# 1NC vs Kentucky BD

## OFF

### 1NC – T – “Prohibition”

#### Interp—“Expand the scope” requires broadening the range of claims that can be brought – that’s distinct from just the standard that courts apply

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

#### A prohibition requires ending something fully

Feldman 86 – Member of Procopio's Native American Law practice

Glenn M. Feldman, On Appeal from the United States Court of Appeals for the Ninth Circuit, California v. Cabazon Band of Mission Indians, 1986 U.S. S. Ct. Briefs LEXIS 1221, Supreme Court of the United States, 1986, LexisNexis

In arguing that California's bingo laws are prohibitory rat ther than regulatory, the appeallants have simply misunderstood the fundamental distinction between "prohibition" and "regulation" of conduct. As succinctly put by the Supreme Court of Washington more than 50 years ago, after noting that the prohibition and regulation of the sale of liquor are entirely different things: "To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely." In contrast, regulation "implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations." Ajax v. Gregory, 32 P.2d 560, 563 (Wash. 1934). Because regulation of conduct involves prescribing limitations, regulation, by definition, necessarily involves some degree of prohibition. Blumenthal v. City of Cheyenne, 186 P.2d 556, 566 (Wyo. 1947). The two concepts, however, are analytically distinct. Therefore, when courts have been faced with statutory schemes similar to California's bingo laws, they have consistently held them to be regulatory and not prohibitory.

#### Violation: the AFF changes the standard that courts use to interpret cases, it does not expand the scope to prohibit a new pattern of conduct

#### Vote neg—

#### A] Limits—endless AFFs that make small tweaks to antitrust laws without prohibiting conduct on the basis of illegality

#### B] Ground—All core disad links and CP competition is based on prohibiting conduct rather than adjusting legal standards

### 1NC – Adv CP

[Plank one]

#### The United States federal government should substantially increase regulations for sustainable agriculture by at least

Banning the use of fertilizers that contribute to algae blooms

Banning overuse of pesticides that contribute to insect loss

Requiring sufficient amount of crop genetic diversity

Condition subsidies on implementing theses changes and increase subsidies for farms who comply

End subsidies that contribute to any of the negative effects stated above

[Plank two]

#### The United States federal government should:

Subsidize small and beginning farmers,

Relax food standards, and

Reduce output restrictions, including eliminating handler withholding policies.

#### First plank provides a carrot and stick for farms that makes farming sustainable

Searchinger 20 – Tim Searchinger is a Senior Research Scholar at the Princeton School of Public and International Affairs and Senior Fellow at World Resources Institute, where he serves as technical director of its Food Program.

Tim Searchinger, July 21 2020, “Redirecting Agricultural Subsidies for a Sustainable Food Future,” World Resources Institute, https://www.wri.org/insights/redirecting-agricultural-subsidies-sustainable-food-future

Despite a concerning global picture, country and regional studies show some areas of progress that governments around the world can build on to meet our challenging climate and food security goals. Key reforms include:

Condition farm financial aid on the protection of forests and other native areas.

In Brazil, for example, the government conditioned low-cost agricultural loans to farms and municipalities that curbed deforestation. Although imperfectly enforced, these programs helped to reduce deforestation significantly. This example highlights the potential to link efforts to produce more food on existing land with efforts to protect forests.

We recommend that other countries follow this approach. This is important even in developed countries like the United States, where farmers continue to plow up carbon-rich native prairie.

Direct conservation support toward integrated projects that bring together producers with scientists to develop needed innovations.

In the United States and Europe, some conservation funding supports integrated projects that bring groups of farmers together with scientists to try out innovative systems that reduce fertilizer or pesticide use. Such integrated projects are the best way to address vexing challenges and should be the model for spending in general.

Condition funding on environmental practices, and use systems of “graduated” payments that reward farmers for better and better performance.

Europe put in place a structure that in theory conditions all direct funding to farmers based on some environmental practices and distributes much aid in ways that are supposed to improve the environment. Some is even supposed to address climate change. The environmental requirements for these funds have been too limited to provide much environmental benefit, and little money has actually gone towards climate mitigation. Still, the structure is partially in place to make the money achieve real gains. By offering higher payments based on better performance, such systems can avoid setting one set of standards that are too low to be meaningful.

Support more efficient uses of fertilizer in high fertilizer-use countries, and take a more balanced approach to boosting fertilization everywhere.

The Chinese government phased out fertilizer subsidies and started to fund improvements in nitrogen and manure management. In India, the government conditioned nitrogen fertilizer subsidies on use with an additive designed to reduce nitrogen losses to the environment. In Kenya, government programs helped dairy farmers increase their use of nitrogen-fixing, high-protein shrubs, an alternative to using fertilizer, to increase the efficiency of their dairy production.

Target land retirement (i.e., restoration of agricultural land) on carbon-rich peatlands and lands with limited agricultural productivity, and restore them using native vegetation.

​In the United States, a small part of land retirement funds goes toward restoration of buffers and wetlands in specific river systems. In China, the government promised to put a greater emphasis on using native trees for restoration.

Overall, governments around the world should redirect more agricultural funding to focus on mitigation and the synergies between reducing emissions and producing more food. A first step toward a [sustainable food future](https://research.wri.org/wrr-food) is to make better use of the large financial support governments are already providing.

#### Second plank solves concentration without raising food prices

Watson, PhD in Ag Econ, and Winfree, PhD in Econ, 21

(Philip, Agricultural Economics and Regional / Natural Resource Economics from Colorado State University, and Jason, Washington State University, both Associate Professors of Agricultural Economics and Rural Sociology at the University of Idaho, Should we use antitrust policies on big agriculture? Appl Econ Perspect Policy, 1-14) BW

In recent years, there has been a movement to use antitrust policy to break up “big ag”.1 The impetus behind this movement seems to stem from a desire to protect small family farms, protect the environment, and “safeguard the US food supply”. However, any antitrust intervention will have effects on food prices and the availability of food. From a social welfare standpoint, food prices should be of utmost importance when thinking about these policies since cheaper food helps all consumers and alleviates food security concerns. Furthermore, the antitrust policy was designed to prevent higher prices from undue market power, not to protect small producers against competition. In other words, antitrust should not be used to protect producers, rather it should be used to maximize consumer surplus; and any desire to maintain small farms should be done through other policy mechanisms. Evaluating the economic arguments for and against antitrust interventions in large agricultural firms suggests that the implementation of such policies would result in protectionism. While there has been consolidation for decades in the agricultural industry, much of this is due to changes in the cost structure and does not generally create higher prices due to market power. Certainly there are exceptions to this in various agricultural sectors where market power needs to be curbed, but ultimately this is an empirical question that depends on the changes in food prices. We contend that recent consolidation does not seem to have caused a spike in average food prices, and the proponents of antitrust intervention are implicitly arguing for higher food prices, the exact opposite goal of historical antitrust policy. First, some historical background and examples of recent proponents of antitrust intervention in agriculture are given. We then consider the economic theory that shows us whether consolidation is due to changes in the cost structure or driven by market power. This is followed by a discussion of the determinants and direction of food prices. Other arguments are then discussed such as income equality, supply chain issues, and food security. We then briefly touch on potential solutions to helping small farms, such as rethinking policies that deal with food standards or output restrictions. BACKGROUND Antitrust policy in the United States has an interesting history regarding agriculture. In 1890, the Sherman Act dealt with unreasonable restraints of trade, thereby prohibiting monopolies and collusion of prices. In 1914, the Clayton Act strengthened antitrust laws by prohibiting anti-competitive mergers. However, 8 years later, the Capper-Volstead Act (1922) gave specific antitrust exemptions for the marketing activities of agricultural producers (Bolotova, 2016). The reasons cited for passing the Capper-Volstead Act included providing protections to agricultural producers, who were seen as a group of small farms who were fundamentally disadvantaged relative to the larger manufacturers, input suppliers, and wholesalers (National Broiler Marketing Association v. US 1978). This effectively increased producer surplus and increased prices received by agricultural producers. This concern for small and family farms continued through the depression with strictly enforced production quotas to increase prices.” Nearly a century later, there is still a movement to protect small farmers, in part due to skepticism of large agricultural firms. Currently, many policymakers feel that large food and agricultural firms are problematic, not just because of competition with small firms but also because of a myriad of related issues such as income equality, health/quality of food, environmental issues, and concentrated control of the food supply. The agricultural industry is not completely unique in that there is a populist movement to protect small firms in the broader economy. Even though market power may be increasing, many lament the competition in the broader economy that large and efficient stores bring to communities, making it difficult for “mom and pop” stores across various industries. Furthermore, many consumers are leery of the political clout of companies such as Google or Facebook and advocate for antitrust intervention (Zingales, 2017). In this model, lower prices are a bug, not a feature, since they eliminate small firms and concentrate information and control of the market. These are essentially arguments against natural monopolies. These sentiments also occur in agricultural markets, as well as some arguments specific to the agricultural industry. For example, in addition to the exit of small farms and control of the food supply, some feel that cheap food can lead to unhealthy food (Meyersohn, 2019) or environmental problems (Carrington, 2019 (July 16)). While this may or may not be the case, the use of antitrust policy for social issues or externality reduction purposes represents a myopic and ahistorical application of antitrust policy. Furthermore, it has been shown that taxing polluters can yield socially optimal outcomes and that monopolies and oligopolies tend to pollute less than firms in more competitive markets (Benchekroun & Van Long, 1998). In the political realm, law makers have explicitly called for the break-up of large agricultural firms using antitrust laws. For example, in 2007, then presidential candidate Barack Obama issued the platform “Real Leadership for Rural America” which stated he would “strengthen anti-monopoly laws” in agriculture and “make sure that farm programs are helping family farmers, as opposed to large, vertically integrated corporate agribusiness.”“ In 2019, US senators Cory Booker and John Tester proposed a bill that puts a moratorium on agricultural mergers. Additionally, Senators Elizabeth Warren and Bernie Sanders both proposed measures that would break up what they refer to as “unfair farming monopolies”. Specifically, Warren invoked antitrust laws in restricting vertical integration of large agribusiness companies such as (Daniels, 2019 (March 27)), reversing the merger of Bayer AG and Monsanto Tyson (Dorning, 2019 (March 27)), and limiting warranties for companies such as John Deere that prohibit repairs (Hirsch, 2019). More recently, Joe Biden's platform states that he wants to “strengthen antitrust enforcement” so farmers can have “access to fair markets where they can compete and get fair prices for their products”“ In general, these politicians have been clear that the goal is to help smaller farms. This push for policy intervention hinges on the arguments that (1) big agribusiness has the potential to exert too much control over an industry that is fundamental to our food supply and (2) it makes it too difficult for smaller (and ostensibly less efficient) firms to compete. What is conspicuously absent in this debate is a concern for consumer surplus. In other words, much of the debate is focused on protecting small farms by raising prices, which is harmful to consumers. While protecting farm profitability has long been a mainstay of the Farm Bill policy, it is historically antithetical to the purpose of antitrust law to use it as a means to raise prices. This line of reasoning is also somewhat curious given that food is a basic need. Low prices and consumer surplus is the crux of antitrust policy, and economic theory tells us that, under reasonable assumptions, social welfare is maximized when consumer surplus is maximized. However, in agriculture, the debate seems to revolve around profits between various types of firms. So, as most antitrust debates revolve around consumers, in agriculture, it seems to have become a discussion of “small ag” versus “big ag”. From a producer-surplus perspective, these policies could be seen as an avenue towards income equality. While income equality is a normative position that many take, we argue that any discussion on equality should include consumers. Using antitrust to break up “big ag” could certainly lead to an adverse effect on food prices. The claim that “big ag” is a threat to small farms is based on the argument that large agricultural firms create food prices that are too low and force small, and ostensibly less efficient, producers out of production.” However, it would be an unusual and counter-productive use of antitrust policy to break up purported monopolies (or oligopolies) in a bid to raise food prices. Antitrust arguments often use the rule of reason”, which requires proof that firms have engaged in anticompetitive behavior. This implies that the “rule of reason” is used to reduce prices and maximize consumer surplus. Given Engeľ's law, increasing food prices is regressive, at least on the consumer side. So while increasing food prices could potentially increase profits for small firms (which is ambiguous in terms of regressivity), shifting the costs to food consumers is ill-advised. The arguments to maintain small farms has many fronts. In addressing the full effect of a policy, it is important to look at both consumer and producer surplus effects of polices rather than focus on one or the other.” Many consumers and groups advocate for agricultural firms that are local, resilient, sustainable, environmentally friendly, or organic. While consumers associate these traits with small farms, the causality is unclear. In other words, consumers may advocate for small farms to maintain resilience and sustainability or vice versa. Regardless, there is a clear movement in favor of small family farms (Jaffe, 2019 (May 5); Warren, 2019 (March 27). ECONOMIC CONTEXT Since antitrust policy is designed to increase competitiveness, we should understand the market structure and how it is changing in agriculture. After all, as Williamson (1968) pointed out long ago, mergers and/or a more concentrated market might lead to an increase in social welfare if high fixed costs are of more concern than market power. That is, if the benefits of economies of scale are large relative to any added deadweight loss from market power, then fewer firms are welfare-increasing since increased profits are larger than changes in consumer surplus. Further, if the cost curve is such that the change in marginal costs from increased production is small or negative, mergers and/or larger firms could increase production and lower prices, thereby benefiting consumers. The main economic principles that have historically guided antitrust policy are the “rule of reason” and the contestability of markets, not the size of the firms (White, 2021). The “rule of reason” implies that market concentration violates antitrust laws only when it constitutes an unreasonable restriction of trade. This “reasonableness” is most commonly evaluated by analyzing prices and consumer surplus (Werden, 2013). If prices are not increasing (and corresponding consumer surplus is not decreasing) in the affected market, then the market concentration is generally considered to be not restricting trade. Second, market concentration is susceptible to anticompetitive actions (collusion or monopolization) if it renders the affected market incontestable (Shepherd, 1984). A contestable market is when there are de minimis barriers to entry into that market regardless of how much market power a particular firm has in that market. For example, if one firm sells 90% of the cola in a region, but any firm can enter the market with minimal barriers and sell their own cola, then that market is contestable even though it exhibits a high degree of concentration. Given that agriculture consists of many commodities and often complex supply chains, it can be difficult to make generalizations, and some agricultural markets are more concentrated than others. However, if the agriculture and food market is contestable despite the apparent concentration, it would seem that the goal of breaking up big agriculture would be to limit competition, not increase competition. Since the stated goal of these proposed policies is to help small farmers, this implies that it is a protectionist policy, and smaller firms may not be able to produce food at a cost below the market price. In other words, stopping mergers or breaking up large firms will help small firms only if large firms are more efficient and can offer lower prices. This suggests that the competitive market model is the dominant model in this situation. In a competitive market, the optimal firm size is determined completely by the cost structure since firms will compete down to the lowest price until profits are zero. Under this scenario, firms will minimize average costs (costs per unit), and prices will be set equal to average costs. Assuming that variable costs are increasing at an increasing rate, the average costs are minimized when such costs are equal to marginal costs. At that equilibrium, the optimal price is equal to the average or marginal cost, and the optimal quality level is equal to the total costs divided by the marginal cost. Therefore, the optimal size of firms is determined by the cost curve. If fixed costs and/or marginal costs are changing, then the optimal firm size is changing as well. Figure 1 shows that lower prices can be achieved with higher fixed costs and lower marginal costs, but these prices are lowest when firms are larger. This implies that if costs are changing, but firms are not allowed to adjust their size, this will cause a departure from the minimizing cost equilibrium. So, if firms are not allowed to produce at the optimal quantity, then prices will be higher due to these policies. Given the changes in firm size in agriculture, it is worth examining any changes in costs structures. Changes in the cost structure in agriculture Clearly the cost structure in agriculture is dynamic and changing over time, and so the optimal firm size is changing over time as well. With the growing costs of machinery and capital in agriculture, and the technological advances in machinery and capital, it would appear that fixed costs are increasing relative to variable costs, and consequently marginal costs, in agriculture. It has been a trend for a very long time that economic development typically leads to larger farms (Eastwood et al., 2010). Decades ago, it may have been difficult for farms to manage the acreage or herd sizes that they do today. So, at least part of the explanation of the increase in farm size is due to the change in the cost curve (Shapiro et al., 1987; Tauer & Mishra, 2006). This implies that food can be produced more efficiently with fewer firms, and policies designed to break up large farms and/or save small farms may be counter-productive. For example, machinery, such as tractors, have become very expensive, yet farmers buy new tractors because of the advanced technology. So, it must be the case that even if the fixed cost of purchasing some machinery is increasing, it is because it lowers the marginal costs. Under this scenario, changes in technology are driving consolidation in the market and making firms larger. Regulatory issues can also cause changes in the cost structure and therefore the number and sizes of firms. For example, the Food Safety Modernization Act (FSMA) created fixed costs for firms thereby making it more difficult for small firms to be profitable (Bovay & Sumner, 2017), which is a finding similar to previous food safety policies (Antle, 2000; Crutchfield et al., 1997). While there clearly may be benefits from FSMA or other food safety measures, new regulation undoubtedly increases food costs that are disproportionately borne by smaller firms and leads to increased consolidation. Empirical trends confirm the story that the optimal farm size is growing. While economies of scale may not happen at all levels of farm size, typically in developed countries, productivity increases as farm size increases (Foster & Rosenzweig, 2017). The number of farmers has long been on the decline, and the market share of farmers is increasing, although this trend seems to have started to level off over the last few decades (Lusk, 2016). While this increased concentration in the market may have downsides, it might be explained by economies of scale. Nonetheless, not all farms have grown, and while there are various reasons why some farms are smaller than others (You, 1995), changes in the cost structure help explain the economic tensions on smaller farms. Food prices While largely absent in much of the debate, food prices are critical while considering antitrust policies (Sullivan, 2017 (Aug. 29)). The economic theory of antitrust and balancing market power with changes in the cost structure is straightforward, which means this policy is ultimately an empirical question that should hinge on whether or not food prices are increasing. If high levels of market concentration are causing higher food prices, then policy intervention is certainly legitimate. However, in a competitive market, antitrust intervention may lead to higher prices and decrease consumer surplus. Since it is not clear theoretically if mergers and/or fewer firms create higher or lower prices, we should examine trends in food prices. Unfortunately, given the various types of food and changing food preferences, it is not entirely obvious, empirically, whether food prices are increasing or decreasing (Cowen, 2019 (March 19). The agricultural supply chain can be complex and varies widely depending upon the commodity. While there are many factors that go into prices, as well as many types of food, we can at least examine historical prices. If we take data from 1974 to 2018 from the US Department of Agriculture (USDA), Figure 2 shows how prices have changed for food at home, food away from home, and the consumer price index (CPI) in general. As the graph shows, food away from home has become more expensive relative to average goods over the time frame, and especially since 2007. Food at home, on the other hand, has lagged behind average prices since 1979 and is now 14.6% lower than the CPI when compared to 1974 levels and has grown 22.6% less than food away from home. Since consumer units spend on average $4464 (in 2018) on food at home (https://www.bls.gov/news.release/cesan.nr.htm), the relative decline in food prices at home compared to the CPI represents a saving of $766 per year. Many factors go into food prices, and it is difficult to know the magnitude of each factor. For example, food prices spiked around 2007-2008, and Headey and Fan (2008) found this to be due to a myriad of reasons including oil prices, depreciation of the U.S. dollar, and biofuel demand. They also found that this spike in food prices had a harsh effect on the world's poor. However, Gilbert (2010) argued that this spike was more impacted by investments in futures markets. Other factors, including labor and capital supply (Hertel et al., 2016), weather (Mitchell, 2008), and income (Fukase & Martin, 2020), also influence food prices. Therefore, it Is difficult to know the exact effect of market structure on prices. Regardless, it would seem reasonable to assume that market concentration in agriculture would have a more direct impact on prices for food at home compared to food away from home. Furthermore, a relative decrease in food prices translates into considerable household savings. Again, there are certainly exceptions of agricultural markets with high concentrations, and much of the academic literature on antitrust policies in agriculture has focused on these examples (Badruddoza & McCluskey, 2021; Bolotova, 2021; Chidmi et al., 2005; MacDonald, 2017). Additionally, Sexton (2012) citing Azzam and Anderson (1996), Ward et al. (2002), Sheldon and Sperling (2003), and Kaiser and Suzuki (2006) argues that, while market power in food and agriculture warrants greater consideration in how agricultural markets are empirically modeled, market power has caused only very small departures from competitive prices on both the buying and selling sides of the market. Therefore, since overall food prices appear to be slowly declining relative to CPI, policymakers should proceed with caution in using antitrust policies broadly in agriculture if their goal is to decrease prices. NON-CONSUMER PRICE ANTITRUST ARGUMENTS Even though overall food prices may not be increasing and may even be on the decline, many of the policy advocates are concerned about other issues related to market consolidation. Advocates of antitrust intervention in agriculture often cite issues other than consumer prices (Douglas, 2017). These issues include income inequality, food security, health, and environmental concerns. In fact, many of these issues become problematic when prices become too low. While the intent of antitrust law is not to decrease market competition, these issues are still worth examining. Income equality Income inequality has been a primary goal of some advocates of an increase in antitrust enforcement. However, while helping small firms has been an ongoing economic policy goal in the United States, using antitrust law is likely an inefficient way to achieve income equality (Shapiro, 2018). In agriculture, this discussion is typically framed as large agricultural firms versus small agricultural firms. While the USDA has implemented numerous programs explicitly deigned to benefit small, beginning, and family farms (Katchova & Ahearn, 2015), there is sharp criticism that large farms are profiting at the expense of small farms (Bruckner, 2016). However, it is not clear whether using antitrust law is the most effectual mechanism to achieve this goal. Even if we are able to shift market shares from large producers to small producers, there are a number of problems in achieving income equality. First, even ignoring consumers, it is not clear whether protecting small and/or family farms would increase income equality among agricultural producers. For example, large firms do not necessary have higher incomes per employee (Brown & Medoff, 1989). Low-income workers may bear some of the burden of breaking up large agricultural firms. In other words, it is quite possible that there is a negative correlation between profit per worker and the síze of the farm, in which case protecting smaller farms may worsen income inequality. Second, it has been shown that the incomes of small farms are, on average, higher than non-farm incomes (Lusk, 2016). This implies that food consumers are poorer than food producers. Ma et al. (2021) show that for developing countries, consolidation into larger farms can have an overall positive effect while hurting rural households. However, in developed countries, it is not obvious that market concentration exacerbates overall income inequality. It is likely that increasing agricultural output prices to help small farmers will hurt an even more vulnerable population of low income food consumers. If the goal is income equality, certainly the poorest are of the utmost importance. Given Engel's law and the obvious importance of food, changes in the food supply can heavily influence the well-being of the most poor. In this situation, protecting smaller farms ill exacerbate rather than alleviate the problem of income inequality. Third, there may be a misconception about what consolidation means. For example, according to the USDA, in the United States in 2019, almost 98% of farms were family farms, and 90% are small family farms with less than $350,000 in gross cash farm income. So, many of the farms that are being consolidated are being consolidated into other family farms. While some of the rhetoric may focus on large corporations in the agricultural industry, policies are likely to have a negative effect on some family farms as well. Supply chain/vertical integration Another argument in favor of antitrust intervention is that concentration in parts of the agricultural sector creates monopolistic or monopsonistic power. Upstream market power can create increased costs for downstream firms, and downstream market power can create lower prices received for upstream firms. Certainly, market power throughout the supply chain can reduce social welfare, and antitrust intervention may be warranted in some situations (Blair et al., 2009; Blair & Harrison, 2010; Kwoka et al., 2009). In fact, the US Department of Justice has been active in regulating vertical relationships in the agricultural industry (Gerstle et al., 2017). However, this in no way implies that all vertical mergers should be avoided. Often, vertical1 integration can lead to efficiencies or, in the case of both an upstream and downstream monopoly, the elimination of the double marginalization. As is the case with horizontal mergers, integration can be seen as increasing efficiency, and thereby reducing food prices, if there are no barriers to entry into the market. Nonetheless, market concentration either upstream or downstream can be harmful to small farms. For example, downstream producers may prefer contracts with a few large farms, which can hurt small farmers. Some may see antitrust intervention in the supply chain as a way for smaller farmers to enter a market due to availability of contracts. If small farmers are not able to get a contract with large upstream or downstream firms, the effect of antitrust intervention on food prices is not obvious. There may be a tradeoff between more firms/competition and a loss of efficiencies due to scale. Market control and food security/safety Others argue that antitrust laws should be used in agricultural markets owing to the amount of control certain firms have in the food supply and the potential effect that this might have on food security and safety (Hendrickson et al., 2017). The market control concern is similar to the arguments being made to break up technology firms such as Google, Twitter, and Facebook, and is again somewhat subject to the scrutiny of contestability. While technology firms often have a large share of the social media market, these markets could be thought of as contestable, and consumers and competitors are free and able to switch platforms. It is difficult to say whether this is comparable in food markets. While many aspects of the food industry might be considered contestable, especially in the long term, large sunk costs may prevent some competition in some markets. Certainly, control of the food supply, or even widespread adoption of technology, can generate risk. For example, in 1970, over 80% of corn in United States was Texas cytoplasmic male sterile corn. This type of corn was susceptible to fungus (Southern corn leaf blight) and caused a drastic reduction in corn yield. If market concentration creates less genetic diversity, it is possible that this is a cost. However, the association between market concentration and food safety is not entirely clear and using antitrust with this intention would be complex. For example, as previously stated, large firms can often implement safety standards more easily. While controlling the food supply is certainly an incredible responsibility with an enormous downside potential, it is not clear how much actual power firms have and why this power would harm consumers. This may be an area of research that might help inform this policy process.

ALTERNATIVE POLICIES TO ASSIST SMALL FARMS

Antitrust-related policies should not be geared towards protectionism of small firms; however, there may be potential ways to help small farmers without potentially increasing food prices. This section is not meant to be a full accounting of the benefits and costs of these alternatives, but rather shows that there are alternatives that may achieve these goals without driving up food costs for consumers. At the crux of antitrust policy is getting rid of any barriers to entry, which can at times be a barrier to small farmers. However, some policies that the USDA has pursued have the unintended consequence of creating barriers, increasing the fixed costs of production, and exacerbating consolidation in agriculture, further putting small farms in a competitive disadvantage. These policies include food standard regulations and output restrictions. Relaxing and reducing these restrictions, while potentially creating other problems, would likely help small farmers.

Subsidize small and beginning farmers

There are currently a large number policies that the USDA and other agencies are pursing to encourage small and medium-sized producers12 as well as new farmers13. Some groups support the expansion of these types of programs to assist small and beginning farmers because they feel that US agricultural policy has unduly subsidized big commodity agriculture for years at the expense of small farms. Conversely, others argue that subsidizing small farms disproportionately benefits rich consumers who are able to afford the price premium on niche foods. However, irrespective of the relative efficacy of programs and subsidies to support small farms, these efforts will not likely lead to higher prices for basic food products, which should be central to the agricultural policy. The same cannot be said for using antitrust policies to break up “big ag”.

Relax food standards

A good example of policies for increasing fixed costs is food standards. Implementing regulations, such as food quality standards, can increase the level of market concentration in agriculture because it requires all firms to add costly measures, effectively increasing the fixed costs of production. While some of the costs from regulations, such as food standards, might be variable, research has typically shown that it leads to higher fixed costs (Bovay & Sumner, 2017). If these regulations increase fixed costs, it financially incentivizes firms to become larger. Therefore, when such policies are implemented, policymakers should be cognizant of the pressure of such policies. This is not to say that food safety policies are always unwarranted, but the costs of such policies should be taken into account. So, while many advocates of antitrust intervention in agriculture cite food safety as a reason in favor of intervention, food safety standards are likely exacerbating consolidation in agriculture and encouraging larger firms.

Reduce output restrictions

Output restrictions through collective marketing were a hallmark of early exemptions given to agriculture through the Capper-Volstead Act. These exemptions were seen as an avenue to help farmers overcome the inherent “zero-profit condition” that results from commodity production. However, although they are becoming less common, output restrictions in agriculture can help established and larger firms and can hinder smaller and/or new farms. To create new entries into the market, any output restrictions should be minimized. While marketing orders do not commonly invoke volume controls, such controls can hinder competition from small farmers. For example, handler withholding policies and minimum quality standards can be used, at least potentially, to control the supply of commodities. While such restrictions may be beneficial to some firms because they can increase prices, they sometimes do so by restricting membership of a cooperative and keeping out new producers.

CONCLUSION Increases in market consolidation in agriculture certainly comes with a myriad of issues that need to be examined, and, in some cases, policy interventions may be warranted to address market power and any associated externalities. However, given that our food supply is critical, research into how specific interventions are likely to lead to changes in production is vital. Therefore, our concern about the use of antitrust intervention in agriculture is that consumer surplus has been largely absent in the debate. This is curious given that antitrust policy aligns with maximizing consumer surplus and lower prices. In general, the consolidation of farms and the continued growth of “big ag” can be explained by change in the cost curves due to technology. Economic theory tells us that social welfare is maximized when we allow firms to merge if fixed costs are rising relative to marginal costs. Empirically, it does not appear that consolidation is causing an increase in prices. While these changing cost curves do harm some small farms, that effect is smaller than the benefit received by food consumers. To be sure, monopolies can cause great harm to lower income and middle-income consumers (Schmitz et al., 2020). But traditionally, monopolies harm consumers by raising prices and creating barriers to entry. This is why antitrust policy, when dealing with agriculture, should focus on consumers and use the “rule of reason” to try to provide cheaper food. Producers can always create niche markets to produce specialty foods if sufficient consumer demand is present, but the primary goal should be to produce food at a lower price. Similarly, if there are economies of scale, large firms should be encouraged in the industry. While concern for small or family farms may be noble, protection of small farms should not come at the expense of lower food prices. Our policy goals in agriculture should be to eliminate any barriers to entry to foster competition that leads to lower prices. While there are other policy concerns, ceteris paribus, lower food prices should be favored over high food prices. If these antitrust policy directives are not followed, the results could be disastrous. Competition has always meant that some firms may not survive, and under changing cost structures this can imply that firms get larger by consolidating other firms. However, in many industries this seems more easily accepted, perhaps due to other sociological factors. While few people give a second thought about the bankruptcy of a start-up technology firm, family farms are seen as virtuous by some observers and the decline of small farms can be seen as problematic. However, the main goal of agricultural policy should be to feed people. While the typical economic analysis shows that economic welfare is maximized when consumer surplus is maximized, it is even more crucial to focus on consumers when the good is food. Given the obvious necessity of food, policy should be driven by a desire to make food as available as possible.

### 1NC – Antitrust DA

#### Frenzy of deals now because Biden’s antitrust push won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

"The order itself will be less likely to have a chilling effect on strategic M&A than the potential chilling effect of a significant increase in the number of prolonged investigations and merger challenges brought by the agencies," said Michael Schaper, partner at law firm Debevoise & Plimpton.

Spokespeople for the White House and the two main antitrust regulators, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DoJ), did not immediately respond to requests for comment.

Dealmakers were bracing for a tougher antitrust environment under Biden even before last week's executive order. Last month, the DoJ sued to stop insurance broker Aon's (AON.N) $30 billion acquisition of peer Willis Towers Watson (WTY.F). And Biden tapped Lina Khan, an antitrust researcher who has focused her work on Big Tech's immense market power, to chair the FTC.

#### Immediately expanding scope of antitrust liability brings that to a halt—undermines dynamism and global competitiveness

Thierer 21– Adam Thierer is a senior research fellow with the Mercatus Center at George Mason University. Author of several books on antitrust law; former president of the Progress & Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation.

(Adam Thierer, 2-25-2021, "Open-ended antitrust is an innovation killer," TheHill, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer)

Antitrust reform is a hot bipartisan item today, with Democrats and Republicans floating proposals to significantly expand federal control over the marketplace. Much of this activity is driven by growing concern about some of the nation’s largest digital technology companies, including Facebook, Google, Amazon and Apple.

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. Amy Klobuchar (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, recently introduced the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. Josh Hawley (R-Mo.). Hawley recent offered an amendment to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines proclaimed that “MySpace Is a Natural Monopoly,” and asked, “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits insisted “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new corporate “Big Brother” that would decimate digital diversity and online competition.

GOP divided over bills targeting tech giants

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.

#### Internal link goes one way—large-firm dynamism is the only way to maintain tech leadership vis-à-vis china—key to competitiveness and AI

Lee, senior lecturer at the University of Hong Kong Faculty of Business and Economics, ‘19

(David S., “Antitrust action risks holding back US tech giants in competition with China,” <https://asia.nikkei.com/Opinion/Antitrust-action-risks-holding-back-US-tech-giants-in-competition-with-China>)

But the administration should not forget the law of unintended consequences -- effective antitrust measures could stifle the ability of American tech companies to compete with their Chinese challengers. Presumably, that is the last thing the America First president wants to see.

While antitrust has been used to regulate technology companies before, perhaps most notably Microsoft two decades ago, its application against Amazon.com, Facebook, and Google seems different.

For the last half-century or so, U.S. antitrust law has been underpinned by the concept of maximizing consumer welfare, frequently measured by price to consumers. In regulating big technology companies today, however, a new paradigm has emerged, dubbed "hipster antitrust."

Hipster antitrust looks beyond traditional economic harm and includes wider effects such as wage inequality, data privacy intrusions, and sheer size as grounds to invoke the law.

But the wider the antitrust authorities reach, the more likely they are to damage the tech giants' global competitiveness. This applies especially in the key field of artificial intelligence, where the U.S. and China are world leaders.

AI is the engine powering the Fourth Industrial Revolution and the fuel for that engine is data, lots of data. Such data can only be collected at scale, which conflicts with hipster antitrust notions of size. If American antitrust measures compel large technology companies to shrink or in the extreme, to break up, then the U.S. will find itself at a disadvantage to China.

The idea of size is one of many fundamental differences separating Chinese and American technology ecosystems. Chinese government leaders have clearly grasped that scale matters for the technologies they want to dominate, such as artificial intelligence, as well as for the type of digital governance Beijing is striving to implement.

In the U.S., however, the economic value attached to scale is offset by deep-rooted concerns about privacy, bullying behavior and unfair political and social influence. Senator Elizabeth Warren of Massachusetts, a popular Democratic Party candidate for the 2020 presidential election, wrote: "Today's big tech companies have too much power -- too much power over our economy, our society and our democracy."

But in China this is not a hot-button political issue. In a recent fintech course I helped lead comprised of students from different countries, mainland Chinese students considered privacy differently than peers elsewhere. Though aspects of privacy are important to Chinese users, many readily understand there are trade-offs in operating on technology platforms.

Chinese technology platforms such as Alibaba and Meituan have developed so-called "super apps" that serve the same functions that users in the West might find by going to different applications on their devices.

Super apps are designed to be convenient to users so they can handle everything from ride hailing, shopping, food purchases, and payment, all without leaving the digital confines of a single app. This has become the dominant way Chinese citizens consume online. With the most internet users in the world, approximately 750 million, super apps also provide Chinese technology companies an incredible amount of data.

In his book, "AI Superpowers: China, Silicon Valley, and the New World Order," technology executive and investor, Kai-Fu Lee outlined four factors necessary to win the AI race: talent, computing speed, data, and government policy. Though the U.S. has an advantage in many areas, that lead is shrinking, and if China does overtake the U.S. in artificial intelligence, it will likely be a result of advantages in data and government policy.

This combination of data and government policy is perhaps best exemplified by SenseTime, widely considered the world's most valuable artificial intelligence startup. SenseTime boasts world leading facial recognition, which is enhanced because it reportedly has access to Chinese government databases, a rich source of data to further develop models.

Chinese companies like SenseTime have excelled in facial recognition, with some reports estimating that there are almost ten times as many Chinese facial recognition patents filed as American. Chinese surveillance technology is already used in the U.S., including New York City.

This widening gap will have broader implications beyond surveillance, security, and policing. Facial recognition technology will also serve as a biometric identifier for finance, retail, and health. With China moving forward aggressively both domestically and abroad in its use of such technologies, American competitors who are pursuing facial recognition, such as Amazon and Google, may not be able to close the growing competitive chasm.

So while American politicians may see antitrust investigations into large technology companies as necessary, there could be a significant impact on America's ability to compete with China.

Google's former CEO, Eric Schmidt forecast last year that China and the United States would lead the bifurcation of the internet into two spheres. Evidence of this splintering is already apparent. What remains undetermined, however, is which of those spheres will dominate.

Large Chinese technology companies, for example Alibaba Group Holding, are already setting-up far-flung outposts by partnering with and investing in local, non-Chinese technology companies around the world. This form of Chinese technological expansion allows Chinese big tech to shape user privacy norms, establish global networks, and attract more users into their ecosystems, all of which leads to increased user activity and ultimately more data.

While China aggressively expands its technological reach and hones its ability through mining evermore data, it is important that U.S. regulators understand that aggressive antitrust sanctions would risk inhibiting American companies from maintaining the scale necessary to compete with their Chinese rivals.

AI supremacy will be a defining feature of superpower status. And if future researchers one day examine how the U.S. lost the war for artificial intelligence, the hindsight of history may show that the current antitrust debate was the fatal turning point.

#### Tech innovation prevents nuclear conflict—US lead is key

Kroenig and Gopalaswamy 18 – Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the South Asia Center at the Atlantic Council

Matthew Kroenig and Bharath Gopalaswamy, "Will disruptive technology cause nuclear war?," Bulletin of the Atomic Scientists, 11-12-2018, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>

Rather, we should think **more broadly** about how new technology might affect global politics, and, for this, it is helpful to turn to scholarly international relations theory. The dominant theory of the causes of war in the academy is the “bargaining model of war.” This theory identifies rapid shifts in the balance of power as a primary cause of conflict.

International politics often presents states with conflicts that they can settle through peaceful bargaining, but when bargaining breaks down, war results. Shifts in the balance of power are problematic because they undermine effective bargaining. After all, why agree to a deal today if your bargaining position will be stronger tomorrow? And, a clear understanding of the military balance of power can contribute to peace. (Why start a war you are likely to lose?) But shifts in the balance of power muddy understandings of which states have the advantage.

You may see where this is going. New technologies threaten to create potentially destabilizing shifts in the balance of power.

For decades, stability in Europe and Asia has been supported by US military power. In recent years, however, the balance of power in Asia has begun to shift, as China has increased its military capabilities. Already, Beijing has become more assertive in the region, claiming contested territory in the South China Sea. And the results of Russia’s military modernization have been on full displayin its ongoing intervention in Ukraine.

Moreover, China may have the lead over the United States in emerging technologies that could be decisive for the future of military acquisitions and warfare, including 3D printing, hypersonic missiles, quantum computing, 5G wireless connectivity, and artificial intelligence (AI). And Russian President Vladimir Putin is building new unmanned vehicles while ominously declaring, “Whoever leads in AI will rule the world.”

If China or Russia are able to incorporate new technologies into their militaries before the United States, then this could lead to the kind of rapid shift in the balance of power that often causes war.

If Beijing believes emerging technologies provide it with a newfound, local military advantage over the United States, for example, it may be more willing than previously to initiate conflict over Taiwan. And if Putin thinks new tech has strengthened his hand, he may be more tempted to launch a Ukraine-style invasion of a NATO member.

Either scenario could bring these nuclear powers into direct conflict with the United States, and once nuclear armed states are at war, there is an inherent risk of nuclear conflict through limited nuclear war strategies, nuclear brinkmanship, or simple accident or inadvertent escalation.

This framing of the problem leads to a different set of policy implications. The concern is not simply technologies that threaten to undermine nuclear second-strike capabilities directly, but, rather, any technologies that can result in a meaningful shift in the broader balance of power. And the solution is not to preserve second-strike capabilities, but to preserve prevailing power balances more broadly.

When it comes to new technology, this means that the United States should seek to maintain an innovation edge. Washington should also work with other states, including its nuclear-armed rivals, to develop a new set of arms control and nonproliferation agreements and export controls to deny these newer and potentially destabilizing technologies to potentially hostile states.

These are no easy tasks, but the consequences of Washington losing the race for technological superiority to its autocratic challengers just might mean nuclear Armageddon.

### 1NC – Section 5 CP

#### The Federal Trade Commission should:

**PLANK 1**

--determine that “unfair methods of competition” pursuant to section 5 of the FTC act to establish a structural presumption against agricultural mergers and bring associative enforcement actions

**PLANK 2**

--issue cease and desist letters to companies engaging in platform conduct that violates the presumption, stating that their practice violates the core antitrust laws

#### Congress granted the FTC broad authority to regulate anticompetitive practices under section 5 – the CP prevents a slew of anticompetitive practices

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

Under progressive leadership, one federal agency, the FTC, could resurrect antitrust law as “a comprehensive charter of economic liberty.”22 Modern administrative law and Congressional delegation of policymaking authority grant the FTC expansive power to interpret the antitrust provision of Section 5 of the FTC Act.23 In enacting this statute, Congress articulated a grand progressive-populist vision of antitrust. It wanted the FTC to police “unfair methods of competition” that injure consumers, prevent rivals from competing on the merits, and allow large corporations to dominate our political system.24 Congress intended the FTC’s antitrust authority to encompass more than the prohibitions in the Sherman and Clayton Acts and to nip anticompetitive problems in the embryonic stage before corporations gained undue power over consumers, small suppliers, competitors, and the American political system.25

Since the early 1980s, the FTC has championed antitrust law centered on economic efficiency. In 2015, the FTC codified this approach in a Statement of Enforcement Principles laying out its interpretation of Section 5’s prohibition on unfair methods of competition.26 The FTC stated that it would use its Section 5 authority to advance “consumer welfare,” which is functionally similar to the allocative efficiency goal, and apply the rule of reason framework.27 In articulating this narrow interpretation of Section 5, the FTC contradicted Congress’s political economic vision in 1914, which sought to prevent not only short-term injuries to consumers, but also exclusionary practices by large businesses and the accumulation of private political power. And in making the rule of reason the centerpiece of its analytical framework, the FTC adopted a convoluted test that cannot advance the Congressional vision underlying Section 5.

Despite being a champion of the efficiency paradigm since 1981, the FTC under progressive leadership in the future could still change course and be true to the Congressional intent from when the agency was created more than a century ago. In setting out an interpretation of Section 5, whether through enforcement actions or rulemakings, the FTC should anchor Section 5 in the expansive political economic vision of Congress. By enacting the FTC Act, Congress sought to prevent—rather than remedy after the fact—three principal harms from concentrated economic power: wealth transfers from consumers and producers to monopolies, oligopolies, and cartels; private blockades against entry and competition in markets; and the accumulation of economic and political power in corporate hands. To advance Congress’s antitrust vision, the FTC should adopt presumptions of illegality for a variety of competitively suspicious conduct, such as mergers in concentrated industries, exclusionary practices by firms with market dominance or near-dominance, and restraints on retail competition; and challenge monopolies and oligopolies that inflict significant harm on the public. When seeking to preserve or restore competitive market structures, the FTC should pursue simple structural remedies over complicated behavioral fixes.

**Section 5 expansion and clarification is critical to preventing international protectionism**

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act’s considerable normative influence abroad,66 especially with respect to areas of regulator discretion in enforcement. Within two years of the statute’s enactment, President Wilson would confess candidly of the new FTC: “It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business.”67 While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act’s purview over any “unfair methods of competition”68 per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act’s reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, “then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute,” while permitting dialogues “with business to facilitate compliance with the law (those emphasized by Wilson).”69 As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”70 This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,71 not the least a presumption that the public referenced is the domestic public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”72 Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”73 Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”74 Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.75 When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”76 Wilson was quick to rely on Section 6,77 and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.78 The originators of the legislation would not have had it any other way.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

### 1NC – FTC Tradeoff DA

#### The plan forces tradeoffs in FTC enforcement efforts – they’re in a merger tsunami and barely staying afloat, but the plan drowns them

Rose ’19 - Department Head and Charles P. Kindleberger Professor of Applied Economics in the MIT Economics Department. She served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the DOJ from 2014 to 2016, and was the director of the National Bureau of Economic Research Program in Industrial Organization from 1991 to 2014.

Nancy Rose, FTC Hearing #13: Merger Retrospectives, April 12, 2019, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-14-merger-retrospectives>

So I want to start with the last question that was on the set that Dan and Bruce circulated for this panel. Should the FTC devote more resources to retrospectives, even at the cost of current enforcement? And I was delighted to see Commissioner Slaughter be so passionate in her defense of the need for more resources. This goes to what I feel is the most significant, and yet still largely invisible message, in the ongoing debate over competition policy, which is that antitrust enforcement in the United States is chronically and substantially underfunded.

For years, the appropriation requests have been modest in their increases. Oversight hearings and interactions with the Hill have too often featured the mantra, “when business picks up, our talented and hardworking staff just do more with less.” I will say I think the career staff at both the FTC and the DOJ Antitrust Division are among the most dedicated, highly-skilled, and hardest-working professionals.

It was my great privilege to work with a number of them at DOJ, and I know that colleagues who have worked at the FTC feel the same way. They deserve our greatest appreciation and applause and not just from those of us who work in antitrust policy, but from the entire American public, on whose behalf they tirelessly work.

But there is a limit to the number of hours in a day and the number of days in a week and the well below market compensation for the lawyers and economists who work in the agencies, which is another significant problem, is insufficient to demand that staff give up all rights to leave their buildings, occasionally see their families, or catch up on sleep.

So I think it’s inevitable that if we’re asking agencies to reflect on the effectiveness of their decision-making through programs like retrospective programs, it is going to come out of someplace else. And I fear that given the ongoing intensity of the merger wave, that’s going to come out of enforcement.

We are amid an ongoing sustained, what’s been called by some, tsunami of mergers. Each year there are thousands of mergers noticed to the agencies and thousands more below the HSR thresholds, that work by Thomas Wollmann at the University of Chicago suggests, skate through to consummation with practically no probability of review or action, the occasional consummated merger enforcement action notwithstanding.

The dollar volume of mergers is at historic levels and that suggests that there are a lot of mega mergers competing for enforcement resources. In addition, litigation costs continue to climb, both for challenging mergers or bringing Section actions, especially as parties with especially deep pockets escalate litigation defenses, correctly calculating that even adding some tens of millions of dollars in antitrust litigation costs would be just rounding error in their merger financing.

And, finally, I would say it’s inconceivable to me that there are not at least some counsel that are advising parties that a good time to bring marginal mergers forward is when the agencies are stretched thin by major investigations or multiple litigations.

#### Despite short resources, FTC is effectively regulating hospital mergers – the plan halts that progress

Muris ’20 – Professor of Law at George Mason, former Chairman of FTC, Senior Counsel at Sidney Austin LLP, JD from UCLA,

Timothy Muris, “Response to Subcommittee on Antitrust, Commercial, and Administrative Law Committee on The Judiciary U. S. House of Representatives” April 17, 2020, <https://judiciary.house.gov/uploadedfiles/submission_from_tim_muris.pdf>

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden‘s maxim that “when you are through learning, you are through.” The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC’s hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC’s approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

#### Long term per-person healthcare costs will collapse the economy from a bubble burst or terminal budget overstretch – no alt causes – restoring competition in hospital markets is key to reduce costs

Evan Horowitz, Fivethirtyeight, January 11, 2018, The GOP Plan To Overhaul Entitlements Misses The Real Problem, <https://fivethirtyeight.com/features/to-cut-the-debt-the-gop-should-focus-on-health-care-costs/>

There is no wide-reaching entitlement funding crisis, no deep-rooted connection between runaway debts and the broad suite of pension and social welfare programs that usually get called entitlements. The problem is linked to entitlements, but it’s much narrower: If the U.S. budget collapses after hemorrhaging too much red ink, the main culprit will be rising health care costs.

Aside from health care, entitlement spending actually looks relatively manageable. Social Security will get a little more expensive over the next 30 years; welfare and anti-poverty programs will get a little cheaper. But costs for programs like Medicare and Medicaid are expected to climb from the merely unaffordable to truly catastrophic.

Part of that has to do with our aging population, but age isn’t the biggest issue. In a hypothetical world where the population of seniors citizens didn’t increase, entitlement-related health spending would still soar to unprecedented heights — thanks to the relentlessly accelerating cost of medical treatments for people of all ages.1

What’s needed, then, is something far more focused than entitlement reform: an aggressive effort to slow the growth of per-person health care costs. Or — if that’s not possible — some way to ensure that the economy grows at least as fast as the cost of health care does.

Diagnosing the debt: It’s not about demographics

America’s long-term budget problem is very real. Already, the federal government has a pile of publicly held debts amounting to around $15 trillion, or about 75 percent of the country’s entire gross domestic product. That’s the highest level since the 1940s, yet the debt burden is expected to double by 2047 and reach 150 percent of the GDP, according to the Congressional Budget Office.2

It makes sense to list entitlement spending among the culprits for the growing national debt, given that these programs have grown from costing less than 10 percent of the GDP in 2000 to a projected 18 percent in 2047. Part of this is simple demographics: As America ages, more of us become eligible for Social Security and Medicare, thus driving up expenses.3

But there’s a crack in this demographic explanation: It only makes sense for the next 10 to 15 years. That’s the period of rapid transition when graying baby boomers will boost the population of seniors from around 50 million to more than 70 million. A change like that should indeed produce a surge in entitlement spending as those millions submit their enrollment forms.

By 2030, however, this wave will start to ebb, leaving the elderly share of the population at a roughly stable 20 to 21 percent all the way through 2060, based on the size of the population following the boomers and slower-moving forces like lengthening lifespans.

But think what this should mean for entitlement spending. As the population of seniors levels out in those later years, costs should naturally stabilize — at least, if demographics were really the driving factor.

This is exactly what you see for Social Security. The CBO expects total Social Security spending to leap up over the next decade but then settle at just over 6 percent of the GDP, at which point it will cease to be a major contributor to rising entitlement spending or growing debts. Social Security is thus a minor player in our long-term budget drama; if you cut the program to the bone, shrinking future payouts so that they won’t add a penny to the deficit, the federal debt would still reach 111 percent of the GDP in 2047.4

Likewise, cuts to welfare and poverty-related entitlements like food stamps and unemployment insurance are unlikely to improve the debt forecast. In fact, spending on these entitlements has been dropping since the high-need years around the Great Recession and is expected to shrink further in the decades ahead — partly because payouts aren’t adjusted to keep up with economic growth, and partly because the birth rate has been falling and several programs are geared to families with children.5

But the scale of the problem is totally different when you turn to health care. Spending on entitlement-related health programs — including Medicare, Medicaid and subsidies required by the Affordable Care Act — will never shrink or stabilize, according to projections. The CBO predicts these costs will grow over 65 percent between now and 2047 — and then go right on growing after that, heedless of the fact that the percentage of the population that’s over 65 should no longer be increasing.

Why is health care eating the budget? Per-person costs

Demographics aren’t responsible for the projected explosion in health care costs. More important than the growing number of elderly Americans is the growing cost per patient — the rising expense of treating each individual

The CBO found that the lion’s share — 60 percent — of the projected increase in health spending comes from costs that would continue to increase even if our population weren’t getting older.

The reasons for this are many, including the rising cost of prescription drugs and the fact that hospital mergers have reduced competition. But since 2000, per capita health costs in the U.S. have, on average, grown faster than the GDP. And while these costs rose more slowly after the Great Recession and the implementation of the Affordable Care Act, analysis from the Centers for Medicare and Medicaid Services suggests this slower growth rate won’t last.

Which is bad news for these programs, because if the problem were demographic, it’d be easier to solve. By mixing the kind of program cuts Republicans generally support with targeted tax increases favored by some Democrats, you could meet the short-term challenge posed by retiring baby boomers and raise enough money to cover the larger — but stabilizing — population of eligible seniors. But with ever-rising costs, there is no stable future to prepare for. To keep these programs funded, you’d need a wholly different approach — indeed a whole new perspective on mounting federal debt and the role of entitlements.

The future is a race between rising health care costs and economic growth, a race that the economy is losing. Each time health costs outpace the GDP, it creates what the CBO calls “excess cost growth,” which feeds the federal debt. If the government could close this gap, the long-term budget outlook would be a lot rosier.

There are two ways to solve this issue: Either contain health care costs — say through price regulation or more competitive markets — or boost economic growth enough to pay for this expensive health care. Success on either front would make health care spending look more manageable over future decades and lighten the debt load.

Entitlement reform needs health care reform to work

Few of the proposals that commonly fall under the heading of entitlement reform target the health care cost problem, which limits their ability to reduce the long-term debt.

Even when they do address health care, often the result is to shift — rather than solve — the problem. Say lawmakers decide to dramatically cut Medicare. That would indeed ease the government’s debt problem. But the underlying dynamic — the race between health costs and the GDP — wouldn’t really change. Seniors would still need health care, and per-person costs would likely still grow (maybe even faster, since Medicare is a relatively efficient program).

On top of all this, there’s also a deep-seated political barrier: It’s no good if one party picks its favored solution only to watch the other party dismantle it when they next take over. You need political consensus to make changes stick, and America is notably short on consensus right now.

In the end, though, it won’t do to just throw up our hands. Absent some workable solution, spending on health care will sink the federal budget, generating levels of debt that would hold back the economy and potentially spark a global crisis of confidence in the United States’ ability to borrow.

#### Sustained economic depression triggers world war

Walt 20 – Stephen M. Walt is a columnist at Foreign Policy and the Robert and Renée Belfer professor of international relations at Harvard University.

Stephen Walt, May 13 2020, “Will a Global Depression Trigger Another World War?” Foreign Policy, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

### 1NC – Ex Ante CP

#### Text: The United States federal government should substantially increase prohibitions on agricultural mergers by imposing ex-ante regulations prohibiting agricultural mergers.

#### Ex-ante regulation creates clarity and deters violations before they occur – that means the counterplan solves without requiring frequent enforcement proceedings.

Posner 10 – Judge in the U.S. Court of Appeals for the Seventh Circuit, Senior Lecturer at the University of Chicago Law School

Richard A. Posner, “Regulation (Agencies) versus Litigation (Courts): An Analytical Framework,” Regulation vs. Litigation: Perspectives from Economics and Law, National Bureau of Economic Research, Inc., 2010, https://ideas.repec.org/h/nbr/nberch/11956.html

Ex ante regulation can, as I said, be judicial as well as administrative, as in preventive detention, injunctions, and regulatory decrees, and ex post regulation can be administered by agencies as well as courts, such as the Federal Trade Commission and the National Labor Relations Board, which operate mainly by trial-type proceedings conducted after a violation of the laws administered by the agency has occurred.

Ex ante: pros. The ex ante approach promotes clarity of legal obligation and therefore presumably better compliance (fewer inadvertent violations) by laying down rules in advance of the regulated activities. Ex ante regulation is activated before there is a loss, unlike a lawsuit; it can be centrally designed and imposed (for example, by a single agency such as the Food and Drug Administration, as opposed to a decentralized judicial system); and it is enforceable by means of light penalties, because the optimal penalty for creating a mere risk of injury is normally lighter than the optimal penalty for causing an actual injury. This means, however, that ex ante and ex post regulation actually are inseparable; because compliance with rules is never 100 percent, there must be a machinery for punishing violators, though the machinery may involve penalties meted out by the regulatory agency itself, with judicial involvement limited to judicial review of the penalty proceeding. But while rules involve heavy fixed costs (i.e., designing the rule in the first place), if they are very clear and carry heavy penalties compliance may be achieved without frequent enforcement proceedings, so marginal costs may be low. Rules are therefore attractive when the alternative would be vague standards, resulting in frequent actual or arguable violations and hence frequent enforcement proceedings.

As this discussion shows, ex ante regulation and rules have an affinity. Ex ante regulation enables exploitation of the economizing properties of rules as preventives. With vague standards, the regulatory emphasis shifts to seeking deterrence by proceedings to punish violators.

## Food Security Adv

### 1NC – No Solvency

#### Didn’t specify actor in CX – means you presume against them solving and in favor of the DAs linking – you don’t know how the plan happens, so you can’t know it solves

#### That’s a better interp for debate – they refused to specify to avoid “giving us CP competition” – they made a clear strategic decision to garner an advantage, and that advantage must come with a corresponding cost

### 1NC – Concentrated Ag Good

#### Concentrated ag is the linchpin of innovation – the biggest firms have outsized R&D spending and drive international dissemination.

Fuglie et al, PhDs in Econ, 12

(Keith, Ph.D. and M.S. in Applied Econ from the University of Minnesota, John King, Econ (Industrial Organization) from Vanderbilt University, David Schimmelpfennig, Econ from MSU, senior ERS economists, and Paul Heisey, Ag Econ from the University of Wisconsin-Madison, Rising Concentration in Agricultural Input Industries Influences New Farm Technologies, Economic Research Service, Amber Waves 10(4)) BW

The increase in R&D performed by global agricultural input industries (see “Private Industry Investing Heavily, and Globally, in Research To Improve Agricultural Productivity” in the June 2012 issue of Amber Waves) has coincided with significant changes to the structure of these industries. The largest firms have increased their market shares and account for most of the investment in (and ownership of) new innovations in these industries. Implications of market concentration in the U.S. seed industry were addressed earlier in Amber Waves and in other ERS research (see suggested readings). New ERS data allow a closer look into global market concentration across a number of agricultural input industries. Market Concentration is Increasing in Research-Intensive Agricultural Input Industries Since the 1990s, global market concentration (the share of global industry sales earned by the largest firms) has increased in the crop seed/biotechnology, agricultural chemical, animal health, animal breeding, and farm machinery industries – all of which invest heavily in agricultural research. By 2009, the largest four firms in each of these industries accounted for at least 50 percent of global market sales. Market concentration was particularly high in animal genetics and breeding, where the four-firm concentration ratio reached 56 percent in 2006/07 (the latest year for which data are available). Growth in global market concentration over 1994-2009 was most rapid in the crop seed industry, where the market share of the four largest firms more than doubled from 21 to 54 percent. The top eight firms in all five input sectors had between a 61- and 75-percent share of global market sales by 2009. Factors Driving Market Concentration Vary by Industry Firms increase their market share either by expanding their sales faster than the industry average or by acquiring or merging with other firms in the industry. Firms can expand their sales faster than others in the industry by offering better products or services (often an outgrowth of larger R&D investments), improving their marketing ability, or offering lower prices (often through economies of scale). The leading input firms in 2010 had faster sales growth than the industry average, but a significant amount of that growth came from acquisitions of other firms. Reasons for mergers and acquisitions vary by industry and firm circumstances but include market forces and the emergence of new technologies. Government policies can also affect the ability of firms to compete in markets and their incentives to merge with or acquire other firms.

• In the crop seed and animal breeding sectors, the emergence of biotechnology was a major driver of consolidation. Companies sought to acquire relevant technological capacities and serve larger markets to share the large fixed costs associated with meeting regulatory approval for new biotechnology innovations.

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• In the animal breeding sector, vertical integration in the poultry and livestock industries enabled some large firms to acquire capacity in animal breeding as part of their integrated structure.

• In the farm machinery industry, many of the major mergers and acquisitions can be traced to large financial losses sustained by some leading firms during periods when the farm sector was in prolonged recession, which substantially reduced demand for farm machinery as farmers delayed major capital purchases. Firms experiencing large financial losses are often vulnerable to acquisition.

• The agricultural chemical sector has been heavily affected by changes in government regulations governing the health, safety, and environmental impacts of new and existing pesticide formulations: larger firms appear better able to address these stricter regulatory requirements.

• Consolidation in the animal health sector appears to be largely a byproduct of mergers and acquisitions in the pharmaceutical industry, as most of the leading animal health companies are subsidiaries of large pharmaceutical companies.

The Crop Seed-Biotechnology Industry Has Undergone Significant Structural Transformation In 2009, seven large seed companies each had annual seed sales of over $600 million. Five of these top seed companies--Syngenta, Bayer, Dow, Dupont, and Monsanto- -are also market leaders in agricultural chemicals. A sixth firm, BASF, is making significant investments in crop biotechnology research but so far reports few crop seed or trait sales, although it is a market leader in agricultural chemicals. These companies currently constitute the “Big 6” involved in crop seed, biotechnology, and chemical research. The seed-biotechnology industry has been reliant on small and medium-sized enterprises (SMEs) as sources of new innovation. New SME startups (often spinoffs from university research) tend to specialize in commercial development of a new research tool, genetic trait, or both. Significant entry by SMEs into the seed-biotechnology sector began in the late 1970s and early 1980s, with a second wave of new entrants in the late 1990s and early 2000s. In recent years, exits have outnumbered entrants, and by 2008 just over 30 SMEs specializing in crop biotechnology were still active. The majority of the exits from the industry were the result of acquisition by larger firms. Of 27 crop biotechnology SMEs that were acquired between 1985 and 2009, 20 were acquired either directly by one of the Big 6 or by a company that itself was eventually acquired by a Big 6 company. Concentration in a research-intensive industry can be measured not only in terms of share of product sales but in share of new innovations. Firms that are most successful in creating new innovations are often better positioned to dominate the market (although not all new product introductions will be commercially successful). In research for genetically engineered crop varieties, for example, companies typically obtain a patent first, then initiate field trials, and finally obtain regulatory approval to sell crop seeds. Although there is considerable overlap in terms of companies participating, the markets for crop seeds can be distinguished from markets for genetically modified traits. The shares of these research outputs held by the Big 6 companies in each case are between 55 and 95 percent. Consequences of Concentration For Agricultural Innovation The rising concentration in global agricultural input markets means fewer firms are supplying those inputs to farmers. It also means that fewer firms are responsible for many of the new innovations that drive growth in agricultural productivity. The share of private R&D performed by the largest firms is even larger than their share of sales. In crop seed and biotechnology, eight seed-biotechnology companies accounted for 76 percent of all R&D spending

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by this industry in 2010. In agricultural chemicals, five companies (each with over $2 billion sales in 2010) were responsible for over 74 percent of the R&D in this sector. In farm machinery, four companies (each with over $5 billion in farm machinery sales) accounted for over 57 percent of farm machinery R&D, and in animal health, just eight companies accounted for over 66 percent of R&D. Moreover, all of these leading firms are multinational companies with R&D facilities positioned around the world. These global research networks allow large firms to develop and adapt new technologies to local conditions, meet national regulatory requirements for new product introductions, and achieve cost economies in some of their R&D activities. Greater market power resulting from the structural changes in agricultural input industries means that farmers may pay higher prices for purchased inputs. With stronger legal protection over their intellectual property and fewer firms offering competition, firms can charge higher prices for their new innovations. Such price premiums are necessary to provide firms the means (and incentive) to invest in R&D in the first place, and farmers are willing to pay higher prices so long as the gains from higher productivity outweigh their higher costs. In fact, for the past two decades, the prices of farm inputs have been rising faster than the prices U.S. farmers receive for their crops and livestock. The largest increase over 1990-2010 was in crop seed prices, which more than doubled relative to the price received for agricultural commodities. This increase was due, at least in part, to the value of the new seed traits resulting from research investments made by seed/biotechnology companies. However, higher input prices may also stem from increases in the prices of labor, capital, energy, and other materials used in their manufacture. The sharp rise in the price of fertilizer in 2008-09 was driven by a significant increase in the cost of energy and materials used to make fertilizers, higher transportation costs, and the falling value of the U.S. dollar. Multiple factors contribute to changing prices for farm inputs, and it is difficult to isolate the effects of market power, product quality, and other factors affecting these prices. The growing concentration in agricultural input industries raises a number of issues. One is the inherent tension between public policies regulating intellectual property rights (IPR) and market competition. While antitrust laws restrict firms from exercising monopoly power, some exceptions are made for intellectual property rights over new innovations. However, antitrust rules may still apply

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to how firms license their intellectual property to other firms. Another issue is whether under the current market and policy environment there are significant economies of scale in crop and animal biotechnology, implying that only very large firms can hope to compete effectively in these sectors. This might mean there is a significant barrier to entry for new firms and a potential loss of new innovations, particularly from SMEs. On the other hand, the global reach of the large, multinational agricultural input firms could speed up the rate of international technology transfer and help to close the productivity gaps between regions and countries. The rate of transfer will be influenced by international trade agreements and how countries regulate and protect IPR in new agricultural innovations, especially those involving genetically modified organisms. Finally, public investments in research can be an important enabler of market competition. Examples include public provision of elite parent material for crop/livestock breeding companies and the basic scientific tools necessary for commercial development using genomics and molecular biology.

#### US is key – still the global leader despite China’s progress.

Clancy et al, PhDs in Econ, 16

(Matthew, Econ from Iowa State University, Keith Fuglie, Ph.D. and M.S. in Applied Econ from the University of Minnesota, and Paul Heisey, Ag Econ from the University of Wisconsin-Madison, U.S. Agricultural R&D in an Era of Falling Public Funding, USDA ERS) BW

U.S. Remains First in Key Innovation Output Indicators While the U.S. public sector share of agricultural R&D has slipped relative to the private sector share and to global public R&D, the U.S. agricultural research system as whole remains one of the most productive in the world. In fact, the U.S. is still a leader in agricultural science publications and citations, as well as agricultural patents. Scientific publications often reflect research aimed at making more fundamental discoveries about how the world works, while patents may indicate the transformation of R&D knowledge into agricultural products. In 2012, the U.S. had the highest share (18 percent) of global agricultural science publications, more than twice the share of the second highest nation, China. Still, the U.S. share has dropped sharply from nearly a third of the global total in 1996, driven by a rise in publications from other countries rather than a decline in total U.S. publications. The U.S. share of citations to its published research output is higher than its publication share, indicating higher-than-average quality. The U.S. share (over a fifth of citations worldwide) is the highest among all nations, but it, too, has decreased since 1996. [FIGURE OMITTED] The United States also remains the world’s largest agricultural inventor. Between 2006 and 2011, U.S. inventors had 4,500 patents in agricultural science and 18,000 patents in agriculture—about three times as many as the next highest country, Japan. U.S. patents for new plant technologies and crop cultivars have also increased rapidly since utility patent protection was extended to biological innovations in the 1980s. The number of patents granted annually for plant modifications topped 1,500 in 2014, while the number of patents for crop cultivars exceeded 1,000 in the same year. Both the public and private sector produce scientific publications and patents. However, as the private sector increases its own investments in agricultural R&D and moves into new areas previously under the purview of public research, there is a risk that public sector R&D may compete directly with private sector R&D for customers and scientific talent. Competition from the public sector, which does not have to recoup R&D costs, may discourage private R&D from these areas—an effect called “crowding out.” But if the public sector focuses on areas where the private sector continues to undersupply research (for example, because the social benefits exceed potential profits), crowding out may be minimal. Then, the new technological opportunities opened up by public research could stimulate more private R&D. In such cases, public sector R&D is “complementary” to private sector R&D. As it happens, public and private R&D expenditures do tend to fall in different research areas. The private sector performs almost all research in “food and feed manufacturing” and “farm machinery and engineering,” areas that may result in improved production processes or products that provide profits for investors. In contrast, the public sector performs nearly all R&D associated with “environment and natural resources,” “human nutrition and food safety,” “economics, statistics, and policy,” and “social and community development.” Successful research in these areas may generate widespread social benefits, even if private R&D investors are unable to capture enough of the benefits to justify their own expenditures. The public and private sector each conduct significant research in “plant systems and crop protection” and “animal systems and animal health.” However, public and private research appear to focus on different areas within these sectors. Much of the private R&D on plant and animal systems aims at new commercial products like new GM crop traits, agricultural pesticides, and veterinary pharmaceuticals. In contrast, public R&D focuses on topics like improving field practices; studying pest populations, animal pathogens, and soil attributes; and developing improved diagnostic tools for use in public and private research. [FIGURE OMITTED] A more formal way to check for crowding out or complementary R&D is to see what happens to private R&D spending when public R&D spending changes. If the public sector crowds out the private sector, each increase in public R&D spending ought to decrease private R&D spending, as the public sector siphons off customers and scientists in the affected research area. The opposite will be true if the sectors are complementary. Economic studies have generally found that public R&D stimulates private R&D: an additional dollar spent on agricultural research by the public sector appears to stimulate $0.70 in additional private R&D spending. The Future of R&D The decline in U.S. public spending on agricultural R&D may have negative implications for agricultural productivity. The recent emergence of new pests, diseases, and climate stresses on agriculture—such as citrus greening, California’s drought, and new strains of viruses affecting pigs and poultry—are imposing new demands on the Nation’s basic agricultural science capacities. Over the coming decades, rising world population and changing diets afforded by higher per capita incomes are projected to greatly increase the global demand for food. Significant improvements in agricultural productivity around the world will be necessary to meet this rising demand. Finally, in the longer run, climate change may have yet more serious effects on yields, pests, and disease, which may further reduce agricultural productivity.

#### Ag R&D is necessary for global food sustainability – requires dissemination of innovations.

Pardey, PhD, et al, 16

(Philip G., PhD in Ag Econ and Prof of Applied Econ at the University of Minnesota, Connie Chan-Kang, MS in Ag & Resource Econ from Oregon State University, Steven P. Dehmer and the late Jason M. Beddow, both PhDs in Applied Econ from the University of Minnesota, Agricultural R&D is on the move, Nature 537: 301–303) BW

One of the major global challenges in the years ahead is getting the relevant agricultural innovations into the hands of the world's poor farmers, such as those in south Asia and sub-Saharan Africa. Even with the rise of some middle-income countries, food and agricultural research continues to be concentrated in just a handful of nations. In 2011, the top 10 countries ranked by spending on AgR&D accounted for 70% of the total investment worldwide; the bottom 100 contributed just 9% of that year's total. Yet these 100 are home to 22% of the world's population. More and sustained government funding will be essential, along with robust and agile institutional innovations that foster public and private investment in poor-country agriculture. Without efforts to improve the global spread and adaptation of locally relevant technologies, it is likely to get much harder for poor farmers to feed themselves, let alone their nations' increasingly urbanized populations. In those countries currently responsible for most of the world's agricultural production, the innovation challenges are also pressing, if different. History has already shown the cost of running down investment on food and agricultural research in the face of ever-evolving pathogens. The emergence of new virulent strains of wheat stem rust in Uganda in the late 1990s and their subsequent spread throughout Kenya, Ethiopia, South Africa and elsewhere in Africa is a reminder of the need for continued scientific vigilance[6](https://www.nature.com/articles/537301a#ref-CR6). Years of success in keeping the disease at bay had left only a handful of researchers worldwide studying the pathogen. Without sufficiently supported research and innovation in agriculture, crop yields are bound to decline as economic and environmental changes (including changes in weather patterns and crop pests and diseases [driven in part by climate change](http://www.nature.com/nclimate/journal/vaop/ncurrent/full/nclimate3061.html)) undermine past productivity gains. Achieving even higher levels of productivity to feed a growing, increasingly wealthy and more urbanized population — while sustaining or rehabilitating fragile natural resources — is going to require considerably more investment in AgR&D. It will also require both public and private investment, because the two tend to support different, often complementary, types of R&D. The private sector is more attuned to market opportunities — and so well-suited to supply pesticides to farmers, for example. The public sector is better placed to investigate solutions to landscape-scale, longer-term challenges, such as the management of pesticide resistance. If present trends continue, global AgR&D in the middle of the twenty-first century will look very different from how it looked at the dawn of the century. The rise of AgR&D in the rapidly growing middle-income countries, and the increase in private-sector participation in various regions are encouraging. But the retreat from public AgR&D by rich countries and the continued comparatively low levels of investment in many poorer countries, are concerning. Rapidly regaining lost ground for these parts of the world is an obvious priority if we are to feed the world sustainably to 2050 and beyond.

### 1NC – AT: food wars

#### Reducing concentration doesn’t increase resilience – simulations and intervening factors.

Ma and Lusk, PhDs in Ag Econ, 21

(Meilin, UC Davis, Asst Prof of Ag Econ at Purdue, and Jayson L., Kansas State University, Head of Ag Econ Dept at Purdue, Concentration and resilience in the U.S. meat supply chains, National Bureau of Economic Research Working Paper No. 29103, July) BW

Several states have recently considered or adopted legislation to subsidize the introduction of small- or medium-sized meat packers. At the federal level, bills have been proposed to encourage more capital investments and allow small processors to access larger markets (e.g., Feedstuffs, 2020; Hagstrom, 2020). The implicit assumption behind such policy proposals is that they would result in more short-run resilience in the packing system faced with shocks like COVID-19. As the foregoing simulations suggest, however, a less concentrated packing system on average would not necessarily have produced outcomes much different than what was observed during April and May 2020, when cattle and hogs slaughter dropped by almost 40%. One, perhaps counterintuitive, simulation result is that total welfare is typically lower under a more diffuse packing sector because of the lost economies of scale. In addition to policies aimed at promoting more small and medium-sized packers, a number of lawsuits have been levied at large meat packers, and a Justice Department investigation has been launched, following the packing plant shutdowns (e.g., Bunge and Kendall, 2020). Complaints tend to focus on the dramatic increase in the farm-to-wholesale price spread that occurred as a result of the plant shutdowns (Lusk, Tonsor, and Schulz, 2021). Our simulation provides insight into this phenomenon and the controversy surrounding it. In particular, regardless of the degree of concentration, the price spread rises when the industry is faced with an exogenous risk of shutdown. This finding is entirely consistent with the theory of marketing margins (Wohlgenant, 2001), and we show that widening price spreads result from disruptions to processing even if all packers are small-sized and there is no market power. Moreover, even in scenarios where all packers are large, and packers earn profits, our simulations show that compared to the risk-free scenario, packer profits fall as price-spreads rise due to an exogenous shutdown risk. This seemingly counter-intuitive result arises because marginal costs also rise as exogenous shutdown risks bring down the packing capacity of the industry. Thus, our results suggest extreme caution in inferring market manipulation, market power, or packer profits from widening farm-to-wholesale or farm-to-retail price spreads. These simulation outcomes reveal complex consequences of government and industry efforts aimed at increasing the resilience of the food supply chain through changing the horizontal structure. The consequences depend critically on the exogenous risk as well as the target level of industry output. Neither a diffuse nor a concentrated horizontal structure dominates. More comprehensive policy designs may be needed to add short-run resilience in the supply chain under supply-side disruptions. Though long-run resilience is not discussed in this article, biological cycles of livestock production, fixed investments, and other factors are likely to make the role of horizontal structure even more complex and imply even more difficulty in policy design. We leave the long-run resilience in U.S. meat supply chains for future research.

#### The relationship between market concentration and food security is too complex for effective legislation.

Watson, PhD in Ag Econ, and Winfree, PhD in Econ, 21

(Philip, Agricultural Economics and Regional / Natural Resource Economics from Colorado State University, and Jason, Washington State University, both Associate Professors of Agricultural Economics and Rural Sociology at the University of Idaho, Should we use antitrust policies on big agriculture? Appl Econ Perspect Policy, 1-14) BW

Market control and food security/safety Others argue that antitrust laws should be used in agricultural markets owing to the amount of control certain firms have in the food supply and the potential effect that this might have on food security and safety (Hendrickson et al., 2017). The market control concern is similar to the arguments being made to break up technology firms such as Google, Twitter, and Facebook, and is again somewhat subject to the scrutiny of contestability. While technology firms often have a large share of the social media market, these markets could be thought of as contestable, and consumers and competitors are free and able to switch platforms. It is difficult to say whether this is comparable in food markets. While many aspects of the food industry might be considered contestable, especially in the long term, large sunk costs may prevent some competition in some markets. Certainly, control of the food supply, or even widespread adoption of technology, can generate risk. For example, in 1970, over 80% of corn in United States was Texas cytoplasmic male sterile corn. This type of corn was susceptible to fungus (Southern corn leaf blight) and caused a drastic reduction in corn yield. If market concentration creates less genetic diversity, it is possible that this is a cost. However, the association between market concentration and food safety is not entirely clear and using antitrust with this intention would be complex. For example, as previously stated, large firms can often implement safety standards more easily. While controlling the food supply is certainly an incredible responsibility with an enormous downside potential, it is not clear how much actual power firms have and why this power would harm consumers. This may be an area of research that might help inform this policy process.

#### No conflict impact to food insecurity – best models.

Buhaug et al, PhDs, 15

(Halvard, Political Science from NTNU, Tor A Benjaminsen, Human Geography from Roskilde, Espen Sjaastad, Resource Economics from NMBU, and Ole Magnus Theisen, Political Science from NTNU, Climate variability, food production shocks, and violent conflict in Sub-Saharan Africa, Environmental Research Letters 10(12)) BW

Across all models, we find relatively weak and insignificant effects for domestic food production and we also note that the sign of the coefficients shifts between outcome types. In this sense, table 1 implicitly contrasts both claims that political violence is more prevalent when basic needs are met (Salehyan and Hendrix 2014) and claims that agricultural income shocks increase civil conflict risk (von Uexkull 2014). The results are consistent with Koubi et al (2012) and van Weezel (2015), however, who conclude that rainfall—a significant determinant of yields in SSA—has little impact on conflict either directly or through economic performance. The covariate that best and most consistently explains temporal variation in political violence is the time-lagged conflict incidence indicator. Models 1–2 show that a new civil conflict is unlikely to break out if another one is already ongoing in the same country whereas Models 3–6, which capture the occurrence of less organized conflict, demonstrate that violence begets violence. Coups d’état (Models 7–8) exhibit a comparatively weak temporal correlation pattern in our data and are generally regarded as a highly unpredictable phenomenon (Luttwak 1979). Next, we estimate the same set of models on a subsample of 14 countries in SSA where rainfall has a large and significant positive effect on food production (figure 2(b); see supplementary information, section B for details). To better capture the influence of climate variability and reduce concerns with endogeneity, we further replace the standard OLS model with twostage instrumental variable regression. The first stage in this model estimates the joint influence of annual rainfall (linear and squared terms) and temperature (linear) on contemporaneous food production. This effect then constitutes the exogenous instrument for food production in the second stage. The results are reported in table 2. Mirroring the results presented above, we fail to uncover a robust signal for agricultural performance, although the sign of the coefficient for food production now remains negative in seven of the eight specifications. Food production shocks may have different consequences depending on the socioeconomic context, so next we consider a series of interactive relationships. Specifically, we investigate the joint effect of food production and (i) low level of development, (ii) extent of discriminatory political system, and (iii) economic dependence on agriculture; three conditions whereby loss of income from agriculture might constitute a particular challenge to society. To model these interactions, we include time-varying regressors instead of country-fixed effects where (i) is represented by infant mortality rate (IMR; World Bank 2014), (ii) is captured using the Ethnic Power Relations v.1.1 data (Cederman et al 2010), while (iii) uses an index of agricultural contribution to GDP (World Bank 2014). Moreover, to preserve focus on temporal dynamics, food production is now operationalized as yearly deviation from the country mean, 1961–2009. We use additive inverse deviation values to ensure theoretical consistency among the components in the interaction terms. All models control for (ln) population size, conflict history, and a common time trend, and models without IMR and agricultural dependence additionally control for (ln) GDP per capita. The results are presented in table 3. Again, we are unsuccessful in establishing a consistent covariation pattern between agricultural performance and political violence. Interpreting the combined effect of interaction terms with continuous parameters is inherently difficult but figure 4 shows that food production is insignificantly related to all conflict outcomes across levels of socioeconomic development for all three interaction terms. The sole exception is the result in Model 24, where lower food production in highly discriminatory societies is negatively associated with non-state conflict. This result would seem to contradict the standard scarcity thesis (Homer-Dixon 1999) although it is consistent with observations that conflict is more prevalent during surplus years (Witsenburg and Adano 2009, Salehyan and Hendrix 2014). Mirroring earlier research, ethnopolitical exclusion is strongly related to higher civil conflict risk, but not necessarily to other forms of political violence. Infant mortality rate and economic dependence on agriculture appear largely irrelevant. While this may come as a surprise, recall that most countries in SSA are characterized by underdevelopment and a large agricultural sector, implying that the variation in values on these indicators is modest. Large parameter uncertainties and p-values above the conventional significance threshold (5%) may disguise substantively important effects (Ward et al 2010). Accordingly, as a final assessment, we conduct a set of out-of-sample simulations and compare predictions for models with and without food production. The models are estimated on a subset of the full sample, in this case all years before 2000, and the estimated effects are then used to predict conflict outcomes out of sample, i.e., the 2000–09 period. Figure 5 shows the predicted values from four pairs of models that are specified similarly to Models 17, 20, 23, and 26, except for the shorter time period and the fact that one model in each pair drops the food production deviation variable. For civil conflict and social unrest, the models generate very similar predictions, signaling that agricultural performance adds little to the models’ predictive power. There is more spread in the predictions for the remaining two outcome categories. Puzzlingly, the model without food production performs better in both cases—i.e., the Receiver Operating Characteristics curves have higher ‘Area Under the Curve’ scores. We hesitate to put too much emphasis on the ROC tests, given the rareness of the outcomes(notably Models 17 and 26) and the relatively small training samples (Models 20 and 23), but nonetheless the patterns observed in the out-of-sample simulations substantiate the regression results reported above; fluctuations in agricultural output explain little of the observed variation in political violence in post-colonial Sub-Saharan Africa. 5. Concluding remarks Emerging evidence suggests that food price shocks are associated with an increase in social unrest (Smith 2014, Bellemare 2015, Hendrix and Haggard 2015, Weinberg and Bakker 2015). Yet, the robust ‘non-finding’ presented here implies that so-called ‘food riots’ play out largely isolated from climate-sensitive production dynamics in the affected countries. Likewise, claims that adverse weather and harvest failure drive contemporary violence in Africa (e.g., Hsiang et al 2013, IFPRI 2015) are not supported by our analysis. Instead, social protest and rebellion during times of food price spikes may be better understood as reactions to poor and unjust government policies, corruption, repression, and market failure (e.g., Bush 2010, Buhaug and Urdal 2013, Sneyd et al 2013, Chenoweth and Ulfelder 2015).

### 1NC – Monopoly Efficient

#### Concentration in ag is associated with higher rates of food productivity – best studies

Mérel and Sexton, PhDs in Ag Econ, 17

(Pierre, Ag and Resource Econ from UC Davis, and Richard J., Ag and Applied Econ from the University of Minnesota, both Professor of Agricultural and Resource Economics at UC Davis, Buyer power with atomistic upstream entry: Can downstream consolidation increase production and welfare? International Journal of Industrial Organization 50: 259-293)

Results from the analytical and simulations sections suggest that entry into production of the input and economic welfare are more likely to be increasing in the extent of concentration in the downstream buying industry the more inelastic the supply of the input, the more elastic the demand for the output produced from that input, and the greater the ex ante degree of concentration in the industry, measured for purposes of the model by the number of buyers. Agricultural product markets often represent such settings. Inelastic supply (flexible prices) is a widely accepted stylized fact of agricultural product markets. Indeed, inelastic supply, along with inelastic aggregate demand, slow demand growth, and rapid supply growth, constitute the four market characteristics that define what is known as the “farm problem,” e.g., in Gardner (1992). Table 1 provides recent

Table

Description automatically generated

estimates of short-run supply elasticities for a representative sample of annual and perennial crops and animal products. For nearly all of the commodities considered the estimated elasticities are 0.5 or less (flexibilities 2.0 or more).23 Farm product procurement markets are also likely to be highly concentrated due, as noted, to their generally limited geographic dimensions based upon high costs of transporting such products in their raw form, and also due to pervasive economies of scale in operating processing facilities. Further, such markets are narrow in product dimensions as well due to the highly specialized nature of processing facilities. Thus, finished products such as different meats or different vegetables that might compete in the same output markets due to close substitutability in consumption will not compete as raw products because a facility built to process one particular product, e.g., cattle, cannot normally handle another farm product such as hogs. Because reporting on industry concentration levels is done at the national level and focuses on output markets, there is little formal evidence on rates of concentration that are applicable to farm input markets in general, although there is common agreement among analysts that modern procurement markets are highly concentrated for many products (Rogers and Sexton, 1994; Swinnen and Vandeplas, 2010; Crespi et al., 2012). 3.2 Merger Analysis We apply the previous analysis to three recent U.S. merger cases wherein the U.S. DOJ challenged the proposed mergers at least in part on the grounds that the merger would have negative impacts on procurement of inputs, input prices, and implicitly welfare. In each case the available evidence indicates that the DOJ applied its conventional methods of analysis, as described at the outset of this paper, and gave no consideration to the factors studied herein, namely that the merger could increase input employment, procurement price, and overall welfare. Our point in presenting these cases is not to argue that the DOJ necessarily reached an incorrect conclusion, but, rather, that its analysis would have benefited from consideration of the economic factors set forth here.24 In U.S. v. Cargill, Incorporated and Continental Grain Company the DOJ asserted that “the grain trading business at certain levels is highly concentrated. Cargill and Continental compete to purchase corn, soybeans, and wheat in numerous rail terminal, river elevator, and port elevator markets throughout the country where they are two of a small number of competitors.” The DOJ argued that geographic markets were limited due to “costly and time consuming” transportation and identified several regional procurement markets for corn, wheat, and soybeans which it considered to be highly concentrated. For example, the DOJ claimed that a post-merger Cargill would have a 94% share of soybean purchases and 53% of corn purchases in the Pacific Northwest. It further stated that, within the Central California port range market, a merged Cargill-Continental firm would be a virtual monopsonist. Applying traditional market-power analysis, the DOJ claimed the merger would “substantially lessen competition for purchases of corn, soybeans, and wheat in each of the relevant geographic markets, enabling it unilaterally to depress the prices paid to farmers.” Table 1 does not include supply elasticity values for corn, wheat, and soybeans specific to the aforementioned U.S. regions, however the values reported for other U.S. states and for the European Union indicate that the supply is likely inelastic. The combination of the high rates of concentration reported by the DOJ and the inelastic commodity supplies put these procurement markets well within the range of values wherein the market performance measured in terms of number of farmers and overall welfare might have been increased by the merger.25,26 In U.S. et al. v. JBS S.A. and National Beef Packing Company, LLC the DOJ challenged a merger between JBS and National, the third and fourth largest U.S. beef packers, respectively, alleging that if the merger were approved, over 80% of U.S. beef production would be controlled by a three-firm oligopoly/oligopsony. The DOJ argued that the purchase of fed cattle constituted a relevant antitrust product market, and the central “High Plains” region and Southwest region of the U.S. comprised relevant geographic markets for fed cattle. Based upon the DOJ’s analysis, a three-firm oligopsony would prevail in the High Plains, and the Southwest would be a near monopsony if the merger were approved. In either market the DOJ forecast “less aggressive competition and lower prices for feedlots and producers of fed cattle.” Cattle supply response is complicated by dynamic considerations discussed by Rosen et al. (1994) among others. Nonetheless, short-run supply is highly inelastic as exemplified by Marsh’s estimate of 0.26 reported in Table 1 (Marsh, 2003). This proposed merger was ultimately abandoned due to the opposition of the U.S. DOJ and several states’ attorneys general, but the combination of the highly inelastic short-run supply and the high prevailing concentration ratios in the regional cattle procurement markets suggest the possibility that this proposed merger might have increased entry, production, and overall welfare, as the merged company internalized more of the long-run impacts of its procurement practices.27 In U.S. and State of Texas v. Aetna, Inc. and Prudential Insurance Company of America, the DOJ challenged a proposed merger between HMO providers in part on the claim that the proposed merger would depress competition and price in the markets for physician services in the areas of Houston and Dallas, Texas. According to the DOJ the merger would have increased Aetna’s market share in the HMO sector from 44% to 63% (26% to 42%) in Houston (Dallas). The DOJ thus argued that “the proposed acquisition would give Aetna the ability to unduly depress physician reimbursement rates in Houston and Dallas, likely leading to a reduction in quantity or degradation in the quality of physicians’ services.” Although the DOJ presented no estimates of the elasticity of supply of physician services in these areas, its analysis presumed that the supply was quite inelastic: “[nor] will such a price decrease cause physicians to stop providing their services or shift towards other activities in numbers sufficient to make such a price reduction unprofitable.” Although the buyer concentration rates at issue here were somewhat lower than in the aforementioned agricultural market cases, these concentration levels, coupled with a sufficiently inelastic physician supply in these areas, could plausibly have caused the merger to increase physician entry and supply in the affected areas.28 4 Conclusion We have investigated in a dynamic framework how downstream concentration in an industry may affect entry incentives at the upstream stage. Our parameterized model is a natural dynamic extension of the prototypical Cournot oligopsony model that allows for both purchase commitments and hold up of upstream investments by downstream buyers. The impact of such hold up on suppliers’ willingness to participate in the market is endogenized through suppliers’ intertemporal zero-profit condition. As such, the model parsimoniously captures two essential incentives facing oligopsonistic buyers: short-run benefits from reducing input employment and long-run incentives to secure input supplies. When such incentives are at play in a relatively unconcentrated processing industry, long-run incentives are not sufficient to reverse the short-run incentive of buyers to exercise the buyer power at their disposal, thereby causing reduced input employment as concentration increases, and the traditional view applies, namely that rising concentration diminishes upstream entry and social welfare. However, our model reveals the existence of market settings where long-run incentives do dominate, resulting in a positive effect of increased buyer concentration on upstream entry. More specifically, for already-concentrated industries and sufficiently inelastic upstream supplies, further concentration will induce more upstream entry and increase social welfare. The range of model parameters supporting such scenarios includes values that are relevant in many empirical settings, including markets for agricultural inputs where individual (farm-level) supplies are typically inelastic in the short run, buyers are often few in a given geographic area, and demand for the finished product is highly elastic (for instance, because it is sold in a much broader geographic market than the input procurement market). Our result is particularly relevant for antitrust, because merger policy focuses on industries that are already highly concentrated. As we have shown, an increase in industry concentration in such settings may not be incompatible with increased social welfare, independent of the existence of scale economies or other efficiency gains enabled by the merger (Williamson, 1968; Farrell and Shapiro, 1990). In addition, our parameterized model provides guidance for identifying such market settings.

## Sustainable Ag Adv

### 1NC – Big Ag Good

#### Big agriculture is better than small agriculture for the economy and the environment—economies of scale create efficiency and allow people to work in other, more profitable industries

Nordhaus and Blaustein-Rejto 5/18

(Ted, director of research at the Breakthrough Institute, Dan, director of Food and Agriculture at the Breakthrough Institute, “Big Agriculture is Best,” Foreign Policy, 4 April 2021, https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/)

The United States’ industrialized food system moved millions of people out of poverty and is better for the environment, too.

In some ways, it is not surprising that many of the best fed, most food-secure people in the history of the human species are convinced that the food system is broken. Most have never set foot on a farm or, at least, not on the sort of farm that provides the vast majority of food that people in wealthy nations like the United States consume.

In the popular bourgeois imagination, the idealized farm looks something like the ones that sell produce at local farmers markets. But while small farms like these account for close to half of all U.S. farms, they produce less than 10 percent of total output. The largest farms, by contrast, account for about 50 percent of output, relying on simpliﬁed production systems and economies of scale to feed a nation of 330 million people, vanishingly few of whom live anywhere near a farm or want to work in agriculture. It is this central role of large, corporate, and industrial-style farms that critics point to as evidence that the food system needs to be transformed.

But U.S. dependence on large farms is not a conspiracy by big corporations. Without question, the U.S. food system has many problems. But persistent misperceptions about it, most especially among aﬄuent consumers, are a function of its spectacular success, not its failure. Any eﬀort to address social and environmental problems associated with food production in the United States will need to ﬁrst accommodate itself to the reality that, in a modern and aﬄuent economy, the food system could not be anything other than large-scale, intensive, technological, and industrialized. Not so long ago, farming was the principal occupation of most Americans. More than 70 percent labored in agriculture in 1800. As late as 1900, some 40 percent of the U.S. labor force still worked on farms. Today, that ﬁgure is less than 2 percent.

The consolidation of U.S. agriculture has been underway for more than 150 years. First came irrigation and ploughs, then better seeds and fertilizers, and then tractors and pesticides. With each innovation, farmers were able to produce larger harvests with fewer people and work larger plots of land. Better opportunities drew people to cities, where they could get jobs that provided higher wages and, thereby, produced greater economic surplus— that is, proﬁts and ultimately societal wealth. The large-scale migration of labor from farms to cities pushed farmers to invest even more in laborsaving and productivity-enhancing practices and technologies in a virtuous cycle of urbanization, agricultural intensiﬁcation, and economic growth that is the hallmark of all aﬄuent societies.

It is not a stretch to say that the United States is wealthy today because most of its people work in manufacturing, services, technology, and other sectors of the economy. In this, the country is not alone. No nation has ever succeeded in moving most of its population out of poverty without most of that population leaving agriculture work.

No nation has ever succeeded in moving most of its population out of poverty without most of that population leaving agriculture work.

That transition often isn’t easy. Millions of Black Americans made the diﬃcult journey from tenant farming in the South to factory work in the North, where they faced new forms of racism even as they escaped the tyranny of sharecropping. More recently, small farmers have struggled to survive as increasingly high agricultural productivity and falling communities have likewise suﬀered as dramatic improvements in labor productivity have shrunk employment in agriculture.

But over the long term, the living standards and life opportunities oﬀered in the modern knowledge, service, and manufacturing economies have proved vastly greater than anything possible under the agrarian social and economic arrangements that most Americans over the last two centuries happily abandoned—and that too many Americans today romanticize.

Modern life required not only liberating most Americans from agrarian labor but also the development of a food system capable of getting food from farms to the cities where increasing numbers of Americans lived and worked. A food system that lost much of its harvest to pests and spoilage needed to dramatically cut losses even as its bounty needed to travel farther and farther. For this reason, the rise of modern agriculture is as much a story of railways and highways as combines and tractors, refrigeration and grain elevators as pesticides and fertilizer.

The development and growth of feedlots followed a similar path. As the historian Maureen Ogle recounts in her magniﬁcent history of the beef industry, In Meat We Trust, the ﬁrst feedlots grew out of the stockyards of Chicago and Kansas City in the late 19th century. The most eﬃcient way to get beef to burgeoning markets in America’s cities was to drive cattle to these new rail centers, where they were ﬁnished, slaughtered, and then shipped throughout the country by rail. After World War II, beef production and feedlots expanded massively, driven not so much by corporate greed as by rising demand for beef from the United States’ newly prosperous middle class and by a scarcity of labor as ranch hands returning from the battleﬁelds of Europe and the Paciﬁc chose to pursue better economic opportunities in the postwar economy.

Debates about the social and environmental impacts of America’s food system cannot be disentangled from the basic reality that in a modern industrialized society, most people will live in cities and suburbs and will not work in agriculture. As a result, most food will need to be produced by large farms, with little labor, far away from the people who will consume it.

### 1NC – AT: Concentration Homogenized Ag

#### Reducing concentration doesn’t increase resilience – simulations and intervening factors.

Ma and Lusk, PhDs in Ag Econ, 21

(Meilin, UC Davis, Asst Prof of Ag Econ at Purdue, and Jayson L., Kansas State University, Head of Ag Econ Dept at Purdue, Concentration and resilience in the U.S. meat supply chains, National Bureau of Economic Research Working Paper No. 29103, July) BW

Several states have recently considered or adopted legislation to subsidize the introduction of small- or medium-sized meat packers. At the federal level, bills have been proposed to encourage more capital investments and allow small processors to access larger markets (e.g., Feedstuffs, 2020; Hagstrom, 2020). The implicit assumption behind such policy proposals is that they would result in more short-run resilience in the packing system faced with shocks like COVID-19. As the foregoing simulations suggest, however, a less concentrated packing system on average would not necessarily have produced outcomes much different than what was observed during April and May 2020, when cattle and hogs slaughter dropped by almost 40%. One, perhaps counterintuitive, simulation result is that total welfare is typically lower under a more diffuse packing sector because of the lost economies of scale. In addition to policies aimed at promoting more small and medium-sized packers, a number of lawsuits have been levied at large meat packers, and a Justice Department investigation has been launched, following the packing plant shutdowns (e.g., Bunge and Kendall, 2020). Complaints tend to focus on the dramatic increase in the farm-to-wholesale price spread that occurred as a result of the plant shutdowns (Lusk, Tonsor, and Schulz, 2021). Our simulation provides insight into this phenomenon and the controversy surrounding it. In particular, regardless of the degree of concentration, the price spread rises when the industry is faced with an exogenous risk of shutdown. This finding is entirely consistent with the theory of marketing margins (Wohlgenant, 2001), and we show that widening price spreads result from disruptions to processing even if all packers are small-sized and there is no market power. Moreover, even in scenarios where all packers are large, and packers earn profits, our simulations show that compared to the risk-free scenario, packer profits fall as price-spreads rise due to an exogenous shutdown risk. This seemingly counter-intuitive result arises because marginal costs also rise as exogenous shutdown risks bring down the packing capacity of the industry. Thus, our results suggest extreme caution in inferring market manipulation, market power, or packer profits from widening farm-to-wholesale or farm-to-retail price spreads. These simulation outcomes reveal complex consequences of government and industry efforts aimed at increasing the resilience of the food supply chain through changing the horizontal structure. The consequences depend critically on the exogenous risk as well as the target level of industry output. Neither a diffuse nor a concentrated horizontal structure dominates. More comprehensive policy designs may be needed to add short-run resilience in the supply chain under supply-side disruptions. Though long-run resilience is not discussed in this article, biological cycles of livestock production, fixed investments, and other factors are likely to make the role of horizontal structure even more complex and imply even more difficulty in policy design. We leave the long-run resilience in U.S. meat supply chains for future research.

### 1NC – Monolpoly best for GHG

#### High yields are the most effective strategy of mitigating GHG emissions—especially as food demand increases with population growth

Burney et al 10

(Jennifer, Associate Professor; Marshall Saunders Chancellor’s Endowed Chair in Global Climate Policy and Research at UC San Diego, Stephen J Davis, Associate Professor of Earth System Science at UC Irvine, David Lobell, Gloria and Richard Kushel Director of the Center on Food Security and the Environment and Professor of Earth Systems at Stanford University, 29 June 2010, “Greenhouse gas mitigation by agricultural intensification,” Proceedings of the National Academy of Sciences of the United States of America, https://www.pnas.org/content/107/26/12052)

As efforts to mitigate climate change increase, there is a need to identify cost-effective ways to avoid emissions of greenhouse gases (GHGs). Agriculture is rightly recognized as a source of considerable emissions, with concomitant opportunities for mitigation. Although future agricultural productivity is critical, as it will shape emissions from conversion of native landscapes to food and biofuel crops, investment in agricultural research is rarely mentioned as a mitigation strategy. Here we estimate the net effect on GHG emissions of historical agricultural intensification between 1961 and 2005. We find that p to 161 gigatons of carbonwhile emissions from factors such as fertilizer production and application have increased, the net effect of higher yields has avoided emissions of u (GtC) (590 GtCO2e) since 1961. We estimate that each dollar invested in agricultural yields has resulted in 68 fewer kgC (249 kgCO2e) emissions relative to 1961 technology ($14.74/tC, or ∼$4/tCO2e), avoiding 3.6 GtC (13.1 GtCO2e) per year. Our analysis indicates that investment in yield improvements compares favorably with other commonly proposed mitigation strategies. Further yield improvements should therefore be prominent among efforts to reduce future GHG emissions. Since the middle of the 20th century, global agricultural output has kept pace with a rapidly growing population, repeatedly defying Malthusian predictions of global food shortage. Between 1961 and 2005, the world's population increased by 111% (from 3.08 to 6.51 billion; Fig. 1, Upper Left), whereas crop production rose by 162% (from 1.8 to 4.8 billion tons; Fig. 1, Upper Right) (1). Although agricultural production has increased both by expanding the land area cultivated (extensification) and by improving crop yield from the land already under cultivation (intensification), the gains observed since 1961 were largely intensive. Global cropland grew by 27% (from 960 to 1,208 Mha; Fig. 1, Lower Left), but total crop yield increased by 135% (from 1.84 to 3.96 t/ha, weighted by production across crop groups; Fig. S1) (1). These yield gains—driven by dramatic increases in cereal and oil crops—resulted from adoption of higher-yielding crop varieties, increased use of pesticides and fertilizers (Fig. 1, Lower Right), and improved access to irrigation and mechanization. From a humanitarian perspective, the agricultural intensification of the Green Revolution was a resounding success, but its environmental legacy is less clear. It has long been recognized that increased yields have spared forest and shrubland from conversion to cropland (2), but water use and chemical runoff impacted areas beyond those actually cultivated (3, 4) and abundant harvests provided the economic foundation for expanded nonagricultural land use (5). It remains a question whether modern agriculture can balance agronomy and ethics to sustain both ecological and human needs in the future (6–8). Substantial greenhouse gas (GHG) emissions from agricultural production and related land use changes further complicate this debate (9). To assess the climatic implications of agricultural intensification, we calculate agricultural GHG emissions for 1961–2005, as well as for two hypothetical “alternative world” scenarios in which growing food needs were met by land expansion (extensification) rather than yield increases (intensification). In each case, we include N2O from agricultural soils; CH4 from rice cultivation; C released from both biomass and soil by conversion of forest, shrub, and grassland to cropland; and N2O, CH4, and CO2 from the production and use of nitrogenous, phosphate, and potash fertilizers. In the first alternative world scenario (hereinafter AW1), we assume as a first approximation that population, the global economy, and sociopolitics evolved exactly as in the real world (hereinafter RW), but that agricultural technology and farm practices remained as they were in 1961. The AW1 scenario thus addresses the question of what it would cost, in terms of GHG impact, to replicate the current global standard of living in the absence of investment in yield improvements. Specifically, we assume the same crop yields and fertilizer application rates as in 1961, and scale land use and fertilizer production accordingly(see Methods). The choice of a counterfactual such as AW1 is never straightforward; for example, the AW1 scenario exogenously specifies that demand for agricultural products over time would have been identical without yield improvements, thus ignoring the role of food prices (which fell in real terms by ∼40% between 1965 and 2000) (22). Previous work has explicitly modeled price effects using a partial equilibrium model to consider what might have occurred in developing countries without the Green Revolution (22, 23), although these studies do not provide details on overall investment levels or land use changes. For this study, we instead use a second hypothetical scenario in an attempt to provide a lower bound on the GHG impacts of agricultural intensification. The second counterfactual scenario (AW2 hereinafter) is a world in which agricultural production increased only enough to maintain 1961 standards of living (in terms of per capita production) through 2005. Whereas the AW1 scenario replicates the RW evolution of living standards but meets production needs with extensive agriculture, the AW2 scenario simply maintains 1961 standards of living, again by extensification instead of intensification. This scenario thus provides a reasonable lower bound on carbon savings by projecting the 1961 per capita supply forward (i.e., maintaining 1961 living standards without the increase in supply that drove prices down in the RW). We acknowledge that a more dire lower-bound scenario exists in which increasing population (and lack of agricultural innovation) could have driven per capita consumption below 1961 levels. However, we assume that even without increased agricultural productivity, income growth from productivity gains in other sectors, as well as higher crop demand for nonfood uses, would nevertheless have kept per capita demand at 1961 levels despite any price increases; in this way, the AW2 scenario is an appropriate and realistic lower bound. To construct the AW2 scenario, we use population projections derived from pre-1961 fertility and mortality rates (24), which coincidentally result in very similar 2000 populations, albeit with different age structures (see Methods for a detailed explanation of the methodology). AW1 Scenario (Upper Estimates). In the AW1 scenario, an additional 1,761 Mha of cropland (an area larger than Russia) would have been needed to achieve the same production levels since 1961 while holding yields and fertilizer intensities constant, or 1,514 Mha more cropland than in the RW (Fig. 2, Upper Left and Upper Center-Left). For comparison, the amount of equivalent potential arable land available worldwide is estimated to be 2,945 Mha (25). Fertilizer use in the AW1 scenario increases from 31 Mt of nutrient to 88 Mt of nutrient, representing a constant mean annual intensity of 32 kg/ha. In the RW, total fertilizer use increased to 136 kg/ha, or 165 Mt total, although regional use varies widely (6) (Fig. 2, Upper Center-Right and Fig. S2). GHG emissions under the two scenarios differ significantly; Fig. 2 (Lower Left and Lower Center) shows annual agricultural GHG emissions between 1961 and 2005 for both, broken down by source. For “land conversion” emissions, we assume that cropland expansion occurred in the same proportions by biome in the AW1 scenario as in the RW, calculated as in previous studies (26). We assign biomass and soil organic carbon content values to each biome from the literature (27–29), and assume an uncertainty of ±20% in these values, reflective of regional differences (a global average of 105 ±21 tC/ha lost in conversion of land to cropland). Although decreased fertilizer use in the AW1 scenario reduces emissions from fertilizer production and agricultural soils compared with the RW, global agricultural emissions in the extensive AW1 scenario are nonetheless much greater, dominated by the effect of land use change. In sum, we find that yield gains in agriculture since 1961 have avoided emissions of 161 GtC (+104.2/−41.9 GtC), or an average of 3.6 GtC/yr (+2.3/−0.9 GtC/yr). This corresponds to 34% of the total 478 GtC emitted by humans between 1850 and 2005 (11) (Fig. S3).\* A detailed explanation of the methodology is provided in Methods. AW2 Scenario (Lower Estimates). The impacts of the AW2 scenario are roughly half those of the AW1 scenario. In the AW2 scenario, an additional 1111 Mha of cropland would have been needed to maintain per capita production at 1961 levels while holding yields and fertilizer intensities constant, or 864 Mha more cropland than in the RW (Fig. 2, Upper Left and Upper Center-Left). Fertilizer use in the AW2 scenario rises from 31 Mt of nutrient to 67 Mt of nutrient, representing the same constant 1961 intensity of 32 kg/ha (Fig. 2, Upper Middle-Right and Fig. S2). Fig. 2 (Bottom) shows the annual agricultural GHG emissions between 1961 and 2005 for the AW1, AW2, and RW scenarios, broken down by source and using the same methodologies. Global agricultural emissions in the AW2 scenario are also much greater than the historic RW emissions, again dominated by the effect of land use change. The AW2 scenario illustrates that, without accounting for any increases in global living standards, yield gains in agriculture since 1961 have avoided emissions of 86.5 GtC (±24.7 GtC), or an average of 1.9 GtC/yr (±0.5 GtC/yr). This corresponds to 18% of the total 478 GtC emitted by humans between 1850 and 2005 (11) (Fig. S3). A detailed explanation of the methodology is provided in Methods. Conclusion. Our results demonstrate the importance of land use change emissions over direct emissions of methane and nitrous oxide from agricultural systems, and suggest that the climatic impacts of historical agricultural intensification were preferable to those of a system with lower inputs that instead expanded cropland to meet global demand for food. Enhancing crop yields is not incompatible with a reduction of agricultural inputs in many circumstances, however. To the contrary, careful and efficient management of nutrients and water by precision farming, incorporation of crop residues, and less intensive tillage are critical practices in pursuit of sustainable and increased agricultural output (3, 4, 6, 37).† Furthermore, it has been shown in several contexts that yield gains alone do not necessarily preclude expansion of cropland, suggesting that intensification must be coupled with conservation and development efforts (5, 8, 38–41). Nonetheless, for mitigating agriculture's future contributions to climate change, continuing improvement of crop yields is paramount. The global population is expected to reach 8.9 billion by 2050, with food demand expected to rise by 70% (42). Even if yield gains over the next four decades are smaller than those of the previous four decades, the potential to avoid future emissions may be larger and more cost-effective than the 161 GtC of emissions avoided thus far, given that current cropland expansion often occurs in tropical forests and that the remaining forests are carbon-rich relative to many cleared forests (43).‡ Improvement of crop yields should therefore be prominent among a portfolio of strategies to reduce global greenhouse gas emissions; in order to speed the adoption of agronomic advancements that improve crop yield, mechanisms for connecting investments in yield gains to the global carbon markets should be explored.

### 1NC – Small Farms Suck

#### Organic ag is doomed – tiny market share and environmental harms.

Nordhaus and Blaustein-Rejto 21

(Ted, leading global thinker on the environment and development, founder of The Breakthrough Institute, and Dan, MPP from the Goldman School of Public Policy, Food & Ag Program Director at The Breakthrough Institute, https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/, 4-18) BW

Many sustainable agriculture advocates tout the recent growth of organic agriculture as proof that an alternative food system is possible. But growing market share vastly overstates how much food is actually produced organically. In reality, organic production accounts for little more than 1 percent of total U.S. agricultural land use. Meanwhile, only a bit more than 5 percent of food sales come from organic producers, mostly because organic sales are overwhelmingly concentrated in high-value sectors of the market, namely produce and dairy, and fetch a premium from well-heeled consumers. Moreover, organic farms, large and small, don’t actually outperform large conventional farms by many important environmental measures. Scale, technology, and productivity make good environmental sense and economic sense. Because organic farming requires more land for every calorie or pound produced, a large-scale shift to organic farming would entail converting more forest and other land to farming, resulting in greater habitat loss and more greenhouse gas emissions. And while organic farming doesn’t use synthetic pesticides or fertilizers, it often results in greater nitrogen pollution because manure is a highly inefficient way to deliver nutrients to crops.

### 1NC – Pandemics

#### No matter the future pandemic, humanity can adapt and find new solutions – we get better at it every single time

Pinker et Al. 20 – Steven earned his BA from McGill and his PhD from Harvard. Currently Johnstone Professor of Psychology at Harvard, he has also taught at Stanford and MIT. He has won numerous prizes for his research, his teaching, and his books, including [The Language Instinct](https://stevenpinker.com/publications/language-instinct-19942007), [How the Mind Works](https://stevenpinker.com/publications/how-mind-works-19972009), [The Blank Slate](https://stevenpinker.com/publications/blank-slate-20022016), [The Better Angels of Our Nature](https://stevenpinker.com/publications/better-angels-our-nature), [The Sense of Style](https://stevenpinker.com/publications/sense-style-thinking-persons-guide-writing-21st-century), and [Enlightenment Now](https://theopenscholars.com/pinker/publications/enlightenment-now-case-reason-science-humanism-and-progress). He is an elected member of the National Academy of Sciences, a two-time Pulitzer Prize finalist, a Humanist of the Year, a recipient of nine honorary doctorates, and one of Foreign Policy’s “World’s Top 100 Public Intellectuals” and Time’s “100 Most Influential People in the World Today.”

Benjamin M. Seitz, Athena Aktipis, David M. Buss, Joe Alcock, Paul Bloom, Michele Gelfand, Sam Harris,  Debra Lieberman, Barbara N. Horowitz, Steven Pinker,  David Sloan Wilson, and Martie G. Haselton, November 10 2020, “The pandemic exposes human nature: 10 evolutionary insights,” Proceedings of the National Academy of Sciences of the United States of America, https://www.pnas.org/content/117/45/27767

Many people have trouble reconciling the demonstrable fact of **human progress—**that, over time, we have become healthier, better fed, richer, safer, and better educated—with the constraints of human biology. Some fear that, if the mind has evolved as a complex structure, then progress would be impossible, because “you can’t change human nature.” Therefore, either there cannot be such a thing as progress or there cannot be such a thing as human nature.

But these are confusions which arise from misconceptions of human nature and of human progress ([85](https://www.pnas.org/content/117/45/27767#ref-85), [86](https://www.pnas.org/content/117/45/27767#ref-86)). Among the adaptations making up human nature is the triad of faculties that adapt us to the **“cognitive niche”** ([87](https://www.pnas.org/content/117/45/27767#ref-87)): know-how, which allows us to understand the physical world and try out new ways to manipulate it to our advantage; language, which allows us to share and recombine these ideas; and sociality, which gives us the motive to coordinate ideas and actions with our fellows for mutual benefit. Among the brainchildren of these faculties are **inventions that magnify their own power**, including the printed and electronic word and institutions of science and governance, which allow knowledge to accumulate over generations. When people deploy knowledge to improve their lives, retaining and combining the innovations that work and discarding those that don’t, p**rogress can take place.**

That’s all that progress consists of. It is not, contrary to conceptions of Herbert Spencer and other Victorians ([88](https://www.pnas.org/content/117/45/27767#ref-88), [89](https://www.pnas.org/content/117/45/27767#ref-89)), a mystical evolutionary force that propels us ever upward. On the contrary, the forces of nature tend to grind us down, including the inexorable increase in physical disorder and the evolutionary conflicts between parasites and hosts, predators and prey, and conspecifics and one another. It’s only the application of hard-won knowledge that allows us to eke out local and provisional advances against the constant challenges to our well-being.

Among these challenges are outbreaks of infectious disease. Bouts of outbreak over millennia were the selective pressure that led to the evolution of our innate, adaptive, and behavioral immune systems.

Yet it was **our cognitive adaptations that led to the recent conquest of the infectious disease**s that felled our ancestors in great numbers. They allowed us to discover vaccination, sanitation, antisepsis, antibiotics, antivirals, and other advances in public health and medicine that have dramatically extended life expectancy.

So it should come as no surprise, and is no refutation of the fact or the possibility of progress, that another infectious pathogen has launched an offensive against us; that is in the very nature of life. Yet the biology of Homo sapiens gives us good reasons to expect that **the disease will be subdued** in its turn—not as an inevitable step in some march of progress, but if (and only if) we redouble the commitment, which human evolution enables but does not guarantee, to the development and application of scientific knowledge to improve human well-being.

# Block

## Section 5 CP

### 2NC – top

**Protectionism causes global losses in confidence and economic crisis – past trade wars have put us on the brink**

**Gunnella and Quaglietti 19** – European Central Bank

Vanessa Gunnella and Lucia Quaglietti, "The economic implications of rising protectionism: a euro area and global perspective," ECB Economic Bulletin, Issue 3/2019, 4-24-2019, https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201903\_01~e589a502e5.en.html

5 Conclusions

Taken in isolation, the repercussions of the tariffs implemented in 2018 pose only a modest adverse risk to the global and euro area outlooks. Preliminary evidence indicates that, in order to circumvent the effects of rising tariffs, firms operating in the targeted sectors may have been frontloading their import orders. While trade flows in the affected sectors may have started to decelerate after the tariffs came into effect, particularly in China, the impact of implemented tariffs and tariff announcements owing to uncertainty effects appears to have remained confined to the targeted sectors for the time being.

If trade tensions were to escalate once again, however, the impact would be larger. Model-based simulations indicate that the medium-term direct impact of an escalation could be sizeable, compounded by heightened financial stress and a drop in confidence. Despite some trade diversion effects, euro area and global trade and, therefore, activity, would decline. The longer-term effects would be even more pronounced.

Trade liberalisation within the framework of multilateral cooperation has been a key factor driving global economic prosperity. Trade integration helped to drive economic growth in advanced and developing economies in the second part of the 20th century, while also helping to pull hundreds of millions of people out of poverty. At the same time, although free trade is often seen as one of the factors behind rising inequality both within and across countries, winding back globalisation is the wrong way to address these negative effects. A retreat from openness will only fuel more inequality, depriving people of the undisputed economic advantages that trade and integration bring. Instead, countries should seek to resolve any trade disputes in multilateral fora. By encouraging regulatory convergence, multilateral cooperation helps to protect people from the unwelcome consequences of openness, and therefore remains crucial as a response to concerns about the fairness and equity of trade. The distributional and social effects of greater economic integration should also be addressed by targeted policies that achieve fairer outcomes, including, for example, redistributive policies or adequate training and educational measures.

### 2NC – AT: PD Aff + Broad Sect 5

**Broad assertion of Section 5 authority fails – absent a specific, coherent framework, courts will shut down increases to Section 5 authority**

**Crane 10** – Professor of Law, University of Michigan

Daniel A. Crane, "Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel," The CPI Antitrust Journal, 2010, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2369&context=articles

In recent years, the Commission has frequently tied itself to the Sherman Act.11 Why would it choose to accept that baggage? Of late, the FTC has been shell-shocked by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions to enjoin behavior that would not violate the Sherman Act. The courts have frequently quashed the FTC’s efforts to develop an independent Section 5, even while paying lip service to the independence principle.12 As Bill Kovacic remarked during his opening comments at the FTC’s October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission’s nearly hundred-year history.13

The reason is institutional. Courts tend to be jealous of their jurisdiction. To cite a venerable precedent to which we will return at end, courts are loathe to abandon their prerogative “to say what the law is.”14 In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a Marbury v. Madison thematic to the FTC: “The words ‘unfair competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.”15 Courts are wary of agency assertions that the agency should be accorded independent space to develop legal norms. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is “untenable.”16

So this is where we are today: Legal doctrine theoretically allows space for an independent Section 5 and there are good policy reasons for some movement away from the constraints of the Sherman Act, but great care needs to be taken in the formulation of a “separation strategy.” It simply will not do for the FTC to declare independence from the Sherman Act and then proceed to formulate its own antitrust policy.17 As Commissioner Rosch recognizes in his statement dissenting from the Commission’s decision to bring an independent Sherman Act Section 2 “tag-along” action, the Commission must not merely assert independence from the Sherman Act, but explain the principles that justify departure from Sherman Act norms in each relevant case.18 A “just trust us, we’re the FTC,” strategy has no chance of success in the courts.

**Overly broad interpretation of Section 5 decks enforcement ability**

**Lande 8** – Venable Professor of Law, University of Baltimore School of Law

Robert H. Lande, Statement of Robert H. Lande at the Federal Trade Commission’s Workshop on Section 5 of the FTC Act As A Competition Statute, Federal Trade Commission, 10-17-2008, https://www.ftc.gov/sites/default/files/documents/public\_events/section-5-ftc-act-competition-statute/rlande.pdf

I have two points to make. First, Section 5 of the FTC Act, properly construed, is indeed significantly broader and more encompassing than the Sherman Act or Clayton Act. Second, the best - and probably the only - way to interpret Section 5 in an expansive manner is to do so in a way that also is relatively definite, predictable, principled and clearly bounded. This best can be done if Section 5 is articulated using the “consumer choice” framework. Without the discipline and constraints provided by this framework, the FTC Act risks becoming unduly standardless. Unless the Commission uses the choice approach, any attempt to construe Section 5 that goes beyond the other antitrust laws risks being viewed as giving undue discretion to the Commission. For these reasons, an expansive approach to Section 5 that does not use the choice framework would be unlikely to be acceptable to reviewing courts, who demand a relatively clear way to distinguish anticompetitive conduct from procompetitive or benign conduct. But if the FTC does adopt the choice limitations, I believe that reviewing courts would be likely to give the FTC Act the comprehensive interpretation it deserves. After presenting the choice framework, I will give three illustrations of how this could make a difference in practice.

### 2NC – AT: PDB

#### It decks section 5 authority—Doing both will allow companies to win section 2 litigations and undermine FTC authority

Rosch 11 – Commissioner, Federal Trade Commission.

J. Thomas Rosch, January 27 2011, “The Great Doctrinal Debate: Under What Circumstances is Section 5 Superior to Section 2?” Federal Trade Commission, https://www.ftc.gov/sites/default/files/documents/public\_statements/great-doctrinal-debate-under-what-circumstances-section-5-superior-section-2/110127barspeech.pdf

Some may say that the Commission has a fourth option which is to sue in Part 3 under both Section 2 and Section 5, as the majority elected to do in Intel. To be honest, the trial lawyer in me hasn’t yet been persuaded that a tag-along Section 2 claim will ever make sense if the Commission’s goal is to actually win a Section 5 case. The minute we allege both claims, **the respondent has the upper hand** because it can go before the ALJ (and ultimately an appellate court, if necessary) and get a ruling on the Section 2 claim. Once a court finds that conduct is protected under Section 2, I think a federal court is going to be **hard pressed** to say the same conduct is nevertheless inappropriate under Section 5. The reason for this is that the core of any Section 5 argument must be that the Commission has special expertise to add and that, for whatever reason, the conduct should not be subject to damages. Once the Commission has proffered the Section 2 claim, it has s**everely undercut these argument**s. It was for this reason, in addition to the others that I discussed above, that I d**issented from the Commission’s decision to challenge Intel’s conduct under Section 2**.19

#### Innovation—expansion of current law decks it – sole section 5 use is the best way to minimize the chilling effect on firms

Crane 13 – Professor of Law, University of Michigan.

Daniel Crane, 2013, “Section 5 and the Innovation Curve,” University of Michigan Law School, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1125&context=book_chapters>

Th ere is a case to be made for **using Section 5 to remove restraints** on innovation that might not be reachable under the Sherman Act because the technological conditions they raise have not previously been considered. But that case should not amount to an undiff erentiated assumption that legal innovation by the FTC should be applied consistently to keep pace with technological innovation. To the contrary, legal innovation will oft en be grossly outpaced by technological innovation. **No amount** of eff ort or determination to enhance the alacrity of legal innovation will do the trick, as even commissions (as contrasted with courts, which are notably ponderous) are constitutionally incapable of keeping up with many fast-moving industries. Nor would it be wise to rush the rate of legal innovation with the hopes of staying within sight of the technological innovation—like the turtle taking steroids to keep within striking distance of the hare. A legal innovation that lags a generation behind the technological state of the art will oft en do **far more damage than good.**

It should be clear that there is a time for declining to apply **even traditional antitrust rules** when the pace of innovation is so fast that application of the rule might interfere with technological progress. In the specifi c context of **Section 5,** the question is whether the Commission should be entitled to go beyond traditional antitrust principles—to impose liability beyond that which would obtain under the Sherman Act. Where the rate of innovation is high, and particularly where the innovation curve is steep, it should not.

### 2NC – firms settle

#### companies will settle those Section 5 claims over litigation because going to court costs too much

Entwisle and Storino 14 – Bob Entwisle represents domestic and international companies and other clients in antitrust litigation and investigations. His experience includes matters involving price fixing, bid rigging, market allocation, and monopolization. Dan Storino is a partner in Mayer Brown’s Litigation and Dispute Resolution group whose practice focuses on antitrust, health care, and complex commercial litigation matters. He represents clients across the country in state and federal trials, arbitration and mediation proceedings, and civil and criminal investigations.

Bob Entwisle and Dan Storino, April 8 2014, “United States: The Uncertain Reach Of Section 5 Of The Federal Trade Commission Act,” Mayer Brown, https://www.mayerbrown.com/files/Publication/42fa1c45-a4b8-4f67-b1f6-f67fc3b0586b/Presentation/PublicationAttachment/29760183-6042-4b33-b358-fb47e026f480/AC\_Review\_Spring\_2014.pdf

Compliance with US antitrust laws requires firms to consider not only conduct that falls within the scope of the Sherman Act and the Clayton Act, but also conduct that may violate the Federal Trade Commission Act (the "Act"), particularly Section 5. This task is complicated by the fact that the outer scope of Section 5 remains largely undefined, leading to uncertainty as to what conduct is permissible and impermissible. In the absence of further legislative or judicial oversight, it is **unclear** just how far Section 5 reaches.

Established almost a century ago, the Federal Trade Commission ("FTC") shares enforcement responsibilities for US competition laws with the Antitrust Division of the Department of Justice. The FTC derives its enforcement powers from the Federal Trade Commission Act and the Clayton Act,1 and its enforcement mission is to halt conduct deemed harmful to competition, including practices barred by the Sherman Act, such as price fixing, bid rigging, customer allocation and other per se antitrust violations.2 Although not expressly authorized to enforce the Sherman Act, the FTC reaches such conduct through Section 5, which states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."3 But a question going back to when the Act first became law still remains unanswered: beyond conduct that is already prohibited by the Sherman Act and the Clayton Act, precisely what falls within Section 5's prohibition on "unfair methods of competition?"

There are some who have argued that Section 5 is "coterminous" with the Sherman Act and the Clayton Act—a "vehicle by which the [FTC] challenges" traditional antitrust violations.4 Yet it seems clear that Congress **intended something else**. The legislative history shows that Congress purposefully passed a vague statute to avoid the "endless task" of legislatively drawing the line between fair and unfair practices in all cases and intended that the reach of Section 5 be developed over time.5 As the Supreme Court observed, "[i]t would not have been a difficult feat of draftsmanship to have restricted the operation of [Section 5] to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation."6

The more widely accepted argument is that Section 5 "was intended from its inception to reach conduct that violates not only the antitrust laws, b**ut also the policies that those laws were intended to promote"**7 and that Congress "adopted a phrase which ... does not admit of precise definition, [because] the meaning and application [would] be arrived at by ... the gradual process of judicial inclusion and exclusion."8 However, while the Sherman Act's equally vague ban on any "contract, combination ... or conspiracy, in restraint of trade" now incorporates a vast body of case law interpreting its meaning, Section 5 jurisprudence did not develop the same way.

Sperry & Hutchinson was the Supreme Court's last comprehensive analysis of the FTC's Section 5 powers. That opinion, however, is 40 years old and has been described as controversial.9 In Sperry, the FTC entered a cease-and-desist order against Sperry & Hutchinson Co. (S&H) for attempting to "suppress the operation of trading stamp exchanges and other 'free and open' redemption of stamps."10 The Fifth Circuit vacated the order, finding that S&H's conduct had not "violated either the letter or the spirit of the antitrust laws," and thus the order exceeded the scope of Section 5.11 Without reaching the question of whether S&H's conduct did, in fact, violate the letter or spirit of existing antitrust laws, the Supreme Court found that Section 5 empowers the FTC to define and proscribe unfair competitive practices, even if not an infringement of other antitrust laws.12 The Supreme Court concluded that the FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."13

Analogizing the FTC's powers to those of a court of equity signals the Supreme Court's view, at the time, that Section 5 powers were quite broad, perhaps not even constrained by precedent. But circuit courts later found that Section 5 has its limits. For example, in E.I. du Pont de Nemours & Co. v. F.T.C.,14 although conceding that a definition of "unfair" methods of competition is "elusive," the court vacated the FTC's finding that competing firms in an oligopoly violated Section 5 by unilaterally and non-collusively adopting practices that included: (1) the sale of a product by all four firms at a delivered price, which included transportation costs; (2) providing "extra" advance notice of price increases; and (3) the use of "most favored nation" clauses in contracts with customers. The court explained its view on the outer reach of Section 5, holding that, when a practice is not "collusive, coercive, predatory or exclusionary in character, the standards for determining whether it is 'unfair' ... must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."15 Otherwise the "door would be open to arbitrary or capricious administration" of Section 5, because "the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition."16

The last time a circuit court evaluated a pure Section 5 claim was 1992, and the standards for determining what is "unfair" continue to remain obscure.17 Recognizing this obscurity, Commissioner Joshua Wright recently advocated that the FTC should focus its Section 5 efforts on "plainly anticompetitive conduct"—meaning a practice that "(1) harms or is likely to harm competition significantly and that (2) lacks cognizable efficiencies."18 Making clear that his position is a starting point for further dialogue, the Commissioner explained this definition would permit the FTC to prosecute conduct that, while falling outside the Sherman or Clayton Act, would not be controversial, because it is already deemed anticompetitive. Citing modern concepts of antitrust harm, Section 5 would, for example, reach "invitation[s] to collude" or the acquisition of too much market power, falling short of a monopoly.19 It remains to be seen whether this approach, or one like it, will be formally adopted or pursued. Still, such a definition might sweep within its scope conduct that, in and of itself, does not violate other antitrust laws and lead to potential penalties for legitimate, non-collusive conduct. For example, one might argue that, under such a definition, an oligopoly like the one at issue in du Pont could be deemed a violation of Section 5.

Proponents of expansive Section 5 powers note that the **FTC is an expert agenc**y that Congress intended to have a central role in policing business conduct. They further note that, unlike the Sherman Act, there is no private right of action under Section 5—which, in theory, limits exposure to damages for conduct that does not, standing alone, violate other antitrust laws. However, while there may be no express private right of action at the federal level, numerous states have enacted their own versions of Section 5 that permit private actions and, in some cases, trebled or punitive damages.20

In addition, the FTC has previously sought and obtained significant monetary penalties in the form of disgorgement and restitution. For example, in FTC v. Mylan Laboratories, Inc.,21 the court accepted the FTC's argument that it could seek monetary relief for violations of Section 5, because doing so is a "natural extension of the remedial powers authorized under § 13(b)."22 The case was later resolved when the defendants agreed to pay $100 million into a fund, that included compensation for indirect purchasers who allegedly were injured.23 At the time, certain Commissioners recognized the significant federal antitrust policy implications of the settlement, in light of the decisions in Hanover Shoe, Inc. v. United Shoe Machinery Corp. and Illinois Brick Co. v. Illinois.24

More recently, in July 2012, the FTC withdrew its existing Policy Statement on Monetary Remedies in Competition Cases that had been in place since 2003. The Statement outlined those circumstances where the FTC would seek monetary penalties. In withdrawing it, the FTC explained that "the practical effect of the Policy Statement was to create an overly restrictive view of the Commission's options for equitable remedies."25 This may signal the likelihood that US businesses will see more FTC attempts to impose monetary penalties in future competition cases.

Further, private plaintiffs regularly cite enforcement proceedings to demonstrate the plausibility of their claims and evade dismissal motions. An expert agency's determination that certain conduct constitutes an "unfair method of competition," even if not falling within the strict contours of a traditional Sherman Act claim, could be an element relied upon by private plaintiffs to successfully plead a Sherman Act claim, opening the door to the expense of antitrust discovery and the potential for trebled damages. For example, a private plaintiff might rely upon Section 5 proceedings based on so-called "invitations to collude," or the exchange of commercially sensitive information, to demonstrate a plausible Sherman Act Section 1 claim.26 Indeed, a jury might be permitted to infer the existence of a tacit agreement based on this type of conduct.27

Consider a case like In re Bosley,28 where the FTC found that an exchange of competitively sensitive information could "mutate into a conspiracy" and "[c]ompetition may be unreasonably restrained whenever a competitor directly communicates, solicits, or facilitates exchange of competitively sensitive information with its rivals." Such proscriptions conceivably sweep in a wide variety of completely legitimate conduct. And, although it is clear that such conduct, standing alone, is not enough to plead a traditional antitrust violation—since plaintiffs must allege more than just an "opportunity" to collude29—the existence of FTC proceedings and/or an adverse FTC finding may nonetheless help plaintiffs get beyond the pleading stage of a Sherman Act claim.30 What is more, the modern enforcement environment **makes it unlikely that firms will elect to litigate a Section 5 claim**—all but foreclosing the possibility that a robust body of case law may someday develop. As in all types of adversarial proceedings, firms elect to settle Section 5 claims for a variety of reasons, including a desire to avoid protracted costs, inherent uncertainty, bad publicity and potential sanctions that can come from choosing to litigate with the government.

So, what can firms do to avoid running afoul of Section 5? Because the FTC has yet to adopt any specific parameters that define the boundaries of Section 5 power, companies continue to be left in the dark as to precisely what type of conduct amounts to a violation. This uncertainty makes it more important than ever to provide employees with careful guidance on how to limit exposure and avoid sliding into "gray" areas. Also, further guidance from the FTC could be coming soon.

After decades of relative silence on the issue, this past year saw a growing coalition of support for establishing Section 5 guidelines. For instance, in addition to the (albeit vague) limiting principles proposed by Commissioner Wright, several members of Congress also recently encouraged the FTC to specify the scope of its Section 5 authority. Corporate counsel should keep abreast of these developments, because, until the FTC formally clarifies its position on the reach of Section 5, US businesses will be forced to wrestle with how to ensure compliance with an ambiguous law.

#### Vague standards of section 5 means that firms will chose to settle

Wright 15 – Joshua Daniel Wright is an American economist and legal scholar who served as a commissioner of the U.S. Federal Trade Commission from 2013 to 2015.

Joshua Wright, February 26 2015, “Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority,” Federal Trade Commission, https://www.ftc.gov/system/files/documents/public\_statements/626811/150226bh\_section\_5\_symposium.pdf

Significantly, the combination of institutional and procedural advantages with the vague nature of the Commission’s Section 5 authority gives the agency the ability, in some cases, to **elicit a settlement** even though the conduct in question very likely may not be anticompetitive. This is because **firms typically will prefer to settle a Section 5 claim** rather than to go through lengthy and costly litigation in which they are both shooting at a moving target and have the **chips stacked against them.** Such settlements also perpetuate the uncertainty that exists as a result of the ambiguity associated with the agency’s “unfair methods of competition” authority by encouraging a process by which the contours of Section 5 are drawn through settlements without any meaningful adversarial proceeding or substantive analysis of the Commission’s authority.

#### Sec 5 cases are plaintiff friendly, which means companies will settle

Wright 13 – Joshua Daniel Wright is an American economist and legal scholar who served as a commissioner of the U.S. Federal Trade Commission from 2013 to 2015.

Joshua Wright, November 2013, “Recalibrating Section 5: A Response to the CPI Symposium,” CPI Antitrust Chronicle, https://www.ftc.gov/sites/default/files/documents/public\_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf

Further, these figures should call into question the idea that concepts like the rule of reason and other substantive doctrine that evolved in the federal courts, a different institutional setting with a different balancing of the costs and benefits of error and administration, are appropriate for wholesale incorporation into Section 5 adjudication. Professor Salop, for instance, proposes that the rule of reason would be an appropriate tool for assessing UMC claims but entirely ignores the **administrative process advantages** available to the Commission in enforcing Section 5 claims that are not available in federal court.9 The intuitive appeal of a rule of reason analysis that might make sense in federal court is undermined by the differences in administrative institutions and Article III courts—a difference starkly highlighted by the Commission’s “perfect” record over almost two decades. A fundamental feature of my Proposed Policy Statement is to harness these administrative advantages and use them where they are appropriate—not in cases involving balancing and the risk of over-enforcement, but rather to use them to attack the worst possible conduct lacking redeeming competitive virtues. The combination o**f institutional and procedural advantages** with the vague nature of the Commission’s Section 5 authority gives the agency the ability, in some cases, to **elicit a settlement** even though the conduct in question very likely may not be anticompetitive. This is because firms typically prefer to settle a Section 5 claim rather than going through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the chips stacked against them. Significantly, such settlements also p**erpetuate the uncertainty** that exists as a result of the ambiguity associated with the Commission’s UMC authority by encouraging a process by which the contours of Section 5 are draw**n without any meaningful adversarial proceeding** or substantive analysis of the Commission’s authority.

#### Empirics—Almost every Section 5 dispute result in a settlement – its cheaper for firms and they think they can’t win

Rybnicek and Wright 14 – Attorney Advisor to Commissioner Joshua D. Wright of the Federal Trade Commission. Commissioner of the Federal Trade Commission and Professor (on leave) at George Mason University School of Law and Department of Economics.

Jan Rybnicek and Joshua Wright, 2014 “DEFINING SECTION 5 OF THE FTC ACT: THE FAILURE OF THE COMMON LAW METHOD AND THE CASE FOR FORMAL AGENCY GUIDELINES,” https://poseidon01.ssrn.com/delivery.php?ID=791101027092092123088029003065097018105084007031052035109089087088104013086001023089043050055106031007050103096004065082031113025019027055033016097006089018118067055086024100075001006088104072122124082029113028089102091001007074118073003095106094010&EXT=pdf&INDEX=TRUE

Moreover, the fact that the Commission alone selects the Section 5 disputes upon which the common law approach is founded is particularly problematic because the FTC’s administrative process advantages create an opportunity for the Commission to **elicit cheap settlements** from each unfair-method-of-competition case it pursues. 95 The opportunity for cheap settlements results from the perception that administrative litigation at the FTC is **biased strongly in favor** of the Commission and that the definition of what constitutes an unfair method of competition is so hopelessly vague that it can be manipulated to fit nearly any set of facts. Unsurprisingly, firms typically prefer to settle Section 5 claims rather than go through lengthy and costly administrative litigation in which they are both “shooting at a moving target and have the chips stacked against them.” 96

\*Footnote Starts

Id. The Commission has **affirmed an overwhelming number** of decisions adjudicated in favor of the Commission by the administrative law judge (“ALJ”) and reversed an overwhelming number of decisions in which the ALJ ruled against the Commission. See, e.g., Joshua D. Wright & Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission, 1 J. ANTITRUST ENFORCEMENT 82, 90-92 (2013). See also Melamed, Comments to FTC Workshop, supra note 7, at 13

\*Footnote Ends

Indeed, as discussed below, in recent history Section 5 disputes **have all resulted in agency settlements rather than litigation.**97 A consequence of the Commission’s exclusive authority to select Section 5 disputes, together with the fact that the Commission’s legal theory is unlikely to be seriously challenged or tested, is that unfair-methods-of-competition law develops only in a way that is desirable to and knowable by the Commission tested, is that unfair-methods-of-competition law develops only in a way that is desirable to and knowable by the Commission.

### 2NC – AT: FTC loses in Court

#### The Court largely defers to the FTC to interpret section 5 – Chevron deference, vagueness of the statute and empirics prove

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau.

Sandeep Vaheesan, May 11 2017, “RESURRECTING “A COMPREHENSIVE CHARTER OF ECONOMIC LIBERTY”: THE LATENT POWER OF THE FEDERAL TRADE COMMISSION,” UPenn Journal of Business Law, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1548&context=jbl

The FTC has broad power to define the meaning of Section 5. Modern administrative law gives executive and independent agencies considerable freedom to define the meaning of statutes phrased in general terms. A body of law, originating with the Supreme Court’s landmark 1984 decision Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 28 has granted elastic quasi-legislative power to the administrative state. The Court held in Chevron that agencies have power to interpret ambiguously worded statutes so long as the interpretation is reasonable.29 Section 5 of the FTC Act, with its language on “unfair methods of competition,” is the type of generally worded statute that an agency is empowered to interpret.30

In addition to interpretive authority under Chevron, when Congress enacted the FTC Act in 1914, it expressly granted the Commission the power to define the meaning of “unfair methods of competition.” Congress was reacting to the Supreme Court decision in Standard Oil Co. v. United States in which the Court held that it had the ultimate power to interpret the Sherman Act.31 In delegating the power to define “unfair methods of competition” to the FTC, Congress sought to reassert control over the development of antitrust policy and prevent the courts from subverting legislative desires.

A. Modern Administrative Law Gives the FTC Broad Discretion to Interpret Section 5

Modern administrative law has transferred significant lawmaking power from the courts to the numerous executive and independent agencies in the federal government. Questions of statutory interpretation that were once the jealous prerogative of the courts are now often resolved by, for example, the Department of Labor, the Environmental Protection Agency, or the Federal Communications Commission. While agency statutory interpretations are still subject to judicial review, interpretations of statutes phrased in general terms are examined under a deferential legal standard.

The Supreme Court’s Chevron decision revolutionized administrative law and policymaking in the United States. In reviewing a challenge to an interpretation of the Clean Air Act by the Environmental Protection Agency, the Court established a deferential standard of review for agency interpretations of statutes. The Court held that an agency’s interpretation of a statute would be accorded deference if the statute is ambiguously worded and the agency’s interpretation is reasonable.32 In practice, Chevron deference has meant that an agency’s interpretation is permissible unless the statute’s language expressly forecloses this particular interpretation.33 Chevron deference represents a transfer of power from the courts to the executive branch. Statutes that were traditionally interpreted by the federal courts are now often given meaning by federal agencies.34

The Court in Chevron justified this transfer of lawmaking and policymaking functions to agencies on multiple grounds. First, open-ended statutory language presumably reflects a desire on the part of Congress for agencies to interpret the statute.35 Second, the Court stated that agencies are better equipped than the courts, both in terms of expertise and resources, to decide the technical questions often implicated in statutory interpretation.36 Third, the Court stated that agency heads, while they are not selected by popular vote, do answer to the democratically elected president.37 As such, agencies face more public accountability than federal judges with life tenure.

#### Previous court rulings have given great weight to commission interpretations of section 5 –

**FTC Commission 21 –** official website

July 9 2021, “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act,” Federal Trade Commission, https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is **not limited** to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17 The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20 The Supreme Court has **repeatedly affirmed this view** of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has **given “deference”22 and “great weight**”23 to the Commission’s determination that a practice is unfair and should be condemned. Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement’s decision to tether Section 5 to the Sherman and Clayton Acts. For example, in Boise Cascade, the Ninth Circuit ruled that the evidence did not support the Commission’s factual finding that the defendants’ conduct had an adverse effect on prices.24 In Ethyl, the Second Circuit explicitly held that the FTC’s Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is “collusive, coercive, predatory, or exclusionary,” or has an “anticompetitive purpose,” or “cannot be supported by an independent legitimate reason.”25 In short, these decisions confirm that **Section 5 empowers the Commission** to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

#### Fact that the court hasn’t touched the aff makes them more likely to defer to the FTC

Crane 13 – Professor of Law, University of Michigan.

Daniel Crane, 2013, “Section 5 and the Innovation Curve,” University of Michigan Law School, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1125&context=book\_chapters

First, courts are **most likely to defer** to administrative agency judgments in cases involving commercial practices about which the courts have not developed a deeply rooted body of precedent. In such cases, the courts may allow some administrative experimentation and testing, even though they might not have reached the same result as the agency if they had analogized to conduct already covered by established liability norms. Conversely, courts are least likely to defer when they have already spoken to the exact practice on many occasions and developed a time-tested body of liability rules to govern it. Refusal by the agency to honor the judicially created precedents may look—to judges at least—like intransigence. 16 It is human nature (and judges are human aft er all) to be more open to an idea on which one has not yet expressed an opinion than to approve of an idea that contradicts one’s prior assertion. Hence, the FTC is most likely to be **accorded a norm-creative role** on issues that have not yet received a signifi cant airing in the courts, rather than in seeking to reform well-worn areas of precedent such as predatory pricing or exclusive-dealing law.

### 2NC – AT: PCP

#### “antitrust laws” are only clayton and Sherman – they explicity exclude the FTC act and section 5

Whyte 07 – Judge, United States District Court, California Northern

Ronald M. Whyte, Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 53220, United States District Court for the Northern District of California, San Jose Division, January 2008, LexisNexis

Section 5(a) accords prima facie weight to a final judgment brought "under the antitrust laws." The Clayton Act specifically defines the phrase "antitrust laws." See 15 U.S.C. § 12(a). The definition includes the Sherman Act and the Clayton Act, but it does not list the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq). This exclusion accords with the final sentence of section 5(a), which distinguishes "the antitrust laws" from "section 45." 2

The Federal Trade Commission brought its proceeding against Rambus pursuant to Section 45, which is also known as Section 5 of the FTC Act. See In re Rambus, Administrative Complaint, Docket No. 9302, at 1, 31-33 (FTC June 18, 2002). 3 The FTC's final order found that "Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act." In re [\*12] Rambus, Opinion of the Commission, Docket No. 9302, at 3 (FTC August 2, 2006). HN4 Section 5 of the FTC Act incorporates various standards from the antitrust laws and also forbids practices the FTC deems against public policy for other reasons. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Although the FTC found that Rambus violated the Sherman Act, the FTC's order was in a proceeding under Section 5 of the FTC Act.

#### Consensus of courts agree

Raphael 16 – Litigation partner in the San Francisco office of Munger, Tolles & Olson

Justin P. Raphael, Motion to Dismiss and Memorandum in Support filed by Defendant, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, LexisNexis

The FTC administrative action was not brought “to prevent, restrain, or punish violations of any of the antitrust laws.” Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term “antitrust laws” is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an ‘antitrust’ statute.”). That definition does not include Section 5 of the FTC Act, and multiple courts have acknowledged that the FTC Act is not an “antitrust law.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “prima facie weight is given only to violations of the ‘antitrust laws’ as defined by the Clayton Act,” which “does not include violations of the FTC Act”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not “one of the ‘antitrust laws’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

### 2NC AT: certainty

#### The CP solves by using S5’s co-extensive authority w/ antitrust laws to remove that heightened burden of proof. That enforcement is binding.

Hubbard 20 – Sally Hubbard is Director of Enforcement Strategy at the Open Markets Institute.

Sally Hubbard, October 1 2020, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online,” Testimony Before the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law, https://docs.house.gov/meetings/JU/JU05/20201001/111072/HHRG-116-JU05-Wstate-HubbardS-20201001.pdf

The Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. We believe the main reason for the radical concentration of power in these corporations is not any shortcoming in law, but the lack of political will by antitrust enforcers. We believe this lack of political will is exacerbated by the adherence of law enforcement agencies to dangerously flawed economic philosophies that largely brought us America’s monopoly crisis in the first place. In short, we believe law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws. Indeed, the Open Markets Institute believes that enforcers could push the law in the right direction simply by bringing more aggressive cases under existing legal standards. A good example of how this could work is United States v. Microsoft Corp., 11 because today’s digital platforms are following Microsoft’s monopolistic playbook. Similarly, federal antitrust enforcers also are not fully using the tools available to combat anticompetitive conduct. The FTC has a powerful tool with Section 5 of the FTC Act,12 which is broader than the Sherman and Clayton Acts.13 Through Section 5, the FTC can establish rules of fair competition and overcome bad Section 2 caselaw.14 But the agency rarely uses this authority. The FTC also has investigative and rule-making authority that it could broadly deploy.

#### Those penalties deter further illegal action.

Chopra and Levine 20 – Commissioner, Federal Trade Commission. Attorney Advisor to Commissioner Rohit Chopra, Federal Trade Commission.

Rohit Chopra and Samuel A.A. Levine, November 3 2020, “The Case for Resurrecting the FTC Act’s Penalty Offense Authority,” University of Pennsilvania Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3721256&download=yes

The Commission has rarely deployed its Penalty Offense Authority, but it can offer three key advantages over seeking monetary relief solely under Section 13(b). First, the authority allows the Commission to seek civil penalties, which unlike equitable **relief can be calibrated to actually deter** wrongful conduct, while promoting practices like self-reporting. Second, particularly given the challenges before the Supreme Court, the Penalty Offense Authority creates less litigation risk than 13(b). Finally, the Authority is well-suited to having a market-wide impact, which promotes widespread compliance and saves taxpayer resources. Each of these advantages is discussed in turn. (i) Deterrence The most important difference between Section 13(b) and the Penalty Offense Authority is that 13(b) authorizes the Commission to seek equitable monetary relief – restitution and disgorgement – while the Penalty Offense Authority authorizes the agency to seek civil penalties. Penalties offer a number of advantages over restitution or disgorgement available through Section 13(b), particularly when it comes to effectuating general deterrence. As discussed above, equitable relief under Section 13(b) is awarded based on a fairly rigid formula, according to which an award generally cannot exceed the amount directly lost by victims or earned by wrongdoers. This formula can under-deter serious wrongdoing, especially when the consequences of that wrongdoing are difficult to calculate, or far exceed direct losses or gains. In fact, the Supreme Court has indicated that punitive remedies are not available in equity.85 Unlike equitable relief, civil penalties are, by their nature, punitive. They are intended not only to punish the wrongdoer but also to deter others from engaging in similar misconduct.86 Because the likelihood of being caught by a law enforcement agency is usually very low, basic deterrence theory indicates that penalties on those who are caught **must be severe**. As one economist put it: Since some who engage in deception will not be caught, the actual fine must be greater than the observed harm for those who are detected. If, for example, one offender of three is detected, then the fine must be equal to three times the harm caused by those who are punished.87 Penalties can and should exceed ill-gotten gains. In a 2012 action against Google, for example, the Commission estimated that the penalties obtained (based on an alleged order violation) constituted more than five times the company’s ill-gotten gains.88 Meanwhile, penalties that do not exceed (or even capture) illgotten gains are generally too lenient, in that they are unlikely to deter others from engaging in similar misconduct, especially when the likelihood of detection is low.89 In addition to deterring wrongful conduct more effectively than equitable relief, civil penalties can be calibrated to the severity of the misconduct. 90 The FTC Act already lays out factors for courts to consider when ordering civil penalties. However, the Commission has **never issued any interpretive rules or guidance**, and these factors leave courts with considerable discretion.91 In contrast, many agencies explicitly outline when self-reporting of unlawful conduct will be rewarded with a degree of leniency.92 Armed with civil penalty authority, the Commission can do the same.93 Notably, in addition to advancing deterrence, civil penalties can also further the goal of obtaining adequate equitable relief. When the Commission has a clear basis to seek civil penalties against a firm, it is **well positioned to instead seek fulsome redress** as part of a negotiated settlement, or to seek a combination of the two. As noted earlier, a unique feature of civil penalty actions is that the Commission must refer complaints for civil penalties to the Attorney General to litigate the matter in the name of the United States. This has been successful. For example, in 2017, the Department of Justice litigated to a final judgment a civil penalty action against Dish Network. The judgment included $280 million in civil penalties.94 This arrangement also allows the Department of Justice to evaluate the Commission’s investigation for violations of other civil and criminal statutes. It can also bring to bear the expertise of the appropriate federal prosecutor, such as the United States Attorney of a federal district, whose office may have unique insights into local markets where the conduct may have occurred. The arrangement can help preserve FTC resources while also preserving its independence. If the Attorney General does not take action within 45 days of the civil penalty action referral, the Commission may file the complaint in its own name.95 In addition, the Attorney General will generally not settle any Commission referral without the agency’s assent.96 If the Commission resurrects the use of the Penalty Offense Authority, the agency should f**ormalize an agreement** between the Federal Trade Commission and the Attorney General that would h**elp to mature and operationalize the existing referral process**, which has the risk of being undermined by turf battles unrelated to the underlying goals of the enforcement action.

#### Previous court rulings have given great weight to commission interpretations of section 5 –

**FTC Commission 21 –** official website

July 9 2021, “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act,” Federal Trade Commission, https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is **not limited** to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17 The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20 The Supreme Court has **repeatedly affirmed this view** of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has **given “deference”22 and “great weight**”23 to the Commission’s determination that a practice is unfair and should be condemned. Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement’s decision to tether Section 5 to the Sherman and Clayton Acts. For example, in Boise Cascade, the Ninth Circuit ruled that the evidence did not support the Commission’s factual finding that the defendants’ conduct had an adverse effect on prices.24 In Ethyl, the Second Circuit explicitly held that the FTC’s Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is “collusive, coercive, predatory, or exclusionary,” or has an “anticompetitive purpose,” or “cannot be supported by an independent legitimate reason.”25 In short, these decisions confirm that **Section 5 empowers the Commission** to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

### 2NC – AT: FTC Not Key

**FTC authority is the main factor in stopping protectionism**

**Nam 18** – Distinguished Practitioner, Center for East Asian Studies, Stanford University; former Visiting Professor of Law at UC Davis School of Law; former Visiting Fellow at Columbia Business School Center on Japanese Economy and Business; former antitrust attorney at Jones Day

Steven Nam, "Our Country, Right or Wrong: The FTC Act's Influence on National Silos in Antitrust Enforcement," University of Pennsylvania Journal of Business Law, Vol. 20, No. 1, 5-12-2018, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2944798

Conclusion

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a creeping loss of public confidence in open markets—coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, as illustrated in this Article—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent liberal peace156 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order’s intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

## Food security adv

### 2NC – concentration good

#### Vertical integration diversifies products while lowering costs.

Crespi et al, PhDs in Ag Econ, 12

(John M., Ag and Resource Econ from UC Davis, Prof of Ag Econ at Kansas State University, Tina L. Saitone, PhD, MS & postdoctoral scholar of Ag and Resource Economics at UC Davis, and Richard J. Sexton, Agricultural and Applied Economics from the University of Minnesota, Competition in U.S. Farm Product Markets: Do Long-Run Incentives Trump Short-Run Market Power? Applied Economic Perspectives and Policy 34(4): 669-695) BW

The developments discussed herein have been precipitated both by technological advancements in farm production and processing, and by key trends in consumer demands for food. We see neither of these factors abating but, rather, the likelihood is that they proceed apace or accelerate. Certainly the advancement of technology seems inexorable, and it occurs with a bias towards capital- and scale-intensive processes. On the processing side this translates into fewer and larger facilities, and facilities with little flexibility to efficiently handle fluctuating levels of throughput. On the production side it points to continued efficiency advantages for larger farmers, making them the desirable trading partners in a coordinated agricultural system. The trend among consumers to demand an ever-wider set of characteristics in the food they consume is in our view the product of both increasing incomes and declining food budget shares, and an increasing social awareness among consumers, neither of which is likely to abate over time. Consumers are the big winners in vertically coordinated modern agricultural markets; they have access to an incredibly wide range of products reflective of their increasingly diverse tastes, and at low cost. The less efficient producers and intermediaries are the big losers. The market is never kind to inefficient operators, but in the past small farms could hang on, in essence by undervaluing family labor, "consuming" the amenities of rural living, and selling into cash markets. In a vertically coordinated agriculture, such producers increasingly have trouble finding selling opportunities.

#### **Big Ag is more efficient and environmentally friendly than other alternatives**

Nordhaus and Blaustein-Rejto 5/18

(Ted, director of research at the Breakthrough Institute, Dan, director of Food and Agriculture at the Breakthrough Institute, “Big Agriculture is Best,” Foreign Policy, 4 April 2021, https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/)

Many sustainable agriculture advocates tout the recent growth of organic agriculture as proof that an alternative food system is possible. But growing market share vastly overstates how much food is actually produced organically. In reality, organic production accounts for little more than 1 percent of total U.S. agricultural land use. Meanwhile, only a bit more than 5 percent of food sales come from organic producers, mostly because organic sales are overwhelmingly concentrated in high-value sectors of the market, namely produce and dairy, and fetch a premium from well-heeled consumers.

Moreover, organic farms, large and small, don’t actually outperform large conventional farms by many important environmental measures. Scale, technology, and productivity make good environmental sense and economic sense. Because organic farming requires more land for every calorie or pound produced, a large-scale shift to organic farming would entail converting more forest and other land to farming, resulting in greater habitat loss and more greenhouse gas emissions. And while organic greater nitrogen pollution because manure is a highly ineﬃcient way to deliver nutrients to crops.

Another beneﬁt of large-scale U.S. farms is that because they are so eﬃcient, economically and environmentally, they are also able to produce vastly more food than Americans can consume, making the country the world’s largest agricultural exporter as well.

That beneﬁts the U.S. economy, of course, but it also comes with an environmental beneﬁt for the world. In the contemporary environmental imagination, highly productive, globally traded agriculture is a bad thing— poisoning the land at home and undermining food sovereignty abroad. But in reality, a pound of grain or beef exported from the United States almost always displaces a pound that would have been produced with more land and greenhouse gas emissions somewhere else.

## Sustainable ag adv

### 2NC – big ag good for enviro

#### Organic farming is worse for climate change

Temple 19

(James, Senior editor for technology at MIT Technology Review, “Sorry—organic farming is actually worse for climate change,” 22 October 2019, MIT Technology Review, https://www.technologyreview.com/2019/10/22/132497/sorryorganic-farming-is-actually-worse-for-climate-change/)

Organic practices can reduce climate pollution produced directly from farming – which would be fantastic if they didn’t also require more land to produce the same amount of food. Clearing additional grasslands or forests to grow enough food to make up for that difference would release far more greenhouse gas than the practices initially reduce, a new study in Nature Communications finds. Other recent research has also concluded that organic farming produces more climate pollution than conventional practices when the additional land required is taken into account. In the new paper, researchers at the UK’s Cranfield University took a broad look at the question by analyzing what would happen if all of England and Wales shifted entirely to these practices. The good news is it would cut the direct greenhouse-gas emissions from livestock by 5% and from growing crops by 20% per unit of production. The bad news: it would slash yields by around 40%, forcing hungry Britons to import more food from overseas. If half the land used to meet that spike in demand was converted from grasslands, which store carbon in plant tissues, roots, and soil, it would boost overall greenhouse-gas emissions by 21%. Among other things, organic farming avoids the use of synthetic fertilizers, pesticides, and genetically modified organisms, all of which can boost the amount of crops produced per acre. Instead, organic farmers rely on things like animal manure and compost, and practices such as crop rotation, which involves growing different plants throughout the year to improve soil health. The study notes that these biological inputs produce fewer emissions than nitrogen-based synthetic fertilizers, notably including the highly potent greenhouse gas nitrous oxide. Separately, the use of manure and longer crop rotations can increase the amount of carbon stored in soil. The emissions impact of the meat, milk, and eggs produced from organically raised livestock is more complicated. On the one hand, emissions can increase because animals don’t plump up as fast without hormones, supplements, and conventional feed. That, for instance, grants cattle longer lives in which to belch out methane, another especially powerful greenhouse gas. On the other, allowing animals to spend more of their lives grazing on open grasslands may stimulate additional plant growth that captures more carbon dioxide, while cutting emissions associated with standard feeds. But the bigger problem, for both crops and livestock, is that these practices end up requiring a lot more land to produce the same amount of food. After all, the whole point of synthetic fertilizer is it boosts crop yields, by providing a “fixed” form of nitrogen that promotes plant growth. The legumes that organic farmers have to rotate in to help convert nitrogen into more reactive compounds in the soil end up cutting deeply into other food crops they could otherwise grow, the study notes. Specifically, the switch to 100% organic practices would require 1.5 times more land to make up for the declines, which would add up to nearly five times more land overseas than England and Wales currently rely on for food. That difference is amplified by the fact that the UK’s agricultural system produces particularly high yields compared with other parts of the world. The study found larger effects than some earlier papers. Notably, a 2012 meta-analysis in Nature determined that organic farming yields are between 5% and 34% lower than those from conventional agriculture, depending on the specific crops and practices. In addition, a 2017 Nature Communications study estimated that switching to organic farming would increase land use by only 16% to 33%. By evaluating the entire farming system of England and Wales, the new study helps to address some of the criticisms of earlier organic emissions assessments, which were often limited to specific farms or crops, says Dan Blaustein-Rejto, associate director of food and agriculture at the Breakthrough Institute, a think tank that promotes technology solutions to environmental challenges. “Looking at the farm scale doesn’t really tell you what a large-scale transition to organic would look like,” he says. “Only a study like this, that takes a system-wide perspective, really does.” The world does need to find ways to cut the emissions and environmental pollution from synthetic fertilizers. But the trick is to clean up these practices in ways that don’t require converting more land to agriculture, or forcing large parts of the world to go hungry. Among other paths, a number of researchers and startups are trying to develop novel agricultural inputs that could cut emissions without reducing yields, crops that take up more of the nitrogen in soil, and various meat and milk alternatives.

#### Large farms are a stronger internal link to all their impacts – they have the highest incentive to innovate and it solves all their scenarios

Lusk 16 – Jayson Lusk, a professor of agricultural economics at Oklahoma State University, is the author of “Unnaturally Delicious: How Science and Technology are Serving Up Superfoods to Save the World.”

Jayson Lusk, September 23 2016, “Why Industrial Farms Are Good for the Environment,” The New York Times, https://www.nytimes.com/2016/09/25/opinion/sunday/why-industrial-farms-are-good-for-the-environment.html

Stillwater, Okla. — There is much to like about small, local farms and their influence on what we eat. But if we are to sustainably deal with problems presented by population growth and climate change, we need to look to the farmers who grow a majority of the country’s food and fiber.

Large farmers — who are responsible for 80 percent of the food sales in the United States, though they make up fewer than 8 percent of all farms, according to 2012 data from the Department of Agriculture — are among the most progressive, technologically savvy growers on the planet. Their technology has helped make them far gentler on the environment than at any time in history. And a new wave of innovation makes them more sustainable still.

A vast majority of the farms are family-owned. Very few, about 3 percent, are run by nonfamily corporations. Large farm owners ([about 159,000](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_003_003.pdf)) number fewer than the residents of a medium-size city like Springfield, Mo. Their wares, from milk, lettuce and beef to soy, are unlikely to be highlighted on the menus of farm-to-table restaurants, but they fill the shelves at your local grocery store.

There are legitimate fears about soil erosion, manure lagoons, animal welfare and nitrogen runoff at large farms — but it’s not just environmental groups that worry. Farmers are also concerned about fertilizer use and soil runoff.

That’s one reason they’re turning to high-tech solutions like precision agriculture. Using location-specific information about soil nutrients, moisture and productivity

of the previous year, new tools, known as “variable rate applicators,” can put fertilizer only on those areas of the field that need it (which may reduce nitrogen runoff into waterways).

GPS signals drive many of today’s tractors, and new planters are allowing farmers to distribute seed varieties to diverse spots of a field to produce more food from each unit of land. They also modulate the amount and type of seed on each part of a field — in some places, leaving none at all.

Many food shoppers have difficulty comprehending the scale and complexity facing modern farmers, especially those who compete in a global marketplace. For example, the median lettuce field is managed by a farmer who has 1,373 football fields of that plant to oversee.

For tomatoes, the figure is 620 football fields; for wheat, 688 football fields; for corn, 453 football fields.

How are farmers able to manage growing crops on this daunting scale? Decades ago, they dreamed about tools to make their jobs easier, more efficient and better for the land: soil sensors to measure water content, drones, satellite images, alternative management techniques like low- and no-till farming, efficient irrigation and mechanical harvesters.

Today, that technology is a regular part of operations at large farms. Farmers watch the evolution of crop prices and track thunderstorms on their smartphones. They use livestock waste to create electricity using anaerobic digesters, which convert manure to methane. Drones monitor crop yields, insect infestations and the location and health of cattle. Innovators are moving high-value crops indoors to better control water use and pests.

Before “factory farming” became a pejorative, agricultural scholars of the mid-20th century were calling for farmers to do just that — become more factorylike and businesslike. From that time, farm sizes have risen significantly. It is precisely this large size that is often criticized today in the belief that large farms put profit ahead of soil and animal health.

But increased size has advantages, especially better opportunities to invest in new technologies and to benefit from economies of scale. Buying a $400,000 combine that gives farmers detailed information on the variations in crop yield in different parts of the field would never pay on just five acres of land; at 5,000 acres, it is a different story.

These technologies reduce the use of water and fertilizer and harm to the environment. Modern seed varieties, some of which were brought about by biotechnology, have allowed farmers to convert to low- and no-till cropping systems, and can encourage the adoption of nitrogen-fixing cover crops such as clover or alfalfa to promote soil health.

Herbicide-resistant crops let farmers control weeds without plowing, and the same technology allows growers to kill off cover crops if they interfere with the planting of cash crops. The herbicide-resistant crops have some downsides: They can lead to farmers’ using more herbicide (though the type of herbicide is important, and the new crops have often led to the use of safer, less toxic ones).

But in most cases, it’s a trade-off worth making, because they enable no-till farming methods, which help prevent soil erosion.

These practices are one reason [soil erosion has declined](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/nra/nri/?cid=stelprdb1041887) more than 40 percent since the 1980s.

Improvements in agricultural technologies and production practices have significantly lowered the use of energy and water, and greenhouse-gas emissions of food production per unit of output over time. United States crop production now is twice what it was in 1970.

That would not be a good change if more land, water, pesticides and labor were being used. But that is not what happened: Agriculture is using nearly half the labor and 16 percent less land than it did in 1970.

Instead, farmers increased production through innovation. Wheat breeders, for example, using traditional techniques assisted by the latest genetic tools and information, have created varieties that resist disease without numerous applications of insecticides and fungicides. Nearly all corn and soybean farmers practice crop rotation, giving soil a chance to recover. Research is moving beyond simple measures of nitrogen and phosphorus content to look at the microbes in the soil.

New industrywide initiatives are focused on quantifying and measuring soil health. The goal is to provide measurements of factors affecting the long-term value of the soil and to identify which practices — organic, conventional or otherwise — will ensure that farmers can responsibly produce plenty of food for our grandchildren.

Over the past century, there has been a notable shift in Americans’ connection with food production. In 1900, about 40 percent of the United States population was on the farm, and 60 percent lived in rural areas. Today the respective figures are only about 1 percent and 20 percent. From the 1940s to the 1980s, the number of farms fell by more than half, and average farm size tripled. A result is that romantic, pastoral images of farming from yesteryear are far from representing reality.

Big problems face farmers and consumers. Climate change, food waste, growing world population, drought and water quality are just a few.

There are no easy answers, but innovation, entrepreneurship and technology have important roles to play. So, too, do the real-life large farmers who grow the bulk of our food.

#### US big ag is the best option – otherwise more environmentally damaging production systems fill in.

Nordhaus and Blaustein-Rejto 21

(Ted, leading global thinker on the environment and development, founder of The Breakthrough Institute, and Dan, MPP from the Goldman School of Public Policy, Food & Ag Program Director at The Breakthrough Institute, https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/, 4-18) BW

Another benefit of large-scale U.S. farms is that because they are so efficient, economically and environmentally, they are also able to produce vastly more food than Americans can consume, making the country the world’s largest agricultural exporter as well. That benefits the U.S. economy, of course, but it also comes with an environmental benefit for the world. In the contemporary environmental imagination, highly productive, globally traded agriculture is a bad thing—poisoning the land at home and undermining food sovereignty abroad. But in reality, a pound of grain or beef exported from the United States almost always displaces a pound that would have been produced with more land and greenhouse gas emissions somewhere else.

## Antitrust DA

### Kicking FTC DA

#### Perception—companies do not expect immediate statutory/legal changes—enforcement only affects a small slice of deals

Zero 21 – Senior Reporter for Mergers & Acquisitions

Brandon Zero, "Antitrust Deal Scrutiny More Storm Than Fury," Mergers & Acquisitions, 8-4-2021, <https://www.themiddlemarket.com/news-analysis/threat-of-antitrust-deal-scrutiny-seen-more-storm-than-fury>

What’s the forecast for regulatory scrutiny of deals so far this year? There may be more cloud cover than storms on the M&A horizon. New antitrust scrutiny and a longer review time are potential looming threats, but they lack the lightning needed to actually block deals.

Let’s look at these twin threats and the risks they pose to dealmaking. President Biden’s executive order has spurred the Department of Justice and Federal Trade Commission to increase scrutiny of deals in a move that, “if implemented by regulators and upheld by the courts…could lead to the most robust antitrust enforcement in decades,” writes Debevoise & Plimpton lawyers in a recent note. But that’s a big ‘if.’ The attorneys write that actually intensifying competition review standards would require acts of Congress and/or litigation. Both regulatory agencies have mixed records in courts. And it’s unclear if Democrats will defy the political gravity that has historically weighed down incumbent presidents’ party performance in midterm elections to win a mandate to rewrite antitrust laws.

What about the other lingering storm cloud on the periphery? A frenetic M&A pace has overwhelmed oversight body the Federal Trade Commission to the extent that it’s warned companies the expiration of the standard 30-day waiting period is no longer an implicit approval of a deal, Bloomberg reports. That creates a threat of enforcement even after deals have closed.

Amidst the merger deluge, a few high-profile deals have been challenged, but context is king: the handful of challenged deals represent a small slice of the year’s record value of announced transactions.

For starters, some of the highest profile deals challenged by the new administration’s antitrust regime represent merger dynamics that have always drawn intense scrutiny. Aon Plc’s proposed $30 billion takeover of Willis Towers Watson (Nasdaq: WLTW), announced only five years after Willis Group’s $18 billion merger with Towers Watson, was challenged by the DOJ as taking the industry from three competitors to two. So called “3 to 2” mergers have always been a bright line for regulators. And the insurance investment bankers I’ve spoken to for a decade about industry consolidation have long steered clear of attempts to marry those players or Marsh & McLennan (NYSE: MMC) out of fear of this precise outcome.

There are wild cards that could skew my forecast. It’s true that zealous enforcement of vertical merger review guidelines has created unexpected scrutiny of some sectors, and that agencies’ evolving theories of harm could disproportionately put tech deals at risk. But on the whole, the latest policy announcements may well be more thunder than lightning**.**

#### No lasting change even if administrative stuff implemented

Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust

Institute, Scalia Law School at George Mason University, former FTC Commissioner, ‘21

(Joshua D., “Lina Khan Is Icarus at the FTC,” July 13, WSJ)

All that has been overshadowed by an executive order aimed at competition and loaded with goodies, good intentions, new regulatory regimes and a blissful ignorance of unintended consequences (“Joe Biden, 20th Century Trustbuster,” Review & Outlook, July 10). Some of its pronouncements, like occupational-licensing reform, are to the good. But the FTC’s competition authority is about to become a free-for-all for the Biden administration to reshape the economy. One wonders how the Republicans going along with all this to “get Big Tech” are feeling right now; I’m guessing “played.” If not, they’ll catch up soon enough.

Imagining the FTC as Icarus flying without the constraints of history, economics or law is a fun thought experiment, but we’ve been here before. Ms. Khan’s initial steps are indicative of a regulatory overreach that will end with the FTC’s wings melting in the courts. This path does not lead to incremental, much less radical, change. I predict early headlines that appease a rabid base, frustration for FTC staff and a new, volatile partisanship at the agency, but actual results that leave unsatisfied the progressives aching for radical change.

#### Squo victories do not touch large firms—bops their link turn not our link

Nicole Goodkind, Fortune, Lina Khan is the face of the populist antitrust moment. But how much power does the FTC chair wield? June 30, 2021, https://fortune.com/2021/06/30/ftc-chair-lina-khan-populist-antitrust-movement-what-can-she-do-federal-trade-commission/

But the question of whether Khan will be able to rouse an agency that’s been in a state of semiconsciousness for nearly half a century remains.

Detractors argue that Khan is little more than a figurehead, meant to placate progressives and antitrust populists while the FTC remains largely ineffective. This week, a federal judge struck down an FTC complaint against Facebook, brought by Khan’s predecessor, that would have forced the company to divest from Instagram and WhatsApp. Khan and the FTC now have until July 29 to file a new complaint.

Amazon also tried to make the case on Wednesday that Khan should recuse herself from any FTC enforcement decisions involving the company—including the FTC review of its $8.45 billion acquisition of movie studio MGM—because of her previous statements that the company should be broken up.

There’s a dichotomy between popular groupthink around monopolies and what’s actually going on in the courts, said Aurelien Portuese, director of antitrust and innovation policy at the Information Technology and Innovation Foundation, a D.C. think tank that is partially funded by Big Tech. “There are a lot of proposals to depart from these principles of how you define the market and market demand. I think these attempts may very well be crushed many times in courts,” he said. Khan might be effective in precautionary rulemaking, he said, but that would largely impact smaller tech upstarts, not the Big Four.

Those interruptions, he argued, would stifle innovation and American entrepreneurship, giving China an upper hand (a similar argument was made when Microsoft faced antitrust charges in 1998).

Populist antitrust sentiment, said Portuese, is a trend that will soon fade: “I don’t see radical changes in the long run, because of the inevitable judicial review that entrepreneurs are subject to.”

#### Biden’s antitrust hullabaloo is all hype

Posner 21– Professor, UChicago Law.

Eric Posner, 7-21-2021, "The Antitrust War’s Opening Salvo," Project Syndicate, https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07

CHICAGO – US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them.

Nonetheless, it would be a mistake to dismiss the order’s tentative language as mere rhetoric. Antitrust is the main body of law governing market competition in the US, and it has been the object of sustained attack by business interests and conservative intellectuals for more than 50 years. Biden is the first president since Harry Truman to take a strong public anti-monopoly stand, and he has backed it up by appointing ardent anti-monopoly advocates to his government.

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

Still, the Biden administration’s antitrust agenda will face significant judicial obstacles. Over the past 40 years, an increasingly business-friendly Supreme Court has gutted antitrust law. In ruling after ruling, it has weakened the standards used to evaluate anti-competitive behavior; raised the burden of bringing an antitrust case; limited the types of antitrust victims who are allowed to bring cases; allowed businesses to use arbitration clauses to protect themselves from class action lawsuits; and much else.

On top of that, the Supreme Court has disseminated throughout the judiciary a generalized suspicion of antitrust claims. Judges at all levels have absorbed an academic skepticism about antitrust law that is now 30 years out of date. Accordingly, business plaintiffs are usually seen as sore losers who have resorted to the law because they were beaten in the marketplace. Consumer cases are attributed to the machinations of trial lawyers. The pretexts businesses offer for their anti-competitive practices are swallowed whole.

So, while Biden is right that “federal government inaction” is partly to blame for the decline in antitrust enforcement, there is little that his (or any) administration can do unless it has the courts on its side. This probably accounts for the order’s careful language. Agencies like the DOJ and the FTC would surely like to enforce antitrust laws more vigorously than in the past, but they are not going to commit resources to bringing cases that will fail in court.

#### FTC is fundamentally limited – need congress for any meaningful change and biggest companies are able to avoid any penalties

Chakravorti, dean of global business at Tufts University’s Fletcher School of Law and Diplomacy, ‘21

(Bhaskar, “Lina Khan Has Her Own Antitrust Paradox,” July 7, Foreign Policy)

But the FTC’s levers are limited.

Although Khan can reframe the fundamentals of the antitrust complaint, without adequate regulatory infrastructure—something only Congress can provide—there are likely to be unsurmountable obstacles as the chess game between the law and Facebook unfolds. No matter how brilliantly Khan’s FTC rewrites the case against Facebook, the agency’s powers, budget, and resources are still limited. Ad hoc adjustments to the FTC’s budget, as envisioned in one of the bills in Congress, and stopgap measures to expand its powers do not get around the fundamental fact that the FTC was not set up to pursue the breadth of novel issues and policy trade-offs that digital industries create.

Antitrust in digital industries cannot be considered in isolation. It is also quite different from antitrust in other industries because there are issues unique to the industry. A holistic view of digital antitrust means tying antitrust concerns with numerous broader questions, such as securing users’ data rights, the responsibilities platforms ought to have for the content they host, and criteria that helps demarcate the benefits of network effects from the abuses of network power. The FTC is too much of a general purpose entity to dive into these complexities. As former Federal Communications Commission chair Tom Wheeler observed: “The vast scope of the FTC’s present responsibilities—as diverse as funeral director practices, robocalls, and labeling hockey pucks—means that the oversight of digital platform regulation must compete with the agency’s existing diverse responsibilities and limited resources.”

Meanwhile, Facebook is shoring up its defenses. Even as the FTC gets its act together and its complaint is reconsidered, Facebook is busy integrating the backend infrastructure that supports its popular apps: Facebook Messenger, Instagram, and WhatsApp. This is likely to make it impossible to tear the apps apart. In addition to the integration’s technical aspects, which offer the company many benefits, Facebook is making the case that consumers benefit from it as well. It is testing a unified “accounts center” that shows the user all the apps the user has open; Facebook Messenger and Instagram users can send messages and get access to features across apps as well. Most significantly, this could also enable end-to-end encryption across all the apps, which would be an enormous boost to Facebook’s argument that its changes are meant to enhance users’ privacy.

It is conceivable that even if the FTC’s rewritten complaint is accepted, an antitrust case would take a long time to prosecute. In the meantime, Facebook will have already accomplished a fait accompli, making it hard to push further with the current, narrow complaint’s core. In fact, Khan’s predecessor, Joseph Simons, acknowledged that Facebook’s plan to integrate its apps would pose challenges to any move to break up the company.

### 1NR – Innovation DA

#### Timeframe—Immediate implementation is bad—it undermines the economic recovery—turns case

Jan Rybnicek is Counsel in the antitrust practice of Freshfields Bruckhaus Deringer and a Senior Fellow at the Global Antitrust Institute at Antonin Scalia Law School at George Mason University, February 12, 2021, Op-ed: Recent antitrust proposals could ‘throw sand in the gears’ of economic recovery by stalling M&A, https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html

Last year, some in Congress called for a merger moratorium banning all M&A during the pandemic. Then, in a surprise announcement, the FTC — over the objection of two commissioners — said it would no longer quickly approve the vast majority of transactions notified to the government that cannot plausibly reduce competition. Most recently, Senator Amy Klobuchar, D-Minn., introduced antitrust reform legislation that would give the government even greater power to block M&A it deems problematic.

While these proposals are well-intentioned, they threaten to throw sand in the gears of the economy and to do far more harm than good. Adding friction to M&A activity has the potential to stall capital markets, reduce innovation and investment, and frustrate economic growth. And it does so at precisely the wrong time — when the nation is attempting an economic recovery during an ongoing global pandemic that has upended how we work.

Antitrust has seized lawmakers’ interest like no other time in modern memory. Senator Klobuchar’s legislation is the most ambitious attempt to reform the antitrust laws in nearly half a century. A key focus of the bill is to make it even easier for the federal antitrust authorities — the Federal Trade Commission (FTC) and the Department of Justice (DOJ) — to intervene in private parties’ dealings by blocking M&A that they decide will harm competition.

Under existing law, the antitrust agencies must convince a judge that a deal is likely to substantially lessen competition in order to obtain an injunction preventing the transaction. The agencies bear the burden in proving their case. That typically has not been too tall an order. While reviewing a government challenge to a small grocery store merger and lamenting the internal contradictions in antitrust law, Supreme Court Justice Potter Stewart once observed that the only thing consistent about merger litigation is that the government always wins.

Over the last several decades, antitrust has become a more principled body of law through the incorporation of economics and a focus on promoting consumer welfare, but one thing has not changed: the government still nearly always wins.

Reform advocates would have you believe that the FTC and DOJ show up in court on a wing and a prayer and rarely are able to convert the power and credibility of the federal government into merger litigation victories. But reality is far different. The government has no problem blocking mergers it believes are problematic. Over the last 20 years the DOJ and FTC have prevailed in nearly 85% of merger challenges. That is a record any litigator would envy. And the government’s win-rate only improves when looking at more recent cases. In fact, after the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government. This even includes successful challenges against deals involving the acquisition of a nascent firm that does not compete against the acquirer today but, in the government’s view, could in the future, such as the DOJ’s recent success in blocking Visa’s purchase of fintech upstart Plaid.

Senator Klobuchar’s legislation would put the thumb on the scale even more in favor of the government. It would lower the legal standard and allow the government to stop any deal that raises even an “appreciable risk of materially lessening competition.” It also would create presumptions against large deals that do not even involve competitors. Most significantly, the legislation flips the traditional burdens of proof on their head and requires defendants to prove that their deal should be allowed to close. In light of the disadvantages companies already face when confronted with government opposition, such changes are unwarranted, unless you believe the government is infallible and should win 100% of its cases.

Giving the government greater discretion to intervene in deals would add unnecessary friction to the M&A market and reduce the types of investments that have fueled U.S. economic growth, including in the many startups whose founders and investors develop new and innovative products in part due to the prospect of exit through M&A.

#### Antitrust liability is uniquely chilling to firms—treble damages increase the potential cost of all conduct and undermines industry dealmaking

Delrahim, JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, ‘20

(Makan, “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco,” September 18, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>)

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is “exclusionary” or “predatory” in nature. I will focus on so-called “exclusionary” conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term exclusionary conduct in antitrust law is potentially misleading because there is a difference under the Sherman Act between “lawful” and “unlawful” conduct that results in exclusion of a competitive alternative. In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn “exclusionary” conduct that is driven by competition on the merits such as innovation. Most obviously, legitimate competition on the merits can be “exclusionary” in the sense that consumers choose a superior product or service. That conduct does not violate Section 2. By comparison, conduct that “excludes” a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.

When courts police the line between lawful and unlawful “exclusionary” conduct, a few themes emerge.

First, courts have recognized that not every type of conduct that may enhance a business’s market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position. The Supreme Court held that the claim did not satisfy Section 2 as a matter of law. That is because the claim would condemn a monopolist’s refusal to share its resources and effectively would create an antitrust duty to help a competitor. Such a duty, the Court explained, is in “tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.” The Court applied a legal rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of “false positives” or condemnations of lawful pro-competitive conduct. As the Court has explained, “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” Judge Robert Bork, in his famous Antitrust Paradox, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that “[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.”

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on “FRAND” terms after committing to do so constitutes a form of unlawful exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the “exclusion” of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey. By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the “winning” technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.

This form of lawful and pro-competitive exclusionary conduct should not be condemned as unlawful under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on “FRAND” terms and engaged in so-called “hold-up.” That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are “FRAND.” I will explain why.

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on “fair,” “reasonable,” and “non-discriminatory” terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down “FRAND” by its component terms makes clear why this is so.

First, the Sherman Act does not police “fair” prices or competition; it protects the competitive process. Judge Easterbrook once asked, “Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When economic pressure must give way to fair conduct . . . rivals will trim their sails”; introducing conceptions of “fairness” into the Sherman Act “is to turn antitrust law on its head.”

Second, having undertaken a contractual duty to charge “nondiscriminatory” rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination; indeed, in some circumstances price discrimination may be pro-competitive.

Third, the Sherman Act does not authorize courts to determine “reasonable” licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would “require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in Trinko, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in Novell v. Microsoft, following Trinko, a monopolist’s refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a “presumably profitable course of dealing between the monopolist and the rival” and that termination is “irrational but for its anticompetitive effect.”

I would note that then-Judge Gorsuch’s standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the Trinko case. The brief stated:

Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival, the inquiry into whether conduct is “exclusionary” or “predatory” requires a sharper focus. In that context, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms. An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme. It logically follows that there is no antitrust liability for proposing to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly “deceives” an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder’s profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of “FRAND” and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of “FRAND.” Because both patent-holders and licensees participating in a standard-setting process recognize that the proper “FRAND” rate will be determined after the fact—in court, if necessary—there is therefore no meaningful ex ante “deception” that should give rise to an antitrust claim.

To be sure, having one’s technology incorporated into a standard, in some circumstances, may increase a patent-holder’s market power. The same could be said, of course, about a monopolist’s refusal to deal with a rival who might gain market share if it had access to the monopolist’s inputs. Even if this occurs as a result of a patent holder’s so-called “deception” about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would “require[] the court to assume the day-to-day controls characteristic of a regulatory agency.”

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### Plan is one of the first major pro-plaintiff changes in decades—that is magnified and affects every future case

Pale 04– R. Hewitt Pale, Former Assistant Attorney General, Antitrust Division @ US DOJ

(R. Hewitt Pale, “ANTITRUST LAW IN THE U.S. SUPREME COURT, Presented at British Institute of International and Comparative Law Conference, May 11, 2004, <https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court>)

In considering my topic for a forum on comparative law, it occurred to me that it might be useful to focus on the special role of the United States Supreme Court in making American antitrust law. The topic is especially timely because our Supreme Court granted review in four antitrust cases this term, each of which is the object of intense study by U.S. antitrust practitioners. The Supreme Court, unlike the intermediate appellate courts of the federal system, has discretion to choose the cases it will hear, and its choices have a profound effect on the development of antitrust law.

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this "common law" approach may lack the certainty provided by a more detailed statute, but it "permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law." (1) Our Supreme Court has described the antitrust laws as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions."(2)

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate.(3) Observing that the standards of the antitrust law must be developed by the courts deciding each case "by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,"(4) the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only "unreasonable" restraints of trade. In another decision that year, United States v. American Tobacco Co.,(5) involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason's fundamental grounding in competition concerns. This standard proscribed "contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."(6)

In 1918, Chicago Board of Trade v. United States(7) made clear that the Rule of Reason encompasses all the relevant circumstances. To determine whether a restraint is illegal, a court must "ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable" and the "history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained."(8)

Around the same time, the Court was also developing the doctrine of per se illegality, which provides bright-line guidance as to certain clearly anticompetitive practices. In United States v. Trenton Potteries Co., (9) the Court held that a price fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."(10) In 1940, in another landmark case brought by the United States in the oil industry, United States v. Socony-Vacuum Oil Co.,(11) the Supreme Court repeated that price-fixing agreements are illegal per se and that "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."(12) The per se rule underpins the Antitrust Division's criminal prosecution of collusion among competitors.

The Supreme Court's pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the fundamental principle — consistent with the modern approach worldwide — that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In Brown Shoe, Pabst, and Von's Grocery, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration.(13) In Schwinn,(14) it abandoned its formerly cautious approach to vertical practices,(15) holding exclusive dealer territories unlawful per se. Similarly, in Albrecht,(16) it held vertical maximum price fixing illegal per se.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In GTE Sylvania,(17) the Court overruled Schwinn, and in State Oil v. Khan,(18) it overruled Albrecht. The Court adopted a significantly different approach to mergers in General Dynamics,(19) refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in Matsushita,(20) the Court poured cold water on theories of liability that make little economic sense, and it expressed skepticism of liability theories based on price cutting, which is often "the very essence of competition."(21)

Of particular note is the Court's decision in Brunswick,(22) in which it rejected the theory that a private plaintiff could obtain treble damages as compensation for continued competition resulting from a merger that prevented a firm from leaving the market. This may be one of the Supreme Court's lesser-known decisions outside the United States, but it is of fundamental significance. Private treble damage litigation is an important tool in the U.S. antitrust enforcement scheme, and the Brunswick decision mandated that it, like government enforcement, be firmly anchored to pro-competition, pro-consumer principles. The Court emphasized that private damages must be based on conduct causing injury of the type that the antitrust laws were intended to prevent. Plaintiffs may not prevail unless they are harmed by anticompetitive consequences of a defendant's conduct, for the antitrust laws were enacted to protect competition, not competitors.

In the last quarter of the twentieth century, the Supreme Court began hearing fewer antitrust cases. In part this reflects a general trend in the Court's practices. In its 2002 term, it issued only 81 written opinions, having issued only 71 the year before.(23) In contrast, thirty years earlier, the Court issued 164 written opinions in its 1972 term and 151 in 1971, including full opinions in ten antitrust cases during those two terms.(24) A litigant's chance of obtaining review today is quite low. In the last complete term, 2002, the Supreme Court considered 8,340 petitions for review by writ of certiorari, but granted full review to only 91 cases, or 1.1%.(25) Even if the unpaid, in forma pauperis, petitions are left out of the calculation, the odds improve only to 4.5%.(26)

A change in the statute governing appeals in civil antitrust cases brought by the government has also had the effect of limiting the number of Supreme Court opinions in antitrust cases in recent years. Until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."(27) Even then, the Court retains discretion to remand the case to the court of appeals. District courts have certified only three such cases for direct appeal.(28) One of these was Microsoft, but the Supreme Court declined to hear the case and remanded it to the court of appeals.

Because there are so few Supreme Court antitrust decisions each year — and because each one sets precedent that will govern the application of the antitrust laws in the lower courts for decades to come — each decision is an event of major significance for antitrust enforcers and the antitrust bar. Every phrase is studied with care, and every future case is evaluated in terms of the Court's reasoning process.

#### AND, even if the substantive change is small—it signals that courts everywhere should favor plaintiffs

Tracy 21– Ryan Tracy and Brent Kendall, tech and legal reporters, respectively, in WSJ’s Washington Bureau

(Ryan Tracy and Brent Kendall, 3-12-2021, "Antitrust Law: What Is It and Why Does Congress Want to Change It? ," WSJ, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>)

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

#### Any change has ripple effects throughout antitrust doctrine

Pearlstein 20 – former business and economics columnist for The Washington Post and the Robinson professor of public affairs at George Mason University

Steven Pearlstein, "Facebook and Google cases are our last chance to save the economy from monopolization," The Washington Post, 12-18-2020, <https://www.washingtonpost.com/business/2020/12/18/google-facebook-antitrust-lawsuit/>

Keeping a close eye on both the antitrust cases and the legislative debate will be the members of the Supreme Court, including six conservative justices who have a well-documented hostility to government regulation of business. The century-old Sherman and Clayton acts are remarkably spare and concise statutes, which has meant that most antitrust law has been judge-made, based on the precedents laid down in individual cases. Any antitrust reform that might come out of Congress, however, is certain to be much more detailed and prescriptive than those earlier laws. Not only would such legislation erode the power and discretion of the court, but it would also likely overturn a number of recent precedents that have made it much more difficult for regulators to limit the size and business practices of dominant firms.

All that could well be playing out in Congress just as the court considers the inevitable appeals in the cases of U.S. v. Google and FTC v. Facebook. And it would hardly be unprecedented if some members of the Supreme Court were to consider the political and legislative consequences as they decide the fate of two companies with whom most Americans interact on a daily basis.

A similar dilemma faced Judge Learned Hand of the U.S. Court of Appeals in 1945 as he considered U.S. v. Alcoa. After the longest federal trial in history — two years — a district court judge had ruled against the government’s request to break up Alcoa, declaring that the company had legally obtained its 90 percent share of the aluminum market. Hand himself was an antitrust skeptic. But in a memo to his fellow appeals court judges, Hand recognized that the public would not accept a highly technical ruling that any such monopoly was benign.

“If we hold that [Alcoa] is not a monopoly, deliberately planned and maintained,” Hand wrote, “everyone who does not get entangled in the legal niceties … will quite rightly, I think, write us down as asses.”

In the end, the appeals court ruled that Alcoa had illegally monopolized the market for aluminum, and Hand’s opinion became one of the most influential, and controversial, in the history of antitrust. The cases against Google and Facebook will be no less consequential or contentious.

#### Plan’s change spills over to other sectors – A] Substantive legal focus—new substantive changes signal a trend throughout the economy

Crowell & Moring 20 – Contributions from: Shawn R. Johnson, partner and co-chair of Crowell & Moring's Antitrust & Competition Group; Wm. Randolph Smith, partner in (and former chair of) the firm's Antitrust & Competition Group; Jeane A. Thomas, partner in Crowell & Moring's Antitrust & Competition and Privacy & Cybersecurity Groups, and co-chair of the firm's E-Discovery & Information Management Practice; Andrew I. Gavil, senior of counsel in Crowell & Moring’s Washington, D.C., office and is a member of the firm’s Antitrust & Competition Group; Gail D. Zirkelbach, partner in Crowell & Moring's Government Contracts and Investigations groups; Alexis J. Gilman, partner in Crowell & Moring’s Antitrust & Competition Group; Jason C. Murray, co-chair of the firm's Antitrust & Competition Group; Lisa Kimmel, senior counsel in Crowell & Moring's Antitrust & Competition Group; Thomas De Meese, co-managing partner of the firm's Brussels office.

Crowell & Moring, "Antitrust in the Digital Age: How Antitrust Investigations into Big Tech Impact Companies in Every Industry," Regulatory Forecast 2020, 2-26-2020, <https://www.crowell.com/files/Regulatory-Forecast-2020-Antitrust-Cover-Story-Crowell-Moring.pdf>

“The antitrust world hasn’t seen an issue this large in decades. Unlike every major antitrust development of the past, a look into Big Tech involves companies that may not charge customers anything and whose assets involve private consumer data that may not be able to be transferred as part of a remedy,” says Shawn Johnson, a partner at Crowell & Moring and co-chair of its Antitrust Group in Washington, D.C. “And this is not just about Big Tech. In the end, all companies are becoming digital. From how we view the role of data privacy to so-called killer acquisitions, these investigations are going to impact a wide range of businesses for years to come.”

While an imminent breakup of any Big Tech firm is unlikely, the increased attention to antitrust issues has implications far beyond the handful of companies that dominate the news. These new developments could affect mergers, acquisitions, and business practices in virtually every sector. That’s because competitive advantage today is often reliant upon access to key data, to online platforms, and to cutting-edge technologies—and antitrust legal and regulatory action sets the rules for such access.

“This is a megatrend,” says Wm. Randolph Smith, a partner at Crowell & Moring in Washington, D.C., former chair of the firm’s Antitrust Group, and a former executive assistant to the chairman of the FTC. “A confluence of events, including political philosophy, economic impact, and missteps on issues like privacy, is creating a shift in antitrust focus and thinking that could reverberate into other sectors.”

So Big. So What?

Big Tech platforms stand accused of a multitude of sins: invasion of privacy; lax data security; unfair treatment of labor, content, or merchandise suppliers; bias against competitors; failing to vet dangerous products or content; and the acquisition of incipient competitors in an effort to squelch future competition, a phenomenon some have labeled killer acquisitions.

Many of these platforms have prospered because they provide a superior service at a lower cost, or for free. But they also have benefited from the “network effects” that tend to favor technology incumbents. Along the way they’ve collected vast quantities of data about customers or users that critics contend entrench their dominance. “Antitrust enforcers are struggling to figure out how to define and police the amount of market power these platforms have amassed, particularly with respect to the collection and use of personal data,” says Jeane Thomas, a Washington, D.C.-based partner in Crowell & Moring’s Antitrust and Privacy & Cybersecurity groups.

Within antitrust circles, a debate has emerged about whether current law and legal precedent suffice to address the alleged challenges presented by Big Tech platforms. For nearly 40 years, antitrust law has been dominated by the idea that consumer welfare is the ultimate goal of antitrust enforcement. Some critics have vigorously challenged that standard, especially when it comes to mergers and dominant-firm conduct, and blame what they view as weak antitrust enforcement for increased market concentration and market power. Others have sought to defend the standard, while still others are actively seeking to define a new middle ground that is at once economically grounded yet acknowledges that increased antitrust enforcement is warranted, notes Crowell & Moring senior counsel Andrew Gavil, a former director of the FTC’s Office of Policy Planning and a member of the firm’s Antitrust Group in Washington, D.C.

Yet the source of Big Tech’s alleged dominance may lie less in legal doctrine than in missed opportunities for more aggressive antitrust enforcement. Many important acquisitions by Big Tech companies in recent years have flown under the radar from an antitrust perspective, notes Johnson. Antitrust enforcers haven’t challenged these deals, likely because the acquired company was viewed as operating in an adjacent or differentiated space. But with the benefit of hindsight, it is likely that some of these companies would have developed into potential competitors, such that a killer acquisition had occurred. “The platforms are thinking 10 years ahead,” Johnson says.

“The current wave of concern about Big Tech mirrors previous eras when antitrust was in the spotlight, such as when supermarkets and shopping malls were hurting Main Streets across America,” says Smith. Beyond acquisitions, big company behavior can raise competitive concerns when the companies take measures to hold onto the power they already have. Or as Smith puts it, “It’s often not what you do to become king of the hill, it’s what you do to stay there” that attracts antitrust attention.

It’s far from clear, however, whether antitrust enforcement is the answer to the problems ascribed to Big Tech. A prime example is concern about the protection of privacy. “Traditionally, privacy concerns have played virtually no role in antitrust enforcement,” says Thomas. “But the platforms have grown so large that some users want, and to some extent need, to be on these platforms so much so that they feel forced to give up significant privacy in exchange.” Some markets might benefit from competitors that would do a better job protecting privacy.

“Privacy protection and competition protection are on a collision course,” Thomas says. If platforms are leveraging customer data to foreclose competition, a typical antitrust solution would be to require them to make that data available to competitors. But this might mean the sharing of personal data, which would be unacceptable to most people. One prominent platform has already withheld information from advertisers about how viewers are interacting with their ads— creating anticompetitive concerns—by saying it must conform with European and California privacy laws. “Regulators are going to have to make some policy choices to say whether or not we’re willing to trade off harm to competition to protect personal data,” Thomas says. “In any case, privacy protection may be better addressed through consumer protection laws, for example by forbidding platforms from collecting certain information or from using it in certain ways.”

Guidelines Ahead

With so many investigations underway, it might seem to some that the era of Big Tech is coming to an end. In reality, experts say, the course of change in 2020 is likely to be slow and incremental—though a change in the political balance of power in Washington could open the door to new legislation that would upend existing judicial precedent.

In January, the DOJ and the FTC jointly released new draft guidelines governing vertical mergers. The FTC has also said that it is developing additional digital platform enforcement guidelines as well as an addendum to 2006 horizontal merger guidelines that would address nascent competition and how the agency analyzes non-price effects of mergers. “Agency guidelines are significant for many reasons,” says Alexis Gilman, an antitrust partner at Crowell & Moring in Washington, D.C., and former head of the Mergers IV Division at the FTC. “They’re a useful road map of the agencies’ own analyses, which make them an important cue for companies that want to understand how the agencies might react to proposed deals. But they also influence how courts analyze issues, especially given the relative paucity of case law.”

But any litigants that choose to pursue an antitrust remedy in the courts—whether agencies, states, or private entities—will run into legal doctrines that have set a very high bar for plaintiffs, particularly standards relating to exclusion and the duty to deal with rivals, says Lisa Kimmel, a senior counsel in Crowell & Moring’s Antitrust Group in Washington, D.C., who formerly served as FTC attorney advisor on antitrust and competition policy matters for then-chairwoman Edith Ramirez. “The case law has been very defense-friendly for many years, especially for monopolization cases. Novel theories are unlikely to prevail under the existing state of antitrust law, which means there may be a disconnect between what U.S. enforcers want to do and what they can actually get done absent legislation that alters the status quo in the courts.”

With the courts and long-standing precedent acting as a backstop, a sea change in antitrust will likely require new laws from Congress. And substantive new laws are unlikely unless a bipartisan consensus coalesces around specific reforms or this year’s election results in single-party control of Congress and the White House, Gavil believes.

Ripple Effects

Regardless of whether this new wave of antitrust investigations results in a major change in law or legal doctrine, it could still have a significant effect on business well beyond Big Tech. That’s because it could impact the robust markets for data and disruptive technology that drive the economy in this era of digital transformation.

“The mere fact of the investigations is already affecting the market,” Gavil says. “It influences investors, venture capitalists, and innovators.” Potential competitors to the Big Tech platforms have been emboldened, the big platforms are more cautious, and some innovators who were looking forward to having their companies bought “could be disappointed.” The likely sources and shape of innovation may well change as a result.

#### B] Agency leverage—enforcers manipulate any new change to the max

Delrahim, Assistant Attorney General, Antitrust Division, United States Department of

Justice, ‘20

(Makan, “The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals,” 69 Cath. U. L. Rev. 657)

What does the future hold for consumer welfare standard? That’s up to us. No policy, no matter how sound, is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won’t mention specific examples, but we have seen this playbook when federal courts interpret or, more accurately, rewrite the law in head scratching ways and when agencies issue new regulations that strain the statutory text. Some reformers now seek to bring this playbook to the domain of antitrust law, which, if read broadly, could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains, and efficiency, and other pro-competitive outcomes for consumers.

Antitrust law may be particularly vulnerable to hasty change given its common law status and evolution in light of advancements and economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made. What can practitioners, academics, judges, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “hipster” antitrust because advocates for abandoning the consumer welfare standard invoked a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only go so far.

Winning the economic debate goes further, but not far enough. The modern antitrust reform movement is less concerned about economic soundness than it is about results. That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don’t act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don’t use our scalpel, we

shouldn’t be surprised to see the reformers sharpening their axes.

#### C] Overdeterrence—aff blurs the line of what is and is not allowed

Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” <https://instituteforlegalreform.com/research/private-antitrust-remedies-an-argument-against-further-stacking-the-deck/>)

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

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent. Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S.

#### And, independently changing merger standards increases costs of beneficial mergers and affects every industry

Huddleston 21 – Director of Technology and Innovation Policy at the American Action, JD from the University of Alabama School of Law

Jennifer Huddleston, "Implications of the Competition and Antitrust Law Enforcement Reform Act," American Action Forum, 2-10-2021, <https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/>

CALERA proposes to change both the standard and the burden for proving that the merger or acquisition would not cause harm. First, it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would “create an appreciable risk of materially lessening competition.” Additionally, in many cases, it would shift the burden of proof from the government onto the merging or acquiring entities. The merger or acquisition could go through only if the private firms can prove that the deal would not hurt competition. Otherwise, regulators could prevent it.

Changing these standards would make mergers and acquisitions **more difficult**. This shift would be **particularly harmful in dynamic markets** such as the technology sector where it is unpredictable what disruption may gain popularity or fundamentally change the market. The current, higher standard for government intervention already prevents mergers and acquisitions that could improve competition and aid consumers. Misunderstanding the changing market or the impact of innovation can already lead to denying mergers that would actually benefit consumers or allow smaller players to pool resources in ways that make them more competitive. A lower standard for challenging mergers would also make such **beneficial deals less likely.**

Shifting the burden presumes that every deal involving companies of a certain size is harmful unless proven otherwise. The existing standard and burden already allow enforcers to successfully prevent and deter mergers they believe may harm consumers. Lowering the standard for action would make benign or **beneficial deals more costly**, **deterring** them and the potential benefits for consumers and competition. While most may be focused on the current antitrust action against large tech companies, legislative proposals such as CALERA could have a significant impact on markets well beyond technology. Changes to the burden for mergers to proceed would target large firms **regardless of industry**. The result could impact not only tech companies, but also large companies in the pharmaceutical and energy industries where such acquisitions often play an important role in promoting competition and boosting innovation.

#### China’s outpacing the US by every measure of R&D

Allison 20 **–** Professor of Government, Harvard Kennedy School

Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

China’s AI Surge

Though still in their infancy, AI technologies will be drivers of future economic growth and national security. From facial recognition and fintech to drones and 5g, China is not just catching up. In many cases, it has already overtaken the United States to become the world’s undisputed No. 1. In some arenas, because of constitutional constraints and different values, the United States willfully forfeits the race. In others, China is simply more determined to win.

China’s AI surge is so recent that anyone not watching closely has likely missed it. As late as 2015, when assessing its international competition, American industry leaders—Google, Microsoft, Facebook and Amazon—saw Chinese companies in their rearview mirrors alongside German or French firms in the third tier. But this changed four years ago—in 2016—when leading AI application company DeepMind fielded a machine that defeated world champion Lee Sedol in the world’s most complex board game, Go.9 Even after several American companies’ machines had bested the chess masters of the universe10, most Chinese remained confident that machines could never beat Go champions, since Go is ten thousand times more complex than chess. Thus, DeepMind’s decisive victory became for China a “Sputnik moment”11—a jolt as dramatic as the Soviet Union’s launch of the first satellite into space that sparked America’s whole-of nation surge in math and science, nasa’s creation and the original “moon shot.”

Kai-Fu Lee’s book AI Superpowers offers an insightful summary of China’s engagement in the field. It began with President Xi Jinping’s personal reaction to the defeat of the world’s Go champion. Declaring that this was a technology in which China had to lead, he set specific targets for 2020 and 2025 that put China on a path to dominance over AI technology and related applications by 2030.12 Recognizing that this would have to be led by entrepreneurial companies rather than agencies of government, he designated five companies to become China’s national champions: Baidu, Alibaba, Tencent, iFlytek and SenseTime.13 Twelve months after Xi’s directive, investments in Chinese AI startups had topped investments in American AI startups.14 By 2018, China filed 2.5 times more patents in AI technologies than the United States.15 And this year China is graduating three times as many computer scientists as the United States.

In contrast to nuclear weapons—where governments led in discovery, development and deployment—AI and related technologies have been created and are being advanced by private firms and university researchers. The military establishments in Washington and Beijing are essentially playing catch-up, adopting and adapting private-sector products.

Where do these two competitors stand in the AI race today? Consider leading indicators under six key headings: product market tests, financial market tests, research publications and patents, results in international competitions, talent and national operating environments.

Consumers’ choices of products in markets speak for themselves. In fintech, China stands alone. Tencent’s WeChat Pay has nine hundred million Chinese users,16 while Apple Pay only has 22 million in the United States.17 And when it comes to capability, WeChat Pay can do much more than Apple Pay. Chinese consumers use their app to buy coffee at Starbucks and new products from Alibaba, pay bills, transfer money, take out loans, make investments, donate to charity and manage their bank accounts. In doing so, they generate a treasure trove of granular data about individual consumer behavior that AI systems use to make better assessments of individuals’ credit-worthiness, interest in products, capacity to pay for them and other behavior. In mobile payments, Chinese spend $50 for every dollar Americans spend, in total, $19 trillion in 2018.18 U.S. mobile payments have yet to reach $1 trillion. Credit cards are as old-fashioned to Chinese millennials as handwritten checks are to their American counterparts. Mark Zuckerberg has noticed: Facebook’s major moves last year into digital payments,19 including the recent introduction of Facebook Pay, are copying Tencent, rather than the other way around.

In facial recognition, the world’s most valuable AI startup is Chinese company SenseTime20—a company whose headquarters Graham visited in October. (While there, Graham also took a tour of Zhongguancun—China’s version of Silicon Valley—guided by Kai-Fu Lee whose hedge fund is one of the leading VC investors in Chinese AI startups.) In 2018’s international competition for facial recognition, Chinese teams claimed the top five places.21 Chinese firms—such as Hikvision and Dahua Technology, which control a third of the world’s security camera market22; Tiandy, whose cameras need light from only a single star at night to capture high-definition color images23; and Wuhan Guide Infared, which specializes in infrared and thermal imaging—are working hand in glove with their government to perfect facial recognition for profit and control. In this domain, there is no U.S.-China contest; the United States has essentially conceded the race because of concerns over the average individual’s privacy, and deep reservations about how this technology could be deployed. Westerners were alarmed in 2017 when researchers at Stanford created an AI algorithm that could detect with shocking accuracy individuals’ sexual orientation simply by scanning a single photo24. It does not take much imagination to consider how less socially liberal governments would apply this technology. So while San Francisco recently banned facial recognition technologies, the Party has given China’s top four facial recognition firms access to its database of over 1.4 billion citizen photos. One well-informed venture capitalist in this arena estimates that Chinese facial recognition firms have 1 million times more images than their U.S. counterparts.

In speech tech, Chinese are beating American firms in all languages—including English. The world’s top voice recognition startup is China’s iFlytek. Its user base is seven hundred million, almost twice the 375 million people who speak to Apple’s Siri.25 In system performance competitions, iFlytek regularly beats teams from Google, Microsoft, Facebook, ibm and mit, all in its second language.26 At Stanford’s international challenge for machine reading comprehension, Chinese teams won three of the top five spots, including first place. Baidu developed a human-level speech recognition system a year before Microsoft did.

Who was the U.S. Army’s major supplier of commercial drones until 2017—when the United States prohibited purchases for foreign suppliers?27 Shenzhen drone maker DJI, which controls 70 percent of the global market28. Drones would be just miniature hobby helicopters without elementary AI, which gives them computer vision for targeting weeds or weapons, and enables them to operate in swarms. As the recent attack on Saudi Arabia’s principal oil facilities demonstrated, the world has just begun to discover the security consequences of AI-enhanced drones operating literally below the radar. Of the world’s top five commercial drones brands, 3 are Chinese; 1 American.29

5g infrastructure will be the backbone that enables AI to reach further into everyday life, from automated cars to smart glasses. China’s Huawei is the world’s leading supplier of this telecom equipment. Not only does it own the Chinese market, which will be the world’s largest, but its 28 percent global market share nearly equals the combined shares of its two top competitors.30 Of the top four brands that will build 5g infrastructure, two are Chinese and zero are American. Chinese firms own twice as many 5g -essential patents as American firms. While the outcome of the current U.S. government campaign against Huawei remains uncertain, the company is currently delivering 5g systems well ahead of all competitors and is bringing a 5g phone to market a year ahead of Apple, the company that invented the iPhone.

Financial markets reflect these realities. Five years ago, two of the world’s twenty most valuable internet companies were Chinese; today, nine are. The “Seven Giants of the AI age”—Google, Amazon, Facebook, Microsoft, Baidu, Alibaba and Tencent—are split on either side of the Pacific. Of every ten venture capital dollars invested in AI in 2018, five went to Chinese startups; four to American firms.31 Of the world’s top ten AI startups, half are American and half are Chinese.

Chinese investments in AI research and development have surged to American levels, and the results are beginning to show it. The blunt truth is that China is laying the intellectual groundwork for a generational advantage in AI. According to the Allen Institute for Artificial Intelligence’s authoritative assessment, China would overtake the United States in 2019 in the most-cited 50 percent of AI papers. It will take the lead in the most-cited 10 percent this year. And by 2025, the United States will fall to second in the top 1 percent of papers.32 (Fortunately, in breakthrough papers, China remains behind.) In public patents for AI technologies, China passed the United States in 2015, and in 2018 filed 2.5 times more than America.33 In machine learning’s hottest subfield—deep learning—China has six times more patent publications than the United States. (Raw numbers, however, must be taken with a grain of salt, since not all patents are equal.)

China is investing heavily in the necessary hardware as well. In 2001, China had none of the world’s five hundred fastest supercomputers. Last year, it had 219 (the United States has 116).34And while China’s supercomputers previously relied on American semiconductors, its top machine today was built entirely with domestically-manufactured processors.

#### BUT it’s *not inevitable* – regulatory environment of *next five* years is key

Allison 20 **–** Professor of Government, Harvard Kennedy School

Graham Allison, August 2020, "Is China Beating the U.S. to AI Supremacy?," Belfer Center for Science and International Affairs, <https://www.belfercenter.org/publication/china-beating-us-ai-supremacy>

Clues for a Winning Strategy

Is AI a race China is destined to win? With a population four times the size of the United States, there is no question that China will have the largest domestic market for AI applications. With many multiples of the United States in data, substantially larger numbers of computer scientists and a government for which there is a first-order priority, we can understand colleagues who are pessimistic. Indeed, it is our best judgment that on the current trajectory, while the United States will maintain a narrow lead over the next five years, China will then catch up and pass us quickly thereafter.

Nonetheless, we believe that this is an arena in which the United States can compete—and win. Congress recently established the “National Security Commission on Artificial Intelligence,” with Eric Schmidt as its chair, and Bob Work, who served as Deputy Secretary of Defense under both Obama and Trump, as Vice Chair. Its mission is to develop that strategy “to ensure America’s national security enterprise has the tools it needs to maintain U.S. global leadership.”55 In the hope of being helpful to that effort, we conclude with five pointers toward a winning strategy.

First, Americans must wake up to the challenge. Recognition that that the United States faces a serious competitor in a contest in which the outcome will be decisive for our future is necessary to get our competitive juices flowing. The Olympics offers an instructive analogy for thinking about a competitive strategy for AI. It also reminds us that competition is inherently a good thing. Competition produces superior performance. Participants in a marathon run faster than they do when running alone. Indeed, competition is a core American value. Free markets organize a competitive process that produces better products at cheaper prices. Science and its applications advance as research teams compete to better understand the world.56

Second, in this competition, the United States cannot hope to be the biggest—in that category, China wins by default due to the size of its population. However, what the United States can be is the smartest. In the seeking to improve and advance the most advanced of technologies, the brightest 0.0001 percent of individuals make the difference. The United States can succeed by recruiting talent from all 7.7 billion people on Earth and enabling these individuals to realize their full potential.57 In fact, U.S. companies have now recruited more than half of the top 100 recognized AI geniuses. In sharp contrast, China is a closed society—limited essentially to 1.4 billion Chinese speakers. Just 1000 foreign born individuals became Chinese citizens last year. So while the United States will not win competitions in which bulk numbers are the dominant factor, where brilliance, creativity and innovation matter most, the United States has a decisive advantage.58

Third, platforms matter. Here the United States begins with a huge sustainable competitive advantage: English is the universal language for science, business and the web. Chinese face the choice of either speaking English, or simply talking to themselves. Not only do the Chinese, but also the French and others often complain that this is unfair—and it may be. But it is a fact. To transform Singapore from a third-world city into one of the world’s most successful and prosperous global trading hubs, Lee Kuan Yew insisted on making English its first language. (Indeed, at one point in counseling Chinese leaders, he suggested that China make English its first language.) Today, more than half of the 7.5 billion people on Earth speak English—and another billion are seeking to learn.

Fourth, American companies have a significant first mover advantage in the establishment of the major platforms in AI, including operating systems (Android and Apple), design of advanced semiconductors (arm), and killer apps—including Instagram, YouTube and Facebook. Instagram has 1 billion monthly active users; Facebook more than 2.4 billion. While Chinese competitors will certainly attempt to displace the current leaders in both platforms and applications, if American companies are smart enough to continue enlarging their users’ opportunities, improving their experiences, and expanding the number of people using their platforms and applications, Chinese and others who want to speak to the world could have to continue relying on U.S.-dominated platforms.