# R3 UK Neg vs Michigan State GK Disclosure

# 1NC

### 1NC---T

T Prohibit---

#### “Prohibit” means to forbid a given practice

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. BABCOCK et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### “Increase” means to make greater

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

#### They don’t meet---the Parker doctrine gives immunity for state actions that are already deemed as antitrust violations.

#### Vote neg---

#### [A]---Limits---allowing AFFs that don’t increase prohibitions explodes limits and makes it impossible for the neg to prep because they don’t have to expand the scope of antitrust liability.

#### [B]---Grounds---core neg generics are predicated on increased prohibitions, not changes to how current prohibitions operate.

### 1NC---CP

Section 5 Counterplan---

#### The United States Federal Trade Commission should:

#### determine that, under Section 5 of the Federal Trade Commission Act, “unfair methods of competition” includes conduct that is covered by the Parker Immunity Doctrine.

#### issue cease and desist letters to companies engaging in the aforementioned conduct, stating that their conduct constitutes a violation of Section 5 of the FTC Act.

#### Broad FTC authority means the counterplan solves

Vaheesan 17 – Regulations Counsel, Consumer Financial Protections Bureau

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

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

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

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

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

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1. Interpretive Latitude in the FTC Act

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

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

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

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

**Protectionism causes global wars**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC---CP

#### Text: The fifty states and all relevant United States territories should:

#### Announce that it will no longer pursue conduct legal under the state action immunity doctrine.

#### States solve---they can enact and interpret their own laws, and cannot be inherently preempted

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### 1NC---CP

#### The United States judiciary should adopt a cost-externalization test when reviewing state regulations that invalidates regulatory schemes that externalize monopoly charges outside state boundaries.

#### The CP solves by increasing scrutiny on state regulatory regimes—it does *not* expand FTC authority *or* expand antitrust laws which the plan *does*

Crane, MSU 1ac author, Frederick Paul Furth Sr. Professor of Law, University of Michigan, ‘19

(Daniel A. "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214)

In light of the limited efficacy of Midcal’s regime, one could consider additional ways to increase the level of antitrust scrutiny of anticompetitive state and local regulations. Commentators have proposed various such doctrinal approaches to invigorate antitrust preemption. For example, courts might adopt a cost-externalization test, which would invalidate regulatory schemes that externalize a disproportionate share of monopoly overcharges outside the boundaries of the political district enacting the regulation.107 Or, as I have proposed elsewhere, they might read the Parker doctrine as entirely inapplicable to enforcement actions by the FTC—a legal question that the Supreme Court has held is still open.108 In the event that the courts hold Parker inapplicable to the FTC, the Commission might play a significantly enhanced role in checking anticompetitive abuses by state and local governments.

Despite calls for a broader use of federal antitrust law to police anticompetitive state and local regulations, the Supreme Court continues to refine the Parker doctrine with an eye on Lochner. Then Justice Rehnquist once worried that the Court should not “engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that th[e] Court ... properly rejected” in terminating Lochnerism.109 In his dissenting opinion in Community Communications Co. v. City of Boulder, Justice Rehnquist warned about the risks of opening up antitrust review of municipal regulations in a way that would require cities to justify their regulations, and the courts, in turn, to weigh those justifications.110 Rehnquist wrote:

If the Rule of Reason were “modified” to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the Lochner era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of “liberty of contract” and “substantive due process,” the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined. Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to “substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” The federal courts have not been appointed by the Sherman Act to sit as a “superlegislature to weigh the wisdom of legislation.”111

Also in the shadow of Lochner, recent years have shown glimmers of a reinvigoration of constitutional doctrines checking anticompetitive abuses by state and local governments. The negative or dormant commerce clause—limited by the Parker Court on antiLochner grounds—has occasionally been deployed to invalidate not only anticompetitive regulatory schemes112 that discriminated against out-of-state interests, but also, on occasion, those that impose significant burdens on interstate commerce without a sufficient justification.113 As of this writing, Tesla is testing the limits of these doctrines in its challenge to Michigan’s direct distribution law.114 Its complaint for injunctive relief asserts:

[Michigan’s] [p]articularly egregious protectionist legislation ... blocks Tesla from pursuing legitimate business activities and subjects it to arbitrary and unreasonable regulation in violation of the Due Process Clause of the Fourteenth Amendment; subjects Tesla to arbitrary and unreasonable classifications in violation of the Equal Protection Clause of the Fourteenth Amendment; and discriminates against interstate commerce and restricts the free flow of goods between states in violation of the dormant Commerce Clause.115

Thus far, Tesla has survived a motion to dismiss in federal court and won a key discovery motion seeking automobile dealers’ communications concerning the Michigan ban on direct distribution.116

