# 1nc fullertown r3

## Offcase

### T-Strucutral – 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.

### CFIUS CP – 1NC

#### counterplan: The United States federal government should:

#### 1---define a comity balancing test that does not incorporate foreign interests as a non-antitrust, regulatory threat to national security;

#### 2---allow a private right of action for discovery of said threats;

#### 3---offer resources that incentivize the government of Brazil to adopt an adjacent standard; and,

#### 4---offer subsidies to the Brazilian economy.

#### cfius solves

Richard M. Steuer 17. Member of the New York Bar. "The Horizons of Antitrust." St. John's Law Review, vol. 91, no. 1, Spring 2017, p. 177-210. HeinOnline.

As described earlier, some countries assign their competition agencies responsibility for assessing and weighing not only consumer welfare, but other goals as well. This can be daunting, but every town council and zoning board routinely faces the challenge of weighing competing goals, usually with far less analytical support.8 ' Nevertheless, the arguments against assigning competition agencies authority for applying other goals are that these agencies are ill equipped to perform non-economic analysis, and that such an approach would concentrate too much discretion within the competition authorities. If, for instance, the Federal Trade Commission were tasked with conducting a "net benefit" analysis, considering all the goals discussed earlier, it would require greater resources. It also would need the political strength to withstand the criticism it would inevitably attract year in and year out from disappointed parties and their supporters. Some countries, such as Canada and Australia, have established authorities separate from competition authorities to oversee foreign investment, applying a wide variety of goals either apart from consumer welfare or, as in Australia, including consumer welfare. 82 A model like that adopted in Australia would contemplate the creation of a foreign investment review board to advise a cabinet member or the president, who in turn would have authority to disapprove foreign investments, applying a "national interest" or "net benefit" test. If such an arm of government were assigned responsibility in the United States for balancing all these goals in the context of foreign investment, who has the breadth of experience, depth of wisdom, and political respect to make such judgments? The National Economic Council, as has been suggested by the Center for American Progress?" Would its determination be subject to judicial review, and under what standard? What about expanding the responsibilities of CFIUS, as proposed under the Foreign Investment and Economic Security bill,' to apply a "net benefit" test to foreign acquisitions of control regardless of whether those acquisitions pose a threat to national security? Under that proposal, the Committee's determination would be subject to review by the President, but otherwise would be nonreviewable. What about creating a new body, modeled on Australia's Foreign Investment Review Board? How would it be composed and who would appoint its members? Would it be modeled on the Federal Trade Commission, with members from more than one political party serving fixed terms or would it be reconstituted by each administration, like the Council of Economic Advisors? Who would have the ultimate responsibility-the Treasury Secretary? The Commerce Secretary? The President? What would be the threshold for review? Would judicial review be possible and, if so, under what standard? The simplest approach might be to expand the mission of CFIUS by defining "national security" to include economic security, or "national interest," and to create a new advisory board, with adequate staffing, to provide the support that CFIUS would need to fulfill a broader mission with respect to acquisitions of foreign control that do not raise issues of national defense or homeland security. Depending upon the scope of this new authority, there might be calls to add provisions to allow judicial review in those instances where neither national defense nor homeland security is involved." It would be easiest to leave well enough alone, of course, but if the American economy truly is being threatened by the current approach, a new assignment of responsibility should be considered. There are several viable alternatives, as just described, each of which has pros and cons. What is clear is that if the present structure in the United States no longer is working satisfactorily, a new structure needs to be considered.

### Prohibit PIC – 1NC

#### Next off is the Prohibit PIC---

#### The United States should only allow the continuation of anticompetitive business practices by the private sector outside of accordance with a comity balancing test when the president determines it is necessary to prevent condition which may pose a direct threat to the national defense or its preparedness programs.

#### The counterplan maintains DPA authority---the plan eliminates it.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Authorities Under Title VII of the DPA

Title VII of the DPA contains various provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Some significant provisions of Title VII are summarized below.

Special Preference for Small Businesses

Two provisions in the DPA direct the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 reiterates89 and expands upon a requirement in Section 108 of Title I directing the President to "accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor."90

Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.91 Though national defense is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.92 Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, most recently in 2009, when Congress added a definition for homeland security93 to place it within the context of national defense.94

Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and therefore need to obtain extensive information from private industries. Under Section 705 of the DPA, the President may "by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA]."95 This authority is delegated to the Secretary of Commerce in E.O. 13603.96 Though this authority has many potential implications and uses, it is most commonly associated with what the DOC's Bureau of Industry and Security calls "industrial base assessments."97 These assessments are often conducted in coordination with other federal agencies and the private sector to "monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities."98 The statute requires the President to issue regulations to insure that the authority is used only after "the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."99 This regulation has been issued by DOC.100

Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA authorizes the President to "consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."101 The President must determine that a "condition exists which may pose a direct threat to the national defense or its preparedness programs"102 prior to engaging in the consultation process. Following the consultation process, the President or presidential delegate may approve and implement the agreement or plan of action.103 Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.104 Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to "enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes," among other examples.105 It could also be used, for example, to develop a plan of action with private industry for the repair and reconstruction of major critical infrastructure systems following a domestic disaster.

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect.

The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110

Nucleus Executive Reserve

Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112

The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114

Authorization of Appropriations, as amended by P.L. 113-72

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116

Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations).

Committee on Foreign Investment in the United States118

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.

CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute.

On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls.

Termination of the Act

Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are

* 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
* 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
* 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and
* 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4.

Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA.

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129

The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

Impact of Offsets Report

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

Congress may consider whether to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. These reporting or notification requirements could be added to the existing law, or could be included in conference or committee reports accompanying germane legislation, such as appropriations bills or the National Defense Authorization Act. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities under specific circumstances. For example, Congress may consider whether to require the President to notify Congress (or the oversight committees) when the priorities and allocations authority is used on a contract valued above a threshold dollar amount.132 Congress might also consider expanding the existing reporting requirements of the DPAC, to include semi-annual updates on the recent use of authorities or explanations about controversial determinations made by the President. Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees.

Enforce and Revise Rulemaking Requirements

Congress may consider reviewing the agencies' compliance with existing rulemaking requirements. A rulemaking requirement exists for the voluntary agreement authority in Title VII that has been completed by DHS, but it has not been updated since 1981 and may be in need of an update given changes to the authority and government reorganizations since that date.133 One of the agencies responsible for issuing a rulemaking on the use of Title I authorities has yet to do so. Congress may also consider potentially expanding regulatory requirements for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities. In addition to formalizing the executive branch's policies and procedures for using DPA authorities, these regulations could also serve an important function by offering an opportunity for private citizens and industry to comment on and understand the impact of DPA authorities on their personal interests.

Broaden Committee Oversight Jurisdiction

Since its enactment, the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and their predecessors have exercised legislative oversight of the Defense Production Act. The statutory authorities granted in the various titles have been vested in the President, who has delegated some of these authorities to various agency officials through E.O. 13603. As an example of the scope of delegations, the membership of the Defense Production Act Committee (DPAC), created in 2009 and amended in 2014, includes the Secretaries of Agriculture, Commerce, Defense, Energy, Labor, Health and Human Services, Homeland Security, the Interior, Transportation, the Treasury, and State; the Attorney General; the Administrators of the National Aeronautics and Space Administration and of General Services, the Chair of the Council of Economic Advisers; and the Directors of the Central Intelligence Agency and National Intelligence.

In order to complement existing oversight, given the number of agencies that currently use or could potentially use the array of DPA authorities to support national defense missions, Congress may consider reestablishing a select committee with a purpose similar to the former Joint Committee on Defense Production.134 As an alternative to the creation of a new committee, Congress may consider formally broadening DPA oversight responsibilities to include all relevant standing committees when developing its committee oversight plan.

Should DPA oversight be broadened, Congress might consider ways to enhance inter-committee communication and coordination of its related activities. This coordination could include periodic meetings to prepare for oversight hearings or ensuring that DPA-related communications from agencies are shared appropriately. Finally, because the DPA was enacted at a time when the organization and rules of both chambers were markedly different to current practice, Congress may consider the joint referral of proposed DPA-related legislation to the appropriate oversight committees.

Amending the Defense Production Act of 1950

While the act in its current form may remain in force until September 30, 2025, the legislature could amend the DPA at any time to extend, expand, restrict, or otherwise clarify the powers it grants to the President. For example, Congress could eliminate certain authorities altogether. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.

#### Key to pandemic response.

J. Mark Gidley et al. 20. J. Mark Gidley chairs the White & Case Global Antitrust/Competition practice. Martin M. Toto and Sean Sigillito. “A Novel Antitrust Defense for COVID-19 Agreements: Section 708 of the Defense Production Act” <https://www.whitecase.com/sites/default/files/2020-04/novel-antitrust-defense-covid-19-agreements-section-708-defense-production-act.pdf>

There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States’ response to the COVID-19 health emergency. The Government’s recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President’s delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act’s antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

#### Extinction.

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93. https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

### Capitalism K – 1NC

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

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

I. Neoliberal Reason

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

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

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

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

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

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

II. From Keynesian State Capitalism to Neoliberal Deregulation

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

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

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

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

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

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

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

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

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

#### Capitalism drives extinction and structural violence.

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

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

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

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

#### Vote neg for global syndicalism – bottom-up pressures are building, forces the hand of monopolies.

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

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

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

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

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

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

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

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

### FTC Disad – 1NC

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

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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

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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

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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.”

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### 1NC

#### The plan is perceived as a protectionist shockwave that shreds any semblance of global free trade and economic growth.

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INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western *leaders* in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western *lawmakers* themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

### Private enforcement fails

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

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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.

### AT: Economic Leverage---1NC

#### Global trade is growing rapidly.

Paul Hannon 10/4/21. Reporter, The Wall Street Journal. “Global Trade Boom to Continue After Covid-19 Reopening Bounce.” https://www.wsj.com/amp/articles/global-trade-boom-to-continue-after-covid-19-reopening-bounce-11633360758

Global trade flows will continue their rapid rebound from the pandemic this year and next, with Asia seeing the strongest gains in exports, and Africa losing out, the World Trade Organization said.

The Geneva-based body’s new forecasts Monday underline the unequal nature of Covid-19’s economic impact, with poorer countries set to suffer the weakest trade recovery, partly because they lack access to vaccines.

The WTO expects that Asia’s exports of goods will be 18.8% higher by the end of 2022 than two years earlier, while Africa’s exports are set to rise by just 1.9%. The trade dispute body expects North American exports to be up 8%, and European exports to be 7.8% higher.

“The trade recovery is strong but unequal,” said Ngozi Okonjo-Iweala, the WTO’s director general. “Poorer regions with mostly unvaccinated populations are lagging behind.”

Exports and imports of goods collapsed in the early months of the pandemic as lockdowns closed factories and transport networks across the globe. Trade flows started to rebound from the middle of 2020 and returned to their pre-pandemic level by the end of that year.

Asia supplied many of the goods that households and businesses needed to navigate the pandemic, including personal-protection equipment, laptops and bicycles. As a result, the continent that includes factory powerhouses such as China and South Korea has led the trade rebound. By the end of this year, the WTO estimates that Asian exports will already be 14.7% higher than at the end of 2019, while exports from North America—which is dominated by the U.S.—will still be slightly down on pre-pandemic levels.

Other economists also expect the trade surge to continue in parts of Asia beyond next year, driven by an ample supply of low-wage workers. HSBC, a U.K. bank historically focused on Asian trade, expects Vietnam to record annual average exports growth of 13% between this year and 2026, not accounting for price rises. It sees Bangladesh close behind at 12.9% and Sri Lanka at 10.1%. The bank expects China’s trade growth to be much lower, at 5.6% annually, putting it roughly in line with the U.S. and Europe.

Despite the suddenness of the collapse in world trade in early 2020, and the strength of its subsequent rebound, the WTO doesn’t see the pandemic having long-term implications for the role that exports and imports play in the global economy.

At the 1990s’ high point of the globalization process, when businesses around the world split production between an increasing number of countries, trade volumes grew at twice the rate of world economic output. The WTO expects that ratio between trade volumes and global gross domestic output to be matched this year, but that trade will grow at roughly the same rate as the global economy from 2022, returning to the pace common since the global financial crisis.

While the pandemic may not see a step up in globalization, neither do economists think it marks a setback. Some economists and policy makers had expected the disruptions caused by the pandemic to push some companies to shorten supply chains or bring production back home.

“This pandemic has highlighted just how interconnected and interdependent we really are,” said Shanella Rajanayagam, an economist at HSBC. “Supply chains are just so complex and there are some components that only certain countries or certain producers make.”

### AT: Emerging Tech---1NC

#### American dominance isn’t necessary for global stability.

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

These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace. In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day. The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work. Conflict and US Military Spending How does one measure polarity? Power is traditionally considered to be some combination of military and economic strength, but despite scores of efforts, no widely accepted formula exists. Perhaps overall military spending might be thought of as a proxy for hard power capabilities; perhaps too the amount of money the United States devotes to hard power is a reflection of the strength of the unipole. When compared to conflict levels, however, there is no obvious correlation, and certainly not the kind of negative relationship between US spending and conflict that many hegemonic stability theorists would expect to see. During the 1990s, the United States cut back on defense by about 25 percent, spending $100 billion less in real terms in 1998 that it did in 1990.68 To those believers in the neoconservative version of hegemonic stability, this irresponsible “peace dividend” endangered both national and global security. “No serious analyst of American military capabilities doubts that the defense budget has been cut much too far to meet America’s responsibilities to itself and to world peace,” argued Kristol and Kagan at the time.69 The world grew dramatically more peaceful while the United States cut its forces, however, and stayed just as peaceful while spending rebounded after the 9/11 terrorist attacks. The incidence and magnitude of global conflict declined while the military budget was cut under President Clinton, in other words, and kept declining (though more slowly, since levels were already low) as the Bush administration ramped it back up. Overall US military spending has varied during the period of the New Peace from a low in constant dollars of less than $400 billion to a high of more than $700 billion, but war does not seem to have noticed. The same nonrelationship exists between other potential proxy measurements for hegemony and conflict: there does not seem to be much connection between warfare and fluctuations in US GDP, alliance commitments, and forward military presence. There was very little fighting in Europe when there were 300,000 US troops stationed there, for example, and that has not changed as the number of Americans dwindled by 90 percent. Overall, there does not seem to be much correlation between US actions and systemic stability. Nothing the United States actually does seems to matter to the New Peace. It is possible that absolute military spending might not be as important to explain the phenomenon as relative. Although Washington cut back on spending during the 1990s, its relative advantage never wavered. The United States has accounted for between 35 and 41 percent of global military spending every year since the collapse of the Soviet Union.70 The perception of relative US power might be the decisive factor in decisions made in other capitals. One cannot rule out the possibility that it is the perception of US power—and its willingness to use it—that keeps the peace. In other words, perhaps it is the grand strategy of the United States, rather than its absolute capability, that is decisive in maintaining stability. It is that to which we now turn. Conflict and US Grand Strategy The perception of US power, and the strength of its hegemony, is to some degree a function of grand strategy. If indeed US strategic choices are responsible for the New Peace, then variation in those choices ought to have consequences for the level of international conflict. A restrained United States is much less likely to play the role of sheriff than one following a more activist approach. Were the unipole to follow such a path, hegemonic-stability theorists warn, disaster would follow. Former National Security Advisor Zbigniew Brzezinski spoke for many when he warned that “outright chaos” could be expected to follow a loss of hegemony, including a string of quite specific issues, including new or renewed attempts to build regional empires (by China, Turkey, Russia, and Brazil) and the collapse of the US relationship with Mexico, as emboldened nationalists south of the border reassert 150-year-old territorial claims. Overall, without US dominance, today’s relatively peaceful world would turn “violent and bloodthirsty.” 71 Niall Ferguson foresees a post-hegemonic “Dark Age” in which “plunderers and pirates” target the big coastal cities like New York and Rotterdam, terrorists attack cruise liners and aircraft carriers alike, and the “wretchedly poor citizens” of Latin America are unable to resist the Protestantism brought to them by US evangelicals. Following the multiple (regional, fortunately) nuclear wars and plagues, the few remaining airlines would be forced to suspend service to all but the very richest cities.72 These are somewhat extreme versions of a central assumption of all hegemonic-stability theorists: a restrained United States would be accompanied by utter disaster. The “present danger” of which Kristol, Kagan, and their fellow travelers warn is that the United States “will shrink its responsibilities and—in a fit of absentmindedness, or parsimony, or indifference— allow the international order that it created and sustains to collapse.” 73 Liberals fear restraint as well, and also warn that a militarized version of primacy would be counterproductive in the long run. Although they believe that the rule-based order established by United States is more durable than the relatively fragile order discussed by the neoconservatives, liberals argue that Washington can undermine its creation over time through thoughtless unilateral actions that violate those rules. Many predicted that the invasion of Iraq and its general contempt for international institutions and law would call the legitimacy of the order into question. G. John Ikenberry worried that Bush’s “geostrategic wrecking ball” would lead to a more hostile, divided, and dangerous world.74 Thus while all hegemonicstability theorists expect a rise of chaos during a restrained presidency, liberals also have grave concerns regarding primacy. Overall, if either version is correct and global stability is provided by US hegemony, then maintaining that stability through a grand strategy based on either primacy (to neoconservatives) or “deep engagement” (to liberals) is clearly a wise choice.75 If, however, US actions are only tangentially related to the outbreak of the New Peace, or if any of the other proposed explanations are decisive, then the United States can retrench without fear of negative consequences. The grand strategy of the United States is therefore crucial to beliefs in hegemonic stability. Although few observers would agree on the details, most would probably acknowledge that post-Cold War grand strategies of American presidents have differed in some important ways. The four administrations are reasonable representations of the four ideal types outlined by Barry R. Posen and Andrew L. Ross in 1996.76 Under George H. W. Bush, the United States followed the path of “selective engagement,” which is sometimes referred to as “balance-of-power realism”; Bill Clinton’s grand strategy looks a great deal like what Posen and Ross call “cooperative security,” and others call “liberal internationalism”; George W. Bush, especially in his first term, forged a strategy that was as close to “primacy” as any president is likely to get; and Barack Obama, despite some early flirtation with liberalism, has followed a restrained realist path, which Posen and Ross label “neo-isolationism” but its proponents refer to as “strategic restraint.” 77 In no case did the various anticipated disorders materialize. As Table 2 demonstrates, armed conflict levels fell steadily, irrespective of the grand strategic path Washington chose. Neither the primacy of George W. Bush nor the restraint of Barack Obama had much effect on the level of global violence. Despite continued warnings (and the high-profile mess in Syria), the world has not experienced an increase in violence while the United States chose uninvolvement. If the grand strategy of the United States is responsible for the New Peace, it is leaving no trace in the evidence. Perhaps we should not expect a correlation to show up in this kind of analysis. While US behavior might have varied in the margins during this period, nether its relative advantage over its nearest rivals nor its commitments waivered in any important way. However, it is surely worth noting that if trends opposite to those discussed in the previous two sections had unfolded, if other states had reacted differently to fluctuations in either US military spending or grand strategy, then surely hegemonic stability theorists would argue that their expectations had been fulfilled. Many liberals were on the lookout for chaos while George W. Bush was in the White House, just as neoconservatives have been quick to identify apparent worldwide catastrophe under President Obama.78 If increases in violence would have been evidence for the wisdom of hegemonic strategies, then logical consistency demands that the lack thereof should at least pose a problem As it stands, the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated. The rest of the world appears quite capable and willing to operate effectively without the presence of a global policeman. Those who think otherwise have precious little empirical support upon which to build their case. Hegemonic stability is a belief, in other words, rather than an established fact, and as such deserves a different kind of examination. The Political Psychology of Unipolarity Evidence supporting the notion that US power is primarily responsible for the New Peace is slim, but belief in the connection is quite strong, especially in policy circles. The best arena to examine the proposition is therefore not the world of measurable rationality, but rather that of the human mind. Political psychology can shed more light on unipolarity than can any collection of data or evidence. Just because an outcome is primarily psychological does not mean that it is less real; perception quickly becomes reality for both the unipolar state and those in the periphery. If all actors believe that the United States provides security and stability for the system, then behavior can be affected. Beliefs have deep explanatory power in international politics whether they have a firm foundation in empirical reality or not. Like all beliefs, faith in the stability provided by hegemony is rarely subjected to much analysis. In their simplest form, beliefs are ideas that have become internalized and accepted as true, often without much further analysis Although they almost always have some basis in reality, beliefs need not pass rigorous tests to prove that they match it. No amount of evidence has been able to convince some people that vaccines do not cause autism, for example, or that the world is more peaceful than at any time before, or that the climate is changing due to human activity. Ultimately, as Robert Jervis explains, “we often believe as much in the face of evidence as because of it.” When leaders are motivated to act based on unjustified, inaccurate beliefs, folly often follows. The person who decides to take a big risk because of astrological advice in the morning's horoscope can benefit from baseless superstition if the risk pays off. Probability and luck suggest that successful policy choices can sometimes flow from incorrect beliefs. Far more often, however, poor intellectual foundations lead to suboptimal or even disastrous outcomes. It is worthwhile to analyze the foundations of even our most deeply held beliefs to determine which ones are good candidates to inspire poor policy choices in those who hold them. People are wonderful rationalizers. There is much to be said for being the strongest country in the world; their status provides Americans both security and psychological rewards, as well as strong incentives to construct a rationale for preserving the unipolar moment that goes beyond mere selfishness. Since people enjoy being “number one,” they are susceptible to perceiving reality in ways that brings the data in line with their desires. It is no coincidence that most hegemonic stability theorists are American. Of the few hegemonic-stability theorists from elsewhere, most hail from the United Kingdom and counsel the United States to follow the lead of the British Empire. Perhaps the satisfaction that comes with being the unipolar power has inspired Americans to misperceive the positive role that their status plays in the world. Three findings from political psychology can shed light on perceptions of hegemonic stability. They are mutually supportive, and, when taken together, suggest that it is likely that US policymakers overestimate the extent to which their actions are responsible for the choices of others. The belief in the major US contribution to world peace is probably unjustified. The Illusion of Control Could 5 percent of the world’s population hope to enforce rules upon the rest? Would even an internationally hegemonic United States be capable of producing the New Peace? Perhaps, but it also may be true that believers in hegemonic stability may be affected by the very common tendency of people to overestimate their ability to control events. A variety of evidence has accumulated over the past forty years to support Ellen J. Langer’s original observations about the “illusion of control” that routinely distorts perception.82 Even in situations where outcomes are clearly generated by pure chance, people tend to believe that they can exert control over events.83 There is little reason to believe that leaders are somehow less susceptible to such illusions than subjects in controlled experiments. The extensive research on the illusion of control has revealed two further findings that suggest US illusions might be even stronger than average. First, misperceptions of control appear to be correlated with power: individuals with higher socioeconomic status, as well as those who are members of dominant groups, are more likely to overestimate their ability to control events.84 Powerful people tend to be far more confident than others, often overly so, and that confidence leads them to inflate their own importance.85 Leaders of superpowers are thus particularly vulnerable to distorted perceptions regarding their ability to affect the course of events. US observers had a greater structural predisposition than others, for example, to believe that they would have been able to control events in the Persian Gulf following an injection of creative instability in 2003. The skepticism of less powerful allies was easily discounted. Second, there is reason to believe that culture matters as well as power. People from societies that value individualism are more likely to harbor illusions of control than those from collectivist societies, where assumptions of group agency are more common. When compared to people from other parts of the world, Westerners tend to view the world as “highly subject to personal control,” in the words of Richard Nisbett.86 North Americans appear particularly vulnerable in this regard.87 Those who come from relatively powerful countries with individualistic societies are therefore at high risk for misperceiving their ability to influence events. For the United States, the illusion of control extends beyond the water’s edge. An oft-discussed public good supposedly conferred by US hegemony is order in those parts of the world uncontrolled by sovereign states, or the “global commons.” 88 One such common area is the sea, where the United States maintains the only true blue-water navy in the world. That the United States has brought this peace to the high seas is a central belief of hegemonic-stability theorists, one rarely examined in any serious way. Indeed the maritime environment has been unusually peaceful for decades; the biggest naval battles since Okinawa took place during the Falklands conflict in 1982, and they were fairly minor.89 If hegemony is the key variable explaining stability at sea, maritime security would have to be far more chaotic without the US Navy. It is equally if not more plausible to suggest, however, that the reason other states are not building blue-water navies is not because the United States dissuades them from doing so but rather because none feels that trade is imperiled.90 In earlier times, and certainly during the age of mercantilism, zero-sum economics inspired efforts to cut off the trade of opponents on occasion, making control the sea extremely important. Today the free flow of goods is vital to all economies, and it would be in the interest of no state to interrupt it.91 Free trade at sea may no longer need protection, in other words, because it essentially has no enemies; the sheriff may be patrolling a crime-free neighborhood. The threat from the few remaining pirates hardly requires a robust naval presence, and is certainly not what hegemonic-stability advocates mean when they compare the role played by the US Navy in 2016 to that of the Royal Navy in 1816. It is at least possible that shared interest in open, free commons keeps the peace at sea rather than the United States. Oceans unpatrolled by the US Navy may be about as stable as they are with the presence of its carriers. The degree to which 273 active-duty ships exert control over vast common parts is not at all clear. People overestimate the degree to which they control events in their lives. Furthermore, if these observations from political psychology are right about the factors that influence the growth of illusions of power, then US leaders and analysts are particularly susceptible to misperception. They may well be overestimating the degree to which the United States can affect the behavior of others. The rest of the world may be able to get along just fine, on land and at sea, without US attempts to control it.

#### Multilat fails and is unsustainable.

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[Modified for ableist language]

The Doha round of trade negotiations is deadlocked, despite eight successful multilateral trade rounds before it. Climate negotiators have met for two decades without finding a way to stem global emissions. The UN is [destroyed] paralyzed in the face of growing insecurities across the world, the latest dramatic example being Syria. Each of these phenomena could be treated as if it was independent, and an explanation sought for the peculiarities of its causes. Yet, such a perspective would fail to show what they, along with numerous other instances of breakdown in international negotiations, have in common. Global cooperation is gridlocked across a range of issue areas. The reasons for this are not the result of any single underlying causal structure, but rather of several underlying dynamics that work together. Global cooperation today is failing not simply because it is very difficult to solve many global problems – indeed it is – but because previous phases of global cooperation have been incredibly successful, producing unintended consequences that have overwhelmed the problem-solving capacities of the very institutions that created them. It is hard to see how this situation can be unravelled, given failures of contemporary global leadership, the weaknesses of NGOs in converting popular campaigns into institutional change and reform, and the domestic political landscapes of the most powerful countries. A golden era of governed globalization In order to understand why gridlock has come about it is important to understand how it was that the post-Second World War era facilitated, in many respects, a successful form of ‘governed globalization’ that contributed to relative peace and prosperity across the world over several decades. This period was marked by peace between the great powers, although there were many proxy wars fought out in the global South. This relative stability created the conditions for what now can be regarded as an unprecedented period of prosperity that characterized the 1950s onward. Although it is by no means the sole cause, the UN is central to this story, helping to create conditions under which decolonization and successive waves of democratization could take root, profoundly altering world politics. While the economic record of the postwar years varies by country, many experienced significant economic growth and living standards rose rapidly across significant parts of the world. By the late 1980s a variety of East Asian countries were beginning to grow at an unprecedented speed, and by the late 1990s countries such as China, India and Brazil had gained significant economic momentum, a process that continues to this day. Meanwhile, the institutionalization of international cooperation proceeded at an equally impressive pace. In 1909, 37 intergovernmental organizations existed; in 2011, the number of institutions and their various off-shoots had grown to 7608 (Union of International Associations 2011). There was substantial growth in the number of international treaties in force, as well as the number of international regimes, formal and informal. At the same time, new kinds of institutional arrangements have emerged alongside formal intergovernmental bodies, including a variety of types of transnational governance arrangements such as networks of government officials, public-private partnerships, as well as exclusively private/corporate bodies. Postwar institutions created the conditions under which a multitude of actors could benefit from forming multinational companies, investing abroad, developing global production chains, and engaging with a plethora of other social and economic processes associated with globalization. These conditions, combined with the expansionary logic of capitalism and basic technological innovation, changed the nature of the world economy, radically increasing dependence on people and countries from every corner of the world. This interdependence, in turn, created demand for further institutionalization, which states seeking the benefits of cooperation provided, beginning the cycle anew. This is not to say that international institutions were the only cause of the dynamic form of globalization experienced over the last few decades. Changes in the nature of global capitalism, including breakthroughs in transportation and information technology, are obviously critical drivers of interdependence. However, all of these changes were allowed to thrive and develop because they took place in a relatively open, peaceful, liberal, institutionalized world order. By preventing World War Three and another Great Depression, the multilateral order arguably did just as much for interdependence as microprocessors or email (see Mueller 1990; O’Neal and Russett 1997). Beyond the special privileges of the great powers Self-reinforcing interdependence has now progressed to the point where it has altered our ability to engage in further global cooperation. That is, economic and political shifts in large part attributable to the successes of the post-war multilateral order are now amongst the factors grinding that system into gridlock. Because of the remarkable success of global cooperation in the postwar order, human interconnectedness weighs much more heavily on politics than it did in 1945. The need for international cooperation has never been higher. Yet the “supply” side of the equation, institutionalized multilateral cooperation, has stalled. In areas such as nuclear proliferation, the explosion of small arms sales, terrorism, failed states, global economic imbalances, financial market instability, global poverty and inequality, biodiversity losses, water deficits and climate change, multilateral and transnational cooperation is now increasingly ineffective or threadbare. Gridlock is not unique to one issue domain, but appears to be becoming a general feature of global governance: cooperation seems to be increasingly difficult and deficient at precisely the time when it is needed most. It is possible to identify four reasons for this blockage, four pathways to gridlock: rising multipolarity, institutional inertia, harder problems, and institutional fragmentation. Each pathway can be thought of as a growing trend that embodies a specific mix of causal mechanisms. Each of these are explained briefly below.

Growing multipolarity. The absolute number of states has increased by 300 percent in the last 70 years, meaning that the most basic transaction costs of global governance have grown. More importantly, the number of states that “matter” on a given issue—that is, the states without whose cooperation a global problem cannot be adequately addressed—has expanded by similar proportions. At Bretton Woods in 1945, the rules of the world economy could essentially be written by the United States with some consultation with the UK and other European allies. In the aftermath of the 2008-2009 crisis, the G-20 has become the principal forum for global economic management, not because the established powers desired to be more inclusive, but because they could not solve the problem on their own. However, a consequence of this progress is now that many more countries, representing a diverse range of interests, must agree in order for global cooperation to occur.

Institutional inertia.

The postwar order succeeded, in part, because it incentivized great power involvement in key institutions. From the UN Security Council, to the Bretton Woods institutions, to the Non-Proliferation Treaty, key pillars of the global order explicitly grant special privileges to the countries that were wealthy and powerful at the time of their creation. This hierarchy was necessary to secure the participation of the most important countries in global governance. Today, the gain from this trade-off has shrunk while the costs have grown. As power shifts from West to East, North to South, a broader range of participation is needed on nearly all global issues if they are to be dealt with effectively. At the same time, following decolonization, the end of the Cold War and economic development, the idea that some countries should hold more rights and privileges than others is increasingly (and rightly) regarded as morally bankrupt. And yet, the architects of the postwar order did not, in most cases, design institutions that would organically adjust to fluctuations in national power.

Harder problems.

As independence has deepened, the types and scope of problems around which countries must cooperate has evolved. Problems are both now more extensive, implicating a broader range of countries and individuals within countries, and intensive, penetrating deep into the domestic policy space and daily life. Consider the example of trade. For much of the postwar era, trade negotiations focused on reducing tariff levels on manufactured products traded between industrialized countries. Now, however, negotiating a trade agreement requires also discussing a host of social, environmental, and cultural subjects - GMOs, intellectual property, health and environmental standards, biodiversity, labour standards—about which countries often disagree sharply. In the area of environmental change a similar set of considerations applies. To clean up industrial smog or address ozone depletion required fairly discrete actions from a small number of top polluters. By contrast, the threat of climate change and the efforts to mitigate it involve nearly all countries of the globe. Yet, the divergence of voice and interest within both the developed and developing worlds, along with the sheer complexity of the incentives needed to achieve a low carbon economy, have made a global deal, thus far, impossible (Falkner et al. 2011; Victor 2011).

Fragmentation.

The institution-builders of the 1940s began with, essentially, a blank slate. But efforts to cooperate internationally today occur in a dense institutional ecosystem shaped by path dependency. The exponential rise in both multilateral and transnational organizations has created a more complex multilevel and multi-actor system of global governance. Within this dense web of institutions mandates can conflict, interventions are frequently uncoordinated, and all too typically scarce resources are subject to intense competition. In this context, the proliferation of institutions tends to lead to dysfunctional fragmentation, reducing the ability of multilateral institutions to provide public goods. When funding and political will are scarce, countries need focal points to guide policy (Keohane and Martin 1995), which can help define the nature and form of cooperation. Yet, when international regimes overlap, these positive effects are weakened. Fragmented institutions, in turn, disaggregate resources and political will, while increasing transaction costs. In stressing four pathways to gridlock we emphasize the manner in which contemporary global governance problems build up on each other, although different pathways can carry more significance in some domains than in others. The challenges now faced by the multilateral order are substantially different from those faced by the 1945 victors in the postwar settlement. They are second-order cooperation problems arising from previous phases of success in global coordination. Together, they now block and inhibit problem solving and reform at the global level.

### AT: Supply Chain---1NC

#### No shock to Battery markets – Europe fills in

1ac Umbach ’18[Frank; September 2018; Ph.D. and Research director of the European Centre for Energy and Resource Security; Konrad Adenauer Foundation, “Energy Security in a Digitalised World and its Geostrategic Implications,” p. 15-16]

As China has scaled back its car subsidies, it has become unclear how fast the worldwide electric mobility – and, in addition to that, the production of batteries and their CRM demand - will further grow in the forthcoming years. Even if the electrification of China’s transport sector may slow down for some years, the digitalisation and the battery development might fasten in other industry sectors, and, therewith, the demand for CRMs will grow. The future chosen locations of the battery gigafactories will considerable shape geography and geo-economics of the auto industry for the next decades. They have numerous advantages towards those car construction plants, having no gigafactory in their direct neighborhood and rely on long-distance imports from Asia. The extended supply chain of those gigafactories also guarantees a large number of skilled jobs in the future. Hence, for European governments it is very alarming when its carmakers invest seven times more in EV production in China than at their home markets. A European car battery value chain alone has been estimated to be wort of 250 bn Euros by 2025. In October, the European Commission has launched a **‘European Battery Alliance’** in October 2017 to **stimulate European and Asian companies to build battery factories in Europe.**

#### Batteries don’t solve grid storage or resiliency

Gregory Barber, 21. Staff writer at WIRED who writes about blockchain, AI, and tech policy. He graduated from Columbia University with a bachelor’s degree in computer science and English literature and now lives in San Francisco. “When the Grid Goes Down, can a Fleet of Batteries Replace It?” February 24, 2021. https://www.wired.com/story/when-the-grid-goes-down-can-a-fleet-of-batteries-replace-it/

A grid backed by 10 million Teslas is unlikely to be the top priority of most energy experts thinking about how to prevent future Texas-style crises. Yes, people need to drive. And yes, it would be impractical, if not impossible to coordinate. Experts have identified plenty of sensible ways to make the Texan grid better: weatherization of existing power plants and lines, improved connections to other grids, and regulations that encourage various forms of resilience as well as low prices. Better planning, basically. But as Grubert puts it, the crisis pointed to many possible futures for a more reliable electric grid. Batteries, both large and small, are becoming more ubiquitous, whether we consciously tie them into the power grid or not. So how could we harness them to make the grid more nimble and keep the power on? “What I was getting at was, there are many ways we could think about planning for the future,” she says. In states like California, finding ways to store energy has long been on the minds of regulators and utility operators. The primary reason is the state’s goal of relying on 100 percent clean energy by the year 2045. The problem with that is that the sun doesn’t always shine and the wind doesn’t always blow—at least not everywhere across the state and not all at once. And so, since 2013, utilities have been required to procure energy storage systems that suck up otherwise wasted power when renewables produce more than is needed, and disburse it when there’s a gap in supply. It’s a matter of balancing a load that’s uneven, but often predictably so, such as when solar panels go offline at night. There’s a basic business proposition in that: Storage operators make money because they can store energy when it’s cheap and sell it when it’s in demand and prices are higher. In many places, including Texas, that’s driven a battery boomlet, helped along by the growth of variable renewable energy sources and falling battery prices. In California, that’s been eased by clean energy goals and rebates. Those batteries themselves often take the form of large, utility-scale installations attached to solar and wind plants. But in some cases those are augmented by a battalion of smaller ones enlisted to share power with the grid, including batteries nestled into neighborhoods or hung inside garages—and, yes, even sitting in private cars. The other possible use is in a crisis. In California, that occurred last August, when Death Valley sizzled past 130 degrees and lingering overnight heat across the state meant people kept running air conditioners long after solar farms had stopped harnessing rays. Natural gas plants that should have stepped in to handle the mismatch of supply and demand didn’t run as efficiently in the heat, and others that should have been on standby were unexpectedly offline. And so, the grid started to fritz. Millions of people lost power. That left some wondering why there shouldn’t be more energy stored to make up the gaps, after gas had failed to do its job as a last-ditch savior. “Diversifying into storage is something that we need everywhere,” says Daniel Kammen, a professor of energy at the University of California, Berkeley, who helped craft the law requiring energy storage in California. He points to similar issues last week in Texas, where gas plants, unable to source the fuel they needed to keep running, represented the bulk of the energy supply lost during the cold weather. Even without a renewable energy goal similar to California’s, Kammen thinks the Texas crisis should invite a discussion in that state about how to install more storage. Batteries alone would not be able stave off a Texas-style crisis. The scale and the duration of the outage, with over 4 million homes in the dark and about half of the usual energy supply missing, was far too large. “Even if you took all the storage assets everywhere in the United States, it wouldn’t be enough,” says Michael Craig, a professor of energy systems at the University of Michigan. The essential problem is that batteries do not produce any energy themselves. At full blast, lithium-ion batteries can distribute power back to the grid for only a few hours at a time. When the grid goes down for a week, as it did in some parts of Texas, you’re out of luck. Even with shorter outages, the batteries themselves would also need their own special protections in cases of extreme weather—as anyone who’s taken their iPhone out on a cold winter day can attest.

#### The grid is strong now---energy efficiency, new tech, and cycle generation.

Krysti Shallenberger 17, Utility Dive associate editor, 1-5-2017, "Predictions 2017: 8 sector insiders on what's next for power markets and regulation," Utility Dive, http://www.utilitydive.com/news/predictions-2017-8-sector-insiders-on-whats-next-for-power-markets-and-re/433358/

The traditional drivers of infrastructure additions were load growth and connecting distant generation sources to population centers. However, that has changed. Load growth is negligible in many areas. (At PJM we forecast peak load growth of less than half of one percent per year.) At the same time, more efficient technology, specifically energy efficiency and new natural gas combined cycle generation closer to load centers, has changed power flow patterns, which reduces the need for additional large-scale transmission expansion projects. The reduction in larger scale projects has allowed focus to be shifted to resolving aging infrastructure concerns on lower-voltage facilities. More efficient technologies, the capacity performance construct and upgrades to the system have made the grid increasingly robust and resilient. Last summer, for example, was the first time PJM met a peak demand of more than 150,000 megawatts without invoking emergency procedures and while net exporting power.

### 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.

### Cartels good

#### cartels are better for innovation---best studies prove they shelter sme’s

Harm G. Schröter 13. Professor of Economic History, University of Bergen, Norway. “Cartels Revisited: An Overview on Fresh Questions, New Methods, and Surprising Results.” *Revue Economique* 64(6): 995-997. November 2013. <https://www.jstor.org/stable/42772281>.

One standard argument against cartels claims they obstruct innovation. Indeed, logic asks: why should a cartelized firm invest into R&D when competition is absent? There are also cases confirming this theory. However, in contrast to such assumptions John A. Cantwell and Pilar Barrera found: "cooperative learning [. . .] does seem to have increased innovative activity."23 Most European cartels included organized transfer of innovation24 while with others no measurable impact could be detected. A third group definitely excluded transfer of knowledge (e.g. dyestuffs). However, a cartel member refraining from innovation would endanger its market share: during the periodic renegotiation of one to three years cartel-members evaluate each other's potential market share at an open market. A less than average innovative firm would run danger of receiving a reduced cartel-share. Furthermore, innovation cycles are often longer than these one to three years of cartel's contracts. Consequently a non-innovative enterprise gambling on its cartel-share would undermine its own future. Because cartels exclude competition only on a defined field, the suggested behaviour of reduced investment into R&D is not found widespread in practical behaviour. There are, of course, within long-term cartels exceptional cases where smaller participants slowed their efforts (e.g. dyestuffs-cartel, which was signed for several decades). But any firm participating in an average cartel was badly advised not to be abreast with technologic development.

Margrit Müller detected another effect. Cartelized sectors used to be established ones with no high rates of growth. Participation in such cartels stimulated Swiss enterprise to invest in new innovative sectors which lay outside the cartelized field. Consequently cartelization could lead not to less but to more innovation!25

The question of misuse of economic power: Large firms represent a potential threat to small ones. Did large international cartels exploited small countries more easily than larger states? A first evaluation suggested: no, there was no difference to be found between the dimension of less and more powerful states.26 The question can be re-addressed to large, international cartels and cartel-members situated in small countries: Did such international cartels exploit their members in small nations more easy than large in large states?27 A more detailed evaluation could find no evidence for this thesis. It seems there was no discrimination according to the size of a member's home-land.28

Cartels shelter from competition on the defined fields of the contract. This can make life easier for small enterprise. Evidence shows that cartels did not only safeguard small and medium enterprise (sme), but often SME received a larger share than in open competition.29 Large cartel-players valued order in the market higher than a small share allocated additionally to SME. Knowing this, many SME asked aggressively for a larger share and often received it. According to George Symeonidis, cartels allowed an increased share and/or expansion of small members. These findings show cartels rather foster SME (and consequently potential competition). However, in the case of Swiss watch ma- king the cartel prevented the industry from concentration and expansion abroad, which, according to Pierre-Yves Donzé, undermined the industry's competitiveness.30 Indeed, cartels "freeze" the structure of their industry fore their defined time. From the general point of competition it is appreciated to have as many part-takers in the market as possible. However, from a perspective of a nations's competitiveness more concentration and less national competition may be asked for. In order to strike a balance, several countries allow in certain cases SME forming a cartel, if their combined market-share does not exceed a certain mar-in.31 It is acknowledged that a cartel of SME is different from a cartel made of giant firms. But more important than firm-size is the share in the respective market.

A recent evaluation of cartels versus small states showed surprisingly no negative results concerning the latter.32 Cartels did not exploit customers in small countries more than in large ones. As small members the respective firms enjoyed preferential treatment not only as small firms, but often played the role of supervisor or arbitrator of the cartel. Cartel-partners from small countries were more trusted than from large states. In case large cartel-firms came from small states they did not behave differently from those based in large countries. Finally small states considered in many cases cartels as an indispensable tool for their economy. This is shown by Niklas Jensen-Eriksen in this volume, but applied also to many commodity-cartels (coffee, rubber, tin and so on) of developing countries.33 It seems that being small was not detrimental, neither for firms nor for countries, as long as they were included as independent cartel-members.

## Indigenous Regimes

### No antitrust enforcement

#### Extraterritorial application fails

DOJ. "Chapter 5 Where Trade and Competition Intersect." Department of Justice Advisory Committee. https://library.unt.edu/gpo/icpac/chapter5.htm

A significant hurdle in extraterritorial enforcement lies in the considerable difficulty encountered during the discovery process. Attempts to obtain access to necessary documents, evidence, and potential witnesses, all of which may be located outside the borders of the investigating jurisdiction, can prove to be an insurmountable obstacle or, at the very least, a barrier to effective and timely enforcement.(133) By requesting that the territorial party pursue the investigation, chances of successful prosecution of the case improve because the territorial party maintains significant advantage in securing necessary documents and witnesses to aid in the investigation of the alleged conduct. Furthermore, the extraterritorial application of domestic laws can result in the inability to secure the necessary remedies to resolve the anticompetitive practices. When the territorial party assumes responsibility for the investigation and potential enforcement actions, such requisite remedies are within the jurisdictional scope and reach of the territorial party.

### at: inequality---1nc

#### Alt causes to SME failure besides competition law, plan can’t solve – we postdate by 5 years

Ronald Serwanja, 17. Principal Consultant- Human Rights and ITechLaw Business Researcher. “The effect of International Financial Reporting Standards (IFRS) on profitability performance of SMEs in developing countries: a case of Uganda.” *International Journal of Technology and Management* 2(1), 12-12.

Like South Africa and Nigeria, which are some of the emerging, though the strongest and most vibrant economies in Africa and the rest of the developing world, SMEs in Uganda have been struggling despite efforts made by different national and private institutions like the private sectors foundation in using a cocktail of remedies to salvage and stem their never ending down ward performance and hence collapse over the years. SMEs make up about 90% of entities in the private sector in Uganda alone (Rwakakamba, Lukwago, & Walugembe, 2014) , (Nangoli, Turinawe, Kituyi, Kusemererwa, & Jaaza, 2013) came up with a list of factors feared to be the leading causes of business failure in Uganda and these included excessive competition amongst business firms, poor management of the SMEs and lack of entrepreneur skills amongst people running these entities among others. Though it addresses the cardinal issues of SME failure in Uganda, its failure to acknowledge the fact that since. time in memorial, Traditional remedies have been tried and not so much success has been registered, hence paving way for the need to try out new remedies like the application of IFRS, as a future solution for the SMES performance. A different study by (IEG, 2009) as part of the IFC and World Bank shows, that SMEs in Nigeria make up to ninety percent (90%) of all business in the country while they constitute 98% of formal and inform all firms in Rwanda (MINICOM, 2016), an underlying factor of how important SMEs are to emerging nations.

