. Such variables in state administration contribute to differences among telehealth laws across states. Further, state laws often do not place geographic restrictions on telehealth coverage.

Among health-care professionals, states also act as payers of insurance, both for their own employees and for the 21% of Americans who use Medicaid.[46] In addition to insurance regulators that set rules for the private markets, state Medicaid agencies establish rules for how beneficiaries can use telehealth services. Most states have similar telehealth rules for Medicaid and private payers, but there are some exceptions. For instance, private insurance can generally reimburse for telehealth when the patient is at work or at home, while several Medicaid state guidelines specify that care must be delivered in a qualified health-care facility to be reimbursed.[47]

From a policy perspective, 50 state legislatures have more leeway to innovate in terms of the provision of health care than does Congress. States also hold the authority to regulate health insurers, and there are also fewer patients served in each state-run health-care program. Unfortunately, there are few transfers of learning across state governments—especially in the areas of successes and failures and the facilitation of policies across state borders.

Though this list is not exhaustive, many states use managed care organizations (MCO) to administer benefits for Medicaid recipients. The state normally pays MCOs on a fixed, per-member, per-month rate. This means that the MCO’s profit margin comes from administering successful care for the individuals enrolled in their plans below the total allotment that the MCO receives from the state. Incorporating cost-effective telemedicine visits is one-way that MCOs are attempting to lower costs, since there isn’t a need to be reimbursed separately for telemedicine when a patient’s care is paid for on a capitated monthly rate. Many of these MCOs also offer private insurance plans. While it’s beyond the scope of this paper, opportunities exist to explore MCOs’ use of telehealth and its effective incorporation into private plans and among all providers, regardless of who is paying for the service.

State benefits to patients, providers, and payers

The authors believe that state regulation of telehealth services can bring leverage to patients who prefer to see their local health-care providers remotely. Within state borders, telemedicine can expand the geographic area that a doctor and hospital can serve, and patients living in rural areas would not need to travel for routine consultations with primary-care physicians or specialists.

Telehealth services supplementing in-person care can provide more frequent access to care than either via telehealth or in-person visits. Providers also benefit from state-level regulation, since doctors primarily serve local patients, are reimbursed by state-licensed health insurers, and are licensed by state medical boards. Further, states define standards of care for its medical professionals. Doctors must navigate both their professional scope of practice as well as state insurance-reimbursement rules to offer telehealth services.

Finally, private health insurance is already sold and regulated at the state level, which substantiate its role at the epicenter of health policy. Payers can decide how telehealth can help them meet their coverage obligations under state regulations.[48] In addition to working with in-network providers, some payers have contracted with third-party providers to provide telehealth services to their members.[49]

State roadblocks

However, telehealth implementation at the state level faces additional obstacles, despite their suitability for more customized services. Though 50 state governments can try many different approaches simultaneously, this can also delay the diffusion of telehealth services. Meeting requirements of 50 state health-insurance markets and medical boards delays the nationwide availability of new telehealth services. States also vary greatly in size and population. For example, a doctor offering a telehealth service in California or Texas can cover many more people over a larger area than a doctor in New Hampshire or Vermont. Incentives to adopt telehealth may be smaller in states with fewer patients to serve.

In a report on telemedicine adoption in North Carolina, Katherine Restrepo outlined several potential solutions to telehealth adoption across states.[50] One is expanding the number of states that have signed the Interstate Medical Licensure Compact, which streamlines the process for physicians applying for licensure in other member states. However, this still limits telehealth practice based on state licensure. Another solution would be a federal law that designates the provider’s location as the location in which care takes place for the purposes of licensure and payment. This would preserve the authority of state medical boards to grant licenses, while allowing physicians to treat patients remotely in other states.

Though states regulate private insurance markets, the Employee Retirement Income Security Act (ERISA), passed by Congress in 1974, exempts employer-funded health-care plans from state insurance regulations. Rather than buy employee health insurance from a third-party vendor, it can be cost effective for larger firms to spread out medical expenses over their many employees. In 2019, 61% of covered workers had an insurance plan that was wholly or partially funded by their employer, and this figure rises to 86% for firms with more than 1,000 workers.[51] Telehealth services for these covered employees must comply with ERISA, either through their health plans or in separate filings for standalone benefits.[52] This high percentage of workers with plans that are exempt from state regulations complicate efforts to promote telehealth adoption through state law.

#### Antitrust and FERC authority are distinct

Milton A. Marquis ‘2. Attorney at Jenner & Block, LLC. "DOJ, FTC and FERC Electric Power Merger Enforcement: Are There too Many Cooks in the Merger Review Kitchen," Loyola University Chicago Law Journal 33, no. 4 (Summer 2002): 783-790. HeinOnline.

Electric utility mergers in the United States are subject to review not only from a federal antitrust agency-either the Federal Trade Commission (FTC) or the Department of Justice (DOJ)-but must also obtain approval from the Federal Energy Regulatory Commission (FERC). As I will discuss, the federal antitrust agencies and the FERC operate under different statutes and regulatory regimes. Shared federal merger jurisdiction between sectoral regulators and competition authorities is strictly an American phenomenon. In the rest of the world, the competition agency almost always reviews transactions involving every industry sector.

#### “anti-trust laws” – must be the doj or ftc

Jarod Bona 21. Bona Law PC. "Five U.S. Antitrust Law Tips for Foreign Companies". Antitrust Attorney Blog. 1-16-2021. https://www.theantitrustattorney.com/five-u-s-antitrust-tips-foreign-companies/

1. Two federal and many state agencies enforce antitrust laws in the United States

The United States government has two separate antitrust agencies—the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The FTC is an independent federal agency controlled by several Commissioners, while the Antitrust Division of the DOJ is part of the Executive Branch, under the President.

Both of them enforce federal antitrust laws (among other laws). Their jurisdictions technically overlaps, but they tend to have informal agreements between each other for one or the other to handle certain industries or subjects. If you are part of a major industry, your antitrust lawyer may be able to tell you whether the DOJ or FTC is likely to oversee competition issues in your field.

#### ‘Expand the scope’---requires judicial involvement

Gibson Dunn 21. Lawfirm. Gibson Dunn partner Howard S. Hogan served as an expert witness for 1-800 Contacts. "Second Circuit Issues Important Ruling on Trademark Settlements and Antitrust/IP Interface". Gibson Dunn. 6-14-2021. https://www.gibsondunn.com/second-circuit-issues-important-ruling-on-trademark-settlements-and-antitrust-ip-interface/

Finally, the decision in 1-800 Contacts also serves as a reminder that, in an era in which commentators are encouraging more aggressive and novel antitrust enforcement, the federal judiciary remains the ultimate arbiter of federal antitrust policy. Enforcers seeking to expand the scope of U.S. antitrust law must do more than bring novel cases—they must also prove their cases with hard facts in a court of law.

#### ‘Core antitrust laws’---requires modifications to Sherman, Clayton, or FTC Act

Thomas Horton 10. Professor of Law and Heidepriem Trial Advocacy Fellow, University of South Dakota School of Law. “Rediscovering Antitrust's Lost Values.” The University of New Hampshire Law Review. https://scholars.unh.edu/cgi/viewcontent.cgi?article=1305&context=unh\_lr

Part II of this Article discusses Congress’s historical balancing and blending of fundamental political, social, moral, and economic values to create a constitutional-like set of flexible laws that can be adapted to unforeseen and changing economic and political circumstances.22 Part II.A. briefly reviews some of the extensive scholarship addressing Congress’s balancing of values and objectives in its core antitrust laws including the Sherman, Clayton, and FTC Acts. Parts II.B. and C. explore the less-studied balancing of political, social, moral, and economic values and objectives in more recent antitrust legislation.23 Part II.B. specifically examines the legislative debates undergirding the passage of the HSR Act. 24 Part II.C. then turns to the debates and discourse that led to the passage of the NCRA in 1984 and the subsequent National Cooperative Production Amendments of 1993 and 2004. 25

#### functional severance is bad---moots lit base and allows teams to shift goalposts through plan writing---both fry ground---here’s…

DOJ ND. “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.

#### External laws don’t “expand the scope” even if they constrain the law.

Francisco Costa-Cabral and Orla Lynskey 17. Francisco Costa-Cabral, Emile Noël Fellow, NYU School of Law. Orla Lynskey, Assistant Professor, LSE Law Department. “Family ties: the intersection between data protection and competition in EU Law.” Common Market Law Review, 54 (1). pp. 11-50. ISSN 0165-0750. https://core.ac.uk/download/pdf/77615074.pdf

Secondly, data protection law can impose external limits on the enforcement of competition law, as a result of its status as a fundamental right. The right to data protection could, for instance, preclude the Commission from accepting commitments or remedies from undertakings that would interfere with that right. In such circumstances, data protection acts as an external constraint on competition law: it does not fit within the logic of competition, or align with its objectives. To date, the impact of the right to data protection on competition law has only been explored in relation to the rights of individuals who are subject to competition investigations.16 The Court of Justice of the EU (the Court) has nevertheless confirmed that the EU Charter constrains the actions of EU Institutions when they adopt legally binding measures. 17 This paper argues that such limitations also apply to the Commission when enforcing competition law. Again, this external constraint does not expand the material scope of competition law to incorporate public policy objectives: in this situation, data protection would not trigger the application of competition law but merely preclude or alter its application.

#### jurisdiction: the plan expands the doj and ftc role

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>

There is a crucial battle playing out in the world of Internet access provision. While the Internet is the natural home of competing business giants and warring digital avatars, the contest that will have the most sweeping ramifications for the future of the Internet is the turf war being waged between the Federal Communications Commission (FCC), on the one hand, and the Federal Trade Commission (FTC) and the Department of Justice (DOJ), on the other.1 Nothing less than jurisdiction over the development of the Internet is at stake.

Jurisdiction over Internet access provision is not the first confrontation between these particular government agencies; in fact, they have clashed many times.2 But it is the current iteration of the FCC’s “net neutrality” regulations that has generated the latest contest. Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.3 For some, net neutrality stands further for the proposition that Internet access operators should not be permitted to provide different qualities of service for certain application providers (e.g., guaranteed speeds of transmission), even if those application providers can freely choose their desired quality of service.4 Net neutrality has reinvigorated what may be described as an underlying interagency tug of war that reaches deep within, and far beyond, the communications industry.

Although the two regimes share a commonality of purpose—to protect consumers and to promote allocative efficiencies in production—the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws “typically aim at similar goals—i.e., low and economically efficient prices, innovation, and efficient production methods” —regulation looks to achieve these goals directly “through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.”5 The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?6

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets— regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures.7 Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly.8 In the vast major- ity of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

This Article sets forth a framework to identify the boundaries between FCC regulatory power and antitrust authority. The goal is to pinpoint for Congress the problematic use of regulatory discretion in defining, or redefining, those boundaries and to propose the standard by which Congress may address inappropriate use of existing FCC jurisdiction. Specifically, this Article creates a new categorization of “procedural opportunism” and “substantive opportunism” to identify problematic, regulatory assertions of jurisdiction. The central issue examined in this Article is to posit what is (or should be) the boundaries of antitrust law in relation to the FCC’s regulatory authority. This important issue has reached a point of public crises in the current net neutrality debate.9 Rather than act reflexively, this is an opportunity for Congress to act clearly to redefine the boundaries between the two regimes that have otherwise been blurred by regulatory overreach.

#### Doesn’t get them out of “antitrust,” “scope,” “expand,” or anything else – “anti-competitive” alone is not constitutive of the perm’s legitimacy.

Gene Kimmelman 18. President and CEO of Public Knowledge. Before the Federal Trade Commission. “Competition and Consumer Protection in the 21st Century”. https://www.ftc.gov/system/files/documents/public\_events/1415284/ftc\_hearings\_session\_5\_transcript\_11-1-18\_0.pdf

But antitrust is not the only tool of competition policy, let alone labor policy or social welfare-type policies. We have sector-specific legislation across almost every sector of this country that deals with ways to both promote competition and promote other values. I think we need to align those with antitrust, and I think it is as much a role of the antitrust enforcers to help those agencies figure out how to work closely with strong antitrust enforcement.

The one sector we do not have that that I think we need to confront is the tech sector. It does not have that history of sector-specific regulation. We have a lot of questions being raised, both vertical, horizontal, potential competition. Maurice raises data. That is an important factor. I think we need to look carefully and say what, if anything, should there be in public accountability that goes beyond antitrust in that sector. I think that would be the productive way of taking all the good ideas that have been presented and framing it into the right policy debate for our society to address in the digital economy.

#### Still severs antitrust – their ev says the FERC can “waive the filed rates doctrine” in the context of their notice requirements, NOT in the antitrust sense [Emory = Blue]

2AC Farmer ’88 [Kiplyn; American lawyer specializing in personal injury, criminal law, and worker compensation; “FERC WAIVER OF THE FILED RATE DOCTRINE: SOME SUGGESTED PRINCIPLES,” <https://www.eba-net.org/assets/1/6/31_9EnergyLJ497(1988).pdf>; KS]

On April 22, 1988 the D.C. Circuit, on rehearing, affirmed that the Fed- eral Energy Regulatory Commission (FERC)1 is free to consider whether it has the authority to waive the "filed rate doctrine.' 2 This determination was the result of a suit brought by Columbia Gas Transmission Corporation (Columbia), a gas purchaser, after the FERC authorized five pipelines to col- lect a surcharge over and above the rates which were filed with the Commis-sion at the time of sale.3 The FERC maintained that it has implied authority to waive the filed rate doctrine4 under the Natural Gas Act (NGA) and that its authority was upheld in City of Piqua v. FERC.6 Although the court over- ruled the Commission's decision in ColumbiaGas7 because the affected parties were not on notice as to the increase in rates caused by the waiver,8 it opened the door to the possibility of allowing the FERC to establish guidelines regard- ing the circumstances in which it could waive the filed rate doctrine in the future. If the FERC is to retain authority to waive the doctrine when it determines that such a waiver is required in order to carry out its statutory mandate that rates and charges be just and reasonable,1" it must establish cri- teria consistent with the principle that the FERC is prohibited from retroac- tive rate-making.'1 This article focuses on the issue of the FERC's authority to waive the filed rate doctrine by permitting rate changes to be made effective retroactively and recent judicial interpretations of the doctrine which the FERC will be required to consider in establishing its guidelines.

**[Michigan’s card ends]**

II. THE FILED RATE DOCTRINE

The "filed rate doctrine" requires that a regulated supplier not charge any rate other than that filed with the proper regulatory body. 2 No change in rates may take effect except upon thirty days' notice to the Commission and to the public.' 3 A change in rates may be accomplished by filing a revised schedule with the Commission."' For all sales or transportation of natural gas subject to Commission regulation, the pipeline is required to file with the Commission schedules of all rates and charges along with other applicable terms and conditions which relate to the filed rates.' 5 The Commission is required to use this data to determine if the rates are just and reasonable. Any rate or charge found not to meet this standard is unlawful.' 6 Where the Commission finds a rate to be improper the NGA empowers the Commission to determine a just and reasonable rate and, by its own order, fix that rate subject to the following conditions: the Commission may order a decrease in the rate if it finds the filed rate to be excessive but it may not order an increase in the rate unless the higher rate conforms with a new schedule to be filed by the regulated company. 7

Generally, pipelines are permitted to modify their rates only prospectively since the NGA requires all rates to be filed with the Commission at least thirty days before taking effect.!' However, the same paragraph of the NGA frees the Commission to allow changes to take effect without thirty days' notice if "good cause" is shown. 19 The circumstances in which the thirty days notice can be waived so as to permit changes in rates to take effect retroactively is the central issue of the litigation discussed in this note.2 " Specifically, in what circumstances can the FERC waive the notice requirement in the NGA so as to give rate changes retroactive application and thereby effectively waive the filed rate doctrine? The answer to this question is not completely answered by the language of the NGA2 and has now been remanded by the court to the FERC for further consideration.22

#### “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.

#### Fiat solves – counterplan introduces same remedies for violations of anticompetitive conduct – those are planks 2 and 3 and …

Robert B. Martin III, ‘3. J.D. Candidate, University of California, Hastings College of the Law, 2004. “Sherman Shorts Out: The Dimming of Antitrust Enforcement in the California Electricity Crisis,” 55 Hastings L.J. 271 (2003).

Available at: https://repository.uchastings.edu/hastings\_law\_journal/vol55/iss1/5

Alternatively, Congress could provide FERC with expanded legisla- tive authority to impose substantial and meaningful penalties on parties who commit anticompetitive conduct within deregulated electricity mar- kets. This avenue is not as attractive as the first for several reasons. First, FERC itself has suggested it lacks the expertise necessary to effectively monitor deregulated electricity markets. 279 The GAO buttressed this sug-gestion in its analysis of FERC's performance during the crisis.28 Con- gress would thus have to provide FERC with additional funding in order to hire the personnel needed for effective oversight. Finally, such an ave- nue would ignore the reliable policies of protecting competition through antitrust laws, as well as deterring anticompetitive conduct through pri- vate treble damages antitrust actions.

#### That can include treble damages – RICO proves.

Jerry Edward Farmer, 84. Juris Doctor Degree and Bachelor of Science in Business Administration. “The Role of Treble Damages In Legislative and Judicial Attempts to Deter Insider Trading”. 41 Washington & Lee L. Rev. 1069 (1984), https://scholarlycommons.law.wlu.edu/wlulr/vol41/iss3/8

Congress already had recognized the need for more extreme punitive measures in two federal statutes which currently employ the treble damages penalty. 93 Section four of the Clayton Antitrust Act, 94 for example, authorizes private plaintiffs to collect treble damages from defendants who violate the antitrust laws. 95 In addition, the Racketeer Influenced and Corrupt Organizations Act (RICO) 96 provides for a civil treble damages remedy. 97 ITSA, which bestows only the SEC with a right of action, contrasts with the Clayton Act and RICO provisions empowering private plaintiffs to seek redress for statutory violations. 98

RICO allows private plaintiffs to recover treble damages by demonstrating that a defendant has committed two acts of racketeering activity within ten years.99 Section I(1)(D)' °° of RICO includes securities fraud within the statutory definition of racketeering activity.'"' A split of authority exists, however, over the general applicability of RICO to securities fraud claims.' 2 Some courts have held that Congress intended RICO to apply only to securities transactions involving organized crime, and thus ordinary securities claims do not qualify for RICO treble damages.0 3 Other courts have suggested, however, that Congress intended the judiciary to construe RICO's remedial measures liberally, thus rendering even ordinary violators of the securities laws liable for RICO treble damages. 0 4 While no private plaintiff has yet recovered treble damages for insider trading under RICO, the Second Circuit recently considered a RICO treble damages claim brought by a private investor against inside traders in Moss v. Morgan Stanley.'

In Moss, an investment analyst disclosed nonpublic information concerning an impending corporate tender offer to a stockbroker named Newman."°6 Newman purchased shares in the target company on the NYSE and tendered the shares to the offering corporation at a substantial profit.'0 7 A private plaintiff who had sold target company shares before the offer became public sued Newman and the investment analyst for violating section 10(b) and rule lOb-5.0 0 The plaintiff also tried to recover treble damages from Newman under RICO. '° 9 The United States District Court for the Southern District of New York dismissed the plaintiff's complaint, holding that Newman had no duty to disclose inside information because no fiduciary relationship existed between Newman and the plaintiff."I0 The district court found, therefore, that the plaintiffs had no standing to sue Newman for violations of section 10(b) and rule lOb-5."' Furthermore, the district court dismissed the RICO claim by declaring that RICO's civil remedies do not apply to ordinary securities law violations." '

On appeal, the Second Circuit affirmed the district court's dismissal of the private action." 3 The Second Circuit, however, disagreed with the district court's view concerning RICO's applicability to securities fraud claims." 4 The Second Circuit affirmed the dismissal of the RICO claim on the ground that the plaintiff's failure to show a violation of section 10(b) or rule lOb-5 necessarily precluded any assertion of RICO securities fraud."I5 The Moss court stated in dictum, however, that a valid showing of ordinary securities fraud could satisfy RICO's pleading prerequisite, and thereby enable a private plaintiff to qualify for RICO treble damages in an insider trading action."16

The prospect of a treble damages penalty would present a much stronger deterrent to insider trading than current sanctions provide. 117 The two goals underlying the present statutory treble damages remedies are deterrence and compensation.' The deterrence theory supports the multiplication of damages on the assumption that the violator has broken the law before or will break the law again with impunity.' 9 Applying a multiplier to actual damages will deter potential violators from trying to profit by illegal conduct on the chance that they likely can avoid prosecution.2 0 Dividing the actual damage measure by the probability of prosecution will yield the appropriate damage multiplier.' 2' Given the current perception that much insider trading goes undetected and unpunished, the deterrence theory of multiple damages supports the proposal for treble damages under ITSA.' 2

#### FERC solves best---expertise and public interest charge.

Albert A. Foer ‘3. President of the American Antitrust Institute, with Diana L. Moss, Ph.D. and Vice President and Senior Research Fellow at AAI. “ARTICLE:ELECTRICITY IN TRANSITION: IMPLICATIONS FOR REGULATION AND ANTITRUST,” 24 Energy L. J. 89, 101. Nexis.

An issue that persistently arises in Congress is whether the FERC or the federal antitrust agencies (Department of Justice (DOJ)/FTC) should have primary responsibility for overseeing mergers. Right now, the FERC and the antitrust agencies each perform an independent review. When competition has displaced regulation, primary responsibility should certainly rest with the antitrust agencies. In the transition phase, however, there are at least three reasons why the FERC should continue to play the primary role:

. The FERC has a "public interest" charge that allows it to take a more pro-active position than the antitrust agencies in shaping an industry for competition.

. The FERC has significant expertise in the highly complicated electricity industry, not matched by the antitrust agencies and especially needed during the chaotic transition phase. In particular, the FERC has a "bird's-eye view" of the industry and is more fully apprised of the structure of regional markets that could be affected by merger activity.

#### Demand-side regulation solves – flips incentives for anticompetitive practices

Sandeep Vaheesan 13. Special Counsel, American Antitrust Institute. "Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity," University of Michigan Journal of Law Reform 46, no. 3 (Spring 2013): 921-974. HeinOnline.

C. Developing Demand-Side Responses

The invisibility of real-time prices to most ratepayers is an impor- tant reason why market power has been a serious and persistent problem in restructured electricity markets. In most markets, high prices translate into lower demand and act as a constraint on sup- pliers who try to raise prices, unilaterally or collectively. For suppliers, setting high prices can result in a higher margin on ex- isting sales but can also lead to a loss of sales volume. The reduced quantity of sales may more than offset the effect of increased prices, making price increases unprofitable. In electricity markets, how- ever, most consumers pay a fixed retail rate at all hours of the day that is adjusted only infrequently by the state public utility commis- sion 20 Their insulation from the underlying price of electricity gives them little reason to reduce their consumption when supply- demand conditions are tight and wholesale prices are high. Since demand is highly inelastic, generators can increase prices without losing salesA21Combined with the inelasticity of supply as load ap- proaches peak levels, demand-side inelasticity makes the exercise of market power highly profitable during hours of peak demand.

If customers pay a price that is tied to wholesale prices, they will likely change their electric consumption patterns. At present, the use of fixed prices based on the average of hourly prices leads to a price that is too high in off-peak hours, when the wholesale price is comparatively low, and too low in peak hours, when the wholesale price is typically higher)” Correcting this distortion can be ex-pected to lead to increased consumption of power in the early morning and late night and decreased consumption in the late af-ternoon and early evening."23 For example, individuals would be more likely to run energy-intensive home appliances like dishwash-ers and washing machines at hours when power prices are lower. Although retail prices that perfectly track wholesale prices would be the ideal policy for many economists, this type of “dynamic” pricing would be fraught with problems. Many residential customers, for example, may not be able to adjust their power usage in response to frequent price changes and may be saddled with signiﬁcantly higher monthly utility bills?" Dynamic pricing, in which customers pay the hourly wholesale price, could lead to significant wealth transfers from ratepayers to utilities and inﬂict substantial eco-nomic harm on low-income households.”5

Demand-side bidding is one way of dealing with the problem of inelastic demand. Under this system, large customers, typically in-dustrial firms, bid into the wholesale market a demand increment that they are willing to curtail, and are treated like another source of supply. 326 If the wholesale price matches or exceeds their bid in a given hour, these customers must curtail their demand by the bid amount or pay the wholesale price of power at the time. 327 Allowing large consumers to bid their demand can thus provide incentives to reduce power consumption during periods of high prices.

In recent years, state regulators and utilities have also tried to expose a greater number of residential customers to wholesale prices (or some proxy of them). These programs create at least some modest variation in retail rates that reflect the changing costs of producing power within a given day. Technological changes like advanced metering and remote control of appliances have permit-ted experimentation in this area. 328 Utilities have run pilot programs in which a small subset of residential ratepayers pay dif- ferent peak and off-peak prices (time-of-use pricing) or very high rates during hours with very high demand (critical peak pricing) and receive enabling technologies like advanced thermostats that take electricity prices into account when setting indoor air temperatures. 329

Replacing fixed retail rates with variable prices for even a minor-ity of customers can discipline generators from exercising market power. If demand fell in response to higher prices, exercising mar-ket power would not be as profitable as it is currently. Generators would recognize that exercising market power would sometimes be unprofitable as higher prices trigger a fall in the quantity of power used.A30 In fact, experimental studies have suggested that demand-side responses could completely defeat the exercise of market power.331 Even if these findings do not translate perfectly into real-world markets, demand-side responses would, at the very least, create electricity markets that resemble other markets in which price signals play an important function in disciplining oligopolistic producers. 332 Empirical research supports the theoretical argument that real-time pricing would lead to changes in electricity usage, even among residential consumers. Demand reductions in peak hours have ranged from 3 percent for time-of-use pricing schemes to 44 percent for critical-peak pricing programs combined with ena-bling technologies. 333 For profit-maximizing generators, the threat of the quantity of power demanded falling in response to higher prices would alter the economic calculus of unilaterally or jointly exercising market power.

#### Expert consensus---it solves market concentration

Diana Moss ‘6. Vice-President and Senior Research Fellow of the American Antitrust Institute (AAI) and adjunct professor at the Georgetown University Graduate Public Policy Institute and University of Colorado, Department of Economics. “ARTICLE: ELECTRICITY AND MARKET POWER: CURRENT ISSUES FOR RESTRUCTURING MARKETS (A SURVEY),” 1 Envt'l & Energy L. & Pol'y J. 11, 35-36. Nexis.

[\*35] The debates on remedies have evolved as electricity markets and market power problems are better understood. First, almost all experts agree that improvements in demand-side response and entry (by reducing market concentration and increasing reserve margins) would ease market power problems. 72 In the United States, widespread entry of merchant generators in response to restructuring established, until recently, a thriving independent generation sector. But the ability of retail electricity consumers to adjust their consumption in response to periodic episodes of high wholesale prices is possible only when metering and variable-rate programs are available. 73 Real-time pricing shifts consumption from peak to off-peak periods when demand is likely to be more price-responsive, reducing the potential gains to sellers from exercising market power. [\*36]

## Solvency

#### no private enforcement---too uncertain

Joshua Davis and Robert Lande 13. Associate Dean for Academic Affairs and Professor of Law, University of San Francisco School of Law. Member of the Advisory Board of the American Antitrust Institute; and Venable Professor of Law, University of Baltimore School of Law, and Director, American Antitrust Institute. “Article: Defying Conventional Wisdom: the Case for Private Antitrust Enforcement.” Georgia Law Review 48: 31-33.

iii. Risk Aversion: Private v. DOJ. Another interesting conclusion is suggested by private plaintiffs pursuing litigation independently of public litigation and prosecuting claims under [\*32] the rule of reason rather than just under a per se standard. Private plaintiffs may not be as averse to risk as government litigators. 130 Again, a comparison to the DOJ is illustrative.

In our original comparison of private enforcement and DOJ enforcement, we noted that the DOJ appears to succeed in a very high proportion of its cases. 131 From 2000 to 2009, it won anywhere from thirty-one to sixty-seven antitrust cases and lost four in one year and from zero to two cases in all other years. 132 In its worst year, it prevailed over 90% of the time. 133

We do not know the rate at which private plaintiffs are successful. 134 But almost certainly they prevail at a much lower rate. This conclusion is suggested by the willingness of private plaintiffs to pursue cases other than following a government filing. It is even more powerfully suggested by their pursuit of rule of reason cases. The rule of reason entails a high degree of uncertainty that can readily result in a successful defense. 135 This proposition is confirmed by Michael Carrier's work, which identifies 221 rule of reason cases between 1999 and 2009 in which a court entered final judgments against plaintiffs (and only one in which a court entered final judgment in favor of a plaintiff). 136 Moreover, any plausible model based on expected value would indicate that plaintiffs would pursue claims with a lower chance of success than the DOJ appears to require. This evidence and analysis suggests that private plaintiffs bring riskier claims than government actors, helping to ensure some deterrence effects when behavior is anticompetitive but will not necessarily result in successful prosecution of a claim.

[\*33] 6. Overall Deterrence Effects: A Study. The evidence discussed above is suggestive, but it does not provide a systematic analysis of the deterrence effects of private enforcement. We know of only one such systematic effort, co-authored by one of us. It analyzes seventy-five cartels, assessing the total sanctions that were imposed on the wrongdoers and the total profits they appeared to reap from their illegal conduct. 137 The article also gathers evidence and theory on the rate at which illegal antitrust conspiracies are discovered and successfully prosecuted. 138 The ultimate conclusion of this analysis is that the total sanctions-- public and private--from antitrust enforcement are insufficient for optimal deterrence. 139 In terms of expected value, illegal antitrust conspiracies remain a profitable endeavor--which explains their persistence. 140 Indeed, based on the seventy-five cases, the overall level of sanctions would have to increase at least threefold--and perhaps by as much as ten times--to achieve optimal deterrence. 141 Of course, this analysis applies only to cartel cases and not to other forms of anticompetitive conduct. 142 But as the only effort of its kind, it provides valuable evidence that private enforcement does not result in excessive deterrence effects.

#### court restrains implementation

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law. “In Praise of Private Antitrust Litigation.” *Antitrust Chronicles, Competition Policy International*. 2019. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343798>.

The Supreme Court has created numerous hurdles to private enforcement in antitrust. The Court has created or enhanced barriers to private antitrust litigation involving standing, antitrust injury (Brunswick), and the direct purchaser doctrine (Illinois Brick). It has created judicial exemptions for damage actions in regulated industries (filed rate doctrine), lobbying all branches of the government for anticompetitive conduct (Noerr-Pennington), and anticompetitive conduct by state and local governments (state action immunity).

The Court has reinterpreted and arguably amended general civil procedure and class action rules involving pleading (Twombly) and summary judgment (Matsushita) in the context of antitrust litigation, and then explicitly expanded their application to all civil litigation (Iqbal, Liberty Lobby). The court has enhanced the general requirements for demonstrating commonality for liability and damages in the certification of antitrust class actions (Behrend), as well as class actions in general (Dukes). There remain open issues regarding standing, mootness, ascertainability, and the availability of cy pres awards where the Court may limit future antitrust and general class actions.

In addition, the general trend of moving entire categories of conduct from per se to rule of reason destroys much of the incentive and practical ability to bring and certify class actions for such conduct. In one instance, the Court was forthright enough to acknowledge that it had created new virtually unscalable burdens for proving actionable predatory pricing because of a fear that plaintiffs would otherwise prevail at trial (Brooke Group). All of these actions were done by the Court on its own initiative without resort to either the statutory process for the amendment of the Federal Rules of Civil Procedure or the passage of a statute through normal Congressional processes.

#### and congress

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law. “In Praise of Private Antitrust Litigation.” *Antitrust Chronicles, Competition Policy International*. 2019. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343798>.

Congress has joined in on the narrowing of private rights of actions both in antitrust and in civil damage litigation more generally. While this combines with the Court and agency action to produce pernicious results, such Congressional actions at least carry with it the legitimacy of duly enacted legislation rather than dubious policy choices by the wrong institutional actors.

There are a variety of statutory exemption and immunity doctrines which bar normal court challenges. While the wisdom of such immunities is frequently challenged, Congress has the power to enact such legislation and hopefully the wisdom to weigh the value of competitive markets and other values in a democratic and open process.20

Congress has further required single damages and erected additional procedural hurdles to private litigation at the margins, rather than the core, of antitrust law. These include export trading companies, standard setting organizations, certain joint ventures, and successful leniency applicants.

## Energy

#### C – Their evidence says it has nothing to do with company price fixing.

1AC Smith 11-8 [Emory reads yellow] [Talmon; November 8; Economics reporter for The New York Times based in New York. Before joining the Business desk, he was a staff editor in Opinion, covering public policy, economics and culture; *The New York Times,* “Winter Heating Bills Loom as the Next Inflation Threat,” <https://www.nytimes.com/2021/11/08/business/economy/home-heating-prices-winter.html>; KS]

With consumers already dealing with the fastest price increases in decades, another unwelcome uptick is on the horizon: a widely expected increase in winter heating bills.

After plunging during the pandemic as the global economy slowed, energy prices have roared upward. Natural gas, used to heat almost half of U.S. households, has almost doubled in price since this time last year. The price of crude oil — which deeply affects the 10 percent of households that rely on heating oil and propane during the winter — has soared by similarly eye-popping levels.

And those costs are being quickly passed through to consumers, who have become accustomed to cheaper energy prices in recent years and now find themselves with growing concerns about inflation this year.

In the United States, the winter months account for about 50 to 80 percent of residential fuel consumption. And there is “a significant chance” consumers could face a “marked increase” in prices for heating, said Nina Fahy, an analyst for Energy Aspects, a research consultancy.

Last winter was warmer than average, which led to residential energy bills that were comparatively low. This season, heating costs could rise to levels not seen a decade, even if there isn’t a severe winter. Several factors — lower global fuel inventories, incentives for producers to let prices rise and a mismatch between supply and demand as economies emerge from the pandemic — may combine to push bills higher regardless.

Mark Wolfe, executive director of the National Energy Assistance Directors’ Association, a group of state officials administering aid to low-income households, says those living paycheck to paycheck, or just trying to save, aren’t going to be soothed by complex explanations about inventory levels, supply chains or global demand. When the bills start coming in December or January, he said, “the public’s going to get angry.”

Expert forecasts suggest that the southern half of the country, which has milder winters and relies on relatively cheap electricity for home heating, may enter spring largely unscathed. But the Northeast and the Northern Plains, as well as rural areas nationwide, are far more dependent on heating oil and propane, which are highly exposed to price spikes in commodity markets.

#### The only AFF-specific card says the exact opposite.

1AC Gorodetsky ‘9 [Emory yellow] [Julia; Winter; Corporate securities lawyer for Andrews Kurth LLC; *Tulane Environmental Law Journal,* “Analogy By Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction,” <https://www.jstor.org/stable/pdf/43294073.pdf?refreqid=excelsior%3A40dc35292abcd134d36ab5a0d941bbc6>; KS]

B. The Unique Nature of the Electricity Market and the Greater Potential for Market Abuse

The electricity market is unique in several ways. First, the demand for electricity is highly inconsistent over time.56 Second, electricity cannot be stored.57 That means that "[e]ach unit consumed must be produced at exactly the nanosecond it is consumed."58 Thus, unless consumers are responsive in their demand for electricity, the only way to stabilize prices is to add more generators because the future capacity cannot balance out the present capacity.59 The demand for electricity is fairly inelastic due to the lack of price information among consumers.60 Price elasticity of demand describes "the extent to which quantity demanded decreases in response to an increase in the price of a good or service."61 Therefore, consumer demand does not act as a constraint upon market power because consumption will continue at the same rate regardless of the price charged.62 Further, the number of generating facilities is relatively fixed due to the substantial entry barriers for production of electricity.63

## Econ

#### Russia and OPEC are alt causes AND prices are going down

Economic Times, 12/30. "Energy costs soar in 2021, fuelled by political unrest." Economic Times, updated December 30, 2021. https://economictimes.indiatimes.com/industry/energy/oil-gas/energy-costs-soar-in-2021-fuelled-by-political-unrest/articleshow/88584117.cms

Energy prices soared in 2021 -- with gas, oil, coal, electricity and carbon all shooting higher in large part owing to a resurgence of geopolitical tensions between producers and consumers.

The "steep rise in prices was probably the most dramatic development on the commodities markets in 2021", noted Commerzbank analyst Barbara Lambrecht.

The most spectacular surge was that of Europe's reference gas price, Dutch TTF, which hit 187.78 euros per megawatt hour in December -- 10 times higher compared with the start of the year.

The spike has been fuelled by geopolitical tensions surrounding Russia, which supplies one third of Europe's gas.

Western countries accuse Russia of limiting gas deliveries to put pressure on Europe amid tensions over the Ukraine conflict and to push through the controversial Nord Stream 2 pipeline set to ship Russian gas to Germany.

Critics say Nord Stream 2 will increase Europe's dependence on Russian gas and Ukraine has described it as a "geopolitical weapon".

Russian energy giant Gazprom has strongly rejected Western accusations that Moscow is limiting gas deliveries to Europe, already hit by low stocks as economies reopen from pandemic lockdowns.

Reliance on gas increased as calmer weather has reduced the availability of wind power.

OPEC oil impact

Crude oil prices rocketed also in 2021, gaining more than 50 percent as demand recovered and oil producing nations led by the Organization of Petroleum Exporting Countries and allies including Russia modestly boosted supplies.

It came after OPEC+ drastically slashed output in 2020 as the pandemic began to unfold, and virus-related restrictions caused demand and prices to crash.

Although crude prices have shot back up, trading above $75 per barrel heading into the new year, the jump "seems almost moderate by comparison" with gas, noted Lambrecht.

US oil benchmark contract, West Texas Intermediate, reached a seven-year peak at $85 per barrel in October, before easing.

#### Fed is confident they can manage it

Martin & Leonard 12/9. Eric Martin and Jenny Leonard. Writers at Bloomberg Magazine. "Biden’s commerce chief ‘confident’ inflation will be short-lived." Al Jazeera, December 9, 2021. https://www.aljazeera.com/economy/2021/12/9/bidens-commerce-chief-confident-inflation-will-be-short-lived

President Joe Biden’s administration remains “quite confident” that the fastest inflation in decades will be short-lived and abate once pandemic-fueled supply-chain and labor-market disruptions ease, according to one of his top economic officials.

The rising cost of living is a problem affecting Americans in their daily lives, particularly around the holidays as they pay higher prices for Thanksgiving turkeys and Christmas trees, and Biden understands the impact, Commerce Secretary Gina Raimondo said in an interview Thursday.

Biden’s administration also has the solutions, she said. They include expanding the labor market through job training; vaccinating more people against Covid-19 so that they can return to work; increasing employment of women through the Build Back Better Act’s expansion of child care and early childhood education; and investing in American semiconductor manufacturing and ports to address shortages of goods.

#### Inflation will peak, and consumers are still optimistic

Anneken Tappe 12/23. Senior Writer, CNN Business. "A key inflation measure just hit a nearly four-decade high." CNN, December 23, 2021. https://www.cnn.com/2021/12/23/economy/us-inflation-pce-incomes-november/index.html

New York (CNN Business) – Prices remain high in America, and inflation shows no sign of slowing down anytime soon.

A key measure of US inflation rose 5.7% in the 12 months ended in November, the Bureau of Economic Analysis said Thursday. It was the fastest increase in the consumer spending price index since July 1982.

Economists multiple inflation gauges each month, but the so-called PCE inflation is the Federal Reserve's preferred measure and informs the central bank's policy decisions.

Stripping out energy and food prices, both of which jumped over the period, the price index advanced 4.7%, the biggest increase since September 1983.

For anyone hoping there would be an end to the exorbitant climb in prices before year-end, this was a disappointment. But it could be the peak.

"We suspect that the November and December headline figures will mark the top given a modest energy price pull-back into the turn of the year," said Mike Englund, chief economist at Action Economics, in a note to clients.

And indeed, prices rose at a slightly slower pace in November -- 0.6% compared with the 0.7% gain in October. Excluding volatile food and energy costs, prices rose 0.5%, unchanged from the prior month.

Englund expects the so-called core price index to reach a peak in February, "given 2020 comparisons that show a big core price acceleration starting last March."

American incomes also rose last month, but not as quickly as prices.

Total incomes rose by 0.4%, or $90.4 billion, slightly less than in October, while disposable incomes also increased by 0.4% last month, corresponding to $70.4 billion.

But consumer spending outgrew both income measures, rising 0.6%, or $104.7 billion as people were getting busy shopping for the holidays.

That said, most of the increase was down to higher spending on services, particularly housing and utilities.

The personal savings rate declined to 6.9%, a small decrease from the month before.

Prices are high, but Americans are optimistic about the economy

Even though the high pandemic-era inflation is weighing on people's living standards, Americans are optimistic about the path of the recovery next year, according to the University of Michigan's consumer sentiment survey.

The sentiment index stood at 70.6 in December, slightly above economists' expectations and higher than in November.

The uptick was in large part due to higher incomes for lower-earning households, said Richard Curtin, Surveys of Consumers chief economist.

"The bottom third [of the income distribution] expected their incomes to rise during the year ahead by 2.8%, up from 1.8% last December, and the highest level since 2.9% was recorded in 1999," said Curtin.

#### Consesus of economic experts

Ernest “Doc” Werlin, 12/27. Spent 35 years in fixed income as a trader and corporate bond salesman, including time as a partner at MorganStanley in charge of corporate bond trading. "Doc’s Prescription: U.S. economic outlook for 2022." Sarasota Herald-Tribune, December 27, 2021. https://www.heraldtribune.com/story/business/2021/12/27/economists-expect-u-s-enjoy-solid-economic-growth-2022/9022524002/

There is a growing consensus that the United States will enjoy solid economic growth in 2022 despite concerns about inflation, supply chain disruptions, COVID-19 and Federal Reserve tightening. The Conference Board, a research group comprising more than 1,000 public and private corporations, forecasts that the U.S. economy will grow by 3.5% in 2022.

The main challenges to the United States and the global economy in the next decade come from a continued trend toward deglobalization and faster-than-expected inflation. The transition toward decarbonization of economies in response to climate change will create challenges and opportunities for global growth.

Despite the acceleration of new COVID-19 cases in December, largely associated with the delta and omicron variants, America enjoyed strong growth in Q4 2021.

A shopper shops at a retail store in Glenview, Ill., on Thursday. Holiday sales rose at the fastest pace in 17 years, even as shoppers grappled with higher prices, product shortages and a raging new COVID-19 variant in the last few weeks of the season, according to one spending measure.

COVID-19 remains a threat but its economic impact is fading. There remains uncertainty regarding the transmissibility, severity, and effectiveness of existing vaccines against omicron. World Health Organization officials, in recognition of the dangers inherent with COVID-19, are advocating more coordinated and decisive efforts to vaccinate the world’s population to prevent the emergence of new, more dangerous variants.

The Food and Drug Administration recently granted emergency authorization to Pfizer’s COVID treatment pill for patients 12 years and up with mild to moderate COVID symptoms who are most likely to end up hospitalized. The agency said it should be prescribed as soon as possible after diagnosis and within five days of symptom onset.

The United States is experiencing robust but an uneven rebound from the pandemic. Demand growth is outstripping supply growth because of unprecedented fiscal and monetary stimulus.

A consensus of economists forecast a decline in the unemployment rate from the current 4.2%. The Bureau of Labor Statistics wrote, “As the nation’s demographic shift continues, with the baby-boom generation moving into retirement, the labor force participation rate will continue to decline, moderating growth.”

The U.S. Census Bureau released a report that the U.S. population grew at a slower rate in 2021 than in any other year since the founding of our nation. This year was the first time since 1937 that the U.S. population grew by fewer than one million people.

In response to COVID-19, households have redirected their spending away from activities that are “locked-down” (food and entertainment) and toward durable goods. Governments have eased COVID restrictions because of vaccines and the ability to more precisely target and curtail certain types of activities.

On Wednesday, in a fresh sign of his growing concerns about inflation, Federal Reserve Chairman Jerome Powell said the Federal Reserve can't be sure that price increases will slow in the second half of next year. To stem inflation, we can expect the Fed to stop bond purchases and raise interest rates three times in 2022.

#### **Their internal link ev concedes that savings will allow the US to absorb the shock [Emory = Blue]**

1AC Mitchell 10-10 [Josh; October 10; Covers the U.S. economy from the Journal's Washington, D.C. bureau. He previously covered transportation policy and the bailouts of General Motors and Chrysler. Prior to the Journal, he worked as a reporter for the Baltimore Sun and the Palm Beach Post; *Wall Street Journal,* “Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy,” <https://www.wsj.com/articles/soaring-energy-prices-raise-concerns-about-u-s-inflation-economy-11633870800>; KS]

The U.S. economy is facing a new threat: rising energy prices.

Crude oil has risen 64% this year to a seven-year high. Natural-gas prices have roughly doubled over the past six months to a seven-year high. Heating oil has risen 68% this year. Prices at the pump are up nearly a dollar over the past 12 months to a national average just over $3 a gallon. Coal prices are at records.

Higher energy prices could push up inflation in coming months, damp consumer spending on other products and services, and ultimately slow the U.S. recovery, economists say.

“For consumers it’s like a tax,” economist Kathy Bostjancic of Oxford Economics said of the price increase. While consumers will likely be squeezed, the energy-price rise “would have to be extreme and prolonged” to halt the economic recovery, she added. More likely, “we would just see growth decelerate more or a longer pause before growth resumes, and that we just get a bit stickier inflation in the meantime.”

Andreas Steno Larsen, an analyst at Helsinki-based Nordea Bank ABP, is more pessimistic. He said this year’s rise in energy prices has caused him to cut his estimate for U.S. growth next year to 1.5% from 3.5%. While he believes oil and gas prices will remain flat in coming months, he also sees a worst-case scenario in which they rise by another 40% some time next year, enough to push the U.S. and global economy into a brief recession in mid-2022.

The higher prices are being driven by rising demand and tight supplies. As the pandemic fades and consumers around the world step up spending, factories and service providers are ramping up production, which requires energy. Oil supplies are tight because oil-exporting countries have decided to increase production in measured steps instead of opening the taps more widely.

**[Michigan’s card ends]**

Natural-gas supplies are running low after a freeze in Texas earlier this year drove up demand and Hurricane Ida forced nearly all of the Gulf of Mexico’s gas output offline, along with higher demand from Europe where inventories have dropped because of hot weather, lackluster wind-power generation and lower imports from Russia.

Coal prices have been pushed up by rising demand colliding with supply held back by carbon emission-reduction plans.

Many analysts believe these factors will push prices up further in coming months. Moody’s Analytics projects oil will rise to between $80 and $90 a barrel by early next year from $79 now and natural-gas prices to $6.50 to $7 per million British thermal units, from $5.5650. JPMorgan Chase & Co. gives a worst-case scenario of oil rising for the next three years and reaching $190 a barrel in 2025. Electricity prices rose 5.2% in August from a year earlier, the largest gain since early 2014, according to the Labor Department.

Energy prices are volatile even in normal times, and particularly unpredictable now because of the cloudy economic outlook and how governments and investors will respond to the shortage of supplies. Investors are pressing companies to maintain high prices and profit margins by resisting drastically expanding production.

Energy represents a sizable chunk of consumer budgets. In August, about 7% of consumer spending went toward energy, according to the Labor Department. Historically, high energy prices have often preceded recessions. Consumers can’t easily cut consumption on short notice, as they can with discretionary purchases, so higher prices act as a tax, draining the money they have available to spend on other goods and services.

Growth slowed sharply this summer as rising Covid-19 infections due to the Delta variant prompted a new round of business restrictions and consumer caution. The Federal Reserve Bank of Atlanta estimates that growth slowed from 6.7%, annualized, in the second quarter to 1.3% in the third.

Higher prices are already stirring concerns of an economic crisis in Europe and Asia, where shortages are particularly acute. In the U.S., analysts say the effect should be less severe for several reasons. Natural-gas prices have risen by much less because the U.S. is a big producer of the commodity and much of the supplies stay within the country. Gas supplies aren’t as tight as oil inventories.

The effect of rising energy prices on consumers’ utility bills will vary across the U.S., said Kevin Book, managing director of ClearView Energy Partners LLC, a Washington, D.C.-based research firm. Some utility companies may start to adjust bills this winter, while others may not adjust rates until later on, depending on how rates are structured.

Households have a cushion of savings from federal stimulus checks and unemployment insurance. “With American households sitting on greater than $2 trillion in excess savings compared with pre-pandemic levels, the U.S. is in a much better position to absorb whatever energy-induced shock that lies ahead compared with our European and Asian trade partners,” said Joe Brusuelas, chief economist at consultant RSM US LLP.

#### No impact to economic decline – countries respond with cooperation not conflict.

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.

#### Financial crisis proves no impact to economic decline.

Daniel W. DREZNER 14, professor of international politics at the Fletcher School of Law and Diplomacy at Tufts University [“The System Worked: Global Economic Governance during the Great Recession,” *World Politics*, Vol. 66, No. 1 (January 2014), p. 123-164]

The final significant outcome addresses a dog that hasn't barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.42 They voiced genuine concern that the global economic downturn would lead to an increase in conflict—whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fueled impressions of a surge in global public disorder.

The aggregate data suggest otherwise, however. The Institute for Economics and Peace has concluded that "the average level of peacefulness in 2012 is approximately the same as it was in 2007."43 Interstate violence in particular has declined since the start of the financial crisis, as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict, as Lotta Themner and Peter Wallensteen conclude: "[T]he pattern is one of relative stability when we consider the trend for the past five years."44 The secular decline in violence that started with the end of the Cold War has not been reversed. Rogers Brubaker observes that "the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected."43

#### Empirics prove --- no shooting wars.

Jervis 11—Professor in the Department of Political Science and School of International and Public Affairs at Columbia University [Robert, “Force in Our Times,” *International Relations*, Vol. 25, No. 4, December 2011, p. 403-425, Emory Libraries]

Even if war is still seen as evil, the security community could be dissolved if severe conflicts of interest were to arise. Could the more peaceful world generate new interests that would bring the members of the community into sharp disputes? 45 A zero-sum sense of status would be one example, perhaps linked to a steep rise in nationalism. More likely would be a worsening of the current economic difficulties, which could itself produce greater nationalism, undermine democracy and bring back old-fashioned beggar-my-neighbor economic policies. While these dangers are real, it is hard to believe that the conflicts could be great enough to lead the members of the community to contemplate fighting each other. It is not so much that economic interdependence has proceeded to the point where it could not be reversed – states that were more internally interdependent than anything seen internationally have fought bloody civil wars. Rather it is that even if the more extreme versions of free trade and economic liberalism become discredited, it is hard to see how without building on a preexisting high level of political conflict leaders and mass opinion would come to believe that their countries could prosper by impoverishing or even attacking others. Is it possible that problems will not only become severe, but that people will entertain the thought that they have to be solved by war? While a pessimist could note that this argument does not appear as outlandish as it did before the financial crisis, an optimist could reply (correctly, in my view) that the very fact that we have seen such a sharp economic down-turn without anyone suggesting that force of arms is the solution shows that even if bad times bring about greater economic conflict, it will not make war thinkable.

## Federalism

#### First evidence is just about the filed rates doctrine [Emory = Blue]

1AC First ’12 [Harry and Christopher Sagers; November 28; Law Professor at NYU; Law Professor at Cleveland-Marshall; Brief of Antitrust and Economics Professors, “McCray v. Fidelity National Title Insurance Company,” http://sblog.s3.amazonaws.com/wp-content/uploads/2013/02/McCray-Final-File-Copy-as-Filed.pdf]

Some courts, though not all, have found that this complex of theoretical considerations has no relevance as soon as a state adopts the simple expedient of a rate-filing system, even if it is identical to the unreviewed, file-and-use system that Ticor found so lacking. They do this on their view that the filed rate doctrine should apply in such cases, and in their view the filed rate rule precludes private remedies even where the agency engages in no actual review of rates filed.3 Amici are eager to undo this extraordinary elevation of form over theoretical substance, and to bring consistency to all cases in which states attempt to limit federal antitrust.

#### And Rossi says that the way the two doctrines play out are similar, but not that they interact [Emory = Blue]

1AC Rossi ’3 [Jim Rossi; 2003; Law Professor at Florida State University; Vanderbilt Law School, “Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,” vol. 56]

2. Vertical Jurisdictional Conflicts: State Action Immunity

Modern antitrust jurisprudence also potentially extends the filed tariff doctrine's reach to a second context, vertical, in which both federal and state regulators have approved tariffs relating to allegedly anticompetitive conduct. In this context, it is conceivably the state-approved tariff that makes antitrust enforcement unnecessary. Some states do not explicitly endorse the filed tariff doctrine, as a matter of state law, 261 but, regardless of whether a state independently does so, state action immunity serves functions similar to those the filed tariff doctrine purports to serve, again making it unnecessary.

State action immunity is designed to accommodate the federal antitrust interest in promoting competition with state interests in regulation. When state regulation works to restrict competition, these two interests may collide. In Parker v. Brown, the United States Supreme Court addressed this conflict in reviewing the potential antitrust liability of state officials enforcing a program that fixed raisin prices and restricted competition between growers. 262 The Court held that the Sherman Act was not intended to restrain "state action," effectively creating absolute immunity for pure state actors, but the Court did not address the potential liability of private parties operating under the auspices of state law. 263

Later cases extended state action immunity to private parties whose allegedly anticompetitive acts were the product of, or approved by, state action. As the Supreme Court stated in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., immunity for private actors exists only if the challenged restraint is taken pursuant to a ""clearly articulated and affirmatively expressed … state policy'" 264 and is subject to active state [\*1653] supervision. 265 The clear articulation requirement does not require a defendant to show that state law compelled the challenged actions, 266 but instead only that the state affirmatively contemplated the type of activity challenged. 267 Given this low threshold, the active supervision requirement does most, if not all, of the heavy lifting in determining whether state action immunity applies to private actors. 268 Courts have held that this requirement is not automatically met when the state "simply authorizes price setting and enforces the prices established by private parties" because such a broad authorization would merely "cast[] … a gauzy cloak of state involvement over what is essentially a price-fixing arrangement." 269

In the context of dual rate regulation schemes, state action immunity can have the same effect as the filed rate doctrine at the state level, while also providing courts flexibility to evaluate the deterrence implications of declining jurisdiction. In Town of Concord v. Boston Edison Co., then-Judge Breyer assessed a price squeeze claim brought under these circumstances. 270 FERC regulated Boston Edison's wholesale electric power rates, while its retail rates were regulated by state authorities. 271 Municipal utilities, such as the Town of Concord, challenged Boston Edison's wholesale prices as anticompetitive, on the grounds that the utility's wholesale price increases, approved by FERC, had not been matched by corresponding retail price increases at the state level. 272 The municipality claimed that the disparity between the two rates put the towns in a price squeeze, making retail customers more likely to purchase directly from Boston Edison and thus placing the municipal customer base at risk. 273 Properly declining to apply the filed rate shield - because this basis for refusing jurisdiction is particularly problematic in the context of price squeeze claims, where sometimes neither the federal [\*1654] nor state regulator has authority to rectify an antitrust violation 274 - Judge Breyer reasoned that Boston Edison enjoyed no express immunity from the application of the antitrust laws, but recognized that careful analysis of the price squeeze claim is necessary in the context of regulated industries. 275 Regulators continue to monitor the reasonableness of rates, as well as the relationship between utilities and their competitors. 276 In addition, Judge Breyer noted that regulation makes it less likely that a price squeeze would drive independent distributors from the marketplace, since the permission of regulators is required to take on new customers. 277 He further observed that supporting a price squeeze claim in such circumstances is at odds with the goals of price competition to the extent that it would encourage greater retail rates, and that there were potential institutional concerns with courts telling regulators what rate to apply under the circumstances. 278 Judge Breyer concluded that "a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct' under [the] Sherman Act … ." 279

# 1NR – Fullertown R5

## FTC

#### b---FTC covers all core antitrust law

Emilia R. Rubin 19. J.D. Candidate, University of California, Hastings College of the Law. “The Heavy Burden of a Lighter Touch Framework The Inadequacy of Antitrust Laws as a Substitute for Net Neutrality.” Summer 2019. Hastings Science and Technology Journal 10.2, 229-261.

The FCC additionally justified repealing the 2015 Order by relying on the ability of both the FTC and private citizens to bring antitrust actions challenging any anticompetitive conduct in the internet sector.115 The FTC enforces three laws with respect to antitrust law: the Sherman Act, the FTC Act, and the Clayton Act. These are the three core federal antitrust laws in effect today. The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” The standard for assessing business conduct under the Sherman Act is a two-pronged approach: (1) per se illegality if the conduct is considered “so harmful to competition that they are almost always illegal;” and (2) rule of reason analysis if the conduct does not fall into an established anticompetitive category articulated under law.116

#### c---They’re tasked with enforcing antitrust laws

Katie Canales 20. Tech reporter at Business Insider, 12/9/20. “Facebook was just hit with 2 big antitrust lawsuits. Here's what 'antitrust' means and how 'trust-busting' laws attempt to keep the biggest firms in US history from growing too powerful.” https://www.businessinsider.com/what-is-antitrust-laws-big-tech-hearing-2020-7

There are three core federal US antitrust laws you should care about: the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. The last would lead to the creation of the Federal Trade Commission, which is the main government entity tasked with enforcing antitrust laws today.

#### d---enforced by the 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.

#### f---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.

#### g---Federal antitrust is enforced by the DOJ and FTC.

NAR. National Association of Realtors. "Antitrust". https://www.nar.realtor/antitrust

Federal and state antitrust laws are designed to protect competition, and the opportunity of competitors to engage in business free of artificial restrictions on competition. Such restrictions include price fixing agreements, group boycotts, “tying” arrangements, and market allocation arrangements. Antitrust laws also make it illegal to operate a monopoly and abuse the power of one who has a monopolistic market position. Antitrust laws are enforced by the U.S. Department of Justice, the Federal Trade Commission, and similar state agencies and state Attorneys General.

#### a-- 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.”

#### b---Limited resources force tradeoffs in enforcement decisions

Asker et al 21. Nathaniel L. Asker, partner in the Antitrust Department at Fried Frank Antitrust & Competition Law Alert, serves on the Antitrust & Trade Regulation Committee of the Association of the Bar of the City of New York and is a member of the Antitrust Sections of the American Bar Association and the New York State Bar Association; with Bernard (Barry) A. Nigro and Aleksandr B. Livshits. “Managing Antitrust Risk in the Biden Administration.” Fried Frank Antitrust & Competition Law Alert, January 5, 2021. https://www.friedfrank.com/siteFiles/Publications/FFAntitrustAggressiveAntitrustEnforcement01052021.pdf

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

#### c---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.

#### b---It’s our brink argument---the FTC’s managing its caseload, but only barely---the aff is a bolt from the blue that forces tradeoff with privacy---their ev is from May, doesn’t assume current conditions

Leah Nylen 9/29/21. POLITICO's antitrust reporter. “Lina Khan’s big tech crackdown is drawing blowback. It may succeed anyway.” https://www.politico.com/news/2021/09/29/lina-khan-war-monopolies-514581

Despite all the friction, Khan’s admirers say the agency is finally back on the right track.

“The FTC is pushing as hard as they can right now, which is what we have needed for so long,” said Charlotte Slaiman, competition policy director for the advocacy group Public Knowledge, during POLITICO’s Tech Summit this month. She added: “I expect great things from the FTC.”

#### c---Current enforcement is streamlined to enable focus on algorithmic bias

Brian Fung 12/17/21. Technology reporter who covers the intersection of business and policy @ CNN. “FTC considers drafting new regulations on data and algorithms to protect consumer privacy and civil rights.” https://www.cnn.com/2021/12/17/tech/ftc-algorithm-regulation/index.html

The Federal Trade Commission says it's considering drafting new rules for US businesses that would more strongly regulate how they can use data and algorithms, in the latest move to clamp down on technology companies run amok.

The effort could lead to "market-wide requirements" targeting "harms that can result from commercial surveillance and other data practices," agency chair Lina Khan announced in a letter to Sen. Richard Blumenthal dated Dec. 14, and shared by the senator's office Friday.

For years, regulators presumed that consumers could protect themselves from predatory practices by revoking their consent to being tracked. But it has become increasingly obvious that that so-called "notice-and-consent" approach has "serious shortcomings," wrote Khan, a vocal tech industry critic who has led the charge on reining in giants like Amazon, Apple, Google and Facebook (now Meta). In particular, she said, many Americans feel they have no choice but to have their data harvested and used in ways they disagree with, simply to participate in modern life.

The announcement of a potential rule making is a shot across the bow not just of Silicon Valley, which pioneered the use of data to drive business decisions, but of the growing number of companies and industries that have turned data mining into lucrative revenue streams — ranging from entertainment to insurance to retail.

Khan's letter follows a September request by nine Senate Democrats for an agency rule making that would set guardrails on the use of consumer data.

#### d---FTC actions so far are only table-setting

Ashley Gold 12/20/21. Tech and policy reporter at Axios. “Six months with Lina Khan's FTC.” https://www.axios.com/lina-khan-ftc-six-months-4a5c4ba6-cef1-4a1f-b1dc-a528b2b41471.html

Why it matters: As Biden's first year ends, many are watching Khan's FTC to see whether it really can fundamentally change how the U.S. regulates big companies and how tech should treat consumers.

Entering the role, the 32-year-old, known for her scholarship in antitrust and competition policy, targeted what she sees as monopolistic behavior in Big Tech and beyond. Under her, the agency re-filed its case accusing Facebook of buying up competitors to maintain dominance.

It sued to block a $40 billion semiconductor chip merger between Nvidia and Arm, arguing it would stifle competing next-generation technologies.

It launched an investigative study into supply change disruptions, targeting retailers like Walmart and Amazon.

It reached a settlement agreement with an ad platform that allegedly violated the Children's Online Privacy Act.

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

#### e---resources---our ev’s comparative

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.

#### b---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."

#### c---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.

#### 1. It’s empty talk that’s years from being implemented---their ev just says biden encouraged agencies, not that they’re pursuing cases

Jeff Jaeckel 21**.** Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### 2. It's non-binding AND will be blocked by the court and Congress

Lewis Brisbois 21**.** Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force. Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.

#### Staff are constrained and trade off

Alison Jones & William E. Kovacic 20. Professor at King’s College London, and Global Competition Professor of Law and Policy at The George Washington University Law School. “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, vol. 65, no. 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

B. Augmenting the Human Capital of the Enforcement Agencies

Measures to expand federal antitrust intervention dramatically—through the prosecution of lawsuits or the promulgation of trade regulation rules—will face arduous opposition from the affected businesses. Assuming that litigation will provide the main method in the coming few years to attack positions of single-firm or collective dominance, the targets of big antitrust cases will marshal the best talent that private law firms, economic consultancies, and academic bodies can offer to oppose the government in court. The defense will benefit from doctrinal principles that generally are sympathetic to dominant firms (again, we assume that legislation to change the doctrinal status quo will not be immediately forthcoming). Beyond a certain point, the addition of new, high stakes cases to the litigation portfolio of public antitrust agencies will create a serious gap between the teams assembled for the prosecution and defense, respectively. Although therefore the public agencies can match the private sector punch for the punch when prosecuting several major de-monopolization cases, when the volume of such cases rises from several to many, the government agencies may have to rely on personnel with considerably less experience to develop and prosecute difficult antitrust cases, seeking powerful remedies upon global giants.

An enhanced litigation program will therefore go only as far as the talent of the agencies will carry it. We propose three steps to build and retain the human capital—attorneys, economists, technologists, and administrative managers133—to undertake a more ambitious litigation program. The first is to use antitrust as a prototype for a program to raise civil service salaries. The second two steps consist of cautions about the dangers of (a) denigrating the skills and accomplishments of existing agency personnel and (b) attempting to shut the revolving door through which professionals move between the public and private sectors. We discuss all three of these steps below.

1. Resources and compensation

To accomplish the desired expansion of enforcement, we see a need for more resources.134 Nonetheless, budget increases that simply allow the enforcement agencies to hire additional staff, while useful, are not enough. We would use more resources to boost compensation for agency employees. This means taking the antitrust agencies out of the existing civil service pay scale. The need is not simply to hire more people. It is to attract a larger number of elite personnel who are equal to the tasks that the ambitious reform agenda will impose. We do not see how the public agencies can recruit and retain necessary personnel without a significant increase in the salaries paid to case handlers and to senior managers. It surprises us that none of the proposals for bold reform mention compensation for civil servants.

#### There are no major cases

Jacob Carpenter 12/3/21. Writer for Fortune. “Lina Khan targets low-hanging fruit for first big antitrust move.” https://fortune.com/2021/12/03/nvidia-arm-lina-khan-antitrust/

But Khan, perhaps smartly, isn’t exactly taking a big swing here. From the moment that Nvidia announced its planned acquisition in September 2020, analysts and competitors have been skeptical the deal would go through. In subsequent months, some of the U.S.’ most prominent tech companies cried foul about the merger, including Google parent Alphabet, Microsoft, and Qualcomm, Bloomberg reported early this year. Khan also has momentum at her back, with European Union and United Kingdom regulators already lining up an antitrust case. A top UK official teed up Thursday’s announcement by telling Bloomberg last month that “there is a lot of collaboration” on each side of the Atlantic with regard to Nvidia and Arm. In addition, the FTC’s case has bipartisan support, with the organization’s two Republican commissioners joining their two Democratic counterparts in support of the case. The true test of Kahn’s mettle lies farther down the road, as the FTC ponders whether to throw its weight behind challenges to acquisitions with more divided support and more complicated facts.

#### 1. Settlements prove FTC success in algorithm enforcement

Natasha Lomas 21. Senior reporter for TechCrunch, 1/12/21. “FTC settlement with Ever orders data and AIs deleted after facial recognition pivot.” https://techcrunch.com/2021/01/12/ftc-settlement-with-ever-orders-data-and-ais-deleted-after-facial-recognition-pivot/

The maker of a defunct cloud photo storage app that pivoted to selling facial recognition services has been ordered to delete user data and any algorithms trained on it, under the terms of an FTC settlement. The regulator investigated complaints the Ever app — which gained earlier notoriety for using dark patterns to spam users’ contacts — had applied facial recognition to users’ photographs without properly informing them what it was doing with their selfies. Under the proposed settlement, Ever must delete photos and videos of users who deactivated their accounts and also delete all face embeddings (i.e. data related to facial features which can be used for facial recognition purposes) that it derived from photos of users who did not give express consent to such a use. Moreover, it must delete any facial recognition models or algorithms developed with users’ photos or videos. This full suite of deletion requirements — not just data but anything derived from it and trained off of it — is causing great excitement in legal and tech policy circles, with experts suggesting it could have implications for other facial recognition software trained on data that wasn’t lawfully processed. Or, to put it another way, tech giants that surreptitiously harvest data to train AIs could find their algorithms in hot water with the US regulator. The quick background here is that the Ever app shut down last August, claiming it had been squeezed out of the market by increased competition from tech giants like Apple and Google. However the move followed an investigation by NBC News — which in 2019 reported that app maker Everalbum had pivoted to selling facial recognition services to private companies, law enforcement and the military (using the brand name Paravision) — apparently repurposing people’s family snaps to train face reading AIs. NBC reported Ever had only added a “brief reference” to the new use in its privacy policy after journalists contacted it to ask questions about the pivot in April of that year. In a press release yesterday, reported earlier by The Verge, the FTC announced the proposed settlement with Ever received unanimous backing from commissioners. One commissioner, Rohit Chopra, issued a standalone statement in which he warns that current gen facial recognition technology is “fundamentally flawed and reinforces harmful biases”, saying he supports “efforts to enact moratoria or otherwise severely restrict its use”. “Until such time, it is critical that the FTC meaningfully enforce existing law to deprive wrongdoers of technologies they build through unlawful collection of Americans’ facial images and likenesses,” he adds. Chopra’s statement highlights the fact that commissioners have previously voted to allow data protection law violators to retain algorithms and technologies that “derive much of their value from ill-gotten data”, as he puts it — flagging an earlier settlement with Google and YouTube under which the tech giant was allowed to retain algorithms and other technologies “enhanced by illegally obtained data on children”. And he dubs the Ever decision “an important course correction”.

#### 2. Facebook proves

Mike Swift 9/17/21. Chief Global Digital Risk Correspondent for MLex, award-winning journalist who has been at the forefront of covering data, privacy and cybersecurity regulatory news for nearly a decade, 9/17/21. “Facebook's 'comprehensive' privacy improvements after US FTC order had 'gaps and weaknesses,' independent assessment concludes.” https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/facebooks-comprehensive-privacy-improvements-after-us-ftc-order-had-gaps-and-weaknesses-independent-assessment-concludes

The initial assessment by global consulting firm Protiviti, covering the six-month period ending in April after the FTC’s privacy order against Facebook took effect, “confirms that the [FTC] Order constituted a watershed moment at Facebook,” leading to “substantial investments” by Facebook in compliance, Facebook’s chief privacy officer for product, Michel Protti, told the FTC in a letter delivering the Protiviti report on July 1. However, the independent assessor concluded in the executive summary of the 230-page report, completed in late June, that “substantial” shortfalls remained that Facebook must address. 'Substantial additional work' “The gaps and weaknesses noted within our review demonstrate that substantial additional work is required, and additional investments must be made, in order for the program to mature,” Provititi concluded in the executive summary, which was heavily redacted by Facebook and the FTC before it was released to MLex following a public records request. Facebook moved too slowly in several specific areas to implement the program, the assessor concluded. “We believe there are significant further opportunities in this area that should be prioritized and accelerated,” Protiviti said. Details of those “opportunities,” which appear to refer to the use of artificial intelligence and other automated technologies, were redacted by Facebook and the FTC Protiviti said the study was independently done without relying on the assertions of Facebook’s management, and used National Institute of Standards and Technology (NIST) principles as the basis for its evaluation. The consultant concluded that Facebook has put the foundations in place for organizational changes that, for a company with a history of serial privacy violations, may improve that record. Facebook told the FTC in its July 1 response to the assessor’s report that it is aware it must make more progress and is working to make its new internal Privacy Organization operate as an independent compliance force within the company, even as “Facebook continues to develop a Company-wide ‘risk and controls’ mindset” on privacy. Perhaps the key change Facebook made was to create an internal Privacy Organization headed by Protti, who reports to Facebook Chief Technology Officer Mike Schroepfer, who reports to CEO Mark Zuckerberg. Protti said in a blog post this year that the Privacy Organization is made up of “dozens of teams, both technical and non-technical, focused solely on privacy and led by some of our most experienced leaders.” “We believe the overall scope of the program and structure into which the program is organized is logical and appropriately comprehensive. As a result, the key foundational elements necessary for an effective program are now in place, although their maturity and completeness vary,” Protiviti concluded in the summary of its assessment. Need for standards The specific “gaps and weaknesses” in Facebook’s evolving privacy program were redacted by Facebook and the FTC in documents released to MLex. However, one problem identified by the assessor was the continuing need for Facebook to “fully establish and mature” independent standards and oversight on privacy. “In our experience, nearly all effective privacy programs operate according to a model where front-line product teams are responsible for performing day to day control activities that are designed to manage the risk associated with those products,” Protiviti concluded. Further details on that topic were redacted by Facebook and the FTC before the document was released to MLex. Facebook has hired new members to its Privacy Organization under Protti, with additional hires expected through the end of 2021, but the number of people Facebook hired and plans to continue to hire were redacted from the documents. A Facebook spokesman declined to provide those numbers today. Facebook views its revamped privacy program as having three lines of defense against misconduct: Its product and business teams are being held more accountable to privacy values in day-to-day work; internal legal and policy teams and the new Privacy Organization set privacy standards and have oversight of product and business teams; and an independent assessor has oversight over the first two levels of defense. Facebook has long been known as a company that operates under Zuckerberg’s infamous slogan: “Move Fast and Break Things,” a rallying cry that for years was posted in red-lettered signs in Facebook offices around the world. But Protti told the FTC in delivering the initial assessment in July that its order has successfully produced lasting change at Facebook, from the chief executive officer on down. “Facebook’s completely redesigned and exponentially expanded Privacy Program reflects the degree of change Mr. Zuckerberg envisioned when the order was announced,” Protti told the FTC. “The Program benefits from multiple levels of oversight, governance and accountability, including the independent Privacy Committee [on the board of directors], senior leadership and the Privacy Org.” 3. The FTC is broadly successful in privacy cases---it’s the de facto regulator---AND antitrust trades off Erika M. Douglas 21. Assistant Professor of Law at Temple University, Beasley School of Law, 1/18/21. “The New Antitrust/Data Privacy Law Interface.” The Yale Law Journal Volume 130. https://www.yalelawjournal.org/forum/the-new-antitrustdata-privacy-law-interface These theories are new, as the intersection of law is itself quite new. It is only in the last twenty-five years that the FTC has established the “new common law of privacy.”13 The rise of the agency as the de facto federal data privacy regulator occurred in lockstep with the emergence of the internet, from the mid-1990s to the present.14 Individuals were suddenly engaging in a myriad of new electronic activity, placing their data online in ever-growing amounts. Spotty, sector-specific privacy legislation left large swathes of that new online activity unprotected by any data privacy laws.15 Congress urged the FTC to fill these gaps, which the agency did using its general consumer protection authority under section 5 of the FTC Act. Section 5 empowers the FTC to prevent unfair or deceptive acts or practices in the marketplace.16 The FTC began to police companies’ false or misleading promises regarding the collection, use, and sale of consumers’ personal data. Over time, these efforts expanded and developed into a body of standards that seek to protect consumers’ reasonable expectations of privacy. An early internet company was among the FTC’s first enforcement targets,17 and the agency has continued to focus on digital companies and their privacy practices ever since.The novelty of the interface between antitrust law and data privacy is best illustrated in the context of monopoly enforcement.18 Consider that the rise of data privacy law coincides precisely with a twenty-year absence of monopolization enforcement by U.S. antitrust agencies. Around the time data privacy law began to take hold, “the anti-monopoly provisions of the Sherman Act went into a deep freeze from which they have never really recovered.”19 The last significant government anti-monopoly case ended around 2001.20 Monopolization enforcement has unthawed only very recently, with a case filed against Google in late 2020.21 This coincidence of timing—quiet in anti-monopolization enforcement while data privacy law bloomed—means that these areas of law are only now beginning to coexist in American law. The theories of their interaction are thus new, and still developing.

#### 4---It’s not topical or normal means. Violates “scope.”

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.

#### \*\*\*\*2---They keep 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.

#### 2---No one else will fill in and top-down approach fails

Michael Spiro 20. Corporate counsel at Smartsheet Inc., where he handles data privacy agreements and other privacy-related matters, J.D. from the University of Washington School of Law, L.L.M. in Innovation and Technology Law from Seattle University School of Law, and more than fifteen years of experience as a federal judicial law clerk for the Western District of Washington. “The FTC and AI Governance: A Regulatory Proposal," Seattle Journal of Technology, Environmental & Innovation Law: Vol. 10: Iss. 1 , Article 2. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=sjteil

As an emerging technology, AI poses signiﬁcant regulatory challenges. The disproportionate allocation of technical knowledge and expertise between industry and regulators compounds these obstacles.14 These challenges make the traditional, top-down command-and-control approach to regulation ill-suited to AI governance. Instead, a co-regulatory model that combines industry self-regulation and stakeholder involvement with government oversight is much more promising, at least in the near term. While some have called for the creation of a new overarching federal agency to regulate in this area, given the difficulty of enacting any major new legislation that impacts powerful interests, Congressional action or any chance of a new oversight body is unlikely.15

A federal agency already exists, however, that is both familiar with and experienced in regulating new and emerging technologies and can step in now to ﬁll the AI regulatory hole. Even with its limited resources, the Federal Trade Commission (FTC) has proven adept at working with industry in the area of data protection, closing many of the “gaps” left by the sectoral approach to privacy regulation in the United States.16 The FTC has done so largely through its broad powers granted under Section 5 of the FTC Act which allows it to regulate “unfair and deceptive practices.” AI and its applications fall under the scope of that language and are thus regulatable by the FTC. Further, Congress can and should increase the FTC’s resources and give it greater rule-making authority. This will allow the FTC to more effectively meet the challenges that AI presents and will continue to present in the future.

#### 3---Agency oversight is essential, and only the FTC has the tools

Michael Spiro 20. Corporate counsel at Smartsheet Inc., where he handles data privacy agreements and other privacy-related matters, J.D. from the University of Washington School of Law, L.L.M. in Innovation and Technology Law from Seattle University School of Law, and more than fifteen years of experience as a federal judicial law clerk for the Western District of Washington. “The FTC and AI Governance: A Regulatory Proposal," Seattle Journal of Technology, Environmental & Innovation Law: Vol. 10: Iss. 1 , Article 2. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=sjteil

One reason for having a single, overarching agency are the efﬁciencies that it creates in terms of meeting the complex, systemic regulatory challenges that Al poses.183 Other agencies that might exert authority over only a small slice of the AI spectrum will lack the necessary expertise, or motivation to regulate its area of responsibility consistently and effectively.184 A single federal agency, on the other hand, can develop comprehensive, holistic policies rather than piecemeal regulatory efforts.185 It can quickly respond to new products, practices, and technological changes with more targeted “granular solutions” that better protect consumers.186 Furthermore, such an agency probably would be more capable of attracting industry talent and thereby build its own expertise.187

In the United States, regulation of AI has taken the sector-specific, multiple agency oversight approach.188 In the near term, there seems to be little movement toward taking steps toward regulating AI more comprehensively.189 And while Congress could move to create a new, overarching federal agency or to enact omnibus legislation dealing explicitly with AI, legislative inactivity over the past 15 years in the area of privacy — which itself has been signiﬁcantly impacted by the rise of machine learning and other AI technologies — demonstrates that this prospect is fairly grim.190

C. The FTC’s Approach to Regulating Technology

Yet, the United States is not without an agency that has both the experience and expertise to step in now to ﬁll the regulatory vacuum: the Federal Trade Commission. For example, the FTC has demonstrated its expertise in the ﬁeld of privacy, which is an area with a similar history of inconsistent or lack of comprehensive regulation.191 In this ﬁeld, the FTC has moved to assert its authority when industries have not been subject to regulation due to gaps in the country’s sectoral laws.192 In doing so, the FTC has shown an ability to bring a “layer of coherence” to the regulatory system that has solidiﬁed over the years.193 The FTC is more than capable of taking on the role of regulatory gap ﬁller and coherent AI policy developer.

Instead of simply imposing top-down, command-and-control rules, the FTC has favored a self-regulatory approach to protecting consumer privacy, gradually developing that approach into a regulatory system that over time has become more robust.194 In the privacy arena, the FTC has taken the position that protecting consumers through self-regulation is more ﬂexible and cost-effective than direct regulation, which at the same time allows for the pace of technological innovation to continue.195 Further, the norms the FTC has enforced over the years have been developed in accordance with industry stakeholders and consumer expectations; this enforcement strategy is in line with the co-regulatory model of governance.196

#### **2---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.

#### 3---Algorithmic bias in AI is 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.”