### 1NC---DA

Blockchain DA---

#### Tech giants will expand into the finance---regulatory changes are the determining factor

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Ryan Jones and Pinar Ozcan, "Rise of BigTech platforms in banking," Saïd Business School at the University of Oxford, Industry Paper 1, 2021, <https://www.sbs.ox.ac.uk/sites/default/files/2021-02/Rise%20of%20BigTech%20Platforms%20in%20Banking%20-%20Oxford%20White%20Paper%20Final%20%28002%29.pdf>

Banks, and in particular current accounts, can be viewed in many ways as a platform model of the 20th century. Incumbents, who provide free current account services to consumers, have long boasted of their number of products per customer (PPC) – quoted as high as 6 for premier account customers of leading UK banks. This has been fostered by a relationship built around the current account platform from which additional services are bundled to create both economies of scale and scope. This in turn has **become the expectation** of consumers who want a **one-stopshop** for financial needs, creating a barrier for new entrants. This barrier has proven hard to navigate for FinTechs whose innovation focuses in one area of the banking ecosystem.

While all informants agree that the traditional disruptive path is significantly constrained and reshaped by the regulatory context, it is also clear that a platform business model is particularly suitable for financial services.

Having seen the impact of BigTech in other industries, the banking industry is understandably keeping an eye on the **potential for BigTech** to deploy their platforms in banking. Amongst our informants, some saw this as a matter of time, whilst others doubted it would happen at all, with the cost of regulation commonly cited as the largest barrier. Interestingly, even among those who saw entry as a certainty, **none considered that it was already happening** – this is supported by the fact that no BigTech company has yet acquired a full banking license in the UK. However, **this should not fool anyone**. Over recent years there has been **significant activity** from BigTech players in **banking-related services**, resurfacing and reiterating the question of where banking **starts and ends.**

As shown in the table above, BigTech are **actively broadening** their platforms into a **number of areas** of the financial ecosystem, in particular payments. This may partly be due to the lower regulatory burden of payments; as one insider put it – e-money license holders can ‘zip around like bugs’ compared with more heavily regulated deposit-takers. Another potential reason is datafication. Access to the payments network provides a vast amount of new data on consumer preferences and buying habits, which can be coupled with existing platform data to enrich BigTech’s understanding of its customers and create new opportunities for monetisation and lock-in.

As well as acquiring new sources of data, activity in financial services to date is also offering BigTech the opportunity to **further monetise** their existing data stacks. Amazon’s extension of credit to businesses on the platform via Amazon Lending, launched in the US in 2012 and in the UK in 2015, is a prime example. Amazon already has **unrivalled access to data** on its seller community. As the sole source distributor for many of its merchants, Amazon already knows product type, quantity and, importantly, revenue generation of each seller per month. This information can be used to profile sellers’ ability to pay and extend credit on a targeted basis, **far better** than a bank could without access to similar data. From this advantage, Amazon can begin to use this data to learn more about risk modelling and other core areas of banking. The same dynamics are true of Facebook and the social media platforms, who capture **swathes of data** on individuals that can be collated with payments and other financial data to create new and innovative bankingproducts.

Entry into these, perhaps peripheral, areas of the banking bundle could be the extent of BigTech’s ambitions in banking. However, they appear to be the start of a **broader envelopment**. While troubled in its execution, Facebook’s closed libra ecosystem has the mission to ‘enable a simple global payment system and financial infrastructure that empowers billions of people’3 . It has since attracted a significant amount of debate and regulatory attention from both the Federal Reserve Bank and the Bank of England, among others. Similarly, Google has announced it ambitions to enter the US ‘checking account’ market with an anticipated consumer launch during 2021. This **gradual participation** in banking services in many ways **mirrors the classic disruptive path** described by the innovator’s dilemma (Christensen, 2003). BigTech’s acquisition of elements of the banks’ bundle could represent a **similar path to market domination**. Ceding markets that they previously dominated may leave incumbents open to a fuller platform envelopment by BigTech in their most profitable services, such as mortgages and consumer credit. This trend is also evident in the table above by the number of lending and credit services already offered by BigTech.

#### Antitrust scrutiny deters investment in finance---wards away big tech

Pedersen 20 – Brendan Pedersen covers federal bank regulation and fintech policy for American Banker

Brendan Pedersen, "Congress's scrutiny of tech giants could be blessing and curse for banks," American Banker, 10-13-2020, https://www.americanbanker.com/news/congresss-scrutiny-of-amazon-google-could-be-blessing-curse-for-banks

WASHINGTON — A Democratic proposal to reform antitrust law to limit the reach of the largest technology firms may hearten banks, but analysts say the financial services sector is not immune from a revived focus on breaking up megacompanies.

In the sweeping 400-page report by the House Judiciary Committee’s antitrust law subcommittee, lawmakers laid out a sweeping case for reforming laws that allow the colossal growth of just a handful of tech giants: Amazon, Apple, Facebook and Google.

“To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” the report said, adding later that “the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform.”

The U.S. banking industry has long worried about the financial ambitions of leading tech firms and even the possibility that one of the four Big Tech giants could charter or acquire a bank with significant competitive advantages at the expense of traditional financial services firms. While none of the four companies have applied for banking powers, past reports have circulated of Google and Amazon being among those having engaged with bank regulators.

The report authored by subcommittee staff did not specifically focus on the tech giants' financial services aims, but rather on how their global reach and impact on sectors like the news media could threaten democratic norms.

But observers said tighter restrictions on acquisitions by tech leaders could put them on more equal footing with banks and even discourage their potential interest in acquiring financial technology startups. The report also appears to validate the regulatory regime for bank parents as a potential model for reining in growth of the tech sector.

“A more aggressive antitrust stance would reduce the likelihood that those companies get even deeper into financial services, so it protects some turf for banks that don't have to compete with a Bank of Amazon or an Apple Bank,” said Jeremy Kress, an associate professor of business law at the University of Michigan.

#### Big tech in finance is key to widespread blockchain adoption

Pejic 17 – author of "Blockchain Babel," a strategy guide to blockchain based on management theory and scientific research. He was voted by McKinsey and the Financial Times as one of three finalists in the Bracken Bower Prize for his work on blockchain in 2016

Igor Pejic, "Tech giants will not be silent about blockchain for long," American Banker, 5-18-2017, https://www.americanbanker.com/opinion/tech-giants-will-not-be-silent-about-blockchain-for-long

The hunt for the killer blockchain application is in full swing. The emergence of the technology saw something akin to a Cambrian explosion for blockchain startups. Now, more than 300 of them are vying to be the global economy’s “next best thing,” posing an obvious competitive threat to traditional financial institutions.

Banks, payment processors and credit card companies worry that brainy entrepreneurs, who transform high IQs into billions of dollars, could cast a pall over their core business. But **it is not fintechs** they should be worried about. It’s the **tech titans** in Silicon Valley that should keep them up at night.

Management theory makes the distinction between de novo market entrants and diversifying market entrants. The former are complete newcomers; they include fintech companies. But diversifying market entrants are firms that have been successful in other arenas. In most technological shifts, it is diversifying entrants that grab market share because they are experts in capabilities that suddenly become relevant to the new product or service generation. And unlike startups, they come with legions of experts, a global network and stuffed pockets. When the camera maker Polaroid failed, it was not de novo entrants that took over. Rather, it was Canon and Nikon that brought to the table their experience with optoelectronics. But how do you spot diversifying entrants in advance? A good start is to identify which competencies will become central once the blockchain hits the market.

For example, a technology like blockchain, challenging one of the world’s largest industries, needs more than just programmers and algorithms. The storage, archiving, communication and file serving needed to run distributed ledgers **gobble up** hard-drive space at **unprecedented speeds**. Moreover, blockchains have an end of life. When they go out of business, they still need to be accessible.

These requirements call out for the capabilities of the cloud-computing giants, such as Amazon, Microsoft and IBM. Banks must not underestimate what these companies can contribute to the blockchain; they offer more than just raw server resources.

At the same time, pure cloud companies will never be able to cut into banks’ core business; they are too far away from the end customer. The really dangerous diversifying entrants will come from somewhere else: **internet giants** such as Google, Apple and Facebook, which already collect massive amounts of data.

Globally dominating data-collecting companies — search platforms, social networks, e-commerce giants — are neglected in the discussion about blockchain. Internet firms haven’t shown a lot of interest in lowering the blockchain gauntlet onto the banking world. **But they will**.

Data behemoths are pointedly silent about the new technological development. Yet their core competencies will be crucial in a blockchain-based banking world. According to a Finextra Research report, companies such as Google and Facebook are **perfectly suited** to outdo banks in driving blockchain mass adoption (particularly in payments) due to their large global customer base. Already, large data collectors are entering payments with Android or Apple Pay and the companies are positioning themselves where they are the strongest: at the front end.

The likes of Google know what we search, what we write in emails, with whom we interact, and which places we frequent. And they know how to turn that data into dollars. Blockchain technology **trims transaction costs to the bone**, and financial services can be offered for free. This model p**lays into the hands of data behemoths**, whose business models are already geared to making money out of free services. Selling highly accurate personalized advertising in two-sided platforms is in their DNA.

Secondly, globally recognizable and trusted brands are another major asset of the tech titans. Google, Apple, and Amazon have been at the pinnacle of global brand valuation lists for years. The gap between these top three and other brands is stunning. Their brands are worth, respectively, $109 billion, $108 billion and $106 billion. People spend hours staring at their logos while checking emails, searching the web, chatting with friends or shopping online. AT&T comes in fourth with “only” $87 billion.

Silicon Valley’s behemoths are also competing to place their brands on payment interfaces.

To be sure, banks are likely to stay on top of global finance for some time to come. But, as it is the painful case with most technological leaps, the **barriers to entry** for nonbank competitors **will eventually disappear**. By how much will depend on identifying the right challengers on time and fending them off. Banks are well advised to keep a close eye on the blockchain activities of data behemoths.

#### Blockchain solves snap financial collapse

Furber 19 – Sophia Furber is a journalist with S&P Global Market Intelligence, where she leads EMEA fintech and banking tech reporting, citing Brian Behlendorf, executive director of Hyperledger

Sophia Furber, "Blockchain could prevent rerun of 2008 banking meltdown, says tech veteran," S&P Global Market Intelligence, 6-28-2019, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/blockchain-could-prevent-rerun-of-2008-banking-meltdown-says-tech-veteran-52534233

The aftermath of the 2008 global financial crisis would have been considerably less chaotic if banks had used blockchain to keep track of complex derivative trades, according to technologist Brian Behlendorf, executive director of Hyperledger.

Hyperledger, a global cross-industry group that aims to advance the use of blockchain technologies, is an initiative of the The Linux Foundation and counts major global banks including Deutsche Bank AG, JPMorgan Chase & Co. and Citigroup Inc. among its members.

More than the crash in the U.S. housing market, it was what happened next with the vastquantity of credit derivatives that really tipped the financial system into crisis, Behlendorf said.

At the height of the global financial crisis in October 2008, the collapse of Lehman Brothers Holdings Inc. triggered hundreds of billions in credit default swap, or CDS, protection payouts, but because the derivative instruments had been bought and sold **so many times**, it was **difficult to** know who was liable to pay out.

'A crisis of paperwork'

"This was not a crisis of over-exuberance. It was a crisis of paperwork," Behlendorf said in an interview. "It showed the fallibility of [banks'] digital systems. There was not an automated systematic record of who owned what, and banks were slow to respond."

Using blockchain would have meant that banks had a common system of record for instruments such as swaps, which could have resulted in a more "orderly unwinding" of contracts, he said.

There is a strong case for using blockchain in the parts of a bank that deal with settlements, clearing and trading, as this could help to prevent a re-runof the events of 2008, he said.

Until February this year, Hyperledger had been chaired by Blythe Masters, the JP Morgan banker widely credited with inventing the credit default swap in the 1990s. Following her career in banking, Masters has emerged in recent years one of the most vocal advocates for the use of blockchain in the world of finance and spent four years as CEO of blockchain services firm Digital Asset Holdings, LLC before stepping down in February this year, citing personal reasons.

Masters has taken a step back from Hyperledger for the time being for health reasons, according to Behlendorf.

The global CDS market has shrunk considerably since the days of the global financial crisis: outstanding notional amounts of CDS contracts stood at $8 trillion at the end of the first half of 2018, compared with $61.2 trillion at the end of 2007, according to the Bank for International Settlements.

But beyond the infamous CDSs, the global derivatives market is still vast — and growing. The notional outstanding value of over-the-counter derivatives stood at $595 trillion as of end-June 2018, up from $532 trillion at end-2017, according to the BIS.

**Absent central bank liquidity, the economy collapses---that sparks global world war**

**Sundaram and Popov 19** – former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007; former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin

Jomo Kwame Sundaram and Vladimir Popov, "Economic Crisis Can Trigger World War," Inter Press Service, 2-12-2019, http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/

KUALA LUMPUR and BERLIN, Feb 12 2019 (IPS) - Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, there are growing concerns about the increased possibility of large-scale military conflict.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, could easily spin out of control and ‘morph’ into military conflict, and worse, world war.

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered likely. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

### 1NC---DA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Diagnosing the debt: It’s not about demographics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Entitlement reform needs health care reform to work

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

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

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

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

#### Healthcare driven budgetary overstretch causes global instability

Brown, PhD, Professor of Practice and Vice Chair, Public Administration and International Affairs at Syracuse, worked as an economist at the International Monetary Fund and as Chief Economist for Eastern Europe, Africa, and the Middle East at BNP Paribas, ‘13

(Stuart S., “Global Power: Key Issues,” in *The Future of US Global Power: Delusions of Decline*, Palgrave, p. 57-58)

In the first instance, structural26 budget deficits are more likely to be symptoms of incipient overstretch then prima facie evidence of national decline. Overstretch suggests a need to realign commitments and resources, hence spending and revenues. In principle, persistently large deficits demand adjustments that need not materially impact the underlying drivers of longer-term prosperity. In contrast, if fiscal imbalances prove sufficiently chronic, they can eventually trigger growth-inhibiting alterations in microeconomic incentives. In such cases, incipient overstretch can mutate into a more primary threat to the system's underlying dynamism.

In its classical formulation, “imperial overstretch” refers to unrestrained and exorbitant foreign military campaigns. The latter can be said to redound to the detriment of great powers by crowding out more productive capital investments. Yet in contrast to widespread impression, the US fiscal challenge does not primarily reflect out-of-control defense spending and the burden of foreign entanglements. If this were the case, then the feasibility of financing an ever-expanding global power projection would be brought into question. This neither minimizes the sizable resources the US commits to military-related spending nor denies that cutbacks in such spending can help facilitate overall fiscal adjustment. Rather, the point is that an endemic failure to rein in explosive economy-wide health care costs with the latter's implications for public sector health insurance programs – the real fiscal challenge – will do more to endanger macroeconomic stability and eventually erode the material foundation of US power (see chapter 8).

By viewing (health-care driven) fiscal deficits as a necessary manifestation of overstretch is misguided for a more basic reason. The root of the US fiscal problem involves unsustainable commitments – particularly in the area of health expenditure – made by government to its citizens. It is decidedly not a question of any dearth of national resources to adequately meet the health needs of the population at large. As the richest country in the world, the US possesses more than enough resources to achieve this goal. The relevant political and social question is whether the population’s basic health requirements are best met via ever-expanding entitlements requiring increasingly higher levels of taxation.

### 1NC---K

Neolib K---

#### The 1AC’s neoliberal application of antitrust naturalizes corporate domination and confines the government’s role to course correcting markets

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>.

ii. antitrust law is not and cannot be “apolitical”

Antitrust law is unavoidably political. Of course, the enforcement of antitrust law should not be political in the popular sense: the President and the heads of the Department of Justice Antitrust Division and Federal Trade Commission should not employ the antitrust laws to reward their friends and punish their enemies.22 Rather, antitrust is political in its content. In designing a body of law, Congress, federal agencies, and the courts must answer the basic questions of whom the law benefits and to what end. Answering these questions inherently requires moral and political judgments. These fundamental questions do not have a single “correct” answer and cannot be resolved through “neutral” methods or decided with an “apolitical” answer.23

Antitrust regulates state-enabled markets, which cannot be separated from politics. The history of antitrust law shows competing visions of both the law’s aims and its methods, suggesting there is no “apolitical,” universal concept of antitrust. Rather than aspire for an impossible utopia of “apolitical” antitrust, we must decide who should determine the political content of the field—democratically-elected representatives or unelected executive branch officials and judges.

A. Markets Cannot Be Divorced from Politics

A market economy is the product of extensive state action and so is inevitably political. The conception of the market as a “spontaneous order” is a useful construct for defenders of the status quo because it lends legitimacy to the current order and suggests that intervention is futile.24 This model, however, is a myth and bears no correspondence to actual markets. Most fundamentally, state action supports a market economy through the creation and protection of property rights25 and the enforcement of contracts.26 As sociologist Greta Krippner writes, “there can be no such excavation of politics from the economy, as this is the sub- stratum on which all market activity—even ‘free’ markets—rests.”27 In addition to property and contract law, examples of state action necessary for the contemporary U.S. economy to function include corporate and tort law (typically established and enforced by state governments), intellectual property, protection of interstate commerce, banking regulation, and monetary policy (generally con- ducted at the federal level).

Antitrust law, therefore, is a governmental action that shapes the power of state-chartered corporations and the scope of their state-enforced property and contractual rights. This regulation of state-enabled markets makes antitrust inherently political. Moreover, in formulating antitrust rules, lawmakers must determine whom the law seeks to protect. Antitrust law could conceivably protect consumers, small businesses, retailers, producers, citizens, or large businesses. But even identifying the protected group or groups does not fully resolve the question. For instance, if consumers are antitrust law’s sole protected group, how should the law protect consumers? Antitrust could protect consumers’ short- term interest in low prices or their long-term interests in product innovation or product variety, just to name a few possibilities.28

Given the foundational role of state action—and therefore politics—in a market economy, the choice of objective in antitrust law is not between intervention and nonintervention. Rather, antitrust law must choose between different con- figurations of state action and different sets of beneficiaries.29 More concretely, we must decide, openly or otherwise, whose interests antitrust law should protect.

B. The History of Antitrust Law Reveals the Unavoidability of Politics

The history of antitrust law further demonstrates the political nature of the field. Although Congress has not modified the antitrust statutes significantly since 1950,30 the content of antitrust has changed dramatically since then. Even the consumer welfare model has not banished political values from the field. While the range of debate within the community of antitrust specialists is narrow, the continuing disagreement over the interpretation of consumer welfare reveals the inescapability of political judgment.

Antitrust law today is qualitatively different from antitrust law fifty years ago. In the 1950s and 1960s, the courts and agencies interpreted antitrust law to advance a variety of objectives. The Supreme Court held that the antitrust laws promoted consumers’ interest in competitively-priced goods,31 freedom for small proprietors,32 and dispersal of private power.33 The Court held that business conduct injurious to competitors could give rise to antitrust violations, irrespective of the effects on consumers.34 It also interpreted congressional intent to be that a decentralized industrial structure should override possible economies of scale gained from greater consolidation of economic power.35 Recognizing this goal of decentralization, the federal judiciary adopted strict limits on business conduct with anticompetitive potential, including mergers36 and exclusionary practices.37

Since the late 1970s, however, the Supreme Court, along with the Department of Justice and Federal Trade Commission, has reduced the scope of the antitrust laws. With a rightward shift in the composition of the Supreme Court under the Nixon Administration and in the leadership at the federal antitrust agencies under the Reagan Administration,38 these institutions curtailed the reach of antitrust law, scaling back its objectives39 and rewriting legal doctrine to preserve the autonomy of powerful businesses—all in the name of protecting consumers.40

Even the adoption of the consumer welfare model has not somehow banished politics from antitrust. Instead, it has underscored the unavoidability of politics in the field. Despite being the prevailing goal of antitrust for nearly four decades now, the meaning of consumer welfare is still not settled. The two primary schools of thought on consumer welfare disagree on a fundamental question—who are the beneficiaries of antitrust law? One holds that actual consumers, as understood in the popular sense, should be the principal beneficiaries of antitrust law.41 The rival camp holds that both consumers and businesses should be the beneficiaries of antitrust law, and that whether a dollar of economic sur- plus goes to a consumer or a monopolistic business should be of no concern to the federal antitrust agencies and courts.42 C. Who Should Decide the Political Content of Antitrust?

Because the objective of antitrust law is thus bound up with political judgments and values, seeking an “apolitical” antitrust jurisprudence is futile at best and a cynical effort to conceal political choices at worst. The choice is not be- tween “apolitical” antitrust and “political” antitrust; rather, lawmakers must decide between different political objectives. Once the inevitably political valence of antitrust law has been acknowledged, we can turn to the key question of whether unelected officials at the antitrust agencies and federal judges (collectively “the technocrats”) or democratically-elected members of Congress should decide this political content.43

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

This congressional indifference to antitrust is not inevitable. Despite pro- longed quietude, Congress could become an active player in antitrust again. Some members of Congress are showing a renewed awareness of the field and an interest in reasserting control over the content of the antitrust statutes.51 The most democratically accountable branch of the federal government may be poised to take the lead on antitrust in the coming years, reclaiming authority over a technocracy that has not answered to the public in decades.

iii. the consumer welfare model is not anchored in congressional intent and reflects a narrow conception of monopoly and oligopoly

Given that consumer welfare antitrust is a political choice, this model can be evaluated against alternatives on a level playing field. Consumer welfare is not “above politics.” It is a political construct that features at least two serious deficiencies. First, the consumer welfare model contradicts the legislative histories of the principal antitrust statutes; the courts and federal antitrust agencies have instead substituted their own political judgments for those of Congress. Second, the consumer welfare model represents an impoverished understanding of corporate power. It focuses principally on one aspect of business power—power over consumers—and ignores other critical manifestations.

Congress’s original vision for the antitrust laws, one that recognizes both the economic and the political impacts of monopoly, is a superior alternative to the consumer welfare philosophy. As the enforcers and interpreters of statutory law in a democratic polity, federal antitrust officials and judges should follow the congressional intent underlying the antitrust laws. Furthermore, commentators, legislators, and policymakers should recognize that controlling the power of large businesses over not only consumers but also competitors, workers, producers, and citizens is essential for preserving at least a modicum of economic and political equality in a democratic society.

A. In Passing the Antitrust Laws, Congress Expressed Aims Much Broader than Consumer Welfare

The consumer welfare model of antitrust is not true to the intent of Congress. An extensive body of careful research has shown that Congress had several objectives when it passed the Sherman, Clayton, and Federal Trade Commission Acts.52 The Congresses that passed these landmark statutes recognized that eco- nomics and politics are inseparable. Congress originally sought to structure markets to advance the interests of ordinary Americans in multiple capacities, not just as consumers. Consumer welfare antitrust reflects, at best, a selective reading of this legislative history and, at worst, an intentional distortion of this historical record. Contrary to Robert Bork’s historical analysis, the legislative histories show no congressional awareness, let alone support, for interpreting consumer welfare as the economic efficiency model of antitrust, one nominally indifferent toward distributional effects.53

In passing the antitrust statutes, Congress aimed to protect consumers and sellers from monopolies, oligopolies, and cartels, as well as defend businesses against the exclusionary practices of powerful rivals.54 Key members of the House and Senate condemned the prices that powerful corporations charged consumers as “robbery”55 and “extortion.”56 The debates reveal similar solicitude for farmers and other producers who received lower prices for their products thanks to powerful corporate buyers.57 In addition to consumers and producers, Congress aimed to protect another important group of market participants: competitors. In enacting the antitrust statutes, Congress sought to restrain large businesses from using their power to exclude rivals.58 Congress recognized the political power of large corporations and aimed to curtail it through strong federal restraints. Indeed, the political power of these corporations represents a running theme in the legislative histories of the anti- trust laws. A number of speakers in the course of the debates pointed to the power wielded by these big businesses over government at all levels.59 In the debate over the Clayton Act, one Congressman declared that the trusts were commandeering ostensibly democratic political institutions.60 Senator John Sherman warned his colleagues that “[i]f we will not endure a king as a political power[,] we should not endure a king over the production, transportation, and sale of any of the necessaries of life.”61

B. The Consumer Welfare Model Reflects an Impoverished Understanding of Corporate Power

Focusing solely on harms to consumers and sellers, the consumer welfare model embodies an emaciated conception of corporate power. With its foundation in neoclassical economics, the consumer welfare model privileges short- term consumer interests. The neoclassical representation of the market—commonly known through supply-and-demand diagrams—presents a static picture of a market and does not account for long-term dynamics. As the default analytical guide for consumer welfare antitrust, the neoclassical model, with its focus on quantification, prizes short-term price harms to consumers and sellers and discounts longer-term injuries.62

Furthermore, the consumer welfare model legitimizes the existing distribution of resources by focusing on change to the status quo. Current antitrust law measures consumer welfare by changes in prices paid; what a person can pay, though, depends on both her willingness-to-pay for goods and services and her existing wealth. By this definition, a rich person who pays more for a luxury good due to a cartel suffers an antitrust harm, but a poor person who has no income and is unable to afford necessities cannot suffer antitrust harm from a monopoly. A wealthy consumer commands power in the market; a poor consumer, in comparison, has little or no clout in the market.63

The consumer welfare model, moreover, affords little or no importance to corporations’ ability to dictate the development of entire markets. Antitrust practitioners and scholars are wont to remind each other and critics that the antitrust laws “protect[] competition, not competitors.”64 Although the expression is arguably empty,65 it is taken to mean that harm to actual and prospective competitors alone is of no import to the antitrust laws. This doctrinal cornerstone is a political choice,66 which gives monopolists and oligopolists the power to dictate who participates in a market and on what terms.67 Under consumer welfare antitrust, businesses can use their muscle to exclude rivals and strangle economic opportunity so long as this exclusion is not likely to injure consumers. In practical terms, consumer welfare antitrust grants big businesses broad latitude to engage in private industrial planning. 68

For the consumer welfare school, the hegemonic power of large corporations is also of no consequence. Monopolistic and oligopolistic businesses across the economy use their power to seek and win favorable political and regulatory de- cisions.69 The ongoing—and frenzied—contest between states and cities to at- tract Amazon’s second headquarters is indicative of a giant business’s weight. In recent years, the concentrated financial sector has offered a vivid example of corporate political power in action.71 Leading banks helped trigger a worldwide economic crisis through their fraud and reckless speculation, and yet they defeated subsequent political efforts to control their size and structure and man- aged to preserve their institutional power.72 An influential analysis of congressional decision making suggests that the United States today is closer to an oligarchy than a democracy—the wealthy and large businesses wield tremendous political clout, whereas most ordinary people have little or no influence.73 Large businesses also set the parameters of political debate through control of the me- dia,74 sponsorship of supportive figures and organizations,75 and marginalization of critical voices.76 Consumer welfare antitrust itself is, at least in part, a product of big business’s reaction against the relatively vigorous antitrust pro- gram of the postwar decades.77

With its narrow analytical frame, the consumer welfare model of antitrust accepts and legitimizes many forms of state-supported corporate power. Under consumer welfare antitrust, large corporations have the freedom to enhance their power through mergers and monopolistic practices that hurt competitors and citizens. Viewed as part of the overall landscape of state-enabled markets, consumer welfare antitrust is not an apolitical choice, but a charter of liberty for dominant businesses.

#### Neoliberalism causes cyclical economic collapses, widespread environmental destruction, and democracy collapse

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Robert Kuttner, “Neoliberalism: Political Success, Economic Failure,” The American Prospect, 6/25/19, https://prospect.org/economy/neoliberalism-political-success-economic-failure/

Since the late 1970s, we've had a grand experiment to test the claim that free markets really do work best. This resurrection occurred despite the practical failure of laissez-faire in the 1930s, the resulting humiliation of free-market theory, and the contrasting success of managed capitalism during the three-decade postwar boom.

Yet when growth faltered in the 1970s, libertarian economic theory got another turn at bat. This revival proved extremely convenient for the conservatives who came to power in the 1980s. The neoliberal counterrevolution, in theory and policy, has reversed or undermined nearly every aspect of managed capitalism—from progressive taxation, welfare transfers, and antitrust, to the empowerment of workers and the regulation of banks and other major industries.

Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

By the 1990s, even moderate liberals had been converted to the belief that social objectives can be achieved by harnessing the power of markets. Intermittent periods of governance by Democratic presidents slowed but did not reverse the slide to neoliberal policy and doctrine. The corporate wing of the Democratic Party approved.

Now, after nearly half a century, the verdict is in. Virtually every one of these policies has failed, even on their own terms. Enterprise has been richly rewarded, taxes have been cut, and regulation reduced or privatized. The economy is vastly more unequal, yet economic growth is slower and more chaotic than during the era of managed capitalism. Deregulation has produced not salutary competition, but market concentration. Economic power has resulted in feedback loops of political power, in which elites make rules that bolster further concentration.

The culprit isn't just “markets”—some impersonal force that somehow got loose again. This is a story of power using theory. The mixed economy was undone by economic elites, who revised rules for their own benefit. They invested heavily in friendly theorists to bless this shift as sound and necessary economics, and friendly politicians to put those theories into practice.

Recent years have seen two spectacular cases of market mispricing with devastating consequences: the near-depression of 2008 and irreversible climate change. The economic collapse of 2008 was the result of the deregulation of finance. It cost the real U.S. economy upwards of $15 trillion (and vastly more globally), depending on how you count, far more than any conceivable efficiency gain that might be credited to financial innovation. Free-market theory presumes that innovation is necessarily benign. But much of the financial engineering of the deregulatory era was self-serving, opaque, and corrupt—the opposite of an efficient and transparent market.

The existential threat of global climate change reflects the incompetence of markets to accurately price carbon and the escalating costs of pollution. The British economist Nicholas Stern has aptly termed the worsening climate catastrophe history's greatest case of market failure. Here again, this is not just the result of failed theory. The entrenched political power of extractive industries and their political allies influences the rules and the market price of carbon. This is less an invisible hand than a thumb on the scale. The premise of efficient markets provides useful cover.

The grand neoliberal experiment of the past 40 years has demonstrated that markets in fact do not regulate themselves. Managed markets turn out to be more equitable and more efficient. Yet the theory and practical influence of neoliberalism marches splendidly on, because it is so useful to society’s most powerful people—as a scholarly veneer to what would otherwise be a raw power grab. The British political economist Colin Crouch captured this anomaly in a book nicely titled The Strange Non-Death of Neoliberalism. Why did neoliberalism not die? As Crouch observed, neoliberalism failed both as theory and as policy, but succeeded superbly as power politics for economic elites.

The neoliberal ascendance has had another calamitous cost—to democratic legitimacy. As government ceased to buffer market forces, daily life has become more of a struggle for ordinary people. The elements of a decent middle-class life are elusive—reliable jobs and careers, adequate pensions, secure medical care, affordable housing, and college that doesn't require a lifetime of debt. Meanwhile, life has become ever sweeter for economic elites, whose income and wealth have pulled away and whose loyalty to place, neighbor, and nation has become more contingent and less reliable.

Large numbers of people, in turn, have given up on the promise of affirmative government, and on democracy itself. After the Berlin Wall came down in 1989, ours was widely billed as an era when triumphant liberal capitalism would march hand in hand with liberal democracy. But in a few brief decades, the ostensibly secure regime of liberal democracy has collapsed in nation after nation, with echoes of the 1930s.

As the great political historian Karl Polanyi warned, when markets overwhelm society, ordinary people often turn to tyrants. In regimes that border on neofascist, klepto-capitalists get along just fine with dictators, undermining the neoliberal premise of capitalism and democracy as complements. Several authoritarian thugs, playing on tribal nationalism as the antidote to capitalist cosmopolitanism, are surprisingly popular.

It's also important to appreciate that neoliberalism is not laissez-faire. Classically, the premise of a “free market” is that government simply gets out of the way. This is nonsensical, since all markets are creatures of rules, most fundamentally rules defining property, but also rules defining credit, debt, and bankruptcy; rules defining patents, trademarks, and copyrights; rules defining terms of labor; and so on. Even deregulation requires rules. In Polanyi's words, “laissez-faire was planned.”

The political question is who gets to make the rules, and for whose benefit. The neoliberalism of Friedrich Hayek and Milton Friedman invoked free markets, but in practice the neoliberal regime has promoted rules created by and for private owners of capital, to keep democratic government from asserting rules of fair competition or countervailing social interests. The regime has rules protecting pharmaceutical giants from the right of consumers to import prescription drugs or to benefit from generics. The rules of competition and intellectual property generally have been tilted to protect incumbents. Rules of bankruptcy have been tilted in favor of creditors. Deceptive mortgages require elaborate rules, written by the financial sector and then enforced by government. Patent rules have allowed agribusiness and giant chemical companies like Monsanto to take over much of agriculture—the opposite of open markets. Industry has invented rules requiring employees and consumers to submit to binding arbitration and to relinquish a range of statutory and common-law rights.

#### Anti-domination counters neoclassical assumptions and judicial supremacy---that restores agency flexibility to democratically check existential threats

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Kate Jackson, “All the Sovereign’s Agents: The Constitutional Credentials of Administration,” *William & Mary Bill of Rights Journal*, 8 July 2021, pp. 2-7, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3813904.

We face no less than four urgent crises: an ongoing pandemic1; racial injustice and its consequent civil unrest2; an economic depression approaching the pain inflicted in 1929; and the accumulating, existential threat of climate change.4 Citizens must rely on their state to tackle these burning perils.5 Yet critics both left 6 and right 7 would tear down its institutional capacity to do so. Some denounce the exercise of administrative power as illