# Navy Octas Wiki

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### 1NC – T

#### “Increase” requires preexistence

Ortega 07 – Judge, Oregon Appeals Court, Oregon Supreme Court

Darleen Ortega, Papas v. Or. Liquor Control Comm'n, 213 Ore. App. 369, Court of Appeals of Oregon, June 2007, LexisNexis

We begin with whether OLCC's interpretation of the rule, as developed and applied in this case, is consistent with the rule's text. Certainly, OLCC's understanding that the rule applies to "competitions" is consistent with the rule's use of the term "contest." See Webster's Third New Int'l Dictionary 492 (unabridged ed 2002) (defining the noun "contest" as a "competition"). However, by its terms, the rule refers and applies to specific types of drinking contests: as pertinent here, ones that involve "increase[d] consumption \* \* \* in increased quantities" of alcoholic beverages. OLCC's interpretation and application in this case fail to account for that qualification or to yield any pertinent point of reference in that regard; that is, nothing in OLCC's interpretation or application of the rule here identifies the consumption or quantities against which the required "increase" is to be, or was, measured. See Webster's at 1145 (defining the transitive verb "increase" as "to make greater in some respect (as in bulk, quantity, extent, value, or amount) : add to : enhance" and defining the adjective "increased" as "made or become greater"). Thus, OLCC's proposed interpretation--that mere competition between participants constitutes conduct violating the rule--is inconsistent with the latter, qualifying aspects of the rule.

#### Prohibit means 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.

#### Voter for limits and ground – their interp allows tons of extra affs, and exemptions affs destroy link uniqueness

### 1NC – DA

M&A DA

**Defense merger markets are opening now – that allows opportunities for firms to invest in new lines of innovation**

**Aaronson et al. 20** – Matt Aaronson leads BCG’s Aerospace and Defense practice globally; Doug Belair is the former Senior Vice President of Strategy and Corporate Development for BAE Systems, Inc., and current Senior Advisor for the Boston Consulting Group; Paul DeLia is a Senior Advisor at The Boston Consulting Group; Drosten Fisher is a Partner in BCG's New York office; Stephen O’Bryan is Senior Advisor for the Boston Consulting Group; Mel Wolfgang serves on Boston Consulting Group's Industrial Goods practice leadership team and the North American management team

Matt Aaronson, Doug Belair, Paul DeLia, Drosten Fisher, Stephen O’Bryan, and Meldon Wolfgang, "Building Beachheads in the US Defense Market Through M&A," Boston Consulting Group, 7-23-2020, <https://www.bcg.com/publications/2020/building-beachheads-us-defense-market-through-mergers-acquisitions>

Despite the serious economic pain that the coronavirus pandemic has created for some defense companies—sapping their ability to undertake acquisitions—**all is not lost**. Defense M&As are **still an option**. Historically, industry **consolidation** occurs when US defense spending is on the decline, and, given the trajectory of such spending today, the industry could well be on the **cusp** of another **period of consolidation.**

Of course, some formidable challenges await companies that want to tap into the enormous US defense market, as well as for companies that hope to expand an established presence. A wave of consolidation over the past decade has cemented positions, leaving a relatively small number of large players that would be logistically difficult to acquire. Any major deal would surely face careful regulatory scrutiny. With those caveats in mind, companies should plan now for how they could seize opportunities to establish new platforms and beachheads in the US defense market.

The Next Consolidation Wave?

US defense spending tends to go in waves, and we may be about to enter **another downturn** with **aggressive cuts** similar to those proposed by the Budget Control Act in 2011. (See Exhibit 1.) While the President’s FY21 defense budget requests an annual 2% increase, our modeling suggests an increase is **unlikely**, given the size of the **stimulus package** to counter COVID-19. We forecast a range of scenarios, with the best case being essentially a flat budget, and the worst being a steep decline. If the worst case occurs, it’s likely that new programs will be postponed, R&D cut for all but the most strategic efforts, and current procurements will slip. There could also be pressure to keep existing programs in service longer than planned—which could increase their sustainment costs and modernization requirements.

[[figure omitted]]

Such downturns have historically been **periods of consolidation** in the industry, a chance for **stronger companies** to buy firms in financial distress and either **establish a beachhead** in the US or **expand their presence**. (See Exhibit 2.) This presents a **near-term opportunity** for companies—whether they are foreign firms, domestic commercial aerospace companies, private equity investors, or existing players looking to create new platforms.

[[figure omitted]]

For example, BAE Systems took advantage of the downturn in the 1990s to acquire the Sanders electronics business from Lockheed Martin. This put BAE on the path to building a $12 billion business in the US, accounting for 50% of the group’s revenue and making it a major prime contractor. The Sanders acquisition helped BAE establish a Special Security Agreement with the US Department of Defense (DOD), which eventually regarded the company’s US business as a domestic company. Using this as a foundation, BAE went on to acquire United Defense and the Bradley Fighting Vehicle franchise in 2005. The company followed up this acquisition in 2007 with the purchase of Armor Holdings a provider of tactical vehicle and soldier protection equipment. The land vehicle acquisitions proved highly lucrative in the Iraq and Afghanistan wars.

While it’s true that few companies have the financial resources of a BAE, or the risk appetite for multibillion dollar acquisitions, we still see **many opportunities** to create **custom plays**—to **assemble** what a company wants in a **few steps** instead of one fell swoop—and at a **lower cost** than buying a large firm (and with less regulatory scrutiny).

Become A **Conduit Of Innovation**

It’s important to understand that while the prime contractors (aka, “the primes”) are huge, their R&D budgets are **relatively constrained**—typically **just 2%** or so of revenue. They tend to focus on winning new programs and developing existing programs but **not pure innovation**. As a result, their “cash cows” can sometimes get shortchanged on the R&D front. The primes still value these programs, but they must prioritize and often **cannot spare the resources** to upgrade them.

This **creates opportunities** for others. A prime might **happily divest** a seemingly stagnant component business (in order, hypothetically, to focus on system integration) but would be very interested if the new owner of that component business **pursued R&D** and did the **necessary conversion work** to help extend the life of the prime’s existing system integration program. In addition, the Pentagon is looking to **diversify its sourcing** to more creative and flexible vendors who will assume more of the financial risk of system **modification and development.**

With that mind, we believe that **ambitious companies** should consider **M&A strategies** that help them become “**conduits of innovation**” for the main players. The aspiring company may need to **acquire several subunits** from existing players to build a **cohesive whole**, then marry **industry knowledge** (such as where to find certain expertise or anchor capabilities) together with an **analytical understanding** of where the leading edge of the industry is trending. This approach requires a coherent vision for what a successful player will look like in three to five years. (See the sidebar, “Six M&A Success Factors.”)

**Increased antitrust scope sends chills throughout the industry – changes in substantive antitrust deter defense mergers**

**Carroll 21** – Partner in the Antitrust & Competition Practice Group in the Washington, D.C. office, former member of the Mergers I Division of the Federal Trade Commission’s Bureau of Competition

John D. Carroll, "How a New Era in Antitrust Enforcement May Impact Government Contractors," The National Law Review, 2-24-2021, https://www.natlawreview.com/article/how-new-era-antitrust-enforcement-may-impact-government-contractors

With a new presidential administration promising vigorous antitrust enforcement, and a new Democratic majority in Congress seeking to make **drastic changes** to U.S. **antitrust laws**, the technology and healthcare industries have found themselves the main targets of increased antitrust scrutiny. Though companies engaging in government contracting, particularly in the **aerospace and defense industries**, already have had to deal with a **range of antitrust issues** – for example, the Department of Justice, Antitrust Division (the “DOJ”) launched the Procurement Collusion Strike Force (“PCSF”) in 2019 (discussed in more detail here), which focused on “deterring, detecting, investigating and prosecuting antitrust crimes … in government procurement, grant and program funding” – they may find themselves subject to **increased antitrust enforcement** in 2021. In fact, on February 23, 2021 PCSF Director Daniel Glad confirmed he is “focus[ed] on three things in 2021: expanding our platform with PCSF building out our data analytics program; and bringing investigations to the recommendation/disposition stage.”

Antitrust enforcement is not typically a “hot button” issue in modern American politics, nor is it at the top of agendas for new administrations’ enforcement priorities. In fact, historically antitrust enforcement has not changed materially when new presidential administrations or Congressional majorities have come into power, even when those administrations or majorities are from a different political party. Recently, however, antitrust has become a prominent issue, as there has been a growing concern among academics, practitioners, and elected officials that U.S. antitrust enforcement is not adequately addressing competition issues and needs major changes.

While it only has been a month since the 117th Congress and the Biden administration have come into power, and many key antitrust positions at the DOJ and Federal Trade Commission (“FTC”) have yet to be filled, the government already has suspended Early Termination (“ET”) for all mergers and acquisitions reportable under the Hart-Scott-Rodino Act, over the objections of two FTC Commissioners – meaning that all such deals now must undergo the full 30 calendar waiting period. In Congress, Senator Amy Klobuchar (D-MN), the Chair of the Antitrust Subcommittee of the Judiciary Committee, introduced the Competition and Antitrust law Enforcement Reform Act on February 4, 2021, that seeks to overhaul U.S. antitrust enforcement, by among other things, placing significant restrictions on businesses that have more than 50% market share in their relevant markets.

Given concerns by some regarding increased concentration in certain aerospace and defense industries – after all, in January 2021, the Pentagon raised concerns about “drastic consolidation” in the defense sector in its annual Industrial Capabilities report to Congress – companies may find their **transactions and personnel practices** under **even more scrutiny** by the DOJ and FTC.

With respect to transactions, companies’ proposed mergers or acquisitions of competitors have received close looks by the government in recent years, especially in concentrated industries, with the Department of Defense (“DOD”) playing a crucial role in determining the scope and result of review by the FTC or DOJ. **Teaming agreements,** which the DOD and antitrust enforcement agencies recognize **can be pro-competitive**, may be **even more closely examined** by government, and it is possible that the **current guidance** from the government regarding its antitrust evaluation of such agreements **could be changed**.

Because government contractors often operate in industries where there is a **limited supply of potential employees** with the necessary skills and credentials, they should be especially careful about **restrictive provisions** in their transaction and employment agreements, such as non-competes and non-solicits. Also, government contractors should be wary about engaging in discussions or **sharing** confidential compensation information sharing with competitors, particularly in light of the government’s recent **criminal antitrust actions** against “**no poach” agreements** entered into between competitors.

Though it is early, it is clear that the Biden administration is going to make antitrust enforcement a priority, and we can expect they may be enforcing **new, more rigorous laws** passed by Congress. Government contractors should therefore **be prepared** to face increased scrutiny of their operations. Antitrust enforcement can have **profound consequences** on a company’s business, as it can place **limitations on transaction strategy** and potentially **expose a company** to **significant** civil or even criminal **liability**.

**That causes global war – defense mergers are critical to maintaining the US’s advantage over Russia and China**

**Marks 19** – Former Senior Policy Advisor to the Under Secretary for Security Assistance, Science and Technology at the U.S. Department of State

Michael Marks, "Strengthen US industry to counter national security challenges," American Military News, 10-10-2019, https://americanmilitarynews.com/2019/10/strengthen-us-industry-to-counter-national-security-challenges/

While U.S. defense budgets have recently been on the rise, it is likely that we will see a spending decline in the coming years as competition for non-defense federal budget dollars increases and deficits grow. The United States, therefore, must **take action** to ensure that we **maintain our technological edge** against our adversaries by **empowering the private sector** to provide cost-effective **innovation** for America’s defense.

Since the end of the Second World War the U.S. has relied on **qualitative superiority** over its potential adversaries, especially those like the Soviet Union/**Russia and China**, who enjoyed comparative quantitative advantages. These qualitative advantages were **vital** to maintaining **global stability** and helped enable our nation to become the preeminent **global economy**, but they have been eroded over the last few decades.

In 1960, the U.S. share of global research and development (R&D) spending stood at 69%. U.S. defense-related R&D alone accounted for 36% of total global expenditures. Soon thereafter other nations recognized the need to increase their R&D expenditures and build their own defense industrial bases to compete with the United States. From 2000-2016, China’s share of global R&D rose from 4.9% to 25.1% while the U.S. share of global R&D dropped to 28%. U.S. defense-related R&D meanwhile now makes up a **mere 4%** of global R&D spending.

There can be no doubt that Russia and China are **determined** **to challenge America’s qualitative advantage**. From the rebirth of Russian military power under Vladimir Putin to the ever-growing Chinese military prowess across the board, their efforts show **no sign** of slowing down.

Russia has been and continues to undergo a **major modernization** of its armed forces. For example, they are in the midst of a ten-year program to build hundreds of **new nuclear missiles** and have set a goal of modernizing 70% of the Russian Ground Force’s equipment by 2020.

One of the most frightening examples of Russia’s resurgence is its development of a **hypersonic missile** that could be ready for combat as early as 2020. Worryingly, the US is currently **unable to defend** against this type of missile. To accompany these developments came the emergence in 2017 of Russia as the world’s second-largest arms producer, ready and able to support nations hostile to US interests.

China, on the other hand, used to be a country that only manufactured cheap products and knockoffs, but that is no longer true. **Technology development** and **innovation** figure prominently in all of China’s national planning goals, with plans to make the country the **global leader** in science and innovation and the preeminent **technological and manufacturing power** by 2049, the 100th anniversary of the Chinese communist revolution.

This, of course, has huge implications for China’s military capability. The country now has the second-largest national defense budget behind the U.S. and wants to be Asia’s preeminent military power. Beijing is developing next-generation **fighter jets, ICBMs** and shorter-range **ballistic missiles**, as well as advanced naval vessels.

The People’s Liberation Army has reached a **critical point of confidence** and now feel they can **match competitors** like the United States in combat. This has implications for the **security of Taiwan, Japan, other US allies** in the region as well as to America itself. To make matters worse, there are a growing number of experts that see China developing **asymmetric technologies**, combined with **conventional and nuclear systems** that could create an **existential threat** to the U.S. pacific based assets.

It is in the wake of these growing threats to our national security American industry will likely be expected to shoulder an even **larger responsibility** concerning investment in **defense-related R&D**.

One of the ways we can empower companies to make these additional investments and lead next-generation defense innovation is to **allow commonsense mergers** between important defense and aerospace companies. Horizontal consolidation **eliminates the redundancy** of enormous fixed costs, **leading to savings** passed down to customers. Mergers can also create **economies of scale** and **existing synergies** that help the combined company realize access to **larger numbers** of engineers and innovators, while keeping cos**ts low** and **improving the timeline** for taking a product from concept to development.

A recent example of how this can work is the proposed Raytheon and United Technologies merger. The two parties project that the new combined company will employ more than **60,000 engineers**, hold over **38,000 patents** and invest approximately **$8 billion per year** in research and development. This will allow the development of **new, critical technologies** more quickly and efficiently than either company could **on its own**. Such private sector investments in innovation will be **critical** in the face of the **growing challenges** to American **military dominance**.

America’s **R&D advantage**, crucial to **maintaining military superiority**, is increasingly **at risk**. As China and Russia continue to challenge America’s military dominance and pressures on the defense budget continue to mount, the federal government will likely turn more and more to contractors and commercial companies to develop **next-generation defense capabilities**. Strengthening U.S. industry, therefore, will be **critical** to countering our **national security challenges.**

### 1NC – DA

Exemption DA

**The aff’s application of antitrust to a previously exempted area causes future limitations in immunities---courts perceive shifts in legislative opinion and adapt accordingly**

**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 difficul**t 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.

**Specifically spills over to limit implied immunity---that disrupts the stability of IPO regulation and discourages going public**

**Denniston 7** – Independent contractor reporter covering the Supreme Court for fifty-eight years

Lyle Denniston, "Analysis: Antitrust "mistakes" and the IPO process," SCOTUSblog, 6-18-2007, https://www.scotusblog.com/2007/06/analysis-antitrust-mistakes-and-the-ipo-process/

Federal officials who regulate the stock markets do not have to fret that antitrust law will get in their way as they oversee the process of bringing new stocks to the public exchanges. The Supreme Court, worried that judges and juries sitting in antitrust cases lack the sophistication about the markets necessary to avoid making “unusually serious mistakes,” opted on Monday to exempt much — though perhaps not all — of the “initial public offering” (IPO) process from federal antitrust laws. The Court was even unwilling to accept a suggestion by U.S. Solicitor General Paul D. Clement that would have salvaged some role for antitrust.

Although Justice Stephen G. Breyer’s opinion for the majority in the 7-1 decision stressed that it was confined to “the conduct alleged in this case,” the language and rationale of the ruling was broad enough to immunize syndicates bringing new shares to market from many and probably most potential antitrust complaints by investors. It thus appears that the Securities and Exchange Commission will mainly have the duty of monitoring what is allowed or prohibited in IPOs.

Here is the specific assignment the Court said it was leaving to the SEC: the task, using its securities expertise, of drawing a “complex, sinuous line separating securities-permitted from securities-forbidden conduct” so as to assure that the process of bringing new stocks to market by underwriting syndicates continues to function quite freely. (A “sinuous line” would be one that is wavering.)

The decision was a very broad victory for 16 of the nation’s largest underwriters of stock — the major investment banking houses that were challenging a Second Circuit Court decision that had cleared the way for a trial of the antitrust claims of 60 investors joined in two class-action lawsuits. The investors had sued under the Sherman Act, Clayton Act and state antitrust laws, claiming that the investment banking houses had joined in syndicates to control the initial issuance and post-IPO trading in the stocks of several hundred high-tech companies.

The lawsuits complained of a pact among the underwriters not to sell shares of popular tech stocks unless a buyer agreed to buy added shares of that securities in the after-market at higher prices — so-called “laddering”; to pay very high commissions on later stock purchases from the underwriters, or to buy from those underwriters other, less desirable stocks (so-called “tying.”

The targeted activity of joint underwriters’ promotion and sale of new securities, Justice Breyer wrote on Monday, “is central to the proper functioning of well-regulated capital markets.” The antitrust complaints, he went on, “concern practices that lie at the very heart of the securities marketing enterprise.”

In the end, the Court reversed the Second Circuit, concluding that “the securities laws are clearly incompatible with the application of the antitrust laws in this context.” Justice John Paul Stevens joined in the result only, concluding that the challenged conduct did not violate the antitrust laws; he did not join, he said, in a “holding that Congress has implicitly granted [the underwriters] immunity from those laws.” Justice Clarence Thomas dissented alone, relying on “savings clauses” in federal securities laws “that preserve rights and remedies existing outside of the securities laws.”

The Court’s main opinion did not specifically declare that each of the challenged practices was, in fact, legal under securities laws. “In the present context,” Breyer wrote, there is “only a fine, complex, detailed line” that separates activity that the SEC permits or encourages from activity that the SEC “must (and inevitably will) forbid” — the latter being the very kind of activity that the investors here were trying to attack under antitrust laws.

Exploring further the perceived difficulty in such line-drawing, Breyer said that “evidence tending to show unlawful antitrust activity and evidence tending to show unlawful securities marketing activity may overlap, or prove identical.”

But, in sentiment as well as in logic, much of the reasoning of the Court in reaching its conclusions against a joint securities-antitrust regulatory regime could be attributed to its perceptions about the inability of antitrust lawsuits to avoid serious disruption of the securities markets. “The factors we have mentioned make mistakes unusually likely” in the antitrust regime, Breyer said. “Antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries…[T]here is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect.”

**A robust and secure IPO process for young companies is critical to productivity growth**

**Wu 11** – Stern School of Business, New York University

Geraldine A. Wu, "The Effect of Going Public on Innovative Productivity and Exploratory Search," Organization Science, Vol. 23, No. 4, pp. 928-950, 7-27-2011, https://www.jstor.org/stable/23252442?seq=1#metadata\_info\_tab\_contents

Introduction

The rapid pace of innovation in high-technology firms has been an important determinant of economic growth and productivity. Good ideas by themselves, however, cannot ensure continued success at innovation. A critical component of corporate research and development (R&D) efforts is access to funding, particularly for the resource-constrained entrepreneurial ventures that have proved to be vital sources of innovation in technology based industries. Yet the financing events that are crucial to continued innovation may subsequently shape the very innovative activities they are funding. These transactions are not merely short-term events that infuse capital into firms with promising innovations; rather, they delineate distinct stages in the evolution of high tech ventures. Funding events like venture capital (VC) investments, minority equity investments, and initial public offerings (IPOs) are often imbued with broader meanings that affect subsequent access to resources and involve significant governance changes—being a VC backed company, having an affiliation with an established firm in the industry, and being a publicly traded entity imply certain levels of success. Therefore, they can have long-term effects, not only on organizational structures, but also on organizational processes, most notably the search processes that drive technological innovation. This paper focuses on the IPO context to explore the inherent tension between financing and innovation: flows of funds to firms that are intended to support R&D shape subsequent innovation efforts.

An IPO is a milestone event in the life cycle of a business organization. The impetus for going public is typically a desire to build a platform for continued growth. By going public, firms can improve their access to financial capital and their ability to attract other resources that contribute to growth, such as high-quality employees and alliance partners. In addition, the concomitant increase in the liquidity of firm equity enhances the ability to pursue acquisitions, mergers, and licensing agreements (Brau and Fawcett 2006). Alongside these benefits, however, come potential drawbacks and substantial organizational change; in particular, the transition to public ownership subjects firms to a multitude of new requirements that leads to decreased management flexibility and an increased need to manage shareholders' earnings expectations. The short-term bias of public markets and its implications for firm innovation were highlighted in Google's well-publicized IPO prospectus from August 2004, in which the founders wrote, "As a private company, we have concentrated on the long term, and this has served us well. As a public company, we will do the same. In our opinion, outside pressures too often tempt companies to sacrifice long-term opportunities to meet quarterly market expectations We will not shy away from high-risk, high-reward projects because of short-term earnings pressure" (Google Inc. 2004, pp. 27-28). Although there has been substantial anecdotal evidence of entrepreneurs being considered about how taking their companies public might affect long-term innovation, this paper is, to my knowledge, the first to empirically investigate the impact of going public on firm innovation. The importance of understanding these potential consequences is underscored by the critical role that IPOs have played in the growth of young ventures in high-tech industries and by the fact that these firms' innovative capabilities are their most valuable assets and key sources of competitive advantage.