### no deforestation !---1nc

#### Alt causes to warming---china and india are the biggets emitters

#### Brazil growth kills the Amazon

Brice & Smith 21 [Jessica Brice and Michael Smith. Bloomberg. 7-29-21. https://www.bloomberg.com/news/features/2021-07-29/amazon-rainforest-deforestation-land-grabs-surge-under-bolsonaro-in-brazil]

Nabhan Garcia, 63, is himself a rancher. He and his boss came of age during the 1970s, when the military government in Brazil viewed turning the wild expanses of the Amazon into cities, farms, and mines as an imperative of national security. The dictatorship, which endured until 1985, built military bases, power plants, and a network of roadways throughout the thick jungle. Those infrastructure projects fueled what’s known as the “Brazilian Miracle,” a period of 10% annual economic growth that still stands out in many minds as the nation’s golden era. But these were some of the darkest days for the rainforest itself. Millions of people migrated inland from coastal cities, carving homesteads and huge industrial hubs out of the jungle. In 40 years, the Amazon has lost an area as big as California to deforestation. Some scientists suggest the Amazon is now close to a tipping point, at which it will become a savanna rather than a rainforest. It will pump greenhouse gases into the atmosphere instead of pulling them down, and so-called flying rivers—bands of moisture in the air that bring rainfall to the continent—will dry up. As many as 10,000 species may be at risk of dying off.

Since taking office in January 2019, Bolsonaro, a former army captain, has revived the 50-year-old worldview that Amazon development and Brazilian prosperity go hand in hand. And he’s stacked key land management and environment agencies with farmers and ranchers who share his vision. Jaci-Paraná is the latest example of that vision’s realization, but it’s far from the only one.

#### China overwhelms

Tahtinen 21 [Lauri Tahtinen, a nonresident fellow at the Finnish Institute of International Affairs and founder of Americas Outlook, a global affairs consultancy. 7-1-21. <https://foreignpolicy.com/2021/07/01/brazil-deforestation-china-amazon-climate-change/> shree]

As the Amazon burned, the United States and Europe were quick to hit back against Brazil. Then-presidential candidate Joe Biden warned that Brazil could suffer “significant economic consequences.” European countries withheld donations to Brasília’s Amazon Fund and turned against the Mercosur trade deal.

But neither Washington nor Brussels is in the position to play police—only Beijing, Brazil’s largest trading partner, is. Since the 2008-2009 financial crisis, during which global trade waned, Chinese demand for Brazilian soybeans and other agricultural, forestry, and mining products has kept Brazil’s economy afloat. As Beijing’s influence in Brasília soared, Washington’s and Brussels’s fell. Today, Brazil’s exports to mainland China exceed its combined exports to the United States and the EU.

#### No extinction---new studies.

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

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

#### The threat of biodiversity loss is overhyped

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

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

#### Even completely unchecked deforestation takes 200 years and won’t cause extinction.

Hannah Voak 16, Assistant Ecologist, Nurture Ecology Ltd., 4/22/16, “A world without trees,” <http://www.scienceinschool.org/content/world-without-trees>

There are approximately 3.04 trillion trees on planet Earth (Crowther et al 15), covering 31% of the world’s land surfacew1. Today, for Earth day, we’re taking a look at trees. Around 15 billion trees are cut down each year. So, hypothetically speaking, it would take just over 200 years for the world’s forests to completely disappear. While this scenario is unlikely, what would be the consequences of a tree-free planet? Let’s start with perhaps the most obvious difference – oxygen concentration. A lack of oxygen? Oxygen makes up roughly 21% of the Earth’s atmosphere, but you probably know that already. What you might be surprised to find out, however, is that only half of this oxygen is produced through photosynthesis in trees and other plants on land. The other half is produced in oceans, by microscopic marine organisms called phytoplankton. The environment would not be devoid of oxygen if all trees were lost but the oxygen level would be lower. Would it be sufficient for humans to survive? In one year, a mature leafy tree produces as much oxygen as ten people breathe. If phytoplankton provides us with half our required oxygen, at current population levels we could survive on Earth for at least 4000 years before the oxygen store ran empty. However, that’s not considering a number of other factors: increasing population size, for example, would reduce the amount of oxygen available, whilst phytoplankton blooms due to an abundance of carbon dioxide could increase oxygen levels. Suffocating smog Whilst there may be enough oxygen for humans to survive on Earth, at least to begin with, the air we breathe could still be responsible for our demise. Like giant filters, trees help to cut down on pollution levels. Leaves intercept airborne particles and ozone, carbon monoxide, sulfur dioxide and other greenhouse gases are absorbed through the leaves stomata. In 2012, outdoor air pollution was estimated to cause 3.7 million premature deaths worldwidew2. Imagine the impact removing these environmental sieves would have on humankind. Air-pollution masks would become a necessity and bottled ‘clean air’ could come at a premium. Full of hot air? Armed with pollution masks, would the climate and temperature still be suitable for us? One important consideration is carbon dioxide. In one year, an acre of mature trees soaks up the same amount of carbon dioxide that we produce by driving the average car 26 000 miles. Since human activities like this increase the normal level of carbon dioxide in the atmosphere, cutting down trees would tip the balance even further, not to mention the enormous amount of stored carbon that would be released from doing so. Deforestation is already responsible for up to 15% of global greenhouse gas emissions and you might think that an overwhelming increase in carbon dioxide would result in a much warmer planet. However, the relationship between trees and global temperature is much more complicated. Energy and water fluxes between trees and the atmosphere also play a role and a tree’s colour, for example, can affect the amount of the Sun’s energy that is absorbed or reflected. Studies have shown that Europe’s trees have actually caused a slight increase in regional temperatures since 1750w3, while transpiration from plants in tropical forests cools the surface temperature. Therefore, whether the temperature becomes too hot to handle could depend on many factors, although a recent study concluded that reducing forest size increases average air surface temperatures in all climate zones (Alkama & Cescatti 16).

# 2NC – Fullertown R3

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#### 2 – and causes bidirectionality – or circumvention

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

We can now look at the causal relations between the variables of primary interest: the relationship between antitrust actions and merger frequencies: Prohibitions has a statistically-significant negative impact on future merger behavior in five out of the six regression equations (excluding only the OLS estimation in regression #1). The consistent significance and strong impact of this variable suggests that spikes in the use of Prohibitions seem to send a very clear signal of toughness by antitrust authorities—a signal that significantly reduces future merger proclivities.

Remedies, on the other hand, seem to positively influence future Mergers; though, the coefficient estimate is only significant in three regression equations—regressions’ #1, #2, & #4. Accordingly, we can interpret these results as suggesting that the effect of remedies coming at the expense of prohibitions (a lowering of antitrust toughness) is stronger than the effect of remedies coming at the expense of clearances (an increase in antitrust toughness). In other words, we have some evidence that firms seem to interpret spikes in remedies as indicating softer behavior on the part of antitrust authorities. Such an interpretation should be cautioned by the fact that the remedies coefficient estimate is not significant in the fixed- effects estimation (regression #3); thus, suggesting that the remedies effect may only be capturing cross-jurisdictional variation. Nevertheless, the important point here is that the application of Remedies does not seemingly involve a significant deterrence effect.

#### 3 – this card on ftc is the violation – it imposes a civil penalty instead of breaking up businessers which is bad \*\*insert\*\*

Simmons ’18 [Jay; November; Executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University; *Southern California Law Review,* “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” <https://southerncalifornialawreview.com/2018/11/02/whats-in-a-claim-challenging-criminal-prosecutions-under-the-ftaias-domestic-effects-exception-note-by-jay-kemper-simmons/>; KS]

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.[153] For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”[154] Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and “criminally prosecutes traditional per se offenses of the law.”[155] In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.[156]

## CFIUS

#### 1 – “Do both” means FTC resources – antitrust blockage means CFIUS won’t interfere.

Jayden R. Barrington 19. J.D. Candidate 2020, University of San Diego School of Law; B.B.A. 2017, University of San Diego. “CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight”. 21 Transactions: TENN. J. Bus. L. 77 (2019).

This structure gave the President fifteen days to make a final determination in the form of a Presidential Order .8 FINSA added criteria for the President to take into consideration and ensured that the President "is under no obligation to follow the recommendation of the Committee to suspend or prohibit an investment." 9 Nevertheless, before blocking a transaction, the President still needed to determine that (1) other laws did not sufficiently protect the country, and (2) that there existed "credible evidence" that if the transaction were to be executed, it would impair national security.80 For example, if the deal would otherwise be blocked by the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) due to antitrust concerns, then there is no reason CFIUS must intervene and the first requirement would not be met. The second requirement of credible evidence that national security would suffer is more subjective. An example of a deal that may not meet this criteria is the foreign sale of a company like Coca-Cola or Levi's; though loved American brands, their foreign ownership would not likely create realistically foreseeable threats to matters of national security.

#### 2 – “Antitrust” and “national security” are distinct agents.

Commissioner Noah Joshua Phillips 20. “Championing Competition: The Role of National Security in Antitrust Enforcement”. The Hudson Institute (Virtual) <https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf>

So should we use antitrust to pursue national security goals, or forbear in enforcing it because of them? As the U.S. Constitution itself makes clear, there is no responsibility more essential for a government than the protection of its citizens. My humble premise is that, like other non-competition considerations, antitrust is an imperfect tool. And, when it comes to national security, the U.S. government has other tools. We have, for example, separate and distinct systems requiring mergers to be notified to one set of enforcers who monitor antitrust concerns and to another set of government officials responsible for national security review. This is not a bug, but a feature, of our government and economic policies more generally.

The Committee on Foreign Investment in the United Stated (CFIUS) is authorized to review national security implications of certain cross-border transactions.23 Note that CFIUS is not an antitrust tool, but a national security one. And a very effective one at that. Look no further than Broadcom’s recent (unsuccessful) bid for Qualcomm.

#### 3 – National security means the counterplan is CFIUS not the FTC.

Elizabeth Balboa 17. Benzinga Staff Writer. "4 M&A Deals Blocked By US Presidents For The Sake Of National Security". . 9-14-2017. https://www.benzinga.com/news/17/09/10059329/4-m-a-deals-blocked-by-us-presidents-for-the-sake-of-national-security

The Federal Trade and Communications Commissions are known buzzkills when it comes to blocking corporate mergers.

But sometimes, in the face of extreme consequences, the role falls on a higher power.

On recommendation from the Committee on Foreign Investment in the United States, the U.S. president has blocked acquisitions four times in the last three decades, each on the grounds of national security.

#### 1 – “National security” versus “antitrust.” They are policy alternatives with unique pros and cons – that’s Steuer. AND they are a separate processes.

Commissioner Noah Joshua Phillips 20. “Championing Competition: The Role of National Security in Antitrust Enforcement”. The Hudson Institute (Virtual) <https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf>

My view is that antitrust works best as a tool for protecting competition, and an imperfect one for vindicating national security goals. There are separate tools for that, and they are important. But one area where antitrust needs to reckon with the strategic interests of other nations is when we scrutinize mergers or conduct involving state-owned entities. The assumptions underlying modern antitrust rest on free market principles, and contemplate markets in which firms compete to maximize profit. But state-owned entities may pursue other goals. That is particularly important to recognize as the U.S. government focuses increasingly on the impact of foreign investment in domestic technology. Where other countries are, in effect, distorting markets, antitrust enforcement needs to take that into account.

#### 2 – We PIC out of “antitrust” and “anticompetitive” – it is the topic debate.

Reuters 15. "Pentagon Eyes Bill to Block Mergers and Acquistions for National Security Reasons". Newsweek. 12-22-2015. https://www.newsweek.com/pentagon-bill-mergers-and-acquisitions-weapons-national-security-ash-carter-408412

WASHINGTON (Reuters) - The Pentagon and other U.S. government agencies should complete a legislative proposal in coming weeks to let regulators block proposed mergers for national security reasons, instead of just antitrust concerns, a top official said on Tuesday. Defense Undersecretary Frank Kendall, who oversees arms weapons acquisitions and industrial base issues for the Pentagon, made the comments in an interview, after first mentioning the legislative push in September. In September he raised concerns about further consolidation among the biggest players in the U.S. weapons industry, warning that big weapons makers were not hesitant to use the power that came with increased size for their own corporate advantage. The comments came days after the U.S. Justice Department approved Lockheed Martin Corp's $9 billion takeover of Sikorsky Aircraft from United Technologies Corp, one of the biggest acquisitions in the weapons industry in years. At the time, Kendall said the U.S. Justice Department cleared Lockheed's acquisition of the helicopter maker because there was no direct anti-competitive issue, but the Pentagon did not want to see its industrial base whittled down to two or three very large suppliers. On Tuesday, Kendall said the Pentagon was working with the Justice Department and other agencies on a proposal that would add a national security provision to current law, much as mergers in other industrial sectors are subject to a "public interest" provision since they serve the nation. He said the proposal should be wrapped up soon and sent to lawmakers for their consideration. Kendall said the prospects for getting the legislation passed in a presidential election year were unclear, but it was important to address the issue. "It's a debate we should have," he said.

#### 3 – expanding the scope” of “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.

#### 4 – 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.

#### 5 – 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.

#### 2 – CFIUS blocks foreign mergers – that gets modelled.

Larry G. Franceski et al. 16. Larry G. Franceski, Of Counsel, Norton Rose Fullbright. Stephen M. McNabb, Chief Legal Officer. Kim Caine, Partner. "President Obama Blocks Proposed Chinese Acquisition of Controlling Interest in German Chip Maker". No Publication. 12-2-2016. https://www.nortonrosefulbright.com/en-us/knowledge/publications/4a3ee7bd/president-obama-blocks-proposed-chinese-acquisition-of-controlling-interest-in-german-chip-maker

CFIUS is a multi-agency U.S. governmental committee established in 1975 to review transactions that could result in control of a U.S. business by a foreign person ("covered transactions") in order to determine the effect of such transactions on U.S. national security.2 Companies involved in a potentially covered transaction may voluntarily submit a notice with CFIUS, or a review may be initiated by CFIUS or by the President. Once a filing is submitted, CFIUS conducts a 30-day review. At that point, the Committee may issue a determination that no threat to national security is presented, and the transaction can proceed, or the Committee may determine that an additional 45-day investigation is warranted. At the end of the 45-day investigation, the Committee may offer no recommendation or make an adverse recommendation to the President, who then has 15 days to make a decision. In some circumstances, the parties agree to mitigation measures with CFIUS to address CFIUS concerns so that an adverse recommendation can be avoided. The President has almost unlimited authority to take "such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States."3 However, before invoking such authority, the President must conclude that other U.S. laws are inadequate or inappropriate to protect the national security, and must have "credible evidence" that the foreign investment will impair the national security. The President must consider a variety of factors in deciding to block a foreign acquisition, including, for example, the potential national security-related effects on U.S. critical infrastructure and whether the transaction is a foreign government-controlled transaction.4

#### 3 – Priority: National security supersedes competition law.

Spencer Weber Waller 19. John Paul Stevens Chair in Competition Law and Director, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law. “Antitrust and Democracy”, 46 FLA. St. U. L. REV. 807 (2019).

A statute which gives the executive branch, or a ministry, the explicit power to sacrifice competition for national security or some other significant national interest is equally defensible in terms of democratic values, regardless of the wisdom of any particular decision under those powers. For example, numerous jurisdictions have public interest standards in their merger laws allowing the approval or rejection of transactions on grounds other than their competitive effects. 145

While the United States does not have public interest standards in its merger regime, it does have three statutes allowing noncompetition factors to supersede competitive analysis in order to achieve national security objectives. First, mergers may be blocked on national security grounds, even if cleared by the competition agencies. 1 4 6 Second, the United States enacted Section 232 of the Trade Act of 1962, which allows the Secretary of Commerce to conduct investigations to determine the effect of imports on any article of the national security of the United States. 147 Finally, the Defense Production Act of 1950 (DPA) allows the President to exempt agreements between private parties from the application of the antitrust laws where such action was taken for the national defense. 1 4 8

#### 4 – Signaling: CFIUS declarations prevent bad deals.

Commissioner Noah Joshua Phillips 20. “Championing Competition: The Role of National Security in Antitrust Enforcement”. The Hudson Institute (Virtual) <https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf>

Even the threat of a CFIUS action can scuttle a deal that is problematic for national security, as it did in 2005, when China National Offshore Oil Company (CNOOC) proposed to acquire Unocal31; or in 2006, when Dubai Ports World considered purchasing the right to operate six major U.S. ports, including terminals in the New York/New Jersey area, Philadelphia, and New Orleans.32

CFIUS is effective and efficient, and Congress—led by my former boss, U.S. Senator John Cornyn—added to the quiver in August 2018 with the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA broadened CFIUS’s jurisdiction to include investment in a U.S. business that “maintains or collects personal data of United States citizens that may be exploited in a manner that threatens national security.”33 In the spring of last year, CFIUS informed the Chinese company Kunlun that its ownership of the popular gay dating app, Grindr, constituted a national security risk, prompting Kunlun to divest the app.34 CFIUS was apparently motivated by concerns that the Chinese government could blackmail individuals with security clearances or use its location data to help unmask intelligence agents.35

#### 5 – Comparative: antitrust is neither necessary nor sufficient – CFIUS solves.

Richard M. Steuer 17. Member of the New York Bar. "The Horizons of Antitrust." St. John's Law Review, vol. 91, no. 1, Spring 2017, p. 177-210. HeinOnline.

CONCLUSION Where does that leave us? We conclude where we began. Critics have been complaining that there are too few jobs in America and too much inequality. They have been calling for broadening the goals of antitrust and, at the very least, for more antitrust enforcement. More enforcement could be expected to have an impact on the concentration of power and on jobs, but even recalibrating the goals of antitrust law cannot, by itself, realistically be considered a panacea for eliminating unemployment or inequality overnight. At the same time, other countries already have broader goals written into their own laws, including their competition laws, which protect jobs and limit foreign investment. These laws create asymmetries that may be placing the United States at a disadvantage. Today, America has the opportunity to expand the goals of its laws to address these asymmetries, either through broadening the interpretation of current legislation-which could but need not include the antitrust laws-or by enacting new laws. Such changes would present the challenge of deciding who should apply these broader goals and how they should be prioritized and balanced. If the antitrust agencies are not the choice to assume this responsibility, an expanded CFIUS or a newly constituted foreign investment review board would be possible alternatives. These changes could foster an environment in which it would be easier for future trade agreements to assure a level playing field for the United States and its trading partners. The devil is in the details, of course, and the devil would feel right at home in this imbroglio. Broadening and strengthening antitrust enforcement and foreign investment review sounds simple enough but would raise a dizzying host of complications and uncertainties. Yet, just because something is hard to measure or hard to solve is no reason to ignore it. If loss of jobs and concentration of power are threatening to harm the nation's economy and are not being adequately checked, changing nothing would be an outcome but would not be a solution. Not all of the changes currently being proposed make equal sense, but for those that make the most sense, the time for serious deliberation is now.

#### 2 – Mergers can be blocked by counterplan – Trump proves.

Matthew Renda 18. Journalist, Courthouse News. "Trump Blocks Tech Company Merger Citing National Security". No Publication. 3-12-2018. https://www.courthousenews.com/trump-blocks-tech-company-merger-citing-national-security/

(CN) - President Donald Trump thwarted a deal between two computer chip manufacturers citing national security concerns. Trump issued an order on Monday blocking the potential merger between Singapore-based Broadcom and Qualcomm — headquartered in San Diego, California — signaling yet another protectionist move for the Trump administration rapidly aligning more firmly against the globalist economic model.

#### 3 – CFIUS applies in all sectors

Aimen Mir et al 19. Aimen Mir, Partner. Christine Laciak, Special Counsel. Sarah Melanson, Associate. "Global Competition Review". No Publication. 9-20-2019. https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-cfius-review

CFIUS’ purview is not restricted to any specific sector, and it has reviewed transactions dealing with information technologies, network security, cyber systems, energy (development and transport), semiconductors, aerospace, telecommunications, optics, robotics, mining and natural resources, agriculture, plastics and rubber, automotive, financial services, coatings and adhesives, chemicals, insurance and steel. The annual reports provide information at a very general level regarding the industries involved in transactions subject to CFIUS review. The annual reports show that transactions involving manufacturing typically account for the highest percentage of cases reviewed by CFIUS, with the finance, information and services sectors accounting for the second-highest percentage. 30 Within the manufacturing sector, transactions involving the acquisition of a manufacturer of computer and electronic products accounted for the largest percentage of transactions reviewed between 2013 and 2015, followed by acquisitions of machinery manufacturers and transportation equipment. 31

#### 4 – “Critical tech” and list expansion solves.

Jayden R. Barrington 19. J.D. Candidate 2020, University of San Diego School of Law; B.B.A. 2017, University of San Diego. “CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight”. 21 Transactions: TENN. J. Bus. L. 77 (2019).

iii. Critical Technologies

Taking aim at Silicon Valley, FIRRMA adds the new category of "critical technologies" to the list of covered transactions. This change is significant because it is the first "depart[ure] from CFIUS' exclusive focus on reviewing inbound foreign investment, and expand[s] its remit to include outbound contributions of certain intellectual property by U.S. businesses."' 150 FIRRMA shows that Congress is no longer only woried about foreign ownership of critical infrastructure within the United States but is equally concerned about critical technologies leaving the control of the United States due to the rise of the global marketplace. The consequence of this shift led FIRRMA to add a special covered transaction category to trigger CFIUS review whenever "critical technologies" are involved in any foreign transaction regardless of the structural transaction type or size of the investment.

Interestingly, FIRRMA reacts to the fear of losing technological superiority 15 by eliminating incentives to stay in the lead by making it more difficult for these innovative industry leaders to operate in the efficiencydriven economy.152 Absent regulatory oversight of intellectual property transfer, national security d

epends on the United States being the first to access new technology and innovate so rapidly that by the time that technology reaches foreign hands, it is irrelevant because the United States has already moved ahead. 153 Agencies dedicated to national security including the DOD and the Department of Homeland Security have grown increasingly dependent on the private sector and have forged innovative partnerships in Silicon Valley. 154 In the field of emerging technologies, products designed and used for commercial purposes are increasingly serving the needs of the military.'55 As a result, both an economic collapse of the California tech hubs and the theft or acquisition of intellectual property used by the DOD would pose risks to national security.

Yielding to pressures driven largely by rapid innovation, Congress left the specific definition of this new triggering category largely undetermined. FIRRMA does not limit the "critical technologies" to only those that are currently utilized by the military; Congress tactfully avoided defining what technologies are considered critical because, with today's rapid pace of innovation, the relevancy of a strict bright-line list of currently critical technologies would quickly expire.156 The legislation avoids creating a list by outlining a compilation of lists determined by other government entities that are updated regularly.'15 CFIUS identified this rapid change in technology as a primary compelling circumstance for implementing a pilot program. 58

CEJUS Additions Via Recommendations

FIRRMA further leaves room for those lists to expand by allowing the Committee chairperson to recommend additional technologies to add to one of the lists the legislation includes.5 9 While the Committee expects to reach consensus on such matters, to have eleven government agencies all in agreement is unlikely. Each department has its own interests and perspectives, and thus are likely to value concerns differently. On a practical level, the DOD will heavily influence the ultimate defining of "critical technologies."160 This is disturbing because the DOD is able to single out any industry and operates in the "black."161 The DOD can make a claim to the Committee and support this claim by stating that it cannot disclose its reasoning or evidence while imposing significant transaction costs on entire industries, not just particular deals. This is bad public policy due to the potential for unchecked abuse of power.

Note further, that the President of the United States again maintains control of the final contents of the list the CFIUS Committee can amend.162 Potentially for political purposes, the President could subject entire industries to the negative effects of CFIUS review borne by the parties who must seek approval; this presents an additional opportunity for the abuse of power. For example, it would be legal, but potentially unwarranted, for the President to remove the Committee's hypothetical addition of pharmaceutical development as a critical technology sector. The Committee may have justifiable reason for making a suggested addition, however, the President is not obligated to present a rationale for accepting or ignoring the Committee's proposal. Consequently, the underlying motivation behind the President's action to shelter or subject a particular industry could be improper, such as to please campaign donors or a supportive voter demographic.

#### 3 – We fiat the executive – not reviewable.

Aimen Mir et al 19. Aimen Mir, Partner. Christine Laciak, Special Counsel. Sarah Melanson, Associate. "Global Competition Review". No Publication. 9-20-2019. https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-cfius-review

While CFIUS is charged with reviewing a transaction and imposing mitigation measures where warranted, Section 721 grants the President, and only the President, the authority to suspend or prohibit a covered transaction. Therefore, if CFIUS seeks to prohibit a transaction and the parties are unwilling to voluntarily abandon the transaction, CFIUS must refer the transaction to the President for action. Though unlikely to occur in practice, if CFIUS fails to reach a consensus for a particular case, CFIUS must also send a report outlining the divergent opinions and recommendations to the President. To exercise the authority to suspend or prohibit a transaction, the President must find both that there is credible evidence that a ‘foreign interest exercising control might take action that threatens to impair the national security’ and that other laws do not, in the President’s judgement, ‘provide adequate and appropriate authority’ to protect national security. Presidential action is rare, partly because mitigation measures often address national security concerns, and partly because parties typically abandon a transaction before CFIUS actually refers the case to the President with a prohibition recommendation.

Determinations by the President under Section 271 are not subject to judicial review. The exemption from judicial review was confirmed by the district court for the District of Columbia in 2013 when Ralls sought to have a presidential order requiring it to divest its interest in certain Oregon wind farms overturned by the court. The district court ruled that the merits of the President’s decision were not subject to judicial review and that a party that completes a covered transaction without clearance assumes the risk of doing so. 26 On appeal, the Court of Appeals for the District of Columbia Circuit agreed that the President’s decision was not subject to judicial review but held that the ‘presidential order deprived Ralls of constitutionally protected property interests without due process of law’ and instructed that, upon remand, Ralls be given access to unclassified evidence in support of the decision. 27 On remand, the District Court ordered CFIUS to provide all unclassified information on which it relied for its decision, afford Ralls an opportunity to respond to that information, and provide Ralls’ response to the information along with CFIUS’ updated recommendation to the President. 28 The parties ultimately resolved the case via settlement. Although CFIUS determinations are theoretically reviewable, this has limited practical implications because CFIUS concerns are generally either resolved through mitigation that the parties voluntarily undertake or the matter is referred to the President, whose decision is not reviewable.

## Indigenous Regimes

#### 3 – government takes over – or if it doesn’t no remedies

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.

#### 4 – specifically in comity

Qingxiu Bu, 20. Senior Lecturer in Corporate/Commercial Law. School of Law, Politics and Sociology at University of Sussuex. "Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment." Journal of European Competition Law & Practice 11, no. 5-6 (2020): 274-286.

VI. Conclusion

The US Supreme Court’s Vitamin C ruling clarifies that international comity does not require a court to give binding deference to a foreign sovereign’s interpretations of its own laws has far-reaching and significant consequences. The Supreme Court certified only a narrow question, and offered several (non-exhaustive) criteria the courts should consider. The standard of respectful consideration leaves open the possibility that federal courts may reach decisions that completely or partially reject positions of foreign governments, and that they may do so on inconsistent grounds. The ruling is focused more on qualitative analysis, there is no much difference in procedures though. Such a multipronged balancing approach casts more uncertainty for litigants. Although it addresses the long-standing split in the deference level, this ruling will not change the federal court’s practice dramatically. In this vein, the ruling does not constitute a significant departure from the current approaches by the federal court. It is not a revolution, but a milestone of the evolution of the deference standard.

#### 2 – Takes centuries.

Cass 17 — Oren Cass, 2017 (“The Problem With Climate Catastrophizing”, Foreign Affairs, March 21st, Available online at <https://www.foreignaffairs.com/articles/2017-03-21/problem-climate-catastrophizing>, Accessed at 3/30/17, RKim)

But that argument gets the dynamic backward. Although climate impacts may be permanent and on-going, costly adaptation—if done wisely—need occur only once. A Manhattan properly insulated from rising waters will not require new protection each time sea level climbs another foot. Conversely, that hypothetical $20 trillion represents the resources that society might commit to the problem in the single year 2100. In Nordhaus’ DICE model, the total allocated to climate costs between 2050 and 2150 is more than $2.5 quadrillion, all without ever slowing annual growth by more than one-tenth of one percentage point. The world’s productive capacity, bolstered by innovation and adaptation over time, is orders of magnitude larger than the demands climate change is expected to impose. Such adaptation may represent a tragic long-term drain on society’s resources, but that does not mean it will noticeably alter the trajectory of human civilization. COSTS IN THE EXTREME To the climate catastrophist, even a credible argument that climate change is manageable may offer little comfort. So what if the IPCC’s best guess of sea-level rise by 2100 is only two feet? Some scenarios contemplate much worse outcomes, and what if those come true? The Esquire article describes the views of Michael Mann, the climatologist who created the famous “hockey-stick” chart used to argue that centuries of climate stability were giving way to sharp warming in recent decades. “As Mann sees it, scientists like [NASA’s Gavin] Schmidt who choose to focus on the middle of the curve aren’t really being scientific. … A real scientific response would also give serious weight to the dark side of the curve.” In Mann’s own words: “Maybe it is true what the ice-sheet modelers have been telling us, that it will take a thousand years or more to melt the Greenland Ice Sheet. But maybe they’re wrong; maybe it could play out in a century or two.” Catastrophists worry that warming temperatures will set off an uncontrollable feedback loop, begetting ever-accelerating warming that leaves the planet uninhabitable; ocean currents might suddenly reverse, sending local climates into wild gyrations; unexpected ice-sheet dynamics might produce rapid glacial melting that causes sea levels to rise rapidly by multiple meters; agricultural yields could collapse, triggering widespread famine and conflict. Perhaps. If nothing else, such claims are unfalsifiable. But it is difficult to know how to weigh such extreme hypotheticals. Emphasizing them risks departing the world of empirical research and model-based forecasting for one governed by fear. A variety of other long-term challenges with truly existential worst-case scenarios already exists, from the archetypical nuclear war to the emergence of artificial super-intelligence hostile to humans, to the global spread of an engineered pandemic, to coordinated cyberattacks on physical and financial infrastructure. Working with a catastrophic mindset and a century-long timeline, one can construct an apocalyptic scenario from almost any problem. Here, the third fault line emerges over placement of climate change in broader context. Catastrophists see their worries about extreme climate change as unique from, and more concrete than, other speculative fears. But when held up for comparison, extreme climate change does not justify a special status. In objective terms, the worst case for climate change does not even place it among the worst of worst cases. For instance, the Global Priorities Project at Oxford observes that climate change could “render most of the tropics substantially less habitable than at present,” as compared to the hundreds of millions or billions of deaths associated with other challenges. Another Oxford study surveyed conference participants about the extinction-level risks of various catastrophes and neglected to even consider climate change; respondents gave molecular nanotechnology, superintelligent AI, and an engineered pandemic all at least a two percent chance of erasing humanity by 2100. A climate change worst-case scenario also differs from others in its speed. Although genuinely existential threats to civilization might circle the globe in months, days, or even minutes, total climate catastrophe unfolds over decades or centuries. One might not like humanity’s chances of reversing or coping with such a threat, but the chances must be higher than for threats striking hundreds or thousands of times faster. These factors place catastrophists in a catch-22. To locate climate-change impacts of sufficient magnitude, they envision scenarios that require temperatures to climb and dominos to fall across multiple centuries. But extending the timeframe dilutes costs faster than it can increase them. No matter how apocalyptic, impacts forecasted hundreds of years in the future are inherently less alarming than those under discussion for the year 2100. Several factors may help to explain why catastrophists sometimes view extreme climate change as more likely than other worst cases. Catastrophists co

nfuse expected and extreme forecasts and thus view climate catastrophe as something we know will happen. But while the expected scenarios of manageable climate change derive from an accumulation of scientific evidence, the extreme ones do not. Catastrophists likewise interpret the present-day effects of climate change as the onset of their worst fears, but those effects are no more proof of existential catastrophes to come than is the 2015 Ebola epidemic a sign of a future civilization-destroying pandemic, or Siri of a coming Singularity. Catastrophists express frustration that the diffuse and intangible impacts of climate change prevent the threat from receiving sufficient attention—“if global warming took out an eye every now and then,” Dan Gilbert, professor of psychology at Harvard University, wrote in 2006, “OSHA would regulate it into nonexistence.” But as compared to other long-term challenges, claims of climate impact appear constantly. Natural disasters, extreme temperatures, and even geopolitical events find themselves linked to discussions of climate change or, if no link is available, cited as the kind of thing climate change might make more common. Greater obsession with climate change produces more coverage of it, stoking greater obsession. Meanwhile, arguments against catastrophism rarely reach the audience that might benefit most from hearing them. Finally, “motivated reasoning” likely plays a role. A charge issued frequently by catastrophists is that anyone expressing inadequate concern must be avoiding the problem because he dislikes the consequences of taking action—bigger government, more regulation, less growth. But this presumably cuts both ways. The policy agenda and social outlook demanded by the catastrophist perspective tends to align closely with the pre-existing preferences of catastrophists. Perhaps tellingly, when proposals arise that are less to their liking—nuclear power and fracked natural gas as substitutes for coal, carbon taxes paired with other tax cuts, use of conservation land for renewable power, research on geo-engineering—the overriding imperative to address climate change has tended to fall by the wayside. COSTS TO CREDIBILITY The errors of today’s climate catastrophists repeat those made by the last generation of environmental doomsayers. As Paul Romer, the chief economist of the World Bank, recently observed: During the 1970s, the Club of Rome famously argued that our economic system was on the verge of collapse because we were running out of fossil fuel. This analysis was flawed not simply because it got the magnitudes wrong. It got the signs wrong. The problem facing the world is not that the earth’s crust contains too little fossil fuel and that we won’t have enough innovation to solve this problem. The real problems are that the earth’s crust contains far too much fossil fuel and that too much [innovation] is making this problem much worse.

#### 3 – SME Failure inevitable – takes out SDGs

Samwel Macharia Chege & Daoping Wang, 20. Chege is a PhD student at Donlinks School of Economics and Management, University of Science and Technology Beijing, China. Wang is a PhD candidate in Regional Science and Urban Economics, at the School of Urban and Regional Science, Shanghai University of Finance "Information technology innovation and its impact on job creation by SMEs in developing countries: an analysis of the literature review." *Technology Analysis & Strategic Management* 32, no. 3 (2020): 256-271.

Challenges facing ICT use by SMEs in developing countries Barriers to ICT use by SMEs in developing countries include high cost of access to telecommunications, lack of government ICT policy, use of obsolete technologies, lack of skilled and well-trained human resources, poor communication infrastructure, high cost ICT equipment, and resistance to change (Ismail, Jeffery, and Belle 2011; Xiong and Qureshi 2015). SMEs operating in Africa face many challenges that hinder their development (Bunyasi, Bwisa, and Namusonge 2014). This is supported by Kamunge, Njeru, and Tirimba (2014) who found that, in addition to positive development effects, SMEs face many obstacles that limit their long-term survival (Table 3). The rate of business failures is worrying, with only a few companies surviving for months to a year (Bunyasi, Bwisa, and Namusonge 2014).

#### 3 – Fragility theories are wrong – the loss of single species won’t cascade and nature won’t implode

Kareiva et al, Chief Scientist and Vice President, The Nature Conservancy, 12 (Peter, Michelle Marvier, professor and department chair of Environment Studies and Sciences at Santa Clara University, Robert Lalasz, director of science communications for The Nature Conservancy, Winter, “Conservation in the Anthropocene,” http://thebreakthrough.org/index.php/journal/past-issues/issue-2/conservation-in-the-anthropocene/)

As conservation became a global enterprise in the 1970s and 1980s, the movement's justification for saving nature shifted from spiritual and aesthetic values to focus on biodiversity. Nature was described as primeval, fragile, and at risk of collapse from too much human use and abuse. And indeed, there are consequences when humans convert landscapes for mining, logging, intensive agriculture, and urban development and when key species or ecosystems are lost. But ecologists and conservationists have grossly overstated the fragility of nature, frequently arguing that once an ecosystem is altered, it is gone forever. Some ecologists suggest that if a single species is lost, a whole ecosystem will be in danger of collapse, and that if too much biodiversity is lost, spaceship Earth will start to come apart. Everything, from the expansion of agriculture to rainforest destruction to changing waterways, has been painted as a threat to the delicate inner-workings of our planetary ecosystem. The fragility trope dates back, at least, to Rachel Carson, who wrote plaintively in Silent Spring of the delicate web of life and warned that perturbing the intricate balance of nature could have disastrous consequences.22 Al Gore made a similar argument in his 1992 book, Earth in the Balance.23 And the 2005 Millennium Ecosystem Assessment warned darkly that, while the expansion of agriculture and other forms of development have been overwhelmingly positive for the world's poor, ecosystem degradation was simultaneously putting systems in jeopardy of collapse.24 The trouble for conservation is that the data simply do not support the idea of a fragile nature at risk of collapse. Ecologists now know that the disappearance of one species does not necessarily lead to the extinction of any others, much less all others in the same ecosystem. In many circumstances, the demise of formerly abundant species can be inconsequential to ecosystem function. The American chestnut, once a dominant tree in eastern North America, has been extinguished by a foreign disease, yet the forest ecosystem is surprisingly unaffected. The passenger pigeon, once so abundant that its flocks darkened the sky, went extinct, along with countless other species from the Steller's sea cow to the dodo, with no catastrophic or even measurable effects. These stories of resilience are not isolated examples -- a thorough review of the scientific literature identified 240 studies of ecosystems following major disturbances such as deforestation, mining, oil spills, and other types of pollution. The abundance of plant and animal species as well as other measures of ecosystem function recovered, at least partially, in 173 (72 percent) of these studies.25 While global forest cover is continuing to decline, it is rising in the Northern Hemisphere, where "nature" is returning to former agricultural lands.26 So

mething similar is likely to occur in the Southern Hemisphere, after poor countries achieve a similar level of economic development. A 2010 report concluded that rainforests that have grown back over abandoned agricultural land had 40 to 70 percent of the species of the original forests.27 Even Indonesian orangutans, which were widely thought to be able to survive only in pristine forests, have been found in surprising numbers in oil palm plantations and degraded lands.28 Nature is so resilient that it can recover rapidly from even the most powerful human disturbances. Around the Chernobyl nuclear facility, which melted down in 1986, wildlife is thriving, despite the high levels of radiation.29 In the Bikini Atoll, the site of multiple nuclear bomb tests, including the 1954 hydrogen bomb test that boiled the water in the area, the number of coral species has actually increased relative to before the explosions.30 More recently, the massive 2010 oil spill in the Gulf of Mexico was degraded and consumed by bacteria at a remarkably fast rate.31 Today, coyotes roam downtown Chicago, and peregrine falcons astonish San Franciscans as they sweep down skyscraper canyons to pick off pigeons for their next meal. As we destroy habitats, we create new ones: in the southwestern United States a rare and federally listed salamander species seems specialized to live in cattle tanks -- to date, it has been found in no other habitat.32 Books have been written about the collapse of cod in the Georges Bank, yet recent trawl data show the biomass of cod has recovered to precollapse levels.33 It's doubtful that books will be written about this cod recovery since it does not play well  to an audience somehow addicted to stories of collapse and environmental apocalypse. Even that classic symbol of fragility -- the polar bear, seemingly stranded on a melting ice block -- may have a good chance of surviving global warming if the changing environment continues to increase the populations and northern ranges of harbor seals and harp seals. Polar bears evolved from brown bears 200,000 years ago during a cooling period in Earth's history, developing a highly specialized carnivorous diet focused on seals. Thus, the fate of polar bears depends on two opposing trends -- the decline of sea ice and the potential increase of energy-rich prey. The history of life on Earth is of species evolving to take advantage of new environments only to be at risk when the environment changes again. The wilderness ideal presupposes that there are parts of the world untouched by humankind, but today it is impossible to find a place on Earth that is unmarked by human activity. The truth is humans have been impacting their natural environment for centuries. The wilderness so beloved by conservationists -- places "untrammeled by man"34 -- never existed, at least not in the last thousand years, and arguably even longer. The effects of human activity are found in every corner of the Earth. Fish and whales in remote Arctic oceans are contaminated with chemical pesticides. The nitrogen cycle and hydrological cycle are now dominated by people -- human activities produce 60 percent of all the fixed nitrogen deposited on land each year, and people appropriate more than half of the annual accessible freshwater runoff.35 There are now more tigers in captivity than in their native habitats. Instead of sourcing wood from natural forests, by 2050 we are expected to get over three-quarters of our wood from intensively managed tree farms. Erosion, weathering, and landslides used to be the prime movers of rock and soil; today humans rival these geological processes with road building and  massive construction projects.36 All around the world, a mix of climate change and nonnative species has created a wealth of novel ecosystems catalyzed by human activities.

## Cartels

#### 1 – plus it’s overhyped.

Freedberg 14 (Sydney J, “Cyberwar: What People Keep Missing About The Threat,” Jan 6, <http://breakingdefense.com/2014/01/cyberwar-what-people-keep-missing-about-the-threat/>, CMR)

**Cites:**

--Peter W. Singer – former director of the Center for 21st Century Security and Intelligence and a senior fellow in the Foreign Policy program

--Allan A. Friedman – Research Scientist at the Cyber Security Policy Research Institute at George Washington University's School of Engineering

**Singer and Friedman** also **do a valuable service** in **beating back the hype** **about “Cyber Pearl Harbors”** **and “Cyber 9/11s” or the US suffering countless millions of “attacks.”** **Those alarmist statistics lump together everything from a virus easily stopped by** someone’s **firewall** to credit card theft **to the loss of secret schematics for the F-35** st

ealth fighter. **Those “attacks” vary from trivial, to significant losses** for one particular business, to actual matters of national security, **but none of them does as much damage as a good old-fashioned bomb**, they argue. **Even if hackers shut down the** national **electrical grid for weeks** on end, bad as that would be, **it wouldn’t be as bad as a single nuclear explosion**. “**It’s** a lot **like ‘Shark Week**,’” Singer said about the overhyped dangers. “**Squirrels have taken down the power grid more times than the zero times hackers have**.” There’s lots of talk about how the attacker always has the advantage in cyberspace, he told an audience at Brookings this afternoon, but “**a true cyber offense, an effective one**, a Stuxnet style [attack] **is** something **quite difficult**.”

# 1NR

## FTC

### o/v---2nc

#### 1--- turns economic strength.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 1. FTC 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

#### 2. 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.

#### Balancing test incorporates foreign interests into antitrust and stimulates global enforcement.

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

VI. CONCLUSION

This Note argues that in order to create a suitable environment for international private redress an international comity balancing test should be introduced into US jurisprudence through the opportunity provided by the FTAIA “direct effect” criterion. Though the United States has historically acted as the world’s courtroom for victimized private parties to seek recovering of antitrust injury, worldwide jurisdictions are beginning to develop their own legal regimes of antitrust enforcement, deterrence, and private recompense. To encourage this development, US courts should embrace the current Supreme Court’s approach to comity as one predicated upon global harmonization rather than conflict avoidance.

The recent efforts of resolving the “direct effect” definition dispute have been unfruitful and have ultimately produced puzzling decisions, including one in which foreign defendants were subject to criminal liability under the Sherman Act but not civil liability. The proposed balancing test responds to the current confusion stemming from these efforts by providing an alternative framework through which to realize the statute’s purpose. While the late Justice Scalia cautioned against using comity balancing tests to determine whether to properly subject foreign defendants to US antitrust law, limiting parameters provided by existing case law establish sufficient conditions to permit a balancing test.

This balancing test would guide courts in determining the propriety of extraterritorial application of US antitrust law for specific cases involving proscribed foreign anticompetitive conduct under the auspices of promoting the development of global antitrust enforcement and maximizing world economic welfare. However, instead of weighing traditional comity considerations as in Timberlane, the comity balancing test proposed in this Note would focus instead on these objectives, i.e., promoting the development of global antitrust enforcement and maximizing world economic welfare, as an extension of the Supreme Court’s harmonization approach. Ultimately, the balancing test would better allow the United States to contemplate and incorporate foreign interests in whether to apply US antitrust law, promoting international dialogue and encouraging growth of foreign private antitrust recourse.

#### American economic strength stops extinction from emerging tech and U.S.-Russia-China war.

Burrows ’16 [Matthew; September 2016; Director of the Atlantic Council’s Strategic Foresight Initiative, PhD in European History from the University of Cambridge; Global Risks 2035, “The Difficult Transition to a Post-Western Order,” Ch. 8, http://espas.eu/orbis/sites/default/files/generated/document/en/Global\_Risks\_2035\_web\_0922.pdf]

The multilateralist global system that the United States and the West built after the end of the Second World War was premised on an economically strong United States and West. In 1945, the United States was the only victor that was not completely devastated. World War II had brought the country out of the Great Depression, and the US GDP constituted more than 50 percent of the world’s total. Into the twenty-first century, the members of the Group of Seven (G7) were the world’s political and economic heavyweights. It has only been in the past several years that the collective GDP of the developing world—led by China—has surpassed the developed world’s. Even as non-Western powers grow, it is psychologically hard for the West to think about relinquishing its reins.

Demographically, the West has, for a long time, been in the minority. What’s more recent is the aging of the Western population (analyzed in chapter 2), which is already occurring in Japan and Europe, beginning to squeeze the availability of resources for anything but health, social security, and interest payments on debt. Unless healthcare becomes far more efficient, the US economy will be overburdened with healthcare and pension costs as the “baby boomer” generation ages. Healthcare constitutes a whopping 18 percent of the US GDP—significantly more than is the case for other industrialized countries—without necessarily providing better results.

With more going to health and pensions, there will be less capacity for defense and military spending. The United States is the biggest military spender, but China is increasing its portion of worldwide military spending, while the worldwide share of European NATO members is diminishing.

China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership.

Biggest Problem Is Domestic

The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit.

Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91

Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92

Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s.

In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94

In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95

Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens.

And a Multipolar Financial Architecture, Too

Historically, US and Western power has rested on having a monopoly on reserve currencies and a Western-dominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96

The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia.

Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers.

A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The aging-population factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s.

Are There Alternative Visions to Western Order?

Four years ago, when Global Trends 2030 was published, the answer was largely no.97 Increasingly, the facts on the ground would suggest otherwise. They do not add up to a cohesive plan to substitute wholesale all Western institutions and practices. However, they clearly indicate that there are some no-go areas, particularly those connected to regime change, democracy promotion, state control over NGOs, and maintaining sovereignty. Russia and China, in particular, see themselves as great powers and, as such, believe they have special rights to dominance in their regions. However, as other powers like India develop, it is likely that they will see themselves as regional powers with inherent prerogatives. It is worth recalling the United States’ expansive Manifest Destiny and nineteenth-century Monroe Doctrine, claiming special rights to determine the future of the Western Hemisphere.

The Mercator Institute for China Studies (MERICS) has been closely following Beijing’s efforts to build a network of parallel structures to existing international organizations. It has concluded that China “is not seeking to demolish or exit from current international organizations…It is constructing supplementary— in part complementary, in part competitive—channels for shaping the international order beyond Western claims to leadership.”98

As the accompanying chart indicates, China’s shadow network of alternative international structures encompasses everything from financial and economic partnerships (the Silk Road Economic Belt and the Asian Infrastructure Investment Bank) to full-blown political groupings like the Shanghai Cooperation Organization, Conference on Interaction and Confidence Building Measures in Asia (CICA), and the BRICS association of Brazil, Russia, India, China, and South Africa.99

Moreover, there is increasing cooperation among many of the emerging powers—beyond just authoritarians—to not just limit what they see as Western meddling in domestic affairs, but to go on the attack globally. According to a recent academic study, the “Big Five” authoritarian states of China, Russia, Iran, Saudi Arabia, and Venezuela “have taken more coordinated and decisive action to contain democracy on the global level.” They have sought to “alter the democracy and human-rights mechanisms of key rulesbased institutions, including the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe, and international bodies concerned with the governance of the Internet.”100

How durable are these preferences for nondemocracy and state control? By 2035, if not sooner (in the case of Venezuela), some of the now-authoritarian states could be liberalized, and the perceived threat posed by Western civil-society NGOs may ease. However, China and Russia are more likely than not to want to dominate their regions. Nationalism and democracy have been shown to be highly compatible. It is not clear that an even more powerful China or India would defer to Western leadership of the global order, even if both sides’ values in other areas begin to converge.

What Kind of Post-Western World? Clearly, there is a need to plan for a world that will not have the West as its big economic powerhouse—a prospect hard for Western elites and publics to conceive of, despite a decade or more of publicity about the “rise of the rest.” According to a recent survey, Europeans and Americans are more comfortable with each other than they are with anybody else. Although a majority of Europeans said, in the most recent German Marshall Fund transatlantic-trends polling, that they would like to see their country take an approach more independent from the United States, both Americans and Europeans still prefer each other over more Russian or Chinese leadership in the world.

The Obama administration—considered among the most multilateralist of recent administrations— campaigned hard in 2015 to convince Europeans not to join China’s proposed Asian Infrastructure and Investment Bank (AIIB). It was as if the United States was against any governance structure not “made in the USA,” even when those running the AIIB have made clear their intentions of operating with the World Bank and the Asian Development Bank.

More and more, the talk among Western elites is about locking in as much as possible the status quo, which favors the West, so that it will be harder for the newcomers to overcome. The TPP was sold as a way to set the rules before China gains much more power. A former Obama administration official advised that now might be the best time to undertake UN Security Council reform, before China and other uncooperative powers become more powerful. “A new US administration may be able to advance a proposal to address the Security Council’s anachronistic makeup while perpetuating a council that Washington can work with.”101

For Westerners, the challenge will be to plan for a future that will not be solely run by them, but which they can live with. Handovers have been historically difficult and fraught—more often than not, decided by bloody contests. One could envisage different scenarios, some already described in the earlier chapter on conflict, of military contests between the United States and China, or the United States and China with Russia, or the United States with NATO against Russia. Without delivering a knockout blow by one side or the other, these contests would most likely pit West against East, creating something akin to a new Cold War. Even if there were a knockout blow by the United States against China, it is hard to imagine a defeated China deferring permanently to the West. Its population has been imbued with such a narrative about the injustices by the West against China that any defeat or setback would be confirmation that the United States and West are dead set against a rising China.

Perhaps the most harmful effect of such a contest would be to convince both sides that neither is trustworthy. For the non-West, it would confirm the suspicion that the West does not want to relinquish its leadership position. For the West, it would make it harder to ever reach out and help establish a truly global system.

Need for a Second-Generation US and Western Leadership Model

War is not, and should not be, inevitable as the West struggles with the growing clout of China and other developing states on the world stage. Unlike during other transitions, the tools exist for ensuring more peaceful outcomes. They will require Western acquiescence to greater roles for the developing world to set and implement new rules of the road for the international order. A key feature of the post-1945 US design for the world order is its multilateralist structures. Many of these operate below most people’s radar. This plumbing of the international system has enabled the daily functioning of globalization. To keep it viable, China, as well as other developing countries, must be accorded more representation. There are too many long-term risks involved, for example, in China having only the equivalent of France’s voting rights in the IMF, when it is the first or second economic power in the world. This is how resentments are nurtured—all the more dangerous in China’s case because of its underlying “century of humiliation” mental complex.

As emerging technologies come online, the lack of a truly global institutional framework could be particularly dangerous. Assuring the future security of the Internet is particularly important in this regard, because all the new emerging technologies—bio, 3D printing, robotics, big data—take for granted a secure, global Internet. Everyone loses if cyber crime and cyber terrorism undermine the Internet. In the worstcase scenarios, in which cyber crime proliferates or strong national borders fragment the Internet, an Atlantic Council study, as mentioned, found that the economic costs could be as much as $90 trillion out to 2030, in addition to the risk of open conflict.102

Besides bringing the emerging powers into leadership roles in the panoply of multilateral institutions, the United States will need to temper its often “exemptionalist” stance to ensure the survival of the multilateralist order. According to the Council on Foreign Relations’ Patrick Stewart, a prominent scholar of global governance, one of the persistent paradoxes of the post-1945 decades has been that the “United States is at once the world’s most vocal champion of a rules-based international order and the power most insistent on opting out of the constraints that it hopes to see binding on others.”103 No country has the networks and connections that the United States does, but the system is now polycentric, rather than unipolar, and others resent the “exceptional” privileges that the United States claims. The Global Trends works have talked about the need for a new model of US global leadership. The United States needs to be guiding the international system as a “first among equals,” and willing to play by its own rules. Paradoxically, there is likely to be no vibrant global-governance system without US and Western leadership, but too much domineering behavior could doom it.

Even if the United States adapted its global role, this is not to say that the tensions and differences with many emerging powers would all disappear, or that the governance system would function seamlessly. In addition to the growing number of new state actors, the increasing importance of nonstate actors adds a new complexity to the functioning of global institutions. Moreover, there are clear-cut differences between the West and emerging powers on values-based issues, such as democracy promotion and the responsibility to protect. Many developing-country publics still resent Western colonialism and equate any intrusion with past historical wrong. They point to the 2011 humanitarian intervention in Libya, for example, as cover for the Western goal of regime change. Hence, the UN Security Council failure to stop the fighting in Syria, with more than two hundred thousand killed and 7.6 million displaced. Russia and China want to make a stand against the United States and the West getting their way and ousting the Assad regime. On the other hand, the lack of a solution smacks more of anarchy than global governance. Certainly, it shows one of the gaps that remains, and likely will remain, limiting global governance because of differences in values.

The speed with which new technologies are coming online and becoming an important political, military, and economic tool—for both good and bad—carries big risks for global governance. Stewart Patrick lists four potential new technologies that “cry out for regulation”: geoengineering, drones, synthetic biology, and nanotechnology. Without some setting of rules for their operation, there is the risk of major disruptions, if not catastrophes, stemming from their abuse. The recent advances in synthetic biology lower the bar to abuse by amateurs and terrorists alike, forever affecting human DNA. Geoengineering involves planetary-scale interventions that could interfere with complex climatic systems.

However cumbersome, politically unpopular, and ineffective at times, there is little alternative to increased global cooperation if one does not want to see higher risks of conflict and economic degradation. Without some sort of bolstered global governance, the West would end up with less sovereignty in a “dog-eat-dog” world, in which it was increasingly in the minority. But can the United States and the West rise to the challenge of investing in a global-governance system that will not always favor their interests on every issue? Historically, the United States could be especially generous because it was on top of the world in about everything after the Second World War. Europeans came to truly believe in pooling sovereignty and joint governance after centuries of internecine conflict. The tough economic times at home have seen US and European publics become distrustful of overarching multilateral institutions, believing the will of the United States or individual European countries will not be served. It is oftentimes easier for political leaders to fall in with the public mood rather than display leadership that might appear to work against it.

#### 2---their ev concedes it also includes federal government proceedings---this card is also just not about the aff so don’t give them leverage

2ac Simmons ’18 [Jay; November; Executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University; *Southern California Law Review,* “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” <https://southerncalifornialawreview.com/2018/11/02/whats-in-a-claim-challenging-criminal-prosecutions-under-the-ftaias-domestic-effects-exception-note-by-jay-kemper-simmons/>; KS]

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.[153] For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”[154] Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and “criminally prosecutes traditional per se offenses of the law.”[155] In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.[156]

#### 3---FTC enforces the aff

DOJ. "Chapter 5 Where Trade and Competition Intersect." Department of Justice Advisory Committee. https://library.unt.edu/gpo/icpac/chapter5.htm

Some lawyers and business executives have called for more effective policy tools to open foreign markets, including proposals to involve the trade agencies in making determinations of market foreclosure stemming from anticompetitive practices abroad. For example, lawyers at the firm of Dewey Ballantine have argued that "traditional antitrust law quickly runs into limits where the hand of a foreign government intervenes, and when private practices are involved, there are serious problems of gathering evidence in a foreign jurisdiction."(175) In addition, these lawyers argue that few foreign antitrust authorities can be relied upon to attack conduct that affects U.S. producers because very few foreign competition agencies are as effective as the Department of Justice or the Federal Trade Commission.

#### 5---This distinction is meaningless---the offices work together

Creighton J. Macy 17. Attorney, Baker McKenzie, with Craig Y. Lee, 12/14/17. “When Merger Review Turns Criminal.” https://www.americanbar.org/groups/business\_law/publications/blt/2017/12/07\_lee/

But that separation of criminal and civil enforcement sections at the Antitrust Division does not create walls or silos. The different criminal offices often work together on large investigations and trials. Similarly, the size of many civil investigations requires pulling resources from the various civil sections, as well as from the Antitrust Division’s Appellate, International, and Competition Policy and Advocacy sections. But the collaboration does not end there. Coordination between the civil and criminal sections is the norm. Section managers meet regularly to discuss matters and often consult on an informal basis. Cross‑pollination occurs at the trial attorney level as attorneys are detailed to other sections for specific matters or periods of time. And understanding this collaboration between the civil and criminal sections is vital to attorneys and their clients subject to the merger review process. A recent case not only shows how in sync the Antitrust Division’s criminal and civil sections are, but also highlights the implications of that collaboration.

In December 2014, two packaged seafood companies announced their proposed merger. As is customary to the review process, the parties submitted documents to one of the Antitrust Division’s civil sections. What followed was anything but routine. However, based on the level of collaboration within the Antitrust Division, it should not have been unexpected.

From document review to charges for price-fixing

The Antitrust Division’s civil attorneys reviewed the documents submitted by the parties and uncovered information that raised concerns of price‑fixing. When the parties walked away from the deal on December 3, 2015, then-Assistant Attorney General Bill Baer’s statement in the press release made a veiled reference to their problematic documents. He said, “Our investigation convinced us—and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse.”

The parties’ abandonment of the deal did not end the Antitrust Division’s investigation. Instead, the civil attorneys conducting the merger review shared their findings with their criminal counterparts. A criminal section proceeded to open a price‑fixing investigation based on the shared materials. That investigation has borne fruit and is ongoing. To date, three individuals and one company have been charged for participation in a price‑fixing conspiracy. Criminal antitrust violations, such as price-fixing, have serious implications. Not only are the criminal penalties substantial, but companies can be subject to civil suits with treble damages (15 U.S.C. § 15.).

For individuals, the maximum penalties are 10 years in prison and a $1 million fine. For corporations, the maximum fine is $100 million. Fines for both individuals and corporations can exceed the statutory maximum amount by up to twice the gain derived or twice the loss by victims. See, e.g., Price Fixing, Bid Rigging and Market Allocation: An Antitrust Primer, Department of Justice Antitrust Division, available at https://www.justice.gov/atr/priceifxing-bid-rigging-and-market-al location-schemes (discussing the Sherman Act).

While it is not public what specific information was contained in the documents that raised the attention of the reviewing attorneys, or exactly how the process happened, the Antitrust Division did state that the criminal investigation was triggered by “information and party materials produced in the ordinary course of business.” Until more information is revealed, several questions remain, including whether similar criminal investigations based on documents submitted for merger review could be waiting to surface.

The packaged seafood matter is not the first criminal case to stem from a civil investigation and likely will not be the last. The hand‑in‑hand coordination between the civil and criminal sections of the Antitrust Division will continue. Companies need to be increasingly aware of the risks that ordinary course documents present, not just in impacting merger approval but also in criminal implications. Merger review does not exist in a vacuum. Once documents fall into the Antitrust Division’s (or FTC’s) hands, parties can expect that they will be closely reviewed with an eye toward both civil and criminal actions. Documents always tell a story—and attorneys need to be sure that the story told is one to support a proposed deal and not a criminal investigation.

Similarly, the FTC and Antitrust Division share a close working relationship. We will continue to explore and monitor the collaboration between those two agencies as well as with state attorneys general. We also plan to address the collaboration among competition agencies around the world. Stay tuned.

#### A. Reports from the FTC

Timothy Butler et al. 10/14/21. Partner at Troutman Pepper, with Carlin McCrory, Elizabeth Waldbeser, Matthew White. “FTC Reports to Congress on Data Security and Privacy Priorities.” https://www.jdsupra.com/legalnews/ftc-reports-to-congress-on-data-5727533/

On September 13, the Federal Trade Commission (FTC) released a report to Congress that highlights the agency’s recent efforts to protect Americans’ privacy, announces the agency’s priorities for future data security and privacy protection efforts, and urges Congress to allocate more resources to the agency so it can expand its data security and privacy protection efforts.

As explained in the report, the FTC intends to focus its data security and privacy protection efforts via four key initiatives:

Integrating Competition Concerns. The FTC will focus its enforcement and rulemaking activities on the relationship of digital market dominance to consumer protection violations. The FTC’s report argues that “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 user data.” And it suggests that “violations of consumer protection laws may be enabled by market power, and consumer protection violations, in turn, can have a detrimental impact on competition.” Moreover, the FTC believes it has a “structural advantage” in comparison to other federal and state agencies because, unlike those agencies, it focuses on both competition and consumer protection issues. And, accordingly, the FTC intends to look “with both privacy and competition lenses at problems that arise in digital markets” and will, in some consumer protection cases, seek to impose “competition-based remedies.”

Advancing Remedies. The FTC will focus on crafting strong remedies that protect consumers and deter harmful data security and privacy practices. To protect consumers, it will require companies to disclose data breaches and data misuse. It will also negotiate redress funds for consumers harmed by data breaches and, where necessary, partner with other agencies in order to obtain redress for consumers. Additionally, the FTC will expand nonmonetary relief for affected consumers, for example, by requiring companies to provide identity verification services. As for deterrence, the FTC intends to penalize companies in violation by depriving them of the tools that caused the harm, such as requiring deletion of an algorithm. Per the report, the FTC will implement these remedies through orders issued in enforcement actions.

Focusing on Digital Platforms. The FTC will keep a close eye on the data practices of market-dominant digital platforms by focusing on order enforcement and conducting additional compliance reviews. Indeed, the FTC’s report notes that the agency “will shift resources to order compliance and enforcement especially against the largest respondents.”

Expanding Understanding of Algorithms. The FTC will develop greater understanding of algorithms and the consumer protection and competitive risks they may pose. The FTC will also provide more in-depth guidance for businesses on using algorithms and artificial intelligence fairly and equitably. In particular, the FTC would like to understand the ways that algorithms may create racial bias and prevent such uses of algorithms. It will also act to encourage companies to comply with its previously issued recommendation that they “test their algorithms, both at the outset and periodically thereafter, to make sure it doesn’t create a disparate impact on a protected class.”

#### B. Expressed plans

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

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

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

#### C. Statements from Kahn

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.

#### A. They’re just warnings---those don’t use agency resources

William H. Stallings 21. Partner in Mayer Brown's Washington DC office, where he co-leads the firm’s global Antitrust & Competition practice, with Meytal McCoy and Scott P. Perlman, 8/6/21. “One Bite at the Apple or Two? The FTC Warns Companies of Potential Post-Waiting Period Investigations.” https://www.mayerbrown.com/en/perspectives-events/publications/2021/08/one-bite-at-the-apple-or-two-the-ftc-warns-companies-of-potential-post-waiting-period-investigations

Despite the FTC’s promise of “aggressive enforcement” and that any “inaction by the Commission should not be construed as a determination regarding lawfulness,” the FTC always has had the right to investigate transactions post-closing,5 although, absent new facts, the risk of a post-consummation investigation or challenge is rare.6 Expiration of the HSR Act waiting period simply is simply that—the end of a statutory time period that removes a legal prohibition against consummation, not an immediate grant of approval or permanent clearance for a transaction.7 The blog post and issuance of warning letters do not, in fact, change the regulatory state-of-play. At best, the post/letter signal ratcheted-up merger enforcement, but all signs have been pointing in that direction for weeks, if not months, since the Biden administration took office. The warning letter does hint at a broadening of the FTC’s views on potential theories of harm by reminding parties that the FTC may challenge deals that “threaten to reduce competition and harm consumers, workers, and honest businesses.”8 Adding in harm to both “workers and honest businesses” implies that the FTC may be considering more ways that transactions can have an adverse impact other than just harm to competition and consumers.9

Together with the FTC’s decision earlier this year to suspend granting early termination of the HSR waiting period,10 the blog post could be viewed as an attempt to modify the temporal framework of the HSR Act. For example, Commissioner Wilson expressed concern that the “HSR framework is suffering a death by a thousand cuts.”11 Prior to February 2021, 75 percent of transactions could be reviewed well within the 30-day window.12 When the early termination suspension was implemented, the FTC asserted that it needed that entire 30-day period to review deals.13 Commissioner Wilson interpreted the blog post/warning letters as an effort to “keep merger investigations open indefinitely,” arguing that “[f]or the HSR Act to retain meaning,” the FTC cannot change the HSR rules “as a matter of routine, every time there is a surge in filings.”14 Commissioner Phillips further cautioned that issuing the warning letters, and effectively expanding the 30-day framework, could be “intended to chill legal M&A across the board,” which concerned him particularly where there was no reason “to conclude that the transaction [was] illegal.”15

As with the February 2021 suspension of the early termination process,16 the FTC blamed the need for these letters on the recent “tidal wave” of filings that is “straining the [FTC’s] capacity to rigorously investigate deals ahead of statutory deadlines.”17 Through the end of July 2021, more than 2,900 transactions were reported to the FTC.18 It is not clear, however, whether these record-breaking HSR filing numbers have led (or will lead) to more deals being investigated. Historically, only about 13 percent of all deals reported are investigated in some fashion, and roughly 3 percent of all deals reported receive a more thorough, substantive review through the issuance of a Second Request.19 Even if more deals are being reported, for the majority of transactions, the HSR process is purely administrative, raising no antitrust concerns, and, theoretically, uses few, if any, agency resources.20

#### B. Issues don’t cost resources until the FTC initiates actual enforcement actions

Leon B. Greenfield et al. 21. Partner at Wilmer Hale, with Hartmut Schneider, Perry A. Lange, Renita Khanduja, 8/16/21. “The FTC’s New “Warning Letter” in Merger Reviews: More Waiting After the HSR Waiting Period?” https://www.wilmerhale.com/en/insights/client-alerts/20210816-the-ftcs-new-warning-letter-in-merger-reviews-more-waiting-after-the-hsr-waiting-period

The new FTC warning letter is a significant change from prior practice, with potentially far-reaching implications for certainty in an FTC merger review. Procedural predictability and repose have long been strengths of the US merger review process, and it is therefore unsurprising that some observers have raised concern that the FTC’s new policy, together with other HSR-related changes such as the ongoing suspension of grants of early termination and introduction of “advance notice” provisions in consent decrees,9 will gradually weaken the pillars of an HSR merger review framework that has generally worked well.10

Whether these concerns are realized will depend on how frequently the FTC issues warning letters, how often the FTC takes enforcement actions in matters where warning letters have been issued, and how transparently the FTC deals with parties both before and after issuing warning letters. It also remains to be seen whether the DOJ will implement a similar policy for mergers it reviews. In the meantime, merging parties should consider early in transaction planning how they would respond to a warning letter, whether that expected response should be reflected in the deal agreement, and whether the possibility of a warning letter changes the calculus for early engagement with FTC staff.

#### a---they’re ev says that it encourages the ftc to act, not that it will

2ac MFEM ‘8-19 [Masuda, Funai, Eifert & Mitchell, Ltd; August 19; Law firm; Mondaq, “The Implications of President Biden's ‘Executive Order on Promoting Competition in the American Economy,” <https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1103288/the-implications-of-president-biden39s-executive-order-on-promoting-competition-in-the-american-economy>]

On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” (the “Order”), affirming the policy of the Biden administration to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To achieve this, the Order, among other things, directs regulatory agencies to assert oversight over certain business practices and encourages regulatory agencies to develop and/or strengthen rules. The Order includes 72 initiatives by more than a dozen federal agencies.

The Order specifically cites the areas of “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” The scope of this order is broad. On the other hand, the Order itself does not create new regulations or laws, leaving the specific implications of it vague.

Although the implications of the Order are not limited to the area of antitrust, the Order reflects the Biden Administration's emphasis on it. For example, the Order encourages the DOJ and other agencies responsible for banking to update guidelines on banking mergers to provide heightened scrutiny of mergers. The Order also encourages the DOJ and the FTC to challenge prior “bad mergers,” meaning that mergers that went unchallenged under previous administrations may be challenged in the future. Another specific area that the Order focuses on is the right to repair; it encourages the FTC to limit equipment manufacturers from limiting consumer's rights to repair.

Other affected areas of law include, but are not limited to, labor and employment (e.g. non-compete agreements) and consumer protection (e.g. financial data portability). Corporations with any significant activity in the United States should assess the impact that the Order would have on their businesses and prepare for the materialization of the specific initiatives included in the Order.

#### b---It’s empty talk that’s years from being implemented

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.

#### c---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.

#### d---Even if, it’s moderate and restrained

Andrew Coopersmith 21**.** Managing Director of the Penn Program on Regulation, “The Biden Executive Order on Restructuring Competition”, The Regulatory Review, 7/26/2021, https://www.theregreview.org/2021/07/26/coopersmith-biden-executive-order-restructuring-competition/

Hovenkamp, while still supporting the consumer welfare basis for antitrust decision-making, sees some potential for applying antitrust law in new ways, especially in the regulation of Big Tech. “There are certain types of mergers that we’re not going after because our current merger guidelines don’t cover them, particularly mergers that are intended to eliminate competitors”—for example, Facebook buying Instagram—“or that entail other anticompetitive practices that are not collusive,” he explained.

Hovenkamp stated that he thinks that the U.S. already has effective tools such as the Sherman Act that can allow regulators to use “focused injunctions to stop the conduct without doing unnecessary harm … to the efficiencies and the network effects that have made the tech market so valuable.”

Part of what impressed Hovenkamp about Biden’s executive order is how moderate and un-political it seems. “While this was widely touted as a progressive document,” Hovenkamp noted, “the fact is that it preserves the centrality of economic concerns in antitrust. It never speaks of political power as an antitrust concern.” And it never uses the word “breakup” in reference to Big Tech.

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

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

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

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

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

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.

#### 3. It directly undermines privacy enforcement

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

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

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

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

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

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

#### 4. Companies will drag out cases and drain FTC resources

Michael Kades 21 – the director for markets and competition policy at the Washington Center for Equitable Growth, 7/28/21. “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law.” https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### 5. Congressional backlash scares them off from overexerting themselves

Chris Jay Hoofnagle et al 19. Adjunct Professor of Information and Law - University of California, Berkeley, and Woodrow Hartzog, Professor of Law and Computer Science - Northeastern University, and Daniel J. Solove, John Marshall Harlan Research Professor of Law - George Washington University Law School. “The FTC can rise to the privacy challenge, but not without help from Congress.” Brookings. 8/8/2019. <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>

Resources are the FTC’s greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection. It carries out this mission with a budget of just over $300 million and a total staff of about 1,100, of whom no more than 50 are tasked with privacy. In comparison, the U.K.’s Information Commissioner’s Office (ICO) has over 700 employees and a £38 million budget for a mission focused entirely on privacy and data protection. In addition, for much of modern history, Congress has kept the FTC on a short leash. In 1980, Congress punished the agency for being too aggressive, causing it to shut down twice. Congress has held authorization over the agency’s head and used oversight power to scrutinize what members of Congress perceive as the expansive use of FTC legal authority, including its interpretation of privacy harm.

Given these constraints, FTC attorneys make pragmatic choices in their case selection. At any given time, line attorneys are investigating many companies and weighing decisions on where to target limited enforcement resources. The FTC can only bring actions against a small fraction of infringers, and it has chosen cases wisely to make loud statements to industry about how to protect privacy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### d---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.

#### E---And structurally combat algorithmic bias

Rebecca Kelly Slaughter 21. FTC Commissioner, August 2021. “Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission.” https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms\_and\_economic\_justice\_master\_final.pdf

This article offers three primary contributions to the existing literature. First, it provides a baseline taxonomy of algorithmic harms that portend injustice, describing both the harms themselves and the technical mechanisms that drive those harms. Second, it describes my view of how the FTC’s existing tools—including section 5 of the FTC Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Children’s Online Privacy Protection Act, and market studies under section 6(b) of the FTC Act—can and should be aggressively applied to thwart injustice. And finally, it explores how new legislation or an FTC rulemaking under section 18 of the FTC Act could help structurally address the harms generated by algorithmic decision-making.

#### 2---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”.

#### 3---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.”

#### 1. 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.

#### 2. 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---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.

#### 1. 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

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.”

#### 2. 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.

#### 3. 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.

#### 4. 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.

#### 5. They’re giving everything else a pass.

Zephyr Teachout 10/29/21. Associate professor of law at Fordham Law School. “Why Judges Let Monopolists Off the Hook.” https://www.theatlantic.com/ideas/archive/2021/10/antitrust-facebook-congress-sherman-act/620539/

Americans have gotten far too used to the idea that corporate behemoths are free to acquire any company they want, engage in predatory behavior, and bully, squeeze out, or demand kickbacks from smaller rivals. Indeed, the U.S. government’s decision to let Facebook buy an obvious rival, Instagram, looks so wrong in hindsight—especially now that leaked documents have revealed Facebook’s seeming indifference to the many problems that its products cause or exacerbate—that Americans should utterly disavow the complex legal framework that allowed the Federal Trade Commission to rationalize that decision. Over the past several decades, establishing that a company has violated antitrust law has become an extraordinarily difficult process. And when violations of the law are hard to punish, authorities will usually give them a pass—as the FTC did with Facebook’s acquisition of Instagram. (Yesterday, Facebook rebranded itself as Meta.)

#### 6. FTC is streamlining current enforcement in order to balance its priorities

FTC 9/14/21. Media Contact Peter Kaplan. “FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload.” https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas

At the joint recommendation from its Bureau of Consumer Protection and Bureau of Competition, the Federal Trade Commission voted to approve and make public a series of resolutions that will enable agency staff to efficiently and expeditiously investigate conduct in core FTC priority areas over the next ten years.

The Bureaus recommended that the Commission authorize eight new compulsory process resolutions in these essential areas: (1) Acts or Practices Affecting United States Armed Forces Service Members and Veterans; (2) Acts or Practices Affecting Children; (3) Bias in Algorithms and Biometrics; (4) Deceptive and Manipulative Conduct on the Internet; and (5) Repair Restrictions. (6) Abuse of Intellectual Property; (7) Common Directors and Officers and Common Ownership; and (8) Monopolization Offenses.

“These resolutions enable the FTC to take swift action against a whole host of illegal conduct in important areas of concern to the Commission,” said Holly Vedova, Acting Director of the Bureau of Competition. She noted that, “Companies engaging in conduct implicated by these resolutions should be forewarned: the FTC looks forward to aggressively using these resolutions and will not hesitate to take action against illegal conduct to the fullest extent possible under the law.”

“Harmful practices – especially those targeting children, veterans, and marginalized communities – will not be tolerated by this Commission,” said Samuel Levine, Acting Director of the Bureau of Consumer Protection. “Today’s resolutions ensure our staff can rapidly respond to allegations of abuse and fight fraud without delay.”

Specifically, the resolutions approved by a Commission vote of 3-2 will allow:

Service members and Veterans: harmful business practices directed at service members and veterans are a source of significant public concern, and, now, FTC staff will be able to expeditiously investigate any allegations in this important area.

Children under 18: harmful conduct directed at children under 18 has been a source of significant public concern, now, FTC staff will similarly be able to expeditiously investigate any allegations in this important area.

Algorithmic and Biometric Bias: allows staff to investigate allegations of bias in algorithms and biometrics. Algorithmic bias was the subject of a recent FTC blog.

Deceptive and Manipulative Conduct on the Internet: this omnibus expands a previous omnibus resolution on deceptive practices, which expired on Aug. 1. The existing resolution, has enabled the FTC to develop investigations and bring cases in a variety of areas including day trading services, tech support scams, the BOTS Act, payment processing, and the deceptive marketing of goods and services online, including pandemic-related goods like fake Clorox products and face masks. In addition to the areas covered by the existing resolution, this expanded version covers the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

Repair Restrictions: enhances the FTC’s ongoing investigations into restrictions on repair and builds on the FTC’s recent Policy Statement on Right to Repair. It would cover a wide range of anti-consumer and anti-competitive abuses and facilitate staff’s impending investigation of violations of the Magnuson Moss Warranty Act’s anti-tying provisions.

Abuse of Intellectual Property: allows staff to investigate abuses of intellectual property rights. Conduct involving abuse of intellectual property rights has been a source of much anticompetitive and deceptive conduct in many different areas, including pharmaceuticals, technology and gasoline refining, and this omnibus will allow staff to expeditiously investigate allegations in this area.

Common Director and Officers and Common Ownership: facilitates investigations of both ownership stakes in competing companies that may be anticompetitive as well as interlocking directorates that may violate Section 8 of the Clayton Act, 15 U.S.C. § 19. Interlocking directorates and common ownership continue to raise significant competitive concerns.

Monopolistic Practices: Market power abuses by tech companies and other large companies are rightly a source of bipartisan concern. This omnibus will allow staff to more expeditiously investigate market power abuses by dominant firms that are precluding businesses and entrepreneurs from being able to compete, particularly in digital markets.

Compulsory process refers to the issuance of demands for documents and testimony, through the use of civil investigative demands and subpoenas. The FTC Act authorizes the Commission to use compulsory process in its investigations. Compulsory process requires the recipient to produce information, and these orders are enforceable by courts. Civil investigative demands and subpoenas are assigned to a Commissioner for review and authorization by the FTC’s Office of Secretary, typically on a rotating basis or according to availability. The Commission has routinely adopted compulsory process resolutions on a wide range of topics. The resolutions announced today will broaden the ability for FTC investigators and prosecutors to obtain evidence in critical investigations on key areas where the FTC’s work can make the most impact. Each omnibus covers investigations into competition or consumer protection conduct violations under the FTC Act.

Streamlining and improving efficiency at the agency is vitally important given the increased volume of investigatory work created by the surge in merger filings. Having already doubled between 2010 and 2020, the number of mergers filed with the antitrust authorities this year hit a record-setting pace of 2,067 acquisitions for the first seven months alone. With these resolutions in place, the FTC can better utilize its limited resources and move forward in earnest to quickly investigate potential misconduct. The Bureaus are now authorized to take steps to ensure that any compulsory process orders are enforceable.