**Floundering productivity causes great power conflict**

**Baru 9**

(Sanjaya, Visiting Professor at the Lee Kuan Yew School of Public Policy in Singapore Geopolitical Implications of the Current Global Financial Crisis, Strategic Analysis, Volume 33, Issue 2 March 2009 , pages 163 – 168)

The management of the economy, and of the treasury, has been a vital aspect of statecraft from time immemorial. Kautilya’s Arthashastra says, ‘From the strength of the treasury the army is born. …men without wealth do not attain their objectives even after hundreds of trials… Only through wealth can material gains be acquired, as elephants (wild) can be captured only by elephants (tamed)… A state with depleted resources, even if acquired, becomes only a liability.’4 Hence, economic policies and performance do have strategic consequences.5 In the modern era, the idea that strong economic performance is the foundation of power was argued most persuasively by historian Paul Kennedy. ‘Victory (in war),’ Kennedy claimed, ‘has repeatedly gone to the side with more flourishing productive base.’6 **Drawing attention to the interrelationships between economic wealth, technological innovation**, and the ability of states to efficiently mobilize economic and technological resources for power projection and national defence, Kennedy argued that nations that were able to better combine military and economic strength scored over others. ‘The fact remains,’ Kennedy argued, ‘that all of the **major shifts in the world’s military-power balance have followed alterations in the productive balances**; and further, that the rising and falling of the various empires and states in the international system has been confirmed by the outcomes of the major **Great Power wars**, where victory has always gone to the side with the greatest material resources

### 1NC – K Antidomination

#### The affirmatives drive toward antitrust intervention adopts neoliberal assumptions of politics and economics which concentrates power in the hands of a few

Vaheesan 18 – Policy Counsel at the Open Markets Institute. Former regulations counsel at the Consumer Financial Protections Bureau

Sandeep Vaheesan, “The Twilight of the Technocrats’ Monopoly on Antitrust?,” The Yale Law Journal Forum, 6/4/18, <https://www.yalelawjournal.org/pdf/Vaheesan_ir9dchg8.pdf>.

Over the past forty years, technocrats have dominated antitrust law.44 Leadership at the Department of Justice and Federal Trade Commission as well as Supreme Court Justices have rewritten much of antitrust law.45 They have ignored or distorted the legislative histories of the antitrust laws and have even overridden Congress’s legislative judgments.46 By restricting private antitrust enforcement, the Supreme Court has also limited the ability of ordinary Ameri- cans to influence the content of antitrust law.47

While the antitrust technocrats have been on the march, Congress has been dormant. Its antitrust activities have been confined to secondary issues.48 This combination of technocratic hyperactivism and legislative lethargy has created, in the words of Harry First and Spencer Waller, “an antitrust system captured by lawyers and economists advancing their own self-referential goals, free of political control and economic accountability.”49 Although proponents of technocratic antitrust may characterize it as “pure” or “scientific,” the reality is quite different as big business interests and their representatives dominate debate within this cloistered enterprise.50

#### Elite capture locks in civilizational collapse, but it’s not inevitable. Try or die for putting political and economic power in the hands of the citizenry, and reorienting government decision-making toward the public good.

MacKay 18 – Professor of Sociology, Mohawk College

Kevin MacKay, also a union activist & executive director of a sustainable community development cooperative, The Ecological Crisis is a Political Crisis, 2018, https://www.resilience.org/stories/2018-09-25/the-ecological-crisis-is-a-political-crisis/

With each passing day, reports on global climate change become increasingly bleak. Recent research has affirmed that the glaciers are melting faster than anticipated1, and that acidification, with its catastrophic effect on ocean ecosystems, is also proceeding faster than feared2. As the concentration of atmospheric carbon continues to rise, so does the likelihood we’ve passed the tipping point for irreversible climate change.3

When one looks at other critical earth ecosystems, the danger is equally apparent. Soil is being destroyed.4 Fresh water shortages are wracking several continents and leaving billions of people without reliable access to clean drinking water.5 Fish stocks are plummeting.6 Oceans are clogged with plastic garbage.7 Biodiversity is disappearing at an alarming rate.8 In the face of this full-spectrum ecological assault, a growing number of scientists have been saying that the collapse of civilization is now unavoidable.9

Stopping the destructive effects of industrial, capitalist civilization has now become the defining challenge of our age. If we don’t radically change our society’s course within the next 30 years, then a deep collapse and protracted Dark Age are all but assured. In order to confront this challenge, we need to understand what is causing civilization’s crisis, and most importantly, how the crisis can be resolved. At stake is nothing less than a viable future on this planet.

The Five Horsemen of the Modern Day Apocalypse

In my book, Radical Transformation: Oligarchy, Collapse, and the Crisis of Civilization, I argue that industrial civilization is being driven toward collapse by five key forces – related to terminal dysfunction within its ecological, economic, socio-cultural, and political sub-systems:

Dissociation: globalized production and distribution systems disrupt people’s ability to put their own actions, and the actions of elites, into a coherent causal and ethical framework. Actions by individuals, institutions, and systems of governance are therefore disconnected from their effect on the natural world and on other peoples. Without this critical feedback, even well-intentioned actors can’t make rational and ethical choices regarding their behaviour.

Complexity: the world-spanning nature of industrial capitalist civilization, and the massive number of interrelationships it represents, make predicting the effect of any given change on the system as a whole devilishly difficult. Disastrous tipping points loom in several of civilization’s systems – from the collapse of ocean ecology to the threat of nuclear war. In addition, because the crisis cannot be contained in one part of the globe, the dysfunctions can’t be dealt with in isolation.

Stratification: a profoundly unequal distribution of wealth – both globally and within nations – leads to mass human poverty, displacement, and to premature death through disease and continuous warfare. Stratification also leads to political instability, eroding a society’s social cohesion and undermining decision-making structures.

Overshoot: the economic practices of industrial capitalism are exceeding ecological limits. Our civilization is critically degrading the biosphere, burning through non-renewable energy sources, and shifting the entire climatic balance.

Oligarchy: in states worldwide, political decision-making is controlled by a numerically small, wealthy elite. This form of government serves to lock in patterns of conflict, oppression, and ecological destruction.

Societies as Decision-Making Systems

Each of the horsemen presents a significant threat to civilization’s viability. However, oligarchy is particularly important as it deals with a society’s decision-making systems. In his 2005 book Collapse: How Societies Choose to Fail or to Succeed, geographer Jared Diamond argued that many past civilizations have collapsed due to their inability to make correct decisions in the face of existential threats.10 Diamond drew on the work of archaeologist Joseph Tainter, who in his 1998 book The Collapse of Complex Societies, argued that civilizations fail due to a constellation of factors.11

To Tainter, the ultimate mistake failed civilizations made was to continually solve problems by adding social complexity, and as a result, increasing the society’s energy needs. Eventually, Tainter argued that civilizations encounter a “thermodynamic crisis” in which they are unable to sustain an energy-intensive level of complexity. The result is collapse – ecological devastation, political upheaval, and mass population die-off.

The tendency for societies to collapse under excessive energy demands is an important insight. However, what Tainter and Diamond failed to appreciate is how oligarchy is an even more fundamental cause of civilization collapse.

Oligarchic control compromises a society’s ability to make correct decisions in the face of existential threats. This explains a seeming paradox in which past civilizations have collapsed despite possessing the cultural and technological know-how needed to resolve their crises. The problem wasn’t that they didn’t understand the source of the threat or the way to avert it. The problem was that societal elites benefitted from the system’s dysfunctions and prevented available solutions.

Oligarchic Control in “Democratic” States

Citizens in countries such as Canada, the United States, Australia, or the Eurozone members, would generally consider themselves to be living in democratic societies. However, when the political systems of Western democracies are scrutinized, clear and pervasive signs of oligarchy emerge.

A 2014 study by American political scientists Martin Gilens and Benjamin Page revealed that the great majority of political decisions made in the United States reflect the interests of elites. After studying nearly 1,800 policy decisions passed between 1981 and 2002, the researchers argued that “both individual economic elites and organized interest groups (including corporations, largely owned and controlled by wealthy elites) play a substantial part in affecting public policy, but the general public has little or no independent influence.”12

Today, oligarchic control over decision-making, and its catastrophic ecological effects, have never been clearer. In the U.S., Donald Trump and his billionaire-dominated cabinet are seeking to dismantle the Environmental Protection Agency13, to question climate science14, and to pursue a policy of “American energy dominance” that will dramatically expand production of fossil fuels.15

U.S. energy companies are also having a profound impact on domestic energy policy by accelerating the development of hard-to-access fuel sources through hydraulic fracturing, deep-sea oil drilling, and mountain-top removal coal mining.16 At the same time, fossil fuel oligarchs are working overtime to dismantle green energy initiatives, such as the Koch brothers’ war on the solar industry in Florida, and in other cities across the continent.17

In Canada, often thought of as more progressive than its southern neighbor, the situation hasn’t been much different. Under prime minister Stephen Harper’s two terms, the Canadian state became an unapologetic cheerleader for extracting some of the world’s dirtiest oil –Tar Sands bitumen. Harper accelerated Tar Sands production, leading to the clear-cutting of thousands of acres of boreal forest, the diversion of millions of gallons of freshwater, and the creation of miles of toxic tailings ponds, filled with water contaminated by the bitumen extraction process.18

Like the Trump administration, the Harper government silenced federal climate scientists.19 The government also targeted environmental charities and non-profits, using funding cuts and the threat of audits to undermine climate advocacy.20 When a movement of national outrage swept Harper from power in 2015, Canadians were hopeful that climate change would once more be taken seriously. However, the new government of Justin Trudeau, while embracing the international discourse on global warming, has shown a continued allegiance to the fossil-fuel oligarchy by committing over $7 billion in federal funds to purchase the failing Kinder-Morgan Trans Mountain pipeline.21

What is To Be Done?

To create a sustainable future, we must first learn the lessons of the past, and what archaeological research shows is that throughout history, civilizations that have been captive to the interests of an oligarchic elite have all collapsed.22 Today’s industrial, capitalist civilization is trapped in this same deadly cycle.

As long as a self-interested elite controls decision-making in modern states, we will be far too late to avoid the effects of steadily contracting ecological limits. In addition, we will be unable to avert the downward spiral of economic crisis, conflict, and warfare that will result as oligarchs scramble to maintain their wealth and power in the face of dwindling resources and mounting crisis.23

Breaking free from this destructive pattern will require us to take political and economic power back from the 1% and return it to the hands of citizens. This means that advocates for ecological sustainability must move far beyond individual actions, lobbying, or reform of existing political and economic institutions. If we are to have a chance, we must ensure that governments make decisions based on the public good, not on private profit.

Radically transforming industrial, capitalist civilization won’t be easy. It will require movements for environmental sustainability, social justice, and economic fairness to come together, and to realize their common interest in dismantling the system of oligarchy and building a democratic, eco-socialist society.24 This “movement of movements” must put aside sectarian squabbles, and finally realize that the goals of economic justice, human rights, and ecological sustainability are all intrinsically linked.

Such changes may seem like a tall order, but hope can be found in the deepening struggle being waged to protect our fragile ecosystems. First Nations groups are leading this charge and beginning to win some important victories. The inspiring Water Protectors of Standing Rock were able to disrupt the Dakota Access Pipeline in the face of intense government oppression.25 In Canada, Several British Columbia First Nations recently won an impressive court victory in their opposition to the Trans Mountain pipeline.26

If successful grassroots struggles can be linked with equally hopeful movements for real political change, then there is hope for the future. However, if we continue on with “business as usual” – hoping that change will come from lifestyle choices and the interchangeable representatives of elite political parties, then the future looks grim indeed.

### 1NC – CP

#### The United States federal government should

* Substantially increase funding for the Federal Energy Regulatory Commission
* Mandate FERC to review every energy contract and only approve those not implemented via abuses of monopolistic power
* Reacquire power and generation capacity
* Increase the civil and criminal penalties FERC can impose

#### That restores deterrence and preserves competition in energy markets

FERC 5 – The Federal Energy Regulatory Commission is the United States federal agency that regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce and regulates the transportation of oil by pipeline in interstate commerce.

FERC, March 2005, “ENERGY MARKET OVERSIGHT AND ENFORCEMENT: ACCOMPLISHMENTS AND PROPOSAL FOR ENHANCED PENALTY AUTHORITY,” https://www.ferc.gov/sites/default/files/2020-05/03-2005-cp-rept.pdf

In this report, the Federal Energy Regulatory Commission (the Commission or FERC) staff sets forth a proposal for amendments to the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act of 1978 (NGPA) that will give the Commission enhanced civil and criminal penalty authority for violations of these laws and the Commission’s rules and regulations based on them. This enhanced penalty authority would allow the Commission to better address market manipulation and other misconduct that is damaging to competitive markets. Moreover, it would lead to greater certainty for market participants, thereby encouraging increased participation and liquidity in those markets. Notwithstanding the limited remedies currently available to the Commission, the Commission has accomplished much of what it sought to achieve with the establishment of its Office of Market Oversight and Investigations (OMOI), the Commission’s “cop on the beat.” The enforcement and audit capacity of the Commission has expanded significantly. That expansion has resulted in roughly three times as many completed investigations and audits as prior to OMOI’s formation and numerous multimillion dollar settlements. However, due to the Commission’s narrow penalty authority, the Commission’s enforcement and audit efforts often lack the most effective means of addressing serious misconduct such as market manipulation or the provision of undue preferences to affiliates. Currently, the Commission has few remedies to address misconduct by market participants. The Commission may require that a company issue a refund or disgorge any profits earned as a result of the wrongful conduct. However, application of these remedies is restricted to situations in which an actual profit is earned as a result of the wrongful activity. Where a market participant engages in misconduct but no profit can 2 be proven to have resulted from that misconduct, the violative conduct may go unpunished. In addition, refunds and the disgorgement of unjust profits serve only to return the company that committed the violation to the status quo before the misconduct occurred; the remedy cannot be said to be a true penalty since it merely requires the return of any ill-gotten gains. While those remedies are important because they return monies to persons adversely affected by misconduct, they are not a highly effective means of deterring misconduct. As an alternative to ordering refunds or disgorgement of profits, the Commission may revoke a company’s authorization to charge market-based rates. Unlike the former remedies, revocation of a company’s market-based rate authority can have a dramatic impact on both markets and companies participating in those markets. By revoking a company’s authorization to sell at market-based rates, the Commission may effectively eliminate that company’s ability to act as a seller in the competitive energy market. Because such an action may have far-reaching effects, not only for the company at issue, but also for the market in which the company operates, the Commission must take into account myriad potential ramifications to the market in deciding whether to revoke a company’s market-based rate authority. In many situations, a more targeted approach in the form of civil penalties would better accomplish the twin objectives of deterring misconduct while ensuring the continued vitality of the energy markets. For example, a modest civil penalty may be more appropriate than suspending market-based rates for relatively minor violations of the rules. In other regulated environments, such as the securities and commodities futures trading industries, Congress has long recognized that civil penalty authority is the most effective means of deterring conduct that may harm markets. Civil penalties are also necessary in the markets regulated by the Commission. Appropriate civil penalties would enhance the Commission’s ability to enforce the statutes, rules, and regulations governing jurisdictional energy markets by allowing the Commission to appropriately tailor the 3 penalty to reflect the gravity of the act or omission at issue. To that end, Commission staff recommends that the Commission seek the following statutory changes: • An amendment of the FPA to expand civil penalty authority to cover violations of any provision (and Commission regulations and orders under any provision) in Parts II and III of the FPA and to increase the maximum civil penalty for any such violation from not more than $11,000 per day for each violation1 to not more than $1,000,000 per day per violation; • An amendment of the NGA to create civil penalty authority to cover violations of any provision (and Commission regulations and orders under any provision) of the NGA up to a maximum civil penalty of not more than $1,000,000 per day per violation; • An amendment to the NGPA to increase available civil penalty amounts up to a maximum civil penalty of not more than $1,000,000 per day per violation; • Amendments to the FPA, the NGA and the NGPA increasing criminal penalties from a fine of up to $5,000 per day for each violation and two years imprisonment to a fine of up to $1,000,000 per day per violation and up to five years imprisonment under both statutes, and • Amendments to the FPA, the NGA and the NGPA adding a separate civil penalty for intentional, material false statements made in any matter or filing before the 1 FPA section 316A provides for penalty authority up to $10,000 per day per violation. However, this amount is subject to inflation adjustment and is now $11,000 per day per violation. 18 C.F.R. § 385.1602(d) (2004). 4 Commission, including false statements made to Commission staff during the course of an investigation or audit. Specific language for this proposed legislation is set out in Appendix B to this report.

### 1NC – DA

FERC DA

#### Regulatory efforts to lower prices in energy markets are comparatively better than antitrust – the plan guts FERC authority and ruins effective price setting

Kellogg and Panner 5 – Michael K. Kellogg, educated at Stanford and Oxford in philosophy and at Harvard Law School, is a founding and managing partner at Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. Aaron Panner specializes in antitrust law and U.S. Supreme Court and appellate litigation

Michael Kellogg and Aaron Panner, July 15 2005, “Comments on The Filed Rate Doctrine,” https://govinfo.library.unt.edu/amc/public\_studies\_fr28902/immunities\_exemptions\_pdf/050715\_USTelecom.pdf

The filed rate doctrine is a venerable common law defense to antitrust damages claims, one that strikes an appropriate balance between preservation of regulatory authority over tariffed rates and antitrust intervention to address anticompetitive conduct. As an initial matter, we do not suggest that regulation of rates and imposition of tariff obligations is always desirable or efficient. Rather, so long as a carrier remains subject to a regime of filed tariffs, the filed rate doctrine should preserve the rates that are properly filed with the responsible regulator from improper collateral attack through an antitrust action for damages. The existence of a tariff regime indicates that a regulatory authority is exercising – or, at a minimum, could exercise – supervision over the rates, terms, and conditions of service. To the extent that ratepayers object to existing rates as unreasonable, those complaints should be addressed to the responsible regulator. Allowing collateral attack on the terms of filed tariffs through an antitrust suit undermines (1) regulatory control over those rates and (2) the transparency and non-discrimination that tariffs are intended to insure. Indeed, despite Judge Friendly’s critique, courts have correctly reaffirmed the validity of these concerns in applying the filed rate doctrine to a variety of antitrust claims. See, e.g., Texas Commercial Energy v. TXU Energy, Inc., --- F.3d ---, No. 04-40962, 2005 WL 1413365 (5th Cir. June 17, 2005); Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc., 384 F.3d 756 (9th Cir. 2004), cert. denied, --- S. Ct. ---, No. 04-621, 2005 WL 1500322 (June 27, 2005); Utilimax.com, 378 F.3d 303. 7 Under the state and federal regulatory regimes governing USTelecom’s members, state commissions and the FCC generally have the authority both to review tariff rates when they are filed and to entertain complaints that such rates are unjust and unreasonable. The governing rate regulations reflect a complicated accretion of different regulatory approaches, including rate-ofreturn regulation, price caps, and different degrees of pricing flexibility. See, e.g., Order and Notice of Proposed Rulemaking, Special Access Rates for Price Cap Local Exchange Carriers, 20 FCC Rcd 1994, ¶¶ 9-18 (2005) (describing history of special access pricing regulation). In many cases, the particular rates or rate ceilings have been dictated by regulators, either after elaborate rate cases or pursuant to formulas established pursuant to similarly elaborate rulemaking proceedings. Furthermore, the rate structures in place do not necessarily reflect considerations of economic efficiency alone: regulators may establish rates to promote other interests, including universal service. See United States Telecom Ass’n v. FCC, 290 F.3d 415, 422 (D.C. Cir. 2002); Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000). Thus, determinations about rates involve complicated determinations of policy that legislatures have delegated to expert agencies. See Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 146 n.12 (1990) (“[A] recurring theme in [the filed rate] cases is that the Commission, rather than the courts, should have primary responsibility for administration of the statute. The filed rate doctrine was regarded in significant part as a means for ensuring that this allocation of responsibility was respected.”) (Stevens, J., dissenting). In all events, the establishment of rates is a task that is peculiarly within the institutional competence of regulatory agencies, and outside that of antitrust courts. See Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (“antitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies . . . ) that are easier to administer”). 8 Tariff regimes are meant to promote transparency by requiring the public filing of binding rates. Elimination or weakening of the filed rate doctrine would encourage litigants to side-step the regulatory process – which offers no treble-damages incentive – and thus would undermine agency control over the rate-setting process. As a result, the openness and transparency – and uniformity of treatment – that tariff regimes are designed to promote would be sacrificed. Cf., e.g., Cavalier Tel., LLC v. Verizon Virginia, Inc., 330 F.3d 176 (4th Cir. 2003), cert. denied, 540 U.S. 1148 (2004) (specific procedures for implementation of statutory duties could be over-ridden by collateral antitrust litigation); Covad Communications Co. v. BellSouth Corp., 314 F.3d 1282, 1292 (11th Cir. 2002) (Tjoflat, J., dissenting from denial of rehearing en banc of Covad Communications Co. v. BellSouth Co., 299 F.3d 1272 (11th Cir. 2002), vacated, 540 U.S. 1147 (2004), on remand, 374 F.3d 1044 (11th Cir. 2004)) (noting incentives to evade regulatory control and “run to federal court, seeking treble damages”). Furthermore, there is no reason to believe that the filed rate doctrine leads to underenforcement of the antitrust laws. Judge Friendly noted that increased reliance on “competition rather than regulation to insure the reasonableness of rail and motor carrier rates” might undermine the application of the doctrine. Square D, 760 F.2d at 1354. But where markets are competitive, there is likely no reason to require tariffs – competition protects consumers against both unjust and unreasonable rates and unreasonable discrimination. See, e.g., Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2907 (2004). Even in hybrid regimes that give substantial pricing flexibility while maintaining a tariff requirement, there will usually be a plaintiff that is better suited to enforce any antitrust obligation than a consumer complaining that rates are too high. In cases involving supposedly exclusionary unilateral conduct by an incumbent, for example, the victim of the exclusionary practice would 9 generally suffer a more direct injury and be the appropriate enforcer of any antitrust duty. See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416-17 (2004) (Stevens, J., concurring). And cases involving unlawful horizontal conspiracies, if discovered, are likely to attract the attention of public enforcement authorities – as was the case in Square D itself. See 760 F.2d at 1349 n.1. The requirement that carriers maintain filed tariffs is designed to ensure that regulators have the ability to scrutinize filed rates and to enforce carriers’ obligation to provide service on just, reasonable, and nondiscriminatory terms. Such regimes are “designed to deter and remedy” the harm that would result from charging excessive rates; thus, “the additional benefit to competition” from allowing consumer antitrust actions for damages resulting from such rates “will tend to be small.” Trinko, 540 U.S. at 411. The filed rate doctrine is well calibrated to ensure that antitrust enforcement continues with regard to private, discretionary conduct that is not subject to regulatory scrutiny and control, while blocking claims that would tend to undermine the authority and transparency of existing regulatory controls.

#### Turns case – FERC is legally requiring integration of beyond-the-meter DER into wholesale power markets now, despite state attempts to stop it—SCOTUS upheld it because of the EXACT THING the plan reverses!

Ferrey 18

Steven Ferrey, Professor of Law at Suffolk University Law School and was Visiting Professor of Law at Harvard Law School, primary legal consultant to the World Bank, the European Union, and the United Nations on their renewable energy and climate change policies for developing countries, working extensively in Asia, Africa, and Latin America, JD and MA in Regional Energy Planning-UC Berkeley, SUPREMACY DOCTRINE & SUSTAINABILITY, 50 Ariz. St. L.J. 515, 2018

In 2016, the Supreme Court repositioned the “bright line” articulated in Hughes, which bars state regulation of energy. In FERC v. EPSA, 54 the Court extended and expanded the share of federal authority over power. 55 The case originated when FERC issued its Order 745 in 2011,56 requiring sustainable demand response resources to be allowed to compete in wholesale power markets.57 The cost of implementing demand-response programs, a form of on-demand energy conservation implemented by energy consumers, typically is less than the cost of building new generating facilities to supply additional power.58 Order 745 builds on previous FERC Order 719, requiring RTOs and ISOs59 to accept bids from demand response resources in their markets for certain ancillary services on a basis comparable to treatment of other power generation resources.60 FERC Order 745 allows for any state regulator to prohibit its customers from making demand response bids in the wholesale market.61 In the interest of cooperative federalism, if state regulatory authorities with oversight of demand response transactions forbid market participation, wholesale power operators would be exempt from the acceptance requirement under Order 745.62 Demand-response conservation of energy on the customer side of the meter implicates neither the wholesale nor the interstate sale of power, and therefore there is no sale of power covered by the Federal Power Act.63 By definition,64 demand response is not a sale of energy at wholesale or power transmission, which FERC has jurisdiction to regulate under § 201 of the Federal Power Act.65 Order 745 did not regulate demand response as a “sale” of power under § 201. Instead, FERC relied on its remedial authority under §§ 205 and 206 as the basis for its Order 745 jurisdiction,66 which direct FERC to regulate “practices . . . affecting” the rates for such sales if it finds these practices are “unjust, unreasonable, unduly discriminatory or preferential.”67 The Court has long held that §§ 205 and 206 confer on FERC jurisdiction to regulate “practices . . . affecting” wholesale rates, even when the agency’s actions also impact retail customers.68 The Court in EPSA held that payments to demand response participants do directly impact wholesale electricity rates within the reach of the Federal Power Act.69 Second, despite regulating retail demand response participant markets, the Commission did not move to regulate retail rates themselves.70 The Court reversed the D.C. Circuit’s holding that Order 745 violated the Administrative Procedure Act by instituting arbitrary and capricious compensation rates, based on its plain language interpretation of the Federal Power Act.71 The Supreme Court found demand response to be a factor “directly affecting” wholesale power markets and rates when wholesale power was bid into ISO capacity markets.72 The EPSA case did not reinforce the “bright line” separating state and federal power, but rather moved that line to allow more federal authority. The majority opinion in EPSA held “we afford great deference to the Commission in its rate decisions,” for “[t]he disputed question here involves both technical understanding and policy judgment.”73 The Supreme Court in EPSA acknowledged that Chevron recognizes that Congress can be found to have implicitly delegated discretionary authority to an administrative agency.74 B. The Supreme Court Moves Preemptive “Bright Line” The Supreme Court repositioned the jurisdictional line of authority favoring federal regulation in another way. In Arlington v. FCC, the majority held that Chevron deference applies to an agency’s interpretation of the scope of its own statutory jurisdiction: “[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”75 There is no difference between deference afforded to the agency by an agency’s “jurisdictional” or “non-jurisdictional” interpretations:76 “[i]f ‘the agency’s answer is based on a permissible construction of the statute,’ that is the end of the matter.”77 A federal agency, and particularly independent utility regulatory agencies like the FCC and FERC, through the Arlington decision, are now allowed to determine the jurisdictional scope of their own authority, both substantively and procedurally.78 For example, the demand reduction of power, addressed by FERC Order 745, is within FERC authority to determine whether its authority over wholesale market transactions includes such things as demand reduction transactions.79 In a separate 6–2 opinion, the Supreme Court held that federal agencies are entitled to deference to agency discretion in devising regulations, as per Chevron. 80 So through decisions in Arlington and EPSA, the “bright line” has increased the federal field of jurisdiction and added broader scope. EPSA clearly extended federal authority over indirect electric energy matters— particularly applying to demand-response and conscious use of energy is a foundation of a sustainable environment. Arlington increased traditional Chevron deference to the federal agency to not only exercise deference on the substantive rule of law, but also to decide on what matters its jurisdiction extends, and to interpret this broadly. This Supreme Court extension of substantive and procedural deference enlarges the field of federal authority under the Constitution.

### Energy Adv

#### Aff ev says that filed rate doctrine is based on Chevron deference – plan overturning it is used as an excuse to gut broader admin state

Hernandez 17

Carlos A. Hernandez, JD-Southwestern Law School's SCALE program, employment lawyer, and Warren Grimes, Professor of Administrative Law-Southwestern, NOTE AND COMMENT: FROM ARLINGTON TO TENNESSEE: THE BEGINNINGS OF A CHEVRON DEFERENCE FAREWELL TOUR?, 47 Sw. L. Rev. 179, 2017

In addition to the executive and legislative branches' direct assaults, the change in the composition of the Supreme Court following the death of Justice Antonin Scalia poses another fundamental challenge to the authority and power of the administrative state. Assumedly, the replacement of a "conservative" Justice by another conservative would not upend a constitutional majority regarding a controversial aspect of administrative law. But, attempts to pigeonhole Supreme Court Justices with predictive labels of "conservative" or "liberal" can be more misleading than helpful. 7Link to the text of the note This is certainly true of the late Justice Scalia. While the conservative label often presumes an anti-regulatory position, Scalia was an ardent proponent of affording deference to the ability of administrative agencies to interpret law. 8Link to the text of the note This deference is referred to as Chevron deference9 from the Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 10Link to the text of the note In Chevron, the Court upheld the Environmental Protection Agency's statutory interpretation of a Clean Air Act provision. 11Link to the text of the note In large part, Scalia's pro-Chevron conservative judicial orientation stemmed from his long-standing preference to leave power with the executive agencies to interpret statutory ambiguities, rather than with unelected judges. 12Link to the text of the note Based on the Trump Administration's anti-regulatory agency pronouncements and actions during its first year, it comes as no surprise that the newest member to the Supreme Court, Justice Neil Gorsuch, a presidential nominee, does not share Justice Scalia's pro-Chevron proclivities. 13Link to the text of the note As such, the direction [\*181] of the Court is likely to sway in favor of further limiting administrative agency's power.

This comment focuses on the resurgence of a federalism-based judicial narrative that undercuts the power and authority of the administrative state. Specifically, the comment traces recent judicial attempts to challenge the Chevron deference afforded to the Federal Communications Commission ("FCC"), the independent administrative agency tasked with primary authority for laws, regulations, and innovation related to interstate and international communications. 14Link to the text of the note Namely, the comment contrasts two recent decisions: the Supreme Court's 2013 Arlington v. FCC opinion 15Link to the text of the note with that of the Sixth Circuit's Tennessee v. FCC decision in 2016. 16Link to the text of the note The Sixth Circuit's federalism-based Tennessee decision challenges not only the Court's holding in Arlington that upheld the FCC's Chevron deference, but, more significantly, Tennessee challenges the power and scope of the post-New Deal administrative state. It accomplishes this by positing a fundamental remaking of the Chevron framework. 17Link to the text of the note

This judicial challenge is not based on a new legal theory. It has been percolating in judicial dissents such as the one in Arlington. 18Link to the text of the note In Tennessee, the court accomplishes this challenge to Chevron deference by inserting the clear statement rule, a federalism-based canon of statutory construction, 19Link to the text of the note into its Chevron analysis. This federalism-based refashioning of the Chevron framework substantially limits an agency's ability to exercise its regulatory power, imposing what has been referred to as a "clarity tax" 20Link to the text of the note that effectively denies Chevron deference within the context of potential federal preemption of state law.

At the end of the day, this paper suggests that the Sixth Circuit's federalism-based refashioning of Chevron is a consequential judicial act, especially in light of President Trump's decision to fill the Supreme Court vacancy after Justice Scalia's death with Justice Neil Gorsuch. The Sixth Circuit's decision foreshadows the ascendance of a long dormant desire in an agglomeration of dissenting judicial opinions to place limits on the regulatory power and scope of administrative agencies. Given the anti- [\*182] regulatory zeal ushered in by President Trump's ascendancy to the White House and Justice Gorsuch's Supreme Court confirmation, 21Link to the text of the note this dual case study of Arlington and Tennessee aims to provide insight into one of the ways in which the landscape of the post-New Deal administrative state is almost certain to fundamentally change for years to come, from within the highest courts in the land.

Part I provides an overview of the persuasive power of federalism-based arguments and dissenting opinions to influence and, more significantly, change substantive areas of law. In particular, it explains how Chevron deference works and illucidates how it fits within these federalism-based dissenting opinions as a prime substantive target to curtail. Part II examines the Supreme Court's majority and dissenting opinions' underlying federalism-based arguments in Arlington. This five-to-four decision narrowly upheld the FCC's Chevron deference. Specifically, it contrasts Justice Scalia's defense of Chevron deference in his majority opinion with Chief Justice Roberts' dissent. Particular attention is paid to the dissenting opinion's federalism-based concerns about what it perceived as the threat posed by the growth and power of the regulatory state. Part III focuses on the Sixth Circuit's federalism-based denial of Chevron deference to the FCC in Tennessee. After providing background for the specific issues at stake, this Part explains the fundamental change the Sixth Circuit made to the Chevron analysis, undercutting the power and scope of the FCC. Part IV evaluates the state of Chevron deference post-Tennessee by placing the Sixth Circuit's decision within the current anti-regulatory political context. In essence, this Part suggests that the Sixth Circuit's decision concerning Chevron deference elucidates the rise of a potent federalism-based legal narrative that champions state sovereignty against what has been derisively characterized by critics since the New Deal era as a unconstitutional overreach by the federal government and its administrative apparatus.

#### Effective admin state is key to everything

Posner 17 – Professor of Law, UChicago

Eric Posner, University of Chicago Law School, and Emily Bazelon, Truman Capote Fellow at Yale Law School and staff writer at The New York Times Magazine, The Government Gorsuch Wants to Undo, The New York Times, April 1, 2017, <https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html>

But the reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government — including the rules that keep our water clean, regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the White House adviser Steve Bannon, who has called for its “deconstruction.” The Republican-dominated House, too, has passed a bill designed to severely curtail the power of federal agencies.

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that’s not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state “poses a grave threat to our values of personal liberty.”

The 80 years of law that are at stake began with the New Deal. President Franklin D. Roosevelt believed that the Great Depression was caused in part by ruinous competition among companies. In 1933, Congress passed the National Industrial Recovery Act, which allowed the president to approve “fair competition” standards for different trades and industries. The next year, Roosevelt approved a code for the poultry industry, which, among other things, set a minimum wage and maximum hours for workers, and hygiene requirements for slaughterhouses. Such basic workplace protections and constraints on the free market are now taken for granted.

But in 1935, after a New York City slaughterhouse operator was convicted of violating the poultry code, the Supreme Court called into question the whole approach of the New Deal, by holding that the N.I.R.A. was an “unconstitutional delegation by Congress of a legislative power.” Only Congress can create rules like the poultry code, the justices said. Because Congress did not define “fair competition,” leaving the rule-making to the president, the N.I.R.A. violated the Constitution’s separation of powers.

The court’s ruling in Schechter Poultry Corp. v. the United States, along with another case decided the same year, are the only instances in which the Supreme Court has ever struck down a federal statute based on this rationale, known as the “nondelegation doctrine.” Schechter Poultry’s stand against executive-branch rule-making proved to be a legal dead end, and for good reason. As the court has recognized over and over, before and since 1935, Congress is a cumbersome body that moves slowly in the best of times, while the economy is an incredibly dynamic system. For the sake of business as well as labor, the updating of regulations can’t wait for Congress to give highly specific and detailed directions.

The New Deal filled the gap by giving policy-making authority to agencies, including the Securities and Exchange Commission, which protects investors, and the National Labor Relations Board, which oversees collective bargaining between unions and employers. Later came other agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration (which regulates workplace safety) and the Department of Homeland Security. Still other agencies regulate the broadcast spectrum, keep the national parks open, help farmers and assist Americans who are overseas. Administrative agencies coordinated the response to Sept. 11, kept the Ebola outbreak in check and were instrumental to ending the last financial crisis. They regulate the safety of food, drugs, airplanes and nuclear power plants. The administrative state isn’t optional in our complex society. It’s indispensable.

#### Litigation fails and won’t solve energy consolidation

Vaheesan 13 – Special Counsel, American Antitrust Institute, Washington, D.C.; Duke University School of Law.

Sandeep Vaheesan, 2013, “Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity,” University of Michigan Journal of Law Reform, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1010&context=mjlr

Although the present application of the filed-rate doctrine is problematic and allows some types of market misconduct to go unpunished, the actual benefits of a judicial or legislative repeal or limitation of the doctrine should not be overstated. The KeySpan episode shows how restricting the scope of the filed-rate doctrine can produce better market outcomes. The threat of private antitrust damages actions could have deterred what amounted to explicit collusion between rival generators. Express collusion between generators, however, is not the sole or even primary reason why restructuring the industry has not delivered the promised consumer benefits. Two important forms of anticompetitive market behavior-unilateral withholding and tacit collusion-are permissible and difficult to prosecute, respectively, under long-standing interpretations of the antitrust laws. In other words, the antitrust laws do not proscribe the entire universe of anticompetitive conduct that occurs in electricity markets.

#### And market concentration is more likely to lead to a decrease in prices

O’Shaughnessy 18 – independent renewable energy research consultant.

Eric O’Shaughnessy, May 2018, “The Effects of Market Concentration on Residential Solar PV Prices: Competition, Installer Scale, and Soft Costs,” NREL https://www.nrel.gov/docs/fy18osti/71296.pdf

This study shows PV prices generally decline as market concentration increases, suggesting the price-reducing benefits of installer scale dominate the price-increasing effects of market power in concentrated markets—at least at current levels of PV market concentration. Because of the study’s improved methods and expansive data set, this result imparts confidence in similar findings from previous research (Gillingham, Deng et al. 2016; Nemet, O'Shaughnessy et al. 2017; Pless, Langheim et al. 2017). And, this result has important policy implications. Though competition can reduce market power and reduce PV prices (Bollinger, Gillingham et al. 2017; O'Shaughnessy and Margolis 2017), the benefits of competition must be assessed against the foregone benefits of increased installer scale. Policymakers may be able to leverage the pricereducing benefits of installer scale through policies that help move small- and mid-scale installers up learning curves, connect customers to small- and mid-scale installers to help these installers scale up, and foster experience spillovers from large- to small- and mid-scale installers. Solarize campaigns provide one example of a policy that leverages installer scale while constraining competition, at least temporarily. In a Solarize campaign, a community contracts with one or a limited number of installers to install several PV systems within the community. Solarize campaigns use collective bargaining power to obtain lower prices—even though installers are protected to some degree from competition (Bollinger, Gillingham et al. 2017). The results of this study suggest that Solarize campaigns may have additional benefits as programs to support local installer scaling. The experience accrued by installers during Solarize campaigns may allow the same installers to offer lower prices in the long term.

#### Supply and demand logics make price spikes inevitable and mean the plan can’t solve

Skibbens 21 – Environment Campaigns Associate at U.S. PIRG.

Erin Skibbens, December 14 2021, “The real reason behind rising gas prices, and how electrification can help,” U.S. PIRG, https://uspirg.org/blogs/blog/usp/real-reason-behind-rising-gas-prices-and-how-electrification-can-help

These price spikes are likely due to a [combination of factors](https://www.forbes.com/sites/energyinnovation/2021/11/15/with-high-natural-gas-prices-now-is-the-time-to-build-back-better/?sh=787744933a07). However, the simplest explanation is low supply and high demand. During the early stages of the pandemic, it just wasn’t profitable for oil and gas companies to continue drilling because demand was so low. Then, right as businesses were starting to reopen, we entered into one of the hottest summers on record, leading to a huge jump in demand for meeting the nation’s cooling needs. This combination of low supply and high demand caused a spike in prices that we’ll continue to see, not only in the states, but also [globally](https://www.npr.org/2021/09/25/1040669075/global-natural-gas-prices-are-soaring). Even though demand is still high, the fuel industry is purposefully not increasing production, using high prices to pay off debts and funnel money into stakeholders’ pockets— at the expense of their paying customers.

#### Tons of barriers prevent a transition to renewables – capital costs, subsisdies for fossil fuels, financing risks, regulatory issues and more are not solved by the plan

Beck and Martinot 4 – Renewable Energy Policy Project. Global Environment Facility.

Fred Beck and Eric Martinot, 2004 “Renewable Energy Policies and Barriers,” https://biblioteca.cejamericas.org/bitstream/handle/2015/3308/Renewable\_Energy\_Policies\_and\_Barriers.pdf?sequence=1&isAllowed=y

The need for enacting policies to support renewable energy is often attributed to a variety of “barriers” or conditions that prevent investments from occurring. Often the result of barriers is to put renewable energy at an economic, regulatory, or institutional disadvantage relative to other forms of energy supply. Barriers include subsidies for conventional forms of energy, high initial capital costs coupled with lack of fuel-price risk assessment, imperfect capital markets, lack of skills or information, poor market acceptance, technology prejudice, financing risks and uncertainties, high transactions costs, and a variety of regulatory and institutional factors. Many of these barriers could be considered “market distortions” that unfairly discriminate against renewable energy, while others have the effect of increasing the costs of renewable energy relative to the alternatives. Barriers are often quite situation-specific in any given region or country; nevertheless, three broad categories of barriers are discussed in this section.

#### Green growth and decoupling are impossible with no studies to back its feasibility – massive political and economic change is necessary to stop climate change

Barth et. Al. 19 – Timothée Parrique, Centre for Studies and Research in International Development (CERDI), University of Clermont Auvergne, France; Stockholm Resilience Centre (SRC), Stockholm University, Sweden Jonathan Barth, ZOE.Institute for Future-Fit Economies, Bonn, Germany François Briens, Independent, Informal Research Centre for Human Emancipation (IRCHE) Christian Kerschner, Department of Sustainability, Governance, and Methods, MODUL University Vienna, Austria; Department of Environmental Studies, Masaryk University, Brno, Czech Republic Alejo Kraus-Polk, University of California, Davis, USA Anna Kuokkanen, Lappeenranta-Lahti University of Technology, Lahti, Finland Joachim H. Spangenberg, Sustainable Europe Research Institute (SERI Germany), Cologne, Germany.

Parrique T., Barth J., Briens F., C. Kerschner, Kraus-Polk A., Kuokkanen A., Spangenberg J.H, July 2019, “Decoupling Debunked,” European Environmental Bureau, https://eeb.org/wp-content/uploads/2019/07/Decoupling-Debunked.pdf

This report has sought to make a number of points. To begin with, scientific studies and political discussions about decoupling must be precise as to how they define the term (is it relative or absolute, dealing with resource use or impacts, global or local, and temporary or permanent?) and how it relates to existing environmental thresholds and political targets: Is it sufficient to achieve the target? Does it account for a fair distribution of burdens and benefits? In the second section, we have reviewed the empirical decoupling literature searching for evidence of the type of decoupling that would justify green growth as a political strategy. Our finding is clear: the decoupling literature is a haystack without a needle. Of all the studies reviewed, we have found no trace that would warrant the hopes currently invested into the decoupling strategy. Overall, the idea that green growth can effectively address the ongoing environmental crises is insufficiently supported by empirical foundations. Here, it is important to note that decoupling is neither a new nor a never-tried strategy. It has been the main sustainability plan, at least for the OECD and the European Commission, since 2001, and a key feature of many member states’ environmental and industrial policies since the 1990s. Decoupling is not an innovative strategy but rather the continuation of what has been done in the European Union in the last decades. The meagre achievements of the decoupling strategy until now reported in Section 2 cast serious doubt as to whether prospects for the short- to medium-term future are better. Considering the last two decades as a trial period, one must confront the fact that decoupling has failed to deliver the ecological sustainability it promised CONCLUSIONS: FAREWELL TO GREEN GROWTH 58 At last, we claimed that there were several reasons to be sceptical about the occurrence of decoupling in the future. (1) Rising energy expenditure, (2) rebound effects, (3) problem shifting, (4) the underestimated impact of services, (5) limited potential of recycling, (6) insufficient and inappropriate technological progress, and (7) cost shifting can,

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each individually, and even more all together, compromise or even dismiss the possibility of “green growth.” The insight here is not that efficiency improvements are unnecessary (and in that sense, we support most of the decoupling-targeted policies advocated by UNEP in their 2014a report), but instead that it is theoretically and empirically unrealistic to expect those to absolutely, globally, and permanently delink a constantly growing economic metabolism from its biophysical base. Given the historical correlation of GDP and environmental pressures as well as the required technological improvements needed for a sufficiently large and fast reduction in resource use and environmental degradation, relying on decoupling alone to solve environmental problems appears to be an extremely risky and irresponsible bet. Framing issues of social-ecological justice with the concept of decoupling is like trying to cut a tree with a spoon: it is likely to be a long attempt and most likely to fail in the end. As Daly (1977, p. 115) already argued 40 years ago, the bet we are facing is similar to Pascal’s Wager. Either we hope that somehow these seven problems will solve themselves, continue growth-as-usual and risk a social and environmental collapse; or we acknowledge that decoupling is likely to fail with irreversible consequences on the environment, and follow a precautionary principle approach, moving away from a risky green growth strategy and directly reducing the problematic forms of production and consumption today. In light of what this report shows, prudence alone warrants the abandonment of decoupling and green growth as a sole strategy for sustainability. Because extraordinary claims require extraordinary evidence, the burden of proof should fall upon advocates of decoupling. As we have argued in Section 3, any claim for decoupling must address a series of arguments. This is the challenge for any policy attempting to follow the IPCC 1.5°C mitigation scenario and implement the Sustainable Development Goals. So far, the green growth literature on the topic is either silent or unconvincing regarding any of these seven arguments we have listed in this report. Reflecting on these findings, our recommendation is the following: policymaker have to acknowledge the fact that addressing the climate and biodiversity crises (which are only two of several environmental crises) may require a direct downscaling of economic production and consumption in the wealthiest countries. In other words, we advocate a shift in priorities from efficiency to sufficiency, with the latter being put before the former. The decoupling strategy takes consumption levels as granted and relies on the hope that further economic growth will provide the means to (over) compensate for its own environmental impacts. It is indeed an appealing approach to policymakers in that it requires only minimal changes in economic and social structure. However, this focus on supply appears counter-intuitive and now outdated. The obsession with decoupling in European politics shows a problematic lack of political creativity and ambition, as well as an inability from policymakers to imagine the economy differently than in its current form.

### Housing Adv

#### Tons of factors means we aren’t in a housing bubble and even if we are, prices will lower gracefully to properly balance demand

Zandi 22 – Mark Zandi is chief economist at [Moodys.com](http://moodys.com/).

Mark Zandi, January 6 2022, “No, the housing market isn’t in a bubble. But there still are many things to worry about in 2022.” The Washington Post, https://www.washingtonpost.com/business/2022/01/06/housing-market-forecast-2022/

House prices are sizzling. Not just in swanky neighborhoods in the nation’s big cities or in resort towns. Not just in the suburbs or exurbs. Not just in inner cities or in rural areas. Just about everywhere.

House prices were rising strongly before the pandemic, but since the pandemic hit they’ve been on a tear. The median existing house price — half of homes sold for more and half for less — has surged to more than $350,000, about double what it was a decade ago.

Just in the past year, the price for a typical home is up almost 20 percent. And in about one-fourth of the nation’s 400-plus metropolitan areas, prices have rocketed by more. Even in the mid-2000s just before that housing bubble burst, fewer than one-fifth of metropolitan areas had seen annual prices increase as much.

So, are we in another housing bubble?

No. Not yet. But I say this with less confidence than I did a year ago, and if current trends continue for another year, I won’t be saying it at all.

There are good reasons house prices are up a lot. First, a shout-out to the federal government’s yeoman efforts to shore up the housing market during the pandemic. This includes a foreclosure moratorium and forbearance on payments on government-backed mortgages, which have forestalled distressed home sales, typically at big discounts that weigh on house prices. There have been amazingly few foreclosures during the pandemic.

House prices have also been supercharged as mortgage rates declined to record lows. In no small part due to the Federal Reserve’s efforts, the rate on a typical 30-year fixed-rate mortgage loan fell below 3 percent at the start of the pandemic and has been hovering near there ever since.

For most of the economic expansion before the pandemic, rates were closer to 4 percent. And in the housing bubble they were about 6 percent. Since most home buyers purchase as much home as their mortgage payment and income will allow, lower mortgage rates quickly juice demand and house prices, particularly when there is a shortage of homes, as there is now.

This housing shortage had its beginnings in the bursting housing bubble and collapse in new home building. Builders have slowly ramped up construction since then, but even now the number of new homes is not sufficient to meet demand. The vacancy rate for homes for sale has never been lower and continues to decline. The housing shortfall is especially acute for lower-priced homes. More restrictive zoning since the financial crisis and much higher labor, lumber and other material costs have vexed the economics of building homes at lower price points. The chaos in global supply chains complicates home building even more.

Work-from-anywhere, set off by the pandemic, has further powered housing demand. Many apartment dwellers in the nation’s largest urban centers that were slammed hardest by the pandemic fled for the safety and bigger spaces of the suburbs, exurbs and smaller cities. Many bought homes and have been willing to pay much higher prices that look like bargains compared with house prices in the city.

Take New York City, where well over half a million more people have moved out than have moved in since the pandemic began. New Yorkers are buying homes in places like Atlanta, Austin, Orlando and Tampa. Similar numbers have left the Bay Area and Los Angeles for places like Boise, Idaho; Boulder, Colo.; Las Vegas; and Tucson.

New Yorkers and Californians accustomed to outsize house prices have viewed much lower prices in smaller communities as bargains, even though they are paying much more than any previous buyer has. House prices in these communities have gone parabolic.

Home-buying is also enjoying a demographic tail wind with the bulk of the large millennial generation now in their early 30s, an age when previous generations have purchased first homes. For economic and social reasons, the millennials may take a bit longer to become homeowners. They’ve been slower to strike out from their parents’ homes and start families. But single-family housing demand will continue to get a boost from this cohort through at least mid-decade.

More Zandi: What actions can policymakers take to avert the brewing national housing crisis?

House prices should be riding high, but they have risen so far so fast that they are increasingly disconnected from household incomes, apartment rents and construction costs. If prices consistently rise more quickly than incomes, owning a home ultimately becomes unaffordable. If prices get too far ahead of rents, it makes more financial sense to rent a home than buy it. And if prices outstrip the cost of constructing homes, builders have a strong incentive to put up more homes.

Based on these tried-and-true measures of house-price valuation, homes nationwide appear overvalued by as much as 15 percent, and in much of the South and West they are overvalued by more than 20 percent.

But while the housing market is overvalued, it’s not a bubble. That would happen if the market turned speculative with investors — particularly buyers who purchase homes looking to sell quickly for a profit — dominating the market. House flips — an arms-length sale within one year of the previous sale — have picked up in recent months but are still not a serious concern.

Much of the flipping is by investors purchasing older homes, particularly in less bubble-prone Northeast and Midwestern cities, renovating them, and then quickly selling. Moreover, unlike in the previous housing bubble, today’s housing investors are mostly large well-established companies that have longer-term investment horizons. They buy homes, fix them up and then rent them to families who can’t afford to buy, but want the lifestyle offered in a single-family home.

More Zandi: Housing market could shift under new tax law

Nonetheless, it isn’t a stretch to think inherently over-optimistic flippers will find it tough to pass up what looks like easy money, become more emboldened and cause the overvalued housing market to cross to a bubble. They calculate that if they had purchased a home in some of the nation’s hottest housing markets a year ago, say Phoenix with a typical 20 percent down payment, and sold it today, they would have reaped a near crypto-like 150 percent return. Stock prices, which have had their own amazing run, are up only 30 percent over the same period. This financial arithmetic won’t work for very long, but it can work long enough to inflate a bubble.

This would be especially disconcerting if investors finance their purchases with more debt. Indeed, mortgage debt is increasing quickly. It is up at a near double-digit pace over the past year, the strongest growth since during the previous housing bubble. There are big differences between now and then, since today’s lending is mostly plain vanilla 30-year fixed rate mortgages, where borrowers’ credit history, income and appraised housing values are well documented. This is in contrast to the last bubble when adjustable rate loans were made to borrowers with low credit scores — remember the ubiquitous subprime two-year adjustable rate loan — and questionable, even fraudulent, borrower documentation.

#### Econ decline doesn’t cause war – multiple warrants

Walt 20 – Robert and Renee Belfer Professor of International Affairs at the Harvard Kennedy School.

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

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

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.

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

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

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

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

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

## 2NC

### CP FERC

#### Their ev is a SOLVENCY ADVOCATE because it concludes that if the commission honors its original mandate it will FACILITATE state efforts to decarbonize at worse 2NC plank Federal Energy Regulatory Commission should remove rules that create barriers to renewables

Rich Glick and Matthew Christianse 19, member of the Federal Energy Regulatory Commission, general counsel of the Federal Energy Regulatory Commission, 01/01/19, FERC and Climate Change, Washington: Foundation of the Energy Law Journal, Vol. 40(1), p. 1-46

B. The Commission's Role in the Transition to the Electricity Grid of the Future

The Commission cannot ignore these fundamental changes to the electricity sector. Instead, these changing dynamics will require the Commission to monitor and, in some cases, revise its regulations to ensure that they are facilitating competition and not becoming obstacles to new technologies or entrenching existing methods of generating and transmitting electricity. Ensuring a level playing field through competition should indirectly facilitate a reduction in GHG emissions by ensuring that existing market rules do not become barriers to new technologies, which are generally cleaner than many conventional forms of electricity generation.

Section 205 of the FPA requires that all rates and charges for the wholesale sale and transmission of electricity as well as "all rules and regulations affecting or pertaining to such rates or charges" be just and reasonable and not unduly discriminatory or preferential. 58 Section 206 gives the Commission the authority to revise any existing rate or charge or any practice affecting an existing rate or charge upon a showing that (1) the existing rate, charge, or practice is unjust and unreasonable or unduly discriminatory or preferential and (2) the Commission's preferred replacement rate is just and reasonable and not unduly discriminatory or preferential. 59 The FPA also reserves certain issues for exclusive state jurisdiction, including retail sales of electricity and the facilities used for generating electricity. 60

Sections 205 and 206 the FPA vest the Commission with significant discretion to determine what is just and reasonable and not unduly discriminatory or preferential. 61 As discussed below, the Commission has used this discretion to  [\*15]  establish a series of principles that guide its implementation of the FPA. Chief among these principles are (1) ensuring a level playing field for similarly situated actors, (2) enhancing competition, and (3) promoting cooperative federalism. Whether these are the right principles and the success with which the Commission has implemented those principles can be debated. Nevertheless, these are the principles that the Commission has relied upon in recent years to explain how it implements its statutory mandate.

Regulations consistent with these principles will facilitate the transition to the electricity grid of the future, with important consequences for climate change. For example, eliminating barriers to competition and unduly discriminatory market rules has been a cornerstone of the Commission's implementation of the FPA. Many of the principal barriers to increased competition happen to be arrayed against new technologies that are relatively clean themselves or that have the potential to play important roles in the transition to the grid of the future. And while the Commission has justified its removal of these barriers entirely based on the core, pro-competitive purposes of the FPA, ensuring that these technologies are able to compete on a level playing field could go a long way toward reducing GHG emissions, thereby helping to avoid the worst effects of climate change.

Similarly, the Commission's commitment to cooperative federalism should facilitate state efforts to decarbonize the electricity sector. As noted, the states are currently taking the lead in the fight against climate change, primarily through efforts to reduce GHG emissions from the electricity sector. States as economically and geographically diverse as California, New York, New Mexico, and Colorado have enacted legislation or adopted regulations aimed at significantly or entirely decarbonizing their electricity generation mix. 62 As discussed below, the FPA preserves significant state authority, including the authority to regulate generation facilities, and the Commission has historically been solicitous of states' exercise of this authority, even where doing so may constrain the scope of Commission initiatives. 63 Such solicitude is especially warranted where the states are exercising their police powers over the general health and welfare--in this case by addressing environmental externalities, a core component of those police powers. 64

The balance of this section discusses some of the most significant examples of these principles in action. Critically, although a faithful application of these  [\*16]  principles can have meaningful effect on GHG emissions, doing so is entirely consistent with the Commission's fuel- and technology-neutral approach. The rules and regulations discussed below do not preference one resource class or type over another. Instead, they facilitate competition among all resources on a relatively level playing field and permit the states to play the role that Congress reserved for them under the FPA.

Of course, competition may create winners and losers in the electricity sector. Although Congress and the state legislatures have a history of helping companies--and workers--who find themselves in declining industries, that is not the Commission's role. Instead, the Commission promotes fair and robust competition, not the welfare of particular competitors. 65 The Commission's responsibility to protect the public interest and ensure that rates and practices remain just and reasonable in the face of pressure from entities who may suffer economic losses in the changed energy sector is a perfect illustration of why Congress made the Commission an independent agency.

1. Removing Barriers to Competition and New Technologies

Arguably the Commission's most important overarching policy initiative over the last few decades has been breaking down barriers to competition. The introduction of significant wholesale competition following the Energy Policy Act of 1992 66 and Order No. 888 67 produced substantial savings for consumers while also helping to foster a more diverse and dynamic electric generation sector. But, as the Commission has recognized in a series of orders, those reforms did not create a fully open and competitive wholesale electricity sector. In many cases, rules and practices designed for an industry based on vertically integrated utilities and conventional generation technologies became barriers to competition, even where competition had nominally taken hold. 68 One consequence of these barriers is that the bulk power system frequently either did not recognize or failed to accommodate new resources or technologies that were as capable of providing electricity, capacity, and ancillary services as conventional generators. This section discusses  [\*17]  a series of the Commission's landmark orders attempting to eliminate certain of those barriers to competition. 69

a. Removing Barriers to Full Market Participation

Over the last 30 years, the Commission has issued a series of orders eliminating barriers that prevented resources from participating fully in wholesale electricity markets. In each case, the Commission focused entirely on the longstanding principles underlying its implementation of the FPA, particularly enhancing competition and eliminating undue discrimination. By facilitating competitive markets and breaking down discriminatory barriers, the Commission has laid the foundation for a more dynamic electricity sector in which new competitors and new technologies are able to participate on a relatively level playing field.

Perhaps the most prominent recent example of the Commission's efforts to break down barriers facing new resources involves demand response. Demand response programs pay consumers to reduce their electricity use in response to the price of electricity. 70 In Order No. 719, the Commission sought to ensure that demand response resources were able to participate in wholesale electricity markets. 71 The Commission explained that, because demand response resources could supply many of the services and benefits provided by conventional generators--and often at a lower cost--wholesale markets that precluded demand response from participating were unjust and unreasonable and unduly discriminatory or preferential. 72 Order No. 719 required RTOs and ISOs to make a number of reforms, including revising their market rules to accept offers from demand response resources largely as they would offers from conventional generators, in theory putting both types of resources on a level playing field for balancing supply and demand. 73

The Commission issued a second rule addressing demand response resources a few years later. Order No. 745 required RTOs and ISOs to compensate demand  [\*18]  response resources at the same level as conventional resources, requiring that "demand response providers . . . receive as much for conserving electricity as generators do for producing it." 74 The Commission explained that this pricing formula would break down bathers to competition by ensuring that demand response and conventional resources received commensurate compensation for the services they provided. 75 That change, the Commission explained, would help demand response resources to participate meaningfully in the wholesale market--with the market, not the Commission, determining the appropriate level of demand response resources. 76

Order No. 745 led to one of the most significant Supreme Court cases in the history of the FPA: FERC v. EPSA. 77 In that case, the Supreme Court upheld both the Commission's jurisdiction to regulate wholesale demand response as well as the pricing mechanism it chose in Order No. 745. 78 The Court agreed that the Commission had jurisdiction to issue Order No. 745 because the compensation scheme for demand response "directly affects" the wholesale rate. 79 In support of that conclusion, the Court pointed to the facts that demand response is used to balance wholesale market supply with wholesale market demand and that it puts "downward pressure" on all suppliers' bids. 80 The Court also recognized that the participation of demand response in wholesale markets helped alleviate service problems on the grid by easing "pressure" during periods of peak demand. 81 In short, the Court held that demand response's potential to improve the wholesale market brought the efforts to remove barriers to wholesale demand response within the Commission's jurisdiction under the FPA.

Together, the demand response orders stand for the proposition that barriers to competition that preclude or hinder particular resource types from supplying the services that they are technically capable of providing may be unjust and unreasonable and/or unduly discriminatory or preferential. Although that principle derives directly from the Commission's longstanding pro-competitive interpretation of the FPA, it also has important consequences for electricity-sector GHG emissions. Many wholesale market rules were designed for a grid that was overwhelmingly composed of fully dispatchable, synchronous generators, such as thermal, nuclear, and hydro plants that rely on spinning turbines to generate electricity. 82 Market rules designed with these resources in mind can pose unintended bathers  [\*19]  to variable energy resources, including demand response, but also wind and solar, that do not rely on spinning turbines to generate electricity. For example, many of the standardized products and services purchased in wholesale markets were designed for the needs and capabilities of an electricity grid based primarily on generators that use "spinning mass" to generate electricity. 83 Similarly, wholesale markets have at times precluded the full participation of new technologies--such as demand response, but also storage and distributed energy resources, discussed further below. Accordingly, although enhancing competition is an imperative rooted in the most conventional understanding of the FPA, it can facilitate the participation of new technologies that happen to be relatively clean themselves or that will play an integral role in the electricity grid of the future, thereby leading to a cleaner, more sustainable resource mix.

A more recent example of this principle in action is Order No. 841, which addressed the participation of energy storage resources in wholesale markets. 84 The potential for energy storage resources to radically transform how grid operators balance supply and demand is hard to overstate. 85 Although energy storage resources, particularly batteries, have made enormous strides in recent years, both in terms of cost and technical capabilities, they have continued to encounter barriers to participation in the market as a result of business and operational models that differ from conventional resources. 86 The Commission explained that those barriers include, for example, bidding parameters that preclude electric storage resources from participating to their full potential and rules that impede their ability to charge effectively using electricity purchased in the wholesale market. In addition, Order No. 841 recognized that some of the most important attributes of energy storage resources--including the ability to provide services as both a producer and consumer and to respond almost instantaneously to market signals--are  [\*20]  not recognized in all markets. 87 Accordingly, as in its demand response orders, the Commission recognized that market rules designed for other contexts were now hindering the development of modern storage resources and, by extension, harming consumers by limiting the potential for competition. 88

To remedy this situation, the Commission required RTOs and ISOs to develop market "participation models" that "recogniz[e] the physical and operational characteristics of electric storage resources." 89 The Commission recognized explicitly that a participation model that accommodates energy storage resources' characteristics was necessary to overcome "market rules designed for conventional generation resources which create barriers to entry for emerging technologies." 90 It explained that this participation model will produce rates that are just and reasonable because the participation model will remove barriers to market competition for all the services that energy storage resources are capable of providing. 91 Here again, although the Commission based its action entirely on its core responsibilities under the FPA--including much the same rationale adopted in Order No. 719--the rulemaking has the potential to play a significant role in the transition to the electricity grid of the future given the potential of energy storage technologies to effectively integrate large quantities of variable energy resources. 92 In addition, Order No. 841's concept of a participation model that permits resources to provide all the services that they are technically capable of supplying may eventually provide a model for ensuring that other technologies are fully capable of competing in wholesale markets.

When the Commission issued the notice of proposed rulemaking (NOPR) that became Order No. 841, it also included a proposal to require RTOs and ISOs to eliminate barriers to distributed energy resources' ability to bid their aggregated output into RTO and ISO markets. 93 Just as it did for energy storage resources in Order No. 841, the Commission suggested that distributed resources were capable of providing energy, capacity, and ancillary services, but were prevented from doing so effectively by RTO and ISO rules designed with conventional generators in mind. 94 Even more than demand response and energy storage resources, DERs may face significant barriers to participating effectively in the wholesale market--e.g.,  [\*21]  because DERs interconnect to the distribution system and are frequently located behind customer meters. 95 But DERs may also have greater potential to fundamentally transform how electricity is produced and consumed, given the sheer number and variety of DERs that could eventually participate in wholesale markets through aggregation. Although the Commission subsequently convened a technical conference to develop additional information before taking final action on the NOPR, 96 and the NOPR remains pending at the time of writing this article, the proceeding highlights how the Commission's responsibilities to eliminate barriers to competition and undue discrimination have the potential to accelerate the transition to the electricity grid of the future.

b. Removing Barriers Created by Antiquated Service Models

The previous section focused on how the Commission has eliminated barriers to the development of competition by reforming wholesale market rules that hinder the participation of new technologies. Equally important, however, are the Commission's efforts to ensure that public utilities provide the services needed to accommodate the changing electricity sector. Order No. 888's open access requirement is perhaps the best example. 97 Order No. 888 functionally "unbundled" the wholesale generation and transmission of electricity by requiring all utilities to establish a tariff with separate rates for generation, transmission, and ancillary services and to apply that tariff equally to themselves and third parties. 98 Order No. 888 thus created an "open access" regime in which third parties could utilize the transmission networks of incumbent utilities--a dynamic that established the foundation for the modern, competitive bulk power system. 99

Nevertheless, open access did not entirely eliminate the potential for undue discrimination or preference, especially where transmission owners retained significant discretion in administering their obligations under their OATT. 100 In the  [\*22]  two decades following Order No. 888, the Commission has issued a series of orders to ensure that non-incumbent wholesale market participants are able to access the transmission grid on equal terms as transmission owners. For example, in Order No. 2003 and subsequent rulemakings, the Commission required transmission owners to establish and refine pro forma interconnection procedures, facilitating new generators' access to the bulk power system. 101

The Commission continues to recognize that the nation's "changing resource mix driven by market forces and state and federal policies" and "the emergence of new technologies" have significant implications for the way resources access the transmission grid. 102 The Commission has addressed these implications in a variety of ways. For example, Order No. 845 provides that resources with excess interconnection capacity may use that excess capacity to directly supply energy from other sources or transfer it to another resource--a reform that is likely to facilitate the use of electric storage resources in conjunction with variable energy resources. 103 This change will facilitate the deployment of variable technologies by allowing them to use their interconnection service to provide more dispatchable and predictable energy, capacity, and ancillary services. Reforms along these lines have helped ensure that new technologies are able to access the transmission services needed to participate fully in Commission jurisdictional markets. The provision of non-discriminatory transmission access has, in turn, helped to facilitate the emergence of new, relatively clean resources that have contributed to the declining GHG-intensity of the electricity sector. Provided that the Commission continues to police the potential for undue discrimination in transmission service, there is every reason to believe that this dynamic will continue--and even accelerate--as the cost of renewable resources continues to decline.

Another example of the Commission's efforts to ensure necessary transmission services is Order No. 764, which aimed to create a level playing field for variable resources--primarily wind and solar--by eliminating rules that were designed for conventional resources and that discriminated against variable energy resources. 104 For example, the Commission required transmission owners to reduce the time increment in which they offered transmission service from an hour to fifteen minutes, so that variable energy resources could purchase transmission  [\*23]  services that better aligned with their generation output. 105 Order No. 764 extended the Commission's longstanding recognition that differences in the operational models of variable energy resources may require accommodation under the FPA. 106 Order No. 764 was arguably the Commission's clearest step to date in ensuring that variable energy resources can compete on an equal footing with conventional generators without suffering undue discrimination as a result of "operational procedures that have the de facto effect of imposing an undue burden on [variable energy resources]." 107 Nevertheless, as with the other orders discussed above, the Commission based its action on a straightforward understanding of its FPA obligations, in this case by eliminating unduly discriminatory rules and barriers to the entry of new resources. 108

An important point to recognize in the foregoing discussion is that breaking down barriers to competition and fostering new services does not mean giving new technologies a preference over conventional ones or excusing new resources from obligations that apply to similarly situated conventional resources. As new technologies have become increasingly sophisticated, the Commission has required these resources to take on additional responsibilities in maintaining the operations and reliability of the grid. For example, in 2016 the Commission generally required that all generation resources, including variable energy resources, provide reactive power to the grid as part of a new interconnection agreement. 109 Similarly, in 2018, the Commission required all new generating resources, again including variable energy resources, to install the equipment needed to provide primary frequency response. 110 As these examples illustrate, ensuring new technologies can compete on a level playing field will often entail a corresponding obligation to contribute to the reliability of the grid.

The Commission must continue to ensure that new technologies do not face barriers to competition, including rules designed for an outdated electricity sector.  [\*24]  At the time of writing this article, the compliance processes for Order No. 841 and Order No. 845 are ongoing. Although these orders laid out important principles, their ultimate success will turn on technical details of those compliance filings, which must not become barriers in their own right. The Commission similarly has yet to act on the NOPR regarding DERs. 111 Accordingly, ensuring that DERs--arguably the largest category of emerging new technologies--do not face unjust and unreasonable or unduly discriminatory or preferential barriers must remain a priority if the Commission is to fulfill its FPA obligations.

In addition, while the rulemakings discussed above addressed, or may address, some of the most fundamental barriers to entry facing certain new technologies, other barriers will likely emerge as new technologies expand their capabilities and reach unprecedented scale as part of the transition to the electricity grid of the future. For example, project developers are increasingly pairing renewable resources with battery storage technologies, reflecting both the improving economics of these combinations and their ability to provide expanded services to the grid. 112 These resources will not always fit neatly into the current generator constructs offered in many existing wholesale markets. Consistent with its responsibilities under the FPA and the precedents discussed above, the Commission must ensure that RTO/ISO rules do not become unnecessary barriers to the development of these hybrid resources, especially as their economics and technical capabilities make them an increasingly relevant part of the generation mix. Whether such barriers will arise--and, if so, how to address them--is outside the scope of this article. Our point is that the Commission must remain vigilant and continue applying its longstanding pro-competitive principles to ensure that any such barriers that do arise are promptly removed.

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#### Refuting the profits of energy companies is sufficient to achieve a deterrent effect and remedy anticompetitive practices

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Jeffery Gray, 2005, “RECONCILING MARKET-BASED RATES WITH THE JUST AND REASONABLE STANDARD,” https://www.eba-net.org/assets/1/6/7-Vol26\_No2\_2005\_Art\_Market-Based\_Rates.pdf

With respect to preventive measures, the FERC's Market Behavior Rules and the recently enacted rules for reporting changes in status are moves in the right direction. Diligent market monitoring by the FERC will also help to prevent market abuses and inform the FERC of where additional rules or structural changes may be needed. Moreover, the Energy Policy Act of 2005~~ gives the FERC additional rulemaking, enforcement, and civil penalty authority, which will help to prevent market manipulation. The threat of refunds is also a powerful preventive measure. By requiring refunds in the West, the FERC can provide both a remedy to past market misconduct, and a deterrent to future market misconduct.

#### The CPs increase in FERC authority creates the most effective method of deterrence that is calibrated specifically to harm caused

FERC 5 – The Federal Energy Regulatory Commission is the United States federal agency that regulates the transmission and wholesale sale of electricity and natural gas in interstate commerce and regulates the transportation of oil by pipeline in interstate commerce.

FERC, March 2005, “ENERGY MARKET OVERSIGHT AND ENFORCEMENT: ACCOMPLISHMENTS AND PROPOSAL FOR ENHANCED PENALTY AUTHORITY,” https://www.ferc.gov/sites/default/files/2020-05/03-2005-cp-rept.pdf

Congress has long recognized civil penalty authority for federal regulatory agencies as the most effective means of deterring conduct detrimental to free and open markets. The Commission’s enforcement efforts would be further enhanced if its statutory authority allowed it to impose appropriate civil penalties for violations of the FPA and the NGA. For most violations of these statutes, the Commission currently does not have sufficient - - or in many instances, any - - civil penalty authority that would assist it in regulating its jurisdictional markets and entities. Remedies currently available to the Commission in the form of refunds and disgorgement of profits do not deter 12 anticompetitive or manipulative market behavior to the same degree as civil penalties. As stated in a report to the Administrative Conference of the United States: [T]he civil fine has assumed a place of paramount importance in the compliance arsenal of most federal regulatory agencies. It is today almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction. It has become commonplace for observers of the administrative process, disillusioned with traditional criminal, injunctive and license-removal sanctions, to urge greater reliance on civil fines as an enforcement device.10 Appropriate civil penalties would allow the Commission to be even more effective in enforcing the statutes, rules and regulations governing its jurisdictional markets. The discrepancy in the settlements obtained by the Commission as compared to the CFTC in connection with the investigation of market manipulation during the California energy crisis of 2000–2001 demonstrates the need for the Commission to have effective civil penalty authority.11 The Commission and CFTC each based their settlements on conduct that was brought to light in the Western Markets Report, which was prepared by Commission staff. In other words, both agencies’ settlements were based on actions engaged in to attempt to manipulate the energy markets. Although the Commission was able to obtain the full amount of revenues associated with the alleged misconduct from the majority of the twenty-four wrongdoers, estimated at just over $28 million, the Commission lacked the authority to obtain civil penalties. In contrast, the CFTC was able to obtain approximately $268 million in civil penalties from 23 parties.12 In short, because it had civil penalty authority, the CFTC was able to obtain settlement amounts that were approximately ten times greater than those obtained by the Commission. The chart below further illustrates the wide gap between the Commission’s and the CFTC’s available remedies. The Commission’s limited civil penalty authority under the FPA regarding electric markets was conferred in the Energy Policy Act of 1992, but it does not address the needs of the greatly changed electric energy markets since that time. Expansion of civil penalty authority would modernize the Commission’s powers and allow it to address problems in today’s energy markets. In addition, Congress should increase the Commission’s criminal penalty authority to levels that will serve as effective deterrence and punishment in today’s economy. It is worth noting that at least some of the Commission’s success to date is attributable to the fact that the Enron debacle and the California energy crisis, which were the impetus for the formation of OMOI by Chairman Wood, are still prominent in the minds of investors and the public. Thus, the possibility of negative publicity and reputation risk for companies found to have engaged in misconduct has undoubtedly helped motivate companies to negotiate settlements with Commission staff, even given the limitations on the Commission’s ability to penalize certain conduct. During the last several years, a public pronouncement that a company may have engaged in market manipulation and, thus, may lose its ability to charge market-based rates, has posed a serious threat to both the company’s reputation and its stock price. Nonetheless, the most effective long-term deterrent to abusive misconduct by companies is expanded civil penalty authority.

#### Which is the only way to actually solve energy prices – the automatic trebling of antitrust damages is a HUGE deterrent to investment in energy because the punishment vastly outweighs the actual harms caused. This ruins their attempts at competition because companies won’t want to go into the electricity market if they’re liable for treble damages

Helein, Marashlian and Haddad 2 – Charles H. Helein is the founder and Managing Partner of The Helein Law Group. Jonathan S. Marashlian is head of the firm’s Regulatory Practice and editor of the firm’s telecommunications newsletter. Loubna W. Haddad is head of the firm’s Litigation Practice.

Charles Helein, Jonathan Marashlian, and Loubna Haddad, March 2002, “Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the “Self” Interest,” Federal Communications Law Journal, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1296&context=fclj

The key distinctions between a Filed Tariff Doctrine environment and a standard contract environment may be narrowed down to four fundamental concerns: (1) the cost of doing business; (2) the exposure to legal liability; (3) the ability to comply with regulatory requirements; and (4) the exposure of regulatory interference, control of business methodology, and management discretion. First, looking at the changes that will affect the cost of doing business, the elimination of the Filed Tariff Doctrine will affect the degree of certainty that can be achieved in establishing and ordering business relationships with tens of thousands of customers spread throughout the country, as well as the efficiency and cost of doing so. The changes would affect not only the companies’ external costs of customer acquisition, retention, and care; but also the costs of internal management of personnel, record retention, and upkeep, as well as potential increases in late and unpaid charges, uncollectibles, and bad debts. Second, carriers’ exposure to liability for monetary damages, fines, and penalties will increase on all fronts. Customer claims for overcharges, refunds, credits, and damages are all certain to rise. In addition, regulatory claims for unreasonable practices, fraud and misrepresentation, State Attorney General claims for consumer fraud and deceptive practices, class actions on behalf of consumers, and finally, competitor claims for unfair competition126 will become increasingly likely in a world without the Filed Tariff Doctrine. Third, carriers’ ability to comply with regulatory policies and consumer-oriented regulations will be severely circumscribed as the claims for legal liability outlined above begin to grow. Both the number and nature of the claims will create a hostile environment for the carriers, which will breed overzealous enforcement actions and more exacting analysis of the carriers’ continued qualifications to operate as carriers in the multiple jurisdictions in which they are located and must operate. In today’s environment, in which state and federal agencies share and coordinate enforcement and investigative efforts, allegations from around the country can quickly produce joint enforcement efforts by multiple jurisdictions. Individual or joint enforcement efforts of this sort will attract class actions, although the threat of class actions exists independently as well. The nature of the powers given regulators and especially Attorneys General under the consumer protection laws and consumer-oriented regulations is extremely broad and, hence, potentially destructive to carriers. Should these authorities resort to injunctive remedies, they will have the right and power to coerce carriers to change their methods of doing business, particularly in the areas of marketing and sales. Without question, such remedies can be fashioned to require management’s abdication of its discretion and acceptance of the standards and requirements created by outside authorities. In short, carriers will lose their rights to conduct their own businesses. Finally, there is the threat of unfair competition claims which may be created because of new slamming rules that rely in major part on rewarding competitors with compensation when customers claim to have been slammed.127 The threat is that this reward for “catching” competitors in a regulatory error may soon awaken the predatory tendencies of the largest carriers to bring even more monetary injuries on their smaller competitors. The larger carriers may claim that certain pricing schemes marketed without the fullest disclosure are unfairly competitive and subject to injunction and forfeiture of profits.

#### Which nullifies aff solvency – deals will never leave the boardroom because the prospect of treble damages is massive

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(Gary Dushnitsky and Daniel Sokol, “Competition laws could be a death knell for startup mergers and acquisitions,” 7/22/2021, The Hill, https://thehill.com/opinion/white-house/564321-competition-laws-could-be-a-death-knell-for-startup-mergers-and?rl=1)

Technology entrepreneurs and innovations yet to be imagined are in the crosshairs of misguided antitrust legislation. Antitrust policy is under the microscope from both political parties.

The Biden administration’s Executive Order on Promoting Competition in the American Economy lays the groundwork for the first-ever antitrust regulations for technology companies and internet platforms, and proposed legislation by Sens. Amy Klobuchar (D-Minn.) and Josh Hawley (R-Mo.) would rewrite antitrust law. Both bills and the order seek to limit merger activity focused on acquisitions of smaller companies by larger technology companies, with their proposals ranging from presuming anticompetitive effects to outright prohibitions.

However, these proposals likely will have unintended consequences that would hamper innovation and entrepreneurship. The result is that certain potential deals will never leave the boardroom and others will be abandoned because the risks of antitrust intervention are too high.

For deals that do move forward, many will be challenged under more stringent merger laws. Such a change in the law will fundamentally alter the ability of U.S. companies to innovate in the technology sector, and result in collateral damage across a wide range of traditional industries such as biotech, consumer goods and finance, along with sustainability-focused or previously neglected sectors.

Investors and founders must be able to realize returns on their investments and efforts, commonly referred to as ‘entrepreneurial exit,’ or they will not take the risk of investing in startups and commercializing emerging technologies. Without the ability to exit, neither founders nor investors will be able to reap the gains of entrepreneurial value creation. If the proposed legislation becomes law, it will foreclose many merger and acquisition exits and thus lessen the incentives for founding and growing a business. It therefore makes investment in innovative ventures less likely since founders and investors cannot reap the rewards of a relatively timely exit at high valuations. When certain potential acquirers can no longer make acquisition bids, venture capital investors will lose the ability to make significant returns and funding to the entrepreneurial ecosystem may wither.

#### Courts are comparatively worse at designing effective energy markets than FERC – FERC has ample experience and capabilities to preserve competition

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Joseph Coker, 2005, “Saving Otter Tail: The Essential Facilities Doctrine and Electric Power Post-Trinko,” Florida State University Law Review, https://ir.law.fsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1194&context=lr

As mentioned above, the notion of a “deregulated” electric power market is somewhat of a misnomer. Even though market-based reforms are being implemented, the electric power market remains highly regulated. This is especially true with regards to the wholesale electric power transmission market. Most firms who are in this market must, pursuant to FERC regulations, provide open access to their transmission lines and file rates of access with FERC.193 They may also be subject to regulation at the state level. Therefore, more agency, and less judicial, intervention may be justified because there are not sufficient market mechanisms present to prevent competitive harm. This conclusion is also consistent, at least in the electric power context, with the second view of agency versus court regulation discussed above. Because electric power transmission is still a natural monopoly for the most part, active agency regulation is necessary. FERC is currently providing the regulation of this market through the EPAct and Order No. 888. Court intervention via the essential facilities doctrine is most likely duplicative of FERC’s efforts. Additionally, continued use of the essential facilities doctrine in light of FERC’s regulatory capabilities may not only be duplicative, but it may also have negative effects. First, the decision to force access to transmission lines brings about the concerns Justice Scalia described in Trinko (along with the concerns raised by Professor Hovenkamp discussed in Part II): it may reduce incentives to invest in the facility, force the federal courts to act as central planners that must determine the terms of the access between the two parties, and facilitate collusion. A review of essential facilities cases in the electric power context reveals some of these difficulties—primarily with respect to the role of courts as central planners. Courts must determine whether to grant access, what price makes access to a facility “reasonable,”194 under what other terms should access be provided, and how to balance the incumbent’s need to serve its existing customers. Additionally, courts typically do not have special expertise in how particular industries, such as telecommunications or electric power, operate. FERC, however, has specialized expertise with regard to the electric power industry. Further, FERC has experience in dealing with competitive concerns in the electric power market in terms of fulfilling its authority to mandate wheeling and open access, approving agreements between wholesalers and retail power companies, and approving mergers between power companies.195 FERC also has the tools available to proactively address most market failures that might invoke an essential facilities claim—including, of course, the EPAct and Order No. 888. If FERC fails in its responsibilities under applicable law, judicial review of its decisions to wheel or not remains available under administrative law.

#### They fail to grasp price regulations – dooms aff solvency

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Bruce H. Kobayashi, Joshua D. Wright, “Antitrust and Ex-Ante Sector Regulation,” Report on the Digital Economy, Section III, Global Antitrust Institute, 2020, https://gaidigitalreport.com/2020/10/04/ex-ante-regulation-versus-ex-post-antitrust-enforcement/#\_ftn29

The evolution of the merger guidelines highlights the importance of institutional competence and fit in determining both the bounds of a regulatory approach as well as the allocation of tasks between approaches. Indeed, these institutional structures have been used to explain features of ex-ante sector regulation that are not commonly found in the antitrust laws. In particular, the antitrust laws are based on generally applicable standards (e.g., to insure the proper functioning of markets in order to protect the competitive process and maximize consumer welfare).[39] Because the common law of antitrust is produced by generalist judges with limited specific industry knowledge and expertise, they are ill suited to effectively supervise and administer price regulations, especially in dynamic industries.[40] [FOOTNOTE 40 STARTS] As the Court noted in Trinko: “Allegations of violations of [interconnection] duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations.” Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) [FOOTNOTE 40 ENDS] In light of this, the antitrust laws in the U.S., with a few notable exceptions,[41] have maintained a strict separation between antitrust law and price regulation.[42] A corollary of this separation is a cautious and limited approach to antitrust duties to deal, which would require a specification of the price at which the involuntary transaction would take place.[43] [FOOTNOTE 43 STARTS] See Carlton & Picker, supra note 5, at 26 (“[A]ntitrust is a poor framework for price setting or for establishing affirmative duties toward rivals.”). [FOOTNOTE 43 ENDS]

### DA FERC

#### Long standing legal jurisprudence allows FERC to increase its regulations of energy prices using a more expansive vision of public interest

Boyd 20 – Professor, UCLA School of Law and UCLA Institute of the Environment & Sustainability.

William Boyd, 2020, “Ways of Price Making and the Challenge of Mark ys of Price Making and the Challenge of Market Governance in ernance in U.S. Energy Law,” Minnesota Law Review, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4263&context=mlr

Doing that effectively will require FERC to make some clear choices. For starters, the Commission should abandon its uneven and unsuccessful appeals to a vision of these markets as things that can somehow be kept pure.341 Several former and current Commissioners have already embraced a version of this argument.342 It is past time for the rest of the Commission to recognize the incoherence and confusion that results from efforts to promote an unrealistic view of these markets. Second, FERC should clarify once and for all that it will respect the structure of federalism in the Federal Power Act and allow state policy supports (of whatever kind) to flow through these markets without trying to develop offsetting in-market fixes. Here, the Commission will need to send a strong signal to the RTOs and ISOs, as well as to market participants, that it will be vigorous in policing their efforts to use rule changes and/or new in-market products to correct for out-of-market subsidies. Third, the Commission should continue working to find ways to allow new resources and technologies to access these markets, as it has already done with demand response, storage, and distributed generation. 343 In doing so, it will need to differentiate carefully between rules and products that promote entry and those that are directed at offsetting out-of-market supports by enhancing prices. This will not always be an easy line to draw, but FERC is in a better position to draw it than any other entity. Taken together, these three proposals offer a pragmatic approach to the organized electricity markets, while still recognizing the delicate and contested ways of price making at their core as key pieces of infrastructure that require careful and ongoing regulation. As noted, FERC has ample legal authority to regulate along these lines.344 Even in a world where the Commission is relying upon competition and market forces to fix prices, it clearly has authority under its long-standing (and recently elaborated) jurisprudence regarding “practices” affecting rates to engage in any number of ways with the mechanics of price making in these markets.345 Indeed, it would be difficult to think of a “practice” that more directly affects rates than the pricing algorithms, and the broader market rules that shape them, at the center of these markets. There are also good reasons why FERC should take a more proactive approach to regulating these pricing structures rather than delegating crucial questions of their design to the RTOs and ISOs. It is not obvious, in this respect, that the current version of multistakeholder governance operating in the RTOs and ISOs is the best way to design a market or that the outcomes of such processes are necessarily consistent with the public interest.346 The key takeaway here is that once we view these ways of price making as tools for harnessing the power of competition and directing it toward public ends, a more expansive set of choices opens up.347 Thus, while decisions to value demand response, storage, distributed resources, resiliency, or flexibility in the markets (along with proposals to price carbon in various ways) will never get us any closer to the mythical level playing field, they can still rather easily be viewed as choices that fit within FERC’s authority to regulate price formation in a manner that advances the public interest. Some might argue in response that both FERC and the courts have already settled the question by embracing the view that ratemaking (and the just and reasonable standard that governs it) should never try to accommodate extra-economic concerns, environmental or otherwise, that go beyond the traditional balancing of interests between ratepayers and investors.348 As a doctrinal matter, such a view rests on a slender reed.349 As a policy matter, it defies common sense given the unprecedented changes taking place in the electricity sector. Even for those on the fence about how to decarbonize the electricity sector, it does not take much of a leap to recognize that the public interest is expansive enough to encompass an approach to pricing that would encourage competition from new resources and products in order to facilitate a clean energy transition that is well underway.350

#### Even their author concludes that FERC can lower barriers to entry under its existing statutory authority

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

In the absence of congressional action, however, FERC may be able to reduce some of the barriers to entry created by restrictive transmission siting laws by invoking its existing authority. Congress has instructed the Commission to preempt “any rule, regulation, practice, or contract affecting” a rate within the Commission’s jurisdiction that “is unjust, unreasonable, unduly discriminatory or preferential.”205 Moreover, FERC has exclusive jurisdiction over the “transmission of electric energy in interstate commerce,” over the “sale of electric energy at wholesale in interstate commerce,” and over “all facilities for such transmission or sale of electric energy.”206 To the extent that excessively restrictive state transmission siting laws undermine these objectives, it would seem that FERC has authority to issue regulations that create an incentive for states to adopt more permissive laws and regulations to govern transmission line siting. The Commission might, for example, support compensation schemes that give more favorable treatment to states that have taken steps to facilitate the development of merchant transmission lines. In that way, the Commission would put pressure on states to reform their siting laws.

### Rates

#### Monopoly pricing – courts have ruled in previous cases that raising prices while having market power is insufficient to establish a violation under Sherman which means private litigation will fail

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Sandeep Vaheesan, 2013, “Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity,” University of Michigan Journal of Law Reform, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1010&context=mjlr

Today, Section 2 of the Sherman Act does not prohibit dominant firms from charging whatever price the market can bear.227 Companies with monopoly power do not violate the Sherman Act unless that power is maintained or extended through some exclusionary act. At times, Congress and the courts have considered using Section 2 to attack the mere existence of monopoly power. In 1976, Senator Philip Hart proposed expanding Section 2 to deconcentrate industries marked by durable monopoly power.228 This and similar proposals garnered significant attention but were never enacted. In his famed opinion in United States v. Aluminum Co. of America, Judge Learned Hand raised the possibility of "no-fault" monopolization.2 29 He rejected such a rule, though, stating that "[tlhe successful competitor, having been urged to compete, must not be turned upon when he wins."230 Since the mid-1960s, the Supreme Court has held that excluding rivals and possessing monopoly power are both necessary elements for establishing a monopolization claim.23 The charging of high prices is arguably an important part of the competitive dynamic. In theory, high prices in a market, while imposing short-term pain on consumers, should attract new entry and help reallocate scarce resources toward high-value uses and away from low-value ones in the long run.2 3 2 The Supreme Court has taken this idea to an extreme in recent years. In its controversial ruling in Verizon Communications v. Law Offices of Curtis V Trinko, LLP, the Supreme Court asserted in dicta that "[t] he opportunity to charge monopoly prices-at least for a short period-is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."2 33 Although this may be an empirically dubious position, the Court has thus treated the ability to charge high prices as an essential part of the market dynamic-the antithesis of the no-fault monopolization position. Even when viewing the hyperbolic dicta of Trinko with skepticism, high prices also play an important role in electricity markets. High prices signal to investors when, where, and what type of new generation needs to be constructed.23 4 Due to long-standing reading of the Sherman Act, generators that economically or physically withhold electricity from the market do not automatically violate Section 2. They can thus reduce their output to increase their own profits and effect large wealth transfers from consumers. While such conduct may run afoul of RTO rules and other state and federal laws, it does not violate Section 2 under its present judicial articulation.2 35 If, for example, power purchasers had sued TXU in the wake of its anticompetitive conduct in the summer of 2005 had overcome the filed-rate doctrine, they likely would have not obtained antitrust damages. By all appearances, TXU was only exercising its own market power, and did not engage in conduct that excluded rivals from competing against it on a level playing field.23 6 Likewise, based on the allegations in Utilimax,237 the plaintiff would not have been able to obtain damages even in the absence of the filed-rate doctrine. The plaintiff alleged that the defendant had exercised its monopoly power but had made no suggestion that this monopoly power was obtained through exclusionary or other improper conduct.2 38 Even the California crisis appears to be the result of generators unilaterally maximizing their individual profits rather than colluding.23 9 Assuming the filed-rate doctrine had not been applied, private antitrust suits likely still could not have remedied this extended period of market misconduct, which allowed producers to capture billions of dollars from consumers.

#### Empirics – every example of market manipulation they give would NOT have been prevented via antitrust suits

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Sandeep Vaheesan, 2013, “Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity,” University of Michigan Journal of Law Reform, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1010&context=mjlr

Yet, eliminating the filed-rate doctrine would not cure the persistent market-power problems seen in electricity markets. The antitrust laws, as they are interpreted today, do not proscribe unilateral withholding and impose high evidentiary burdens on establishing tacit collusion-two significant forms of anticompetitive behavior witnessed in electricity markets. The California electricity crisis in 2000 and 2001 and TXU's elevation of wholesale prices in Texas in the summer of 2005 likely could not have been remedied through private antitrust damages actions. Although they inflicted significant harm on the public-leading in California to perhaps as much as $20 billion in wealth transfers from ratepayers 333. Faruqui & Sergici, supra note 322, at 221. [VOL. 46:3 Market Power in Power Markets to generators-these episodes were likely the result of unilateral profit-maximizing behavior that does not run afoul of the antitrust laws.

#### And the transmission system is so unprepared for a competitive market which means increases in competition would cause net greater increases in prices

Lave, Apt, and Blumsack 17 – Lester B. Lave is a University Professor at Carnegie Mellon University; The Harry B. and James H. Higgins Professor of Economics at CMU’s Tepper School of Business; Professor in Engineering and Public Policy, and in The H. John Heinz III School of Public Policy and Management; and coDirector of the Carnegie Mellon Electricity Industry Center. Jay Apt is Executive Director of the Carnegie Mellon Electricity Industry Center at the Tepper School of Business and the Department of Engineering and Public Policy, where he is a Distinguished Service Professor. Seth Blumsack is a doctoral student in Engineering and Public Policy at Carnegie Mellon University.

Lave, Apt, and Blumsack, September 4 2017, “Rethinking Electricity Deregulation,” Carnegie Mellon Electricity Industry Center, https://www.cmu.edu/ceic/assets/docs/publications/working-papers/ceic-04-03.pdf

The current transmission system was designed to get power from a particular utility’s generators to its customers. A competitive market gives each customer a choice among suppliers and so the transmission system might be asked to carry electricity over much greater distances and from different generators to customers. Thus, to support a competitive market, a good deal more transmission capacity is required. Blumsack et al. calculated that the additional cost of the new transmission could be large. The cost of the additional generation and transmission needed to support a competitive market is so great that we doubt that the savings from a competitive market would be able to offset this amount

#### Their Author concludes OTHER laws bar renewables

1AC Macey ’20 [Joshua; 2020; Law Professor at Cornell; Vanderbilt Law Review, “Zombie Energy Laws,” vol. 73, no. 4]

Numerous academics have shown that protective transmission line siting laws benefit incumbents, raise electricity prices, and reduce competition.167 One reason restrictive transmission siting laws pose enewable-rich regions tend to be located outside of cities. But wind and solar developments need to be able to build transmission lines in order to transport electricity from wind- and solar-rich regions to populationdense areas that will consume the electricity they produce.168 The permitting requirements for these certificates are problematic for two reasons. The first is that regulators—not price signals—determine when it is “appropriate and necessary” to construct new transmission lines. This means that in some markets, a solar development that has secured long-term contracts to fund its operations and provide low-cost electricity to a region can be prohibited from entering the market if regulators disagree with the developer’s assessment of future demand or determine that the state has no need for these assets. The second problem with many certificate of public convenience and necessity laws is that they stifle competition by explicitly protecting incumbent transmission line owners. Clean Line Energy, for example, could not connect to the grid because Arkansas’s transmission siting laws stipulate that only incumbent utilities can build new transmission lines. Note that this Section does not argue that regulators should play no role in siting—and even encouraging—new transmission projects. Often, new transmission lines are built because a regulator or grid operator determines that there is a need for new transmission capacity and solicits proposals to do so. This Section simply argues that these requests for proposals should not be limited to incumbents, and that a merchant power producer that is willing to pay to construct transmission lines that will connect its generation facilities to the grid should be able to do so regardless of whether a regulatory body agrees with the developer’s financial assessment of a region’s future demand for electricity. As discussed in Section III.B, the siting laws that obstruct clean energy developments were generally drafted at the height of the era when regulators had economic and legal reasons to protect incumbent utilities from competition.169 While regulators have abandoned the economic and legal theories that supported laws mandating that the energy companies receive certificates of public convenience and necessity before entering a new market, the continued requirement for these certificates creates Kafkaesque bureaucratic imbroglios that prevent companies—especially clean energy companies—from competing with incumbent utilities.

#### AND People will also object to the creation of new forms of renewables

Gross 20 – Samantha Gross is a fellow and director of the Energy Security and Climate Initiative.

Samantha Gross, January 2020, “RENEWABLES, LAND USE, AND LOCAL OPPOSITION IN THE UNITED STATES,” https://www.brookings.edu/wp-content/uploads/2020/01/FP\_20200113\_renewables\_land\_use\_local\_opposition\_gross.pdf

Decreasing greenhouse gas emissions in the electricity sector is crucial to avoiding the worst impacts of climate change. The American public overwhelmingly favors renewable power and the costs of wind and solar power have declined rapidly in recent years. However, inherent attributes of wind and solar generation make conflicts over land use and project siting more likely. Power plants and transmission lines will be located in areas not accustomed to industrial development, potentially creating opposition. Wind and solar generation require at least 10 times as much land per unit of power produced than coal- or natural gas-fired power plants, including land disturbed to produce and transport the fossil fuels. Additionally, wind and solar generation are located where the resource availability is best instead of where is most convenient for people and infrastructure, since their “fuel” can’t be transported like fossil fuels. Siting of wind facilities is especially challenging. Modern wind turbines are huge; most new turbines being installed in the United States today are the height of a 35-story building. Wind resources are best in open plains and on ridgetops, locations where the turbines can be seen for long distances. Even though people like wind and solar power in the abstract, some object to large projects near their homes, especially if they don’t financially benefit from the project. Transmission for renewable power can also be unpopular, and even more difficult to site when the power is just passing through an area, rather than directly benefiting local residents. This is an issue today building transmission to move wind power from the Great Plains and Upper Midwest states to cities in the east.

#### Is too slow even if transformative and disruptive – capitalism solving warming would require an innovation so great it rivals the discovery of fire

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Parrique T., Barth J., Briens F., C. Kerschner, Kraus-Polk A., Kuokkanen A., Spangenberg J.H, July 2019, “Decoupling Debunked,” European Environmental Bureau, https://eeb.org/wp-content/uploads/2019/07/Decoupling-Debunked.pdf

Not fast enough In light of the past decades of technological change, the rate of improvement that is needed for highincome, high-footprint economies to absolutely decouple appears disproportionate in contrast to past and present rates of technical progress. Let us consider the example of carbon emissions. Jackson (2016, pp. 96–100) considers several simple hypothetical decoupling scenarios. The first baseline scenario runs as follow: extending the trend of global annual per capita economic growth of 1.3% in parallel of 0.8% of expected annual population growth and with the average annual decline of carbon intensity of 0.6%, that has been observed since 1990, would result in carbon emissions growing by 1.5% per year (1.3% + 0.8% – 0.6% = 1.5). In order to achieve a 90% emission reduction in 2050 compared to current levels with the same GDP and demographic hypotheses, the emission intensity would need to decline at an average rate 8% per year until 2050 – reducing the average carbon content of economic output to 20 gCO2 /US$, that is to say 1/26 of what it is today (497 gCO2 / US$). In comparison, the carbon intensity of the global economy fell from about 760 gCO2 /US$ in 1965 to just under 500 g/CO2 /US$ in 2015, that is to say, an annual decline of only 1%. Many more ambitious scenarios can be imagined,39 but the message is already clear: relying only on technology to mitigate climate change implies extreme rates of eco-innovation improvements, which current trends are very far from matching, and which, to our knowledge, have never been witnessed in the history of our species. Such an acceleration of technological progress appears highly unlikely, especially when considering the following elements: First, global carbon intensity improvement has been slowing down since the turn of the century, from an average yearly 1.28% between 1960 and 2000 to 0% between 2000 and 2014 (Hickel and Kallis, 2019, pp. 8–9). Narrowing the scope to high-income OECD countries only, where most innovations are developed, the improvement rate of CO2 intensity still declines from 1.91% (1970-2000) to 1.61% (2000-2014), which is a long way from matching appropriate levels to curb emissions to a 2°C target, let alone to 1.5°C. This empirical observation is nothing like a surprise with regards to the theory. Technological innovation is limited as a long-term solution to sustainability issues because it itself exhibits diminishing returns (Reason 1). Tracking the number of utility patents per inventor in the US over the 1970-2005 period, Strumsky et al. (2010) provide evidence that the productivity of invention declines over time, including in the sectors such as solar and wind power as well as information technologies (which are often acclaimed for their innovative potentials). “Early work […] solves questions that are inexpensive but broadly applicable. [Then] questions that are increasingly narrow and intractable. Research grows increasingly complex and costly […]” (ibid. 506). Looking at total factor productivity changes from 1750 to 2015, Bonaiuti (2018) argues that humanity has entered an overall phase of decreasing marginal returns to innovation.

### State

#### The housing market in 2021 is the opposite as 2008 – supply issues, lower costs and millennial buyers means a crash is incredibly unlikely

Lambert 21 – Editorial Director for Fortune.

Lance Lambert, August 30 2021, “Why we won’t see a housing market crash anytime soon,” Fortune, https://fortune.com/2021/08/30/housing-market-crash-home-prices-us-august-2021/

The flaming-hot housing market has seen median home prices soar an unprecedented 24% since the outbreak of the virus last year. But in recent weeks, that fire has lost some of its heat as buyers finally start to push back at sky-high prices. Simply put: The housing market is slowing a bit.

Already, a growing list of doomsayers point to the shifting market as taking us one step closer to a bursting housing bubble. In their minds, housing went up too fast and now must come back down. Investor Peter Boockvar chimed in last week on CNBC: “I feel bad for the people who bought homes over the past year because they’re the ones that paid the very elevated prices.”

But what does the data say? When you look under the hood, the run-up to 2008 housing bubble and the hot 2021 housing market are very different bull markets. While there are several reasons why our latest frenzy won’t result in a bust, there’s one reason in particular that really stands out.

Before we get to the answer, we need to look back at the last crash.

In the years leading up to the financial crisis, a complete and utter frenzy overtook the housing market. Ready to profit, homebuilders went on a building spree. It meant that once the market started to slow in 2006, the surplus of new constructions quickly put negative pressure on prices. The housing supply glut only got worse when underwater borrowers foreclosed. It took years for housing to shake that glut.

How does that compare with 2021? Well, they’re very different—almost polar opposites. Burned by the 2008 crisis, homebuilders have been extremely conservative in recent years. In the eight years leading up to the Great Recession, homebuilders averaged 1.7 million monthly housing starts. Meanwhile, over the past eight years (2013 to 2021) they’ve averaged just 1.2 million per month. The problem? Recent levels of building aren’t growing fast enough to keep up with population growth. Indeed, our nation is under-built by about 3.8 million single-family homes, according to Freddie Mac.

Timid levels of building coupled with strong demand is why housing inventory—the number of homes for sale—was falling even before the pandemic. The rush of buyers into the market during the pandemic only made matters worse. Between April 2020 to April 2021, housing inventory fell over 50%. Though it has since ticked up, we’re still near a 40-year low.

This is a long-winded way of saying a supply glut is unlikely to return anytime soon. That’s the No. 1 reason a housing market crash is unlikely. Sure, price growth could go flat or even fall without a supply glut—but a 2008-style crash is improbable without it.

CoreLogic, a real estate research firm, forecasts just a 3.2% appreciation coming in the next 12 months. But let’s say CoreLogic is wrong, and prices fall a bit. In that scenario, sidelined buyers—who got worn down after losing bidding war after bidding war in 2021—could rush back into the market. Of course, that would halt a big upswing in supply.

“The fed-up shoppers have seen how much prices have risen and how quickly and don’t feel comfortable jumping in at today’s levels,” Ali Wolf, chief economist at Zonda, a housing market research firm, told Fortune. “These shoppers play an important role as the housing market softens a bit. If some of them jump in as the market slows, they could put a floor on how much the market softens. The buyers on the sidelines now can actually help extend the life of the housing cycle.”

Even with the recent cooling, the market still has a lot going for it. As Fortune has previously reported, we’re in the middle of the five-year period during which the largest tranche of millennials, those born between 1989 and 1993, are hitting their thirties—the age when first-time homebuying really kicks into gear.

Another reason a crash is unlikely: When factoring in income levels, housing costs are lower now than heading into 2008. Leading up to the foreclosure crisis, 7.2% of U.S. personal income was going toward mortgage payments. In 2021, that figure is just 3.4%. In part, homebuyers have the pandemic to thank: It spurred low interest rates and lowered mortgage and PMI (private mortgage insurance) payments.

That said, there are two big wild cards. If inflation fears cause the Federal Reserve to move up its timeline on higher rates, it would have an instant negative effect on the market. The second risk is posed by the wind down at the end of September of the mortgage forbearance program, which allows some borrowers to pause their payments. The program still protects 1.7 million borrowers. Of course, if those buyers face foreclosure or simply opt to sell rather than restart payments, then it could cause the number of homes for sale to rise. But even that is unlikely to create a supply glut: An analysis done by Home.LLC for Fortune forecasts the end of mortgage forbearance would only cause a temporary 11% rise in inventory.

#### Even if they’re right that price fixing raises prices, consumers can easily bear that cost now without causes a recession

Shinoda 21 – Ken Shinoda is a portfolio manager with Jeffrey Gundlach and Andrew Hsu of the DoubleLine Total Return Bond Fund.

Ken Shinoda, December 29 2021, “Yes, Housing Prices Are Up. But Americans Can Afford More.” Barron’s, https://www.barrons.com/articles/why-housing-prices-room-to-rise-51640724269

As an investor in mortgage-backed securities, I keep my eye on the U.S. housing market. A few years after starting my career, I saw up-close this sector implode into the epicenter of the Global Financial Crisis, an episode of tremendous destruction but also of extraordinary opportunity. So early on, I learned to always stand watch for the next bubble or next crash. Home prices [increased 19% year-over-year](https://www.barrons.com/articles/case-shiller-home-price-index-october-51640646695?mod=article_inline) as of Oct. 31, after a record-breaking 20% 12-month gain through the end of August. Some market participants see another housing bubble. Perhaps in certain areas that’s true. Local markets that welcomed homebuyers from America’s most densely populated, epidemic-hobbled cities could cool as people realize Gotham is not dead and return to the office. However, I think prices will likely climb higher on a nationwide basis.

The same forces that supported home prices through the economic shock of the Covid-19 pandemic and in fact fueled the ongoing rally remain in place today. Demographic demand for single-family housing remains strong while supply is extremely low. Affordability, notwithstanding torrid home price appreciation, is still reasonable.

The pandemic has acted as a [“Great Accelerator”](https://www.marketwatch.com/story/the-great-pandemic-is-really-the-great-accelerator-2020-08-18) in the corporate world, prompting sweeping digitization of internal operations, supply chains, and customer relations. The Great Accelerator also acted on the housing market. The effects of Covid-19 accelerated the move from renting to buying for many individuals who had been sitting on the sidelines. New household formation, including by parents of young children, had already embedded desire for more living space in an important segment of the population. Then along came Covid-19 and workplace shutdowns. Business managers quickly got religion on the benefits, to say nothing of the necessity, of hybrid work and work from home. WFH sped up the demographic demand of the millennials for single-family housing.

New household formation, the main engine of housing demand, is not going away any time soon. From 2019 through 2029, most millennials (people born between 1981 and 1996) will shift into the 35-44 age group. That is the prime age for first-time home buying. The largest generation since the baby boomers, U.S. millennials represent a population of 72.1 million. At today’s home ownership rate of 65.4%, that’s a lot of demand for housing.

The supply of single-family housing was at historical lows entering the pandemic and remains so. In January 2020, the inventory of both existing and new homes for sale stood at 1.6 million homes. By comparison, the peak in homes available for sale was 3.9 million homes in summer 2007. Since then, the U.S. population has grown by 31 million. Inventory currently totals 1.5 million. New home construction, while picking up, is being slowed by material and labor shortages.

Affordability is a function of incomes, mortgage rates, and home prices. From these, one can calculate the average monthly mortgage payment of the average household and that payment’s percentage of monthly household income.

At the peak in the housing bubble in 2006, the median home price in the U.S. reached $230,300 with 30-year fixed mortgage rates at 6.76%, assuming a 20% downpayment. The monthly payment for that mortgage was $1,196 or 29.8% of the $4,071 in monthly income that a household with two working persons generates at the median. Today housing prices are up over 53% with a median home price of $353,900, but household income is up 40% and mortgage rates are cut in half at 3.07%. That implies a $1,204 monthly payment, 21.4% of today’s median monthly income of $5,627. Mortgage rates would have to almost double to revert to 2006 affordability. Long story short, housing affordability is still higher than historical averages of the 1980s and 1990s (28.1% of monthly income), when mortgage rates were much higher.

Speculation on mortgage rates merits a digression on the Federal Reserve. Fed Chairman Jerome Powell has stepped-up tapering of the central bank’s purchases of U.S. Treasuries and Agency mortgage-backed securities. One might extrapolate rising interest rates, synonymous with falling bond prices from decreased asset purchases, but that would be naive. In reality, every time the Fed has begun tapering, long-term rates fell as the bond market priced in slowing growth due to less accommodative monetary policy. This time is no different. Note the decline in the 30-year U.S. Treasury yield from its March 16 intraday high yield of 2.5%.

None of this justifies complacency. Indeed, a number of indicators suggest long-term interest rates should be higher. But affordability is a long way from the averages of the 1980s and 1990s, about 28% of income, when mortgage rates were much higher. Housing prices as measured by the national indexes do not appear at risk to Fed tapering.

#### Finishing

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

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

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

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

#### Won’t escalate – multiple statistical indicators show leaders use diversionary tactics as a low-risk strategy

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Ashani Amarasinghe, “Diverting Domestic Turmoil,” *SoDa Laboratories, Monash University*, November 2020, pp. 42-43, https://poseidon01.ssrn.com/delivery.php?ID=794089007091011082127103023007098077042014005059003070089127117007023028099100083097107039057104056039007122120014111070067003025010090051067091115017108073117029003014033047122080071028001004095012000087074113066088067083072114011016024127022027097013&EXT=pdf&INDEX=TRUE.

Next, I consider another set of potential factors that define relationships between countries. Accordingly, I define Zij as binary indicators equal to 1 if the two countries had a common colonizer, share a common official language or have engaged in past conflict, and 0 otherwise. Results indicate that leaders typically target countries with whom their own country shares a colonial history or a common language. However, somewhat surprisingly, I do not observe diversionary tactics being targeted at countries with whom a history of conflict is shared.

Finally, I explore whether the trade relationship between countries has a role to play in determining the victims of diversionary foreign policy. Here, I generate a binary indicator of trade connectivity, using the median export value in 1997 (the first year of the sample) as the cutoff. Accordingly, Zij as a binary indicator equal to 1 if the export quantity between the two countries is larger than the median export quantity for dyads in the sample, reflecting a strong trade relationship, and zero otherwise. Results indicate that leaders are likely to target countries with whom they maintain a weak trade relationship. The fact that no relationship is observed between strong trade partners again signals that while leaders use diversionary foreign policy as a strategic tool, they are hesitant to allow such policy to lead to significant economic costs.

In Figure 4, I consider whether any particular characteristics of the victim countries could define their selection in to the target group for diversionary tactics. To do so, I generate time-invariant binary indicators of national capability, military power and population based on the median values for the first year of the sample. Here, the indicator Zj is specific for country j, and does not represent a dyadic relationship. As shown in Figure 4, country leaders typically target weak countries, as proxied by low national capability, low military power and low population. This is again illustrative of the use of diversionary foreign policy as a low risk strategic tool, because weak countries, despite being targeted, are unlikely to respond with costly retaliations.

#### Relationship between economic decline and diversionary war is exagerrated

Håkan Frisén 17, Head of Economic Forecasting at SEB, 2-22-17, "Global economy resilient to new political challenges," https://sebgroup.com/press/news/global-economy-resilient-to-new-political-challenges

The interplay between economics and politics was undoubtedly a dominant feature of analyses during 2016. As we know, it was difficult to foresee both election results and their economic consequences. It was certainly not strange that economists were unable to predict the Brexit referendum outcome or Donald Trump’s victory, when public opinion polling organisations and betting firms failed to do so, but lessons might be learned from the economic assessment impacts they made. Economists probably tend to exaggerate the importance of more general political phenomena. While in the midst of elections that appear historically important, it is tempting to present alarmist projections about election outcomes that seem improbable and/or unpleasant. But once the initial shock effect has faded, more ordinary economic data such as corporate reports and macroeconomic figures take the upper hand. ¶ Psychological effects often exaggerated¶ One important observation is that it is difficult to find any historical correlation between heightened security policy tensions and economic activity. Households and businesses do not seem to be especially sensitive in their consumption or capital spending behaviour. This is perhaps because uncertainty is offset by investments in a defence build-up, for example. Only when the conditions that directly determine profitability and investments are affected, for example via rising oil prices or poorly functioning financial markets, will the effects become clear.¶ Markets also seem to have a general tendency to assume that the economic policy makers can actually behave rationally in crisis situations, until this has been disproved. Both during the US sub-prime mortgage crisis of 2007-2008 and the euro zone's existential crisis a few years later, for a rather long time the market maintained its faith that a response would come. Not until after a lengthy period of inept actions by decision makers did these crises become genuinely acute, with large secondary effects as a consequence. This market "patience" is presumably based on a long-time pattern of recurring bailout measures by governments and central banks, which usually benefit risk-taking at the expense of caution or speculation that policy responses will not materialise.¶ It is reasonable to assume that this may also underpin the rather cautious reactions to the risks associated with the Trump administration's agenda. Although one cannot complain about the administration's power of initiative, there is a fairly high probability that in important areas it will not go from words to actions. There may be various reasons for this, such as the inertia built into the separation of powers between the White House, Congress and the court system, or expectations that Trump's newly appointed cabinet secretaries and advisors will eventually take their cues from more established US positions.

## 1NR

### State

#### Culture is a much larger and better explanatory factor for populism than economics

Margalit 19 – Professor of Political Science at Tel Aviv University.

Yotam Maraglit, Fall 2019, “Economic Insecurity and the Causes of Populism, Reconsidered,” Journal of Economic Perspectives, https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.33.4.152

For example, people who worry about cultural homogeneity or changing ethnic composition of their communities are more likely to adopt the view that immigration has negative economic consequences (Sniderman and Hagendoorn 166 Journal of Economic Perspectives 2007; Brader, Valentino, and Suhay 2008). Similarly, individuals who are anxious about the cultural aspects of globalization are more likely to believe that trade is economically harmful (Margalit 2012; for findings consistent with this view, see O’Rourke and Sinnott 2001; Mansfield and Mutz 2009). Using an experiment, I sought to bring some evidence to bear on the direction of causality. I found that when individuals, particularly the less educated, were exposed to a set of four questions designed to trigger preoccupation with cultural change—for example, whether or not they agree with the statement “our traditional way of life is getting lost”—they expressed a substantially more negative view about the impact of trade than a control group that wasn’t exposed to the treatment. Other experimental work provides additional examples of ways in which cultural factors shape beliefs and attitudes about economic issues such as welfare, antipoverty policy, and health care (Gilens 2009; Tesler 2012). Sociological and ethnographic work looking at communities supportive of the populist right provides a more vivid illustration of this causal pathway. These ethnographies—of the French working-class town of Riems (Eribon 2013), of rural communities in Wisconsin (Cramer 2016) and Louisiana (Hochschild 2016), and of declining industrial enclaves in Britain (Dagenham) and the United States (Youngstown, Ohio) (Gest 2016)—document compellingly the ways in which perceived threats to social status play out politically. In doing so, they show how cultural distance and estrangement from the dominant groups in society are intertwined with people’s perception of being economically left behind. For example, these studies detail how people who live in rural areas often harbor deep cultural resentment toward political and economic elites for their perceived disregard, disrespect, or condescension. This resentment then often feeds certain beliefs about the economy, such as the idea that government resources are allocated unfairly, the notion that urban residents (and particularly minorities) get more than their fair share of resources, or the strong conviction that immigrants are a major drain on the government budget. Thus, while economic change can be a source of grievance expressed along cultural lines, in the form of antipathy toward a certain ethnic group, it is also the other way around: cultural changes generate discontent around economic issues. Consequently, when populist politicians address issues such as immigration, trade, or rural-urban disparities, they tap into public disaffection that goes beyond voters’ concern with the material impact of those issues.

#### To the extent that they’re right that economic factors can contribute to the rise of populism, those factors are things the plan wouldn’t resolve

Rohac, Kennedy, and Singh 18 – Dalibor Rohac is a research fellow at the American Enterprise Institute (AEI), where he studies political economy of the European Union. Liz Kennedy is the senior director of Democracy and Government Reform at the Center for American Progress, where she works to restructure the rules of democracy to rebalance power and rebuild trust in government. Vikram Singh is a senior fellow for National Security at the Center for American Progress.

Dalibor Rohac, Liz Kennedy, and Vikram Singh, May 10 2018, “Drivers of Authoritarian Populism in the United States,” https://www.americanprogress.org/article/drivers-authoritarian-populism-united-states/

At first sight, economic hardship appears to be only weakly related to support for authoritarian populists in polling data. According to exit polls from the 2016 U.S. presidential election, Hillary Clinton defeated Donald Trump by 13 points among those earning less than $30,000 a year, and Trump’s lead was strongest among those earning between $50,000 and $99,999.21 That is in line with findings from a growing stream of literature investigating support for right-wing populists in European countries, where cultural and political concerns drive populist voters more strongly than economic ones.22

To what extent does economic inequality, then—as opposed to poor economic performance on the whole—explain the rise of populist politics? It is true that income inequality in the United States is high by standards of advanced industrialized economies, and it has increased since the late 1960s.23 While incomes for American families in the bottom two-thirds of the income distribution more than doubled between 1947 and 1979, in terms of real dollars, they have remained flat since then—even while average productivity has nearly doubled.24

At the same time, a study of CEO compensation at the top 350 U.S. firms found that such compensation had grown 997 percent since 1978; the average CEO compensation of $16.3 million was 303 times the annual compensation of the typical worker, which had risen from a 20-to-1 ratio in 1965 and an 87-to-1 ratio in the mid-1990s.25 The share of pretax income going to the richest Americans surpasses the income inequality of post-Gilded Age 1910 and matches the previous peak of inequality at the end of the 1920s.26 Raw state-level data show a positive association between the basic measure of income inequality, the Gini coefficient, and Donald Trump’s lead in the 2016 election, but the relationship is weak and cannot be taken as evidence of a causal relationship.27 Furthermore, authoritarian populism remains an extremely acute problem in countries that have recorded much lower levels of income inequality—such as Austria—and in countries where income inequality rates have fallen over the past decade, such as the United Kingdom.28

Given the importance of beliefs and perceptions in literature that relies on individual-level data, the support for authoritarian populism might be better explained by the extent to which voters see the economic system as unfair or rigged against them, rather than studying broader aggregate measures of economic health or income dispersion, such as the Gini coefficient. A study by Dalibor Rohac, Sahana Kumar, and Andreas Johansson Heinö found a strong link between support for right-wing authoritarian populists in Europe and “control of corruption,” a measure of corruption—and of corruption perceptions—from the World Bank’s database of Worldwide Governance Indicators.29 Popular accounts, such as Luigi Zingales’ celebrated 2012 book, A Capitalism for the People, suggest that the meritocracy and economic mobility associated with America’s social and economic model have weakened in recent decades, with policies and institutions increasingly favoring cronyism and rent-seeking, resulting in a sense that the system is being rigged by and for a corrupt elite.30

In the United States, emergency measures aimed at propping up the collapsing banking industry in 2008 and 2009 provided a boost to the emerging tea party movement on the right and the widespread Occupy movement, mainly on the left. Likewise, in the European Union, the loans extended to countries such as Greece—which also indirectly helped economic actors who held Greek debt—provided some of the rationale for the growth of Germany’s leading right-wing populist party, the Alternative for Germany. For many citizens of both Germany and America, the ad hoc measures taken to stabilize the economy that benefit a select few, while ordinary people bear the costs, prove that the system is stacked against them.

Yet economic grievances run deeper. In the American context, structural changes are transforming labor markets. An increasing number of jobs are vulnerable to outsourcing and automation, particularly those that require lower qualifications. As Jed Kolko, the chief economist at Indeed.com, noted, economic anxiety might well have been forward-looking: “Trump beat Clinton in counties where more jobs are at risk of technology or globalization.”31 There are other underlying sources of economic grievance and barriers to upward mobility in the United States. For example, the large variation in the quality of schooling available to residents of different school districts dramatically disadvantages communities of color and those born into lower-income backgrounds.32 And at the postsecondary level, it can be argued that universities’ admission policies are only partly meritocratic. In addition to affirmative action, universities also give large weight to legacy preferences, particularly at leading elite schools.33 In a recent book, Brink Lindsey and Steven Teles list a number of other factors that have contributed to increased inequality and a tilted economic playing field, including those linked to intellectual property, financial regulation, occupational licensing, and other policies.34

The threat of economic uncertainty is concentrated in the middle levels of income and skills distribution, not at the bottom. Top-paying jobs in engineering and science, for example, require nonroutine cognitive skills, which are complemented by computers and other capital goods. On the bottom end of the wage distribution, jobs requiring nonroutine manual skills—such as those needed to wait tables, clean, or cook—cannot be made much more productive through the addition of computers and other capital goods. It is the jobs in the middle, which require either routine manual or cognitive skills, that are falling prey to globalization and technological progress. This is consistent with the voting patterns observed in the 2016 U.S. presidential election, as Donald Trump received a large share of votes from the middle segments of the income ladders and from areas where jobs were under threat from automation.

Not all of the ongoing structural changes are easily captured in unemployment statistics. As AEI’s Nicholas Eberstadt has shown, America’s male population is leaving the labor force in record numbers.35 Today, the work rate of prime-age men—those ages 25 to 54—is only slightly lower than it was in 1940, at a time when the United States was recovering from the Great Depression. The phenomenon of declining male labor participation sets the United States apart from other advanced industrialized economies.

And the labor market crisis of American men has not merely been economic; it has gone hand in hand with other worrying developments. Anne Case and Nobel Prize-winning economist Angus Deaton found that since the 1990s, “middle-aged non-Hispanic whites in the U.S. with a high school diploma or less have experienced increasing midlife mortality.”36 The factors include a rise in “deaths of despair”— deaths by drugs, alcohol, and suicide—as well as a stalling of decline in mortality from heart disease and cancer.37 Case and Deaton suggest that the increases in these deaths are accompanied by a measurable deterioration in economic and social well-being for these populations.

Furthermore, current trends in educational achievement in the United States hint at the possibility that, in coming decades, the poor labor market performance of men might perpetuate itself. While men have historically dominated high-paid professions, resulting in a gender pay gap noticeable across all advanced economies, according to researchers David Autor and Melanie Wasserman, “Over the last three decades, the labor market trajectory of males in the U.S. has turned downward along four dimensions: skills acquisition; employment rates; occupational stature; and real wage levels.”38 The resulting loss of relative status might be leading some to turn to divisive populist politics to vent their anger and frustration.

The absolute and relative gains made by historically marginalized groups—including women and people of color—should be celebrated and accelerated. There is there is still a long way to go. In 2016, women working full time in the United States typically were paid just 80 percent of what men were paid; the wage gap for women of color is even more pronounced. 39 However, America will continue to face a significant challenge if the gradual closing of the existing gaps goes hand in hand with an absolute decline of educational and labor market outcomes for white men, who are then drawn to politicians who stoke their sense of resentment. The labor market crisis also has a psychological impact that is contributing to populism. In American culture, work remains a critical means of maintaining social relationships and a sense of dignity, while the absence of work generates despair. AEI President Arthur Brooks coined this as a “dignity deficit”—a potent resource ripe for unscrupulous political candidates to translate into popularized anger.40

### DA Exemption

#### Timeframe – immediate implementation is bad – undermining the economic recovery now 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.

#### [B]---CHIRA had no effect

**DeFilippo et al. 21** – partners at Jones Day

Aimee E. DeFilippo, Kenneth W. Field, Michael A. Gleason, Lisa G. Han, David C. Kiernan, Catherine E. Livingston, James L. Poth, and Margaret A. Ward, "New Law Eliminates 75-Year-Old Antitrust Exemption for "Business of Health Insurance"," Jones Day Publications, January 2021, https://www.jonesday.com/en/insights/2021/01/new-law-eliminates-75yearold-antitrust-exemption-for-business-of-health-insurance

In Short

The Development: Congress unanimously passed and before leaving office, President Trump signed into law, the Competitive Health Insurance Reform Act ("CHIRA"). CHIRA limits application of the McCarran-Ferguson Act, an exemption from the federal antitrust laws, as it relates to the business of health insurance.

The Context: Since 1945, the McCarran-Ferguson Act has exempted certain conduct of insurers from challenge under the federal antitrust laws. State insurance regulators and the health insurance industry's trade group have long maintained that repealing the McCarran‑Ferguson Act is unnecessary, in part, because state antitrust and insurance laws already prohibit conduct such as price fixing that CHIRA proponents claim that McCarran-Ferguson insulates.

Looking Ahead: In addition to the reasons above, CHIRA is not likely to bring significant changes to the operations of health insurers because (i) it leaves the exemption in place for certain critical activities; (ii) other federal antitrust exemptions may nonetheless apply; and (iii) health insurers' procompetitive activities should be found lawful under the federal antitrust laws. However, antitrust claims abhor a vacuum. In the past, expansion of antitrust liability in an industry, including health care, has spawned waves of litigation, attracted by automatic treble damages in successful challenges. Health insurers should expect increased antitrust litigation, and possibly government investigations, and therefore should review their business practices to ensure compliance with the federal antitrust laws.

#### [C]---Wasn’t in the Biden Era---the change put the industry on alert, but no further changes occurred, assuaging fears of broad changes---BUT, the aff shows that the Biden administration is serious about antitrust enforcement, which triggers the link

**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>

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.

**The aff represents the largest substantive antitrust change in decades---that signals to the courts**

**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.

**That new calculus specifically impacts implied immunity---it’s judicially constructed, ambiguous, and is open to change**

**Lacour 8** – J.D. Candidate, June 2009, St. John's University School of Law

Justin Lacour, "Unclear Repugnancy: Antitrust Immunity in Securities Markets After Credit Suisse Securities (USA) LLC v. Billing," St. John's Law Review, Vol. 82, No. 3, Summer 2008, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1084&context=lawreview

Introduction

For over a century, American antitrust laws have sought to promote competitive conduct in the market place and to protect consumers from price discrimination, price fixing, and other ill effects of monopolistic behavior.1 The application of antitrust laws to industries subject to federal regulation presents a difficult issue, since an activity otherwise prohibited by the antitrust laws may be permitted or even required when Congress has spoken by passing a regulatory statute. 2 A court must determine whether a regulatory statute-either expressly or by implication-repeals the antitrust laws, and whether jurisdiction over the particular conduct lies with the regulatory agency, rather than the court.3 When Congress has remained silent, a court may determine that implied immunity exists if maintaining an antitrust action would "thwart the regulatory scheme created by Congress." 4 Although both securities regulation and antitrust laws seek to promote efficient markets,5 the SEC, in regulating securities markets, must consider additional issues, such as "the economic health of the investors, the exchanges, and the securities industry," unlike antitrust law, which is concerned solely with competition. 6 The parallel application of antitrust laws and securities regulation could therefore potentially interfere with regulatory controls and "could undercut the very objectives the antitrust laws are designed to serve. ' 7 The Securities Act, the Securities Exchange Act, and the Investment Company Act,8 like most regulatory statutes, are silent on the issue of antitrust jurisdiction, 9 leaving courts to determine whether implied immunity exists.'0

While the Supreme Court has stated that the general principles applicable to antitrust immunity are "well established,"11 commentators have opined that "'[tjhe case law of implied immunity is... a quagmire.'"12 Courts have differed greatly on when implied immunity is necessary. 13 Despite this confusion, courts have developed two distinct approaches, treating implied immunity largely as a question of authority. Most courts have looked at whether the challenged conduct fell under the jurisdiction of the regulatory agency.14 If the challenged practice fell under the agency's jurisdiction, and the agency has exercised its authority over the practice, then a finding of implied immunity may be appropriate. Courts have differed, though, as to the extent to which the agency must exercise its authority over the practice in question before finding implied immunity.1 5 A second approach is to base a finding of implied immunity solely on the presence of a pervasive regulatory scheme. Courts have found implied immunity appropriate when the agency controls every aspect of the industry's conduct, 16 or when "'Congress must be assumed to have foresworn the paradigm of competition'" in creating the regulatory scheme. 17 Implied immunity, however, has rarely been established solely on the presence of pervasive regulation. 18

Steady throughout these differing approaches to implied immunity in the case law is the long-held standard that, for implied immunity to apply, there must be "'a convincing showing of clear repugnancy between the anti-trust laws and the regulatory system.' "19 Most courts have held that a repugnancy exists when the application of both antitrust laws and the regulatory scheme would produce conflicting standards for the regulated industry.20 Gordon v. New York Stock Exchange, Inc.21 provides a clear example of this traditional implied immunity analysis. In Gordon, the SEC had approved a system of fixed commission rates, a practice that would be a per se violation of antitrust laws. Since the practice fell under the SEC's authority and there was a direct conflict between the two laws, the Supreme Court found implied immunity. 22 Other courts have also viewed repugnancy, not in terms of a conflict between two laws, but as a conflict of authority: Application of antitrust laws would conflict with the authority Congress has granted to regulatory agencies. 23

Still, courts have applied even this seemingly simple rule in different ways. Courts have differed as to the effect agency approval or disapproval of the activity has on the question of implied immunity. Some courts have been willing to find implied immunity even when the challenged conduct has been disapproved of by both antitrust laws and the regulatory agency. 24 Many courts, however, have chosen to treat agency disapproval of the challenged practice as refuting any claim of implied immunity since, in such cases, there would be no conflict between antitrust laws and the regulatory scheme. 25 In short, the "clear repugnancy" standard appears as muddled as the other areas of implied immunity case law.

#### Independently, the aff causes regulators to perceive that antitrust exemptions will be limited in the future, limiting SEC regulatory flexibility

**Kling 11** – Yale Law School, J.D. 2010, Brown University, A.B. 2007

Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

This Part argues that a broad implied immunity standard predicated on the SEC's jurisdiction over, and active review of, a particular activity is efficient. But whereas in Billing the Court justified its implied immunity analysis by reference to the chilling effects of erroneous antitrust judgments ex post, this Part shifts the focus to ex ante regulatory action by the SEC. It argues that, from an ex ante perspective, the principal concern with a narrower implied immunity doctrine is that it might distort the SEC's regulatory decisions. In particular, if the SEC has three regulatory choices- prohibit a class of conduct entirely, permit it entirely, or adopt a nuanced rule that permits some forms of the conduct but prohibits others - and if a nuanced approach is optimal but a blanket authorization is preferable to a complete prohibition, then under either a some regulation standard or an affirmative approval standard the SEC might opt to permit the conduct in its entirety simply in order to preempt antitrust suits.167

[[Begin Footnote 167]]

167. Because the SEC did in fact adopt a fairly nuanced approach to the laddering and tying arrangements at issue in Billing, the arguments presented below might seem inapplicable to the facts of the case. But the SEC presumably expected that antitrust actions would be preempted given the precedents discussed in Part I. Thus, it might in fact be precisely because of the Court's broad implied immunity doctrine that the SEC was able to issue finely drawn guidance with respect to the conduct challenged in Billing.

[[End Footnote 167]]

The SEC can be expected to choose such a second-best solution in two situations. First, the SEC might opt for such a rule if it believes that it will not have time to study the activity at issue before an antitrust suit is resolved and that an antitrust court, if left to its own devices, might prohibit too much conduct or impose excessive liability for antitrust violations. Second, the SEC might choose to permit the entire class of conduct if it believes that, even if it were able to adopt a nuanced rule in time, a court might misapply that rule and prohibit conduct that the SEC would permit or award excessive damages for activities that the SEC prohibits. In combination, these two scenarios, which are modeled in the following Sections, suggest that an active review standard is optimal because it enables the SEC to regulate without solicitude for the possibility of erroneous decisions in antitrust cases.168

[[Begin Footnote 168]]

168. In practice, the SEC would not justify its regulatory choices by reference to the possibility of erroneous antitrust decisions. Nevertheless, such concerns might have a subtle and even unacknowledged influence on the form of regulation ultimately adopted.

[[End Footnote 168]]

**That disrupts financial stability---effective and unilateral SEC regulation is critical**

**Allen**, Associate Professor, Suffolk University Law School, **‘18**

(Hillary, “The SEC as Financial Stability Regulator,” 43 J. Corp. L. 715)

After the financial crisis of 2007-2008 (the “Crisis”), regulators around the world adopted the pursuit of “financial stability” as one of the foremost goals of financial regulation.2 However, the ubiquity of the goal belied a lack of consensus about how regulators should approach financial stability, and that lack of consensus persists today. This Article takes an expansive view of financial stability regulation, arguing that such regulation should seek to prevent disruptions to both financial institutions and markets, if such disruptions would have negative consequences for the broader economy. Because the Securities and Exchange Commission (the “SEC”) has much more experience with the securities markets than other US financial regulators, the SEC is the agency best positioned to **ensure the robustness of those markets**. The SEC can therefore make a significant contribution **as a market-oriented financial stability regulator** – even if other forms of financial stability regulation might be best left to prudential regulators, like the Federal Reserve.

Private participants in the securities markets have neither the **incentives** nor the **ability** to promote **financial stability** (a collective good),3 and so **only a government body** can work to ensure that the securities markets are **robust to shocks**, and minimize the likelihood of shocks occurring in the first place. **If the SEC fails** to take on this role, we **cannot expect any other government agency to fill the lacuna**. While the Financial Stability Oversight Council (“FSOC”) was created to address threats to the stability of the financial system, it is, at its core, a committee that is designed to leverage the expertise of its member agencies rather than performing extensive regulatory functions itself. Other than the SEC, there is no regulatory agency represented on the FSOC that has extensive experience with the securities markets.4 And there are certainly developments in the securities markets that raise financial stability **concerns** – this Article will focus in **particular** on the increasing prevalence of **high frequency trading** (“HFT”) in the equity markets.

HFT is an umbrella term for a variety of different automated trading strategies; their common characteristic is that the computer algorithms that make the trading decisions are designed to hold assets for only a very short period of time. HFT now accounts for **more than half of all trading** in the US equity markets,5 and while the practice certainly affords benefits in terms of reducing the time and cost of executing trades, it also increases the **complexity**, **interconnectedness** and **opacity** of the equities markets.6 Events such as the **“Flash Crash”** in May 2010 have alerted regulators to HFT’s potential to both generate and transmit shocks through the financial system: the potential **threats** that HFT **poses to financial stability** (as well as to **investors** and **capital formation**) will be explored in detail in this Article. Of course, high frequency traders do not trade exclusively in the equity markets (i.e. the secondary trading market for listed stocks): 7 there is an almost limitless list of assets that HFT firms will trade, including a multitude of derivatives instruments. However, this Article will focus on the equity markets.

The SEC is **currently considering** how to **reform its regulation of the equity markets** in light of HFT and other developments, a project that began in earnest with the issuance of a “Concept Release on Equity Market Structure” on January 14, 2010 (the “Concept Release”).8 Although some reforms have been implemented since that time, the project of market structure reform is nowhere near complete. To the extent that the SEC is planning to promulgate further rules addressing HFT and the equity market structure more generally, **such rules can be said to be in the “preproposal period”** (i.e. the time prior to the proposal of any rule in the Federal Register). As Krawiec notes, the preproposal period is “a time period about which little is known, despite its importance to policy outcomes. . . the need to produce a proposed rule that is ready for comment pushes much regulatory work to this early stage of the rule development process.”9 This Article seeks to provide some insight into the preproposal stage of the market structure reform project by considering the testimony, public statements, speeches and press releases that have been disseminated on the subject of HFT by the SEC, its Commissioners, and its staff.10

**No chance of legislation**

Dave **Perera**, US antitrust legislation faces uphill battle despite unified Democratic government, MLex, March 12, 20**21**, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Those expecting — or fearing — more ambitious outcomes likely **won’t see them enacted**. So until America’s November 2022 election, **scratch from the list of high probabilities reforms** such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

Put another way, unless a bill can attract significant Republican support, **not even two years of unified Democratic government** can guarantee reforms.

— American exceptionalism —

Single party control of both congressional chambers and the presidency is relatively rare in American politics. It has occurred in fewer than a third of legislative sessions since 1980. When it strikes, it doesn’t last long — typically just the two years between one congressional election and another.

Historically, unified control is a fertile period for new regulations. President George W. Bush overhauled Medicare. President Barack Obama ushered in financial sector reforms and the Affordable Care Act. Indications are that President Joe Biden is emboldened by his party’s last-minute capture of the Senate.

History, of course, isn’t a blueprint. Even a brief look at past episodes of unified control reveals that **not even single-party capture** of the executive and legislative branches of the US government **can assure the enactment of a partisan agenda.**

For one thing, neither political party is a **monolith**. Although far more politically aligned than when Democratic conservatives found common cause in the 20th century with Republicans, the major American parties nonetheless are coalitions of centrist and activist wings. For Democrats, the tensions inherent in appeasing all sides became apparent earlier this month when centrists trimmed benefits in the $1.9 trillion coronavirus stimulus package.

Neither is single party grip on power secure unless it commands an overwhelming majority in the Senate, thanks to a uniquely American institution: the filibuster. In the Senate, the rules mandate a three-fifths vote before debate over a bill is cut off. In recent decades, it’s become a weapon routinely wielded by the minority party to kill legislation.

The upshot is that policy legislation needs **supermajority** support before it can proceed, meaning the 50 Democrats of today’s Senate have little choice but to resign themselves to the grind of **finding Republican supporters**. There are limited exceptions. Assuming Democrats stay in unison, they don’t need Republican votes to appoint judges, approve executive branch nominations or pass fiscal legislation such as the coronavirus stimulus that just became law.

It’s within Democrats’ power to abolish the filibuster, but for now, the maneuver appears safe. Asked just days ago about the matter, White House spokeswoman Jen Psaki told reporters that the president’s preference is for it to stay in place. “The president is an optimist by nature,” Psaki added.

— Hunting for bipartisan consensus —

Not every bill introduced in Congress, nor even every bill approved by a committee or even an entire single chamber, makes it through the process because its sponsors believe it’ll become law. There are a host of bills drafted with the intent of sending a message to industry, to independent regulators, to donors, to constituents.

There are bills that lawmakers view as setting out a position to influence an ongoing policy debate. Even if it won’t become law this year, it might the next year, or the next, reintroduced and refined along the way.

Telltale signs of whether a bill is a serious attempt at law are the number of cosponsors, and whether that list of names includes members of both parties in good stead with their party’s leadership.

Bipartisan support is important even in the House, where Democrats have the votes to completely bypass Republicans. Because the House doesn’t have the filibuster to contend with, those with the majority of seats control the chamber. House Democrats can and do pass bills in the face of absolute House Republican opposition, but — special exceptions for fiscal bills aside — those bills are dead on arrival in the Senate.

As long as the filibuster exists or Democrats lack a Senate supermajority, the House Judiciary antitrust subcommittee must court Republican support if its intention is to make new law.

Finding clues of what House Democrats might seriously achieve, then, may be little more difficult than looking up the policy prescriptions House Republicans favor: giving regulators more resources, shifting the burden of proof in merger cases and boosting data portability and interoperability.

A report issued by now-ranking Republican Ken Buck as a rejoinder to last year’s Democratic House Judiciary antitrust subcommittee staff report on competition in digital markets allowed that the GOP shares other Democratic concerns, including predatory pricing, monopoly leveraging and control over marketplace platforms.

That conciliatory signal also came weighted, with warnings that Congress should be wary of “handing additional regulatory to agencies in an attempt to micromanage.” Instead, try instead telling enforcers they should return to first principles, the Colorado lawmaker advised.

Whether Republicans and Democrats in the Senate **can find common cause** is an even **more fraught question**. Unlike its House counterpart, the Senate Judiciary subcommittee on antitrust **hasn't conducted a 16-month investigation** into digital monopolization. The subcommittee’s senior Republican, Utah’s Mike Lee, is prone to **touting the importance of the consumer welfare standard** and rails against online platforms “eager to impose the ideological censorship called for by their political benefactors.”

Lee also says he’s open to working with subcommittee Chairwoman Amy Klobuchar on strengthening enforcement, adding the caveat that current antitrust laws are sufficient.

Klobuchar, a Minnesota Democrat, doesn’t need Lee to get a bill through her subcommittee, but failing to find consensus with Republicans imperils her chances of making law. The prospects for her Competition and Antitrust Law Enforcement Reform Act becoming law as current written aren't good.

— 'Big tech is out to get conservatives' —

A looming question hanging over any bill, even one tailored to win bipartisan support, is whether it could be **derailed by Republican anger** at online platforms for alleged anti-conservative bias.

A right-wing trope especially spread by President Donald Trump during his last year in office — the belief that platforms use their content moderation powers to silence conservatives — has mainstream acceptance in Republican circles. It’s a refrain almost obligatory for Republican lawmakers to repeat when discussing any issue related to online platforms. “Big tech is out to get conservatives,” House Judiciary Committee ranking member Jim Jordan of Ohio has said more than once.

Democrats have their own share of anger at online platforms’ content-moderation practices, to be sure. They accuse online platforms of circumventing consumer protections, undermining civil rights laws and not doing enough to stymie disinformation.

It’s Republicans, though, who appear the angriest, and are the more likely to insist that any legislative reform touching online platforms address content moderation, **with the intention of making it harder,** not easier, for online platforms to remove users, **potentially imperiling a compromise measure.**

There is one bill that just might thread that narrow opening between antitrust and content. It has a bipartisan coalition in the House and the Senate. Attached are House antitrust subcommittee Chairman David Cicilline of Rhode Island, Representative Buck, Senator Klobuchar and Senator John Kennedy, a Louisiana Republican. It’s the Journalism Competition and Preservation Act, and it would establish a four-year safe harbor from federal and state antitrust laws for news organization to collectively negotiate with online platforms.

**It isn't antitrust reform**. Critics say **it’s the opposite of reform**, as the answer to monopoly shouldn’t be the mere suspension of antitrust law. But it’s something they agree on, and for lawmakers looking to lodge a win, it might suffice.

#### BBBA/Voting rights are top of the agenda

Hagen 12/30 – Politics reporter for U.S. News & World Report covering Congress, elections, and the Supreme Court.

Lisa Hagen, “Democrats’ 2022 Agenda: Pass 2021 Agenda,” *U.S. News and World Report*, 30 December 2021, https://www.usnews.com/news/politics/articles/2021-12-30/democrats-2022-agenda-pass-2021-agenda.

The start of 2022 is shaping up to look a lot like 2021 for Democrats.

Two of the party’s biggest – but unfinished – priorities are now at the top of the agenda in the early weeks of the new year. And Democrats are working against the clock to fulfill them in the months before the critical midterm elections – while they still have full control of Congress and the White House.

After failing to consolidate uniform support and needing to address more pressing year-end deadlines, Democrats look to start the year once again trying to pass a version of their social spending plan, the Build Back Better Act, and a pair of voting rights bills. Both efforts fizzled out earlier this month, and now the party faces one last test of whether members can get them done before November.

Many in the party see an even greater urgency to enact federal voting legislation as new maps and voter laws in the states start taking effect in 2022. All Democrats support voting rights, but a 50-50 split Senate and Republican opposition in the form of the filibuster have kept legislation on the topic at bay all year long. A rules change is their only option to move it forward – a slow-going effort that scored a major endorsement from President Joe Biden last week.

The party is feeling the pressure of acting on both priorities early enough before the midterms. And some worry inaction could bring electoral consequences for them during an already tough year for Democrats and in elections well beyond 2022.

“Later is better than never, but we’re running out of time to enact voter protections for the 2022 elections,” says Sean Eldridge, the founder and president of Stand Up America, a group pushing for filibuster reform and voter protections. “This isn't a bill that can pass at any time. There's a growing understanding in the Democratic Senate caucus that there are real consequences of delay, and action needs to happen in January.”

“I think that there are certainly potential political impacts on the 2022 election,” he adds. “But equally importantly, inaction would have a lasting impact on our democracy for years to come.”

Midterm elections are usually viewed as referendums on presidents, and historically, their party loses seats in Congress. To flip control, Republicans need a net gain of a few seats in the House and only one in the Senate.

Opposed to both Build Back Better and voting rights legislation, Republicans see their resistance as potentially winning messages during the campaign season. And they’re trying to use Biden’s low approval numbers and a resurgent pandemic as other political cudgels against Democrats.

Democrats view successes on the rest of their uncompleted agenda as a way to blunt the headwinds against them in the midterms – if they can get their priorities passed.

Senate Democrats are planning “as early as the first week back” in January to once again take up voting rights legislation, which activists say must happen well before the midterms. Majority Leader Chuck Schumer of New York wants every member of his caucus on the record for their stance on voting rights and reforms to Senate rules.

The party is feverishly trying to pass such legislation in the wake of new voter laws crafted by GOP-led state legislatures that could restrict access and disportionately hurt voters of color.

Democrats’ sweeping reforms bill, the Freedom to Vote Act, would expand voter registration and mail-in voting, end partisan gerrymandering and enact a number of other government ethics measures. They also want to pass the John Lewis Voting Rights Advancement Act to restore the part of the 1965 Voting Rights Act that gives the Department of Justice the authority to review in advance new voting procedures from states with a history of discrimination.

Because of a divided Senate and the inability for Democrats to reach the 60-vote threshold to move legislation forward, a rules change to the filibuster is the only way to break the impasse. The party currently lacks the support for changing the 60 votes to a simple majority, and all 50 Democrats must be on board.

What that rules change exactly looks like – and if all 50 Democratic senators can get behind it – is still an open question. The party is mulling a carveout of the filibuster rule specifically for voting rights, like ones that existed for economic issues, including raising the debt ceiling. Sen. Joe Manchin of West Virginia and Sen. Kyrsten Sinema of Arizona have been opposed to altering the 60-vote requirement.

Another option under active discussion is reverting back to a talking filibuster, which would require lawmakers to physically stay on the Senate floor and debate the bill in question with the hopes of ultimately moving to a vote. Currently, Republicans have enough votes to block bills from being debated. And they have successfully blocked motions to proceed on election bills.

Republicans see such changes to elections as a federal overreach and bemoan growing efforts to gut the filibuster once more. But both parties while in power weakened the procedural tactic when it came to confirming a president’s judicial nominations over the past decade.

“We’ve heard false claims that the Senate obeying our rules to address the debt limit somehow paves the way for radicals to break the rules” on other legislative items, Senate GOP Leader Mitch McConnell of Kentucky said before the holiday recess.

As they push forward on voting rights, Democrats are also essentially starting from scratch on the embattled Build Back Better Act after Manchin confirmed his opposition to the spending in the $1.75 trillion plan.

They’re now searching for a viable – and almost certainly downsized – alternative, with many of the key programs related to health, education, climate and families on the chopping block. While Manchin presented the biggest obstacle for his own party, Sinema was another Democrat who hadn’t committed to voting for the spending bill.

Progressives are now calling for a two-pronged strategy that involves Biden using his executive authorities to pass as many parts of his Build Back Better agenda as possible. The progressive wing of the party has lost trust in legislators like Manchin, particularly since they gave in to demands to act first on a bipartisan infrastructure bill with the expectation of a commitment on the social safety net package.

“We also can’t just hang our hat on the legislation passing because we thought we had an agreement. Now we don’t and what’s to say whether we’re going to get an agreement,” Rep. Pramila Jayapal of Washington said in an MSNBC interview last week.

Jayapal, chairwoman of the Congressional Progressive Caucus, is calling for Biden to take unilateral action on “as many executive actions as he can to immediately lower costs, to immediately address health care concerns … and to immediately show the world that we are serious about our leadership on climate change.” Biden, for now at least, is focused on solutions emanating from Congress, which would be harder for a future administration to roll back.

As they scramble to fulfill more of their agenda, Democratic leaders are pressing members to campaign on legislative victories from Biden’s first year in office instead of dwelling on what they haven’t accomplished or the intraparty fights stalling their priorities.

They cleared two major pieces of legislation in 2021: Democrats’ federal pandemic relief – the $1.9 trillion American Rescue Plan – and the trillion-dollar bipartisan infrastructure bill. The party is also touting the record number of judicial confirmations in Biden’s first year and the president’s decisions to rescind rules from the Trump era, most prominently on climate change.

With Build Back Better and voting rights in limbo, there’s no certainty Democrats will add to their list of finished business. But the renewed urgency, especially for a potential rules change to break the Senate logjam, has the party feeling a new sense of momentum heading into 2022.

**Broad antitrust application creates uncertainty via inconsistency**

**Hovenkamp 3** – Ben V. & Dorothy Willie Professor of Law and History, University of Iowa

Herbert Hovenkamp, "Antitrust Violations in Securities Markets," Journal of Corporation Law, Vol. 28, No. 4, pp. 607-634, Summer, 2003, https://heinonline.org/HOL/Page?handle=hein.journals/jcorl28&div=35&g\_sent=1&casa\_token=&collection=journals

Implied antitrust immunity is sensible when the regulatory agency has jurisdiction over a practice, has a history of actually reviewing it, and is likely to take into account the concerns for competition that an antitrust court would ordinarily consider. In such cases permitting the federal courts to proceed with antitrust claims subjects the industry and its firms to parallel track regulation with the possibility of inconsistent adjudications. 83 Indeed, the problem of inconsistent outcomes is not simply bilateral. Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another as well. The agency, by contrast, can generally be expected to make and enforce its own mandates consistently. In all events, the issue is not whether the agency has actually passed judgment on the practice, but whether it is competent to do so and likely to do so if asked. In virtually all such cases the regulatory agency has the clear comparative advantage over a court of general jurisdiction, particularly given that private antitrust actions generally proceed via jury trials.

#### But, even if they prove antitrust application is good, narrowed implied immunity encourages blanket authorizations by the SEC, leading to a lack of antitrust application---only broad immunity allows for a balanced approach

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Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

This suggests that as a policy matter the Supreme Court was correct to factor the possibility that antitrust courts might misapply SEC regulations into its implied immunity analysis. However, the Court's conclusion that in the absence of a finding of immunity the prospect of excessive antitrust liability might have a chilling effect on legitimate socially beneficial activities in the securities industry is only part of the story.182 The opposite result might occur if the SEC, in order to preclude antitrust actions, adopts an overly permissive regulation ex ante. Thus, contrary to what the critics of Billing suggest,183 a narrow implied immunity doctrine might actually lead to too little antitrust enforcement in the securities area, rather than too much.

The arguments presented in this and the previous Section imply that of the three potential implied immunity standards discussed in the beginning of this Part, the broadest active review standard is optimal. The possibility that a court might misapply an SEC regulation or impose excessive liability even against firms that do violate SEC regulations suggests that such a standard is superior to an affirmative approval standard- the narrowest standard- even assuming away the possibility that the SEC may be subject to time constraints in choosing between different regulatory options. Moreover, when time constraints are factored into the SEC's regulatory calculus, it becomes apparent that an active review standard is preferable to both a some regulation standard and an affirmative approval standard, each of which would permit antitrust suits in the absence of an SEC regulation and thus might induce the SEC to promulgate a permissive regulation quickly in order to preempt potentially erroneous antitrust decisions. To be sure, the preference for an active review standard ultimately depends on the assumptions articulated and defended in Part II: that antitrust courts can be expected to prohibit too much conduct and impose too much liability in the securities context. But to the extent that these assumptions hold, this Part has shown that the broad implied immunity standard for which Gordon, NASD, and Billing stand is efficient and may actually lead to more antitrust enforcement than would the narrower standard advocated by a number of commentators.

Conclusion

This Note has provided a defense of the Supreme Court's decision in Credit Suisse Securities (USA) LLC v. Billing. It has argued that Billing's emphasis on whether the SEC possesses and exercises jurisdiction over a particular activity is consistent with relevant Supreme Court precedents, which belie the claim that implied immunity has been found only when the SEC explicitly sanctions an activity. Moreover, this Note has argued that Billing was correctly decided as a normative matter as well. The SEC is better positioned than antitrust courts to determine whether a particular activity merits prohibition because it possesses expertise in the securities area that generalist courts lack and because the strictures of antitrust law are not well suited to accommodate some of the policy goals that undergird the securities laws. In addition, the competitive nature of the securities industry and the greater variability of antitrust damage awards as compared to penalties imposed by the SEC imply that, on average, antitrust courts will impose excessive liability even as to activities that both the securities laws and the antitrust laws condemn. As such, a narrow implied immunity doctrine might lead to overdeterrence ex post and might actually cause the SEC to adopt overly permissive regulations ex ante solely for the purpose of preempting antitrust suits. The central accomplishment of Billing's broad implied immunity standard is that it enables the SEC to regulate outside of the shadow of the antitrust laws.

#### The SEC is much better at regulating securities markets than antitrust courts

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Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

A. The False Positives Concern

1. The SEC's Comparative Advantage

There are several reasons to prefer that the scope of permissible conduct in the securities industry be determined by the SEC rather than by antitrust courts. First, SEC regulation serves a sufficient antitrust function. The Commission is required to take into consideration competition effects when it promulgates regulations75 and, when promulgating a regulation pursuant to its authority under the Exchange Act, it must explain the effect of the regulation on competition in its statement of basis and purpose/6 Because antitrust principles permeate the securities laws, the utility of parallel antitrust enforcement is dubious.

Moreover, SEC regulation possesses two affirmative advantages over antitrust litigation. First, the SEC is a specialized agency with a great deal of expertise in the securities area, whereas antitrust courts are generalized tribunals and antitrust matters occupy only a small portion of their dockets.77 In addition, when promulgating and enforcing its regulations, the SEC can take an industry-wide perspective and can alter its position on the basis of new information. By contrast, judicial decisions are limited to the facts of the particular case at bar and are comparatively less dynamic.

Second, relative to SEC regulation, antitrust analysis is comparatively narrow in scope. Whereas antitrust courts focus exclusively on the effect of an activity on competition/8 SEC regulation takes into account, in addition to competition, the effect of a potential rule on the volatility of the capital markets, the accuracy of securities pricing, fraudulent practices by broker- dealers, and the health of regulated companies.79 To the extent that these goals might, at times, conflict with the paradigm of unfettered competition,80 the SEC is in a better position to strike the right balance among them than are antitrust courts.81 In particular, because antitrust courts can be expected to undervalue the non-competition-related benefits of a given activity, they are likely to prohibit some conduct that should be permitted. For example, price stability, a policy which is germane to securities regulation,82 is potentially in tension with traditional antitrust principles.83 As such, antitrust courts may impose liability for concerted action designed to stabilize securities prices even if such action is on balance beneficial.84

#### Denniston’s not an aff card – card concludes that perceptions of antitrust law are key

**Denniston 7** – Independent contractor reporter covering the Supreme Court for fifty-eight years

Lyle Denniston, "Analysis: Antitrust "mistakes" and the IPO process," SCOTUSblog, 6-18-2007, https://www.scotusblog.com/2007/06/analysis-antitrust-mistakes-and-the-ipo-process/

But, in sentiment as well as in logic, much of the reasoning of the Court in reaching its conclusions against a joint securities-antitrust regulatory regime could be attributed to its perceptions about the inability of antitrust lawsuits to avoid serious disruption of the securities markets. “The factors we have mentioned make mistakes unusually likely” in the antitrust regime, Breyer said. “Antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries…[T]here is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect.”

**Limiting applied immunity shatters the walled garden of securities markets, causing massive upheaval**

**Tyler 21** – Legal analyst for Bloomberg Law

Eleanor Tyler, "ANALYSIS: Securities Markets Face Scrutiny Under Antitrust Bill," Bloomberg Law Analysis, 3-24-2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-securities-markets-face-scrutiny-under-antitrust-bill

Under the proposed Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA), conduct in regulated securities and commodities markets that has enjoyed a complete pass from antitrust scrutiny for decades would be subject to lawsuits seeking treble damages.

That could be a bigger shift than some are expecting. While much of the analysis of CALERA to date has focused on its likely impact on technology markets and merger enforcement, the potential impact on securities markets is profound. Financialization has meant that markets regulated by the securities acts have an outsized impact on the overall economy, and the impact of permitting full antitrust enforcement in those areas likely would be sizeable.

Narrowing the Antitrust Exception

With CALERA (S 225), Sen. Amy Klobuchar (D-Minn.) has proposed sweeping changes to antitrust law. Among CALERA’s provisions are new legal standards that would radically change merger enforcement and reinvigorate enforcement against dominant companies.

But also tucked into CALERA are sections that would all but end a fairly obscure judicial doctrine called “implied immunity.” The doctrine currently disallows antitrust complaints about conduct that is regulated under another complex federal statutory framework. In other words, where Congress is silent on the issue of antitrust law overlapping with another statute, courts have occasionally stepped in to close off areas from antitrust scrutiny.

The defense of “implied immunity” doesn’t come up that often, and it is mostly successful in securities markets. Defendants have long argued that applying antitrust law to conduct that is legal under the securities laws infringes on the regulatory authority of the Securities and Exchange Commission and harms financial markets. Core functions of the securities market, like participating in exchanges and listing and selling stocks and options, should only be subject to one set of rules, they argue.

Right now, if the securities acts apply to conduct related to core securities market functions—and the SEC doesn’t explicitly forbid that conduct—then that conduct can be immune from antitrust claims. CALERA would greatly narrow that rule: Instead, implied immunity could only attach to conduct that other laws “explicitly require or authorize.” In short, conduct within the vast gray areas of the securities law wouldn’t qualify for implied immunity under CALERA; only conduct that the securities laws “explicitly require or authorize” would.

Furthermore, CALERA says that the antitrust laws “shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments.” That language counters a Supreme Court statement in Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP that a regulatory framework designed to deter anticompetitive harm probably doesn’t warrant the addition of antitrust scrutiny, even if Congress explicitly preserved the application of the antitrust laws to that regulatory framework.

Together, these provisions mean that courts can’t second-guess whether the antitrust laws should apply to conduct in regulated markets, or water down the antitrust laws when applying them to that conduct. Unless the regulator explicitly permits or requires the conduct, market participants can challenge it under the Sherman Act.

What Conduct Is at Risk?

In practice, few antitrust defendants have successfully pleaded implied immunity from the federal antitrust laws in court. Nevertheless, a wide variety of defendants have argued that their conduct should be immune from the antitrust laws.

Cases in which the defense was raised have included not only antitrust claims against financial market conduct, but also complaints about anticompetitive conduct in, patent infringement, horse racing, merging hospitals, and seeking FDA approval for a generic drug.

Most successful cases have been in the securities or commodities context. The current test for implied immunity comes from Credit Suisse Securities (USA) LLC v. Billing, a 2007 Supreme Court decision that dismissed claims that underwriters colluded to drive up prices for initial public offerings (IPOs). Specifically, the plaintiffs complained about underwriting contracts that required them to buy shares at prearranged escalating prices in the aftermarket in order to get access to an IPO, a practice called “laddering.” Laddering isn’t currently permitted under Regulation M (and was at best disfavored in 2007 when the Court decided Credit Suisse); however, the Supreme Court held that it can only be addressed by the SEC and not by those harmed by inflated share prices under the Sherman Act.

Other financial markets practices shielded under the doctrine have included underwriting contractual provisions prohibiting “flipping” (immediately reselling) of IPO shares, restricting trade in stock options, charging fixed commission rates for stock trades, and restricting trade in mutual funds on the secondary market.

In short, if the myriad kinds of restrictive conduct that are explicitly intended to boost prices for stocks and derivatives become subject to the antitrust laws, many practices, at all levels of the financial system, are likely to come under scrutiny. That scrutiny could include enforcement actions by federal or state regulators or private actions for treble damages under the Sherman Act.

Narrow Wedge, Big Shift

For decades, the markets around the offering and listing of stocks have been largely a walled garden, protected from pruning by the Sherman Act. There is likely a lot that would interest plaintiffs in that overgrowth. That’s an issue that investment bankers, brokers, compliance professionals, and lawyers may need to assess.

#### Antitrust application harms stabilizing regulatory efforts by the SEC, limiting appeal of IPOs

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Jacob A. Kling, "Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine," The Yale Law Journal, Vol. 120, No. 4, pp. 910-953, January 2011, https://www.jstor.org/stable/41060155?seq=1#metadata\_info\_tab\_contents

Second, relative to SEC regulation, antitrust analysis is comparatively narrow in scope. Whereas antitrust courts focus exclusively on the effect of an activity on competition/8 SEC regulation takes into account, in addition to competition, the effect of a potential rule on the volatility of the capital markets, the accuracy of securities pricing, fraudulent practices by broker- dealers, and the health of regulated companies.79 To the extent that these goals might, at times, conflict with the paradigm of unfettered competition,80 the SEC is in a better position to strike the right balance among them than are antitrust courts.81 In particular, because antitrust courts can be expected to undervalue the non-competition-related benefits of a given activity, they are likely to prohibit some conduct that should be permitted. For example, price stability, a policy which is germane to securities regulation,82 is potentially in tension with traditional antitrust principles.83 As such, antitrust courts may impose liability for concerted action designed to stabilize securities prices even if such action is on balance beneficial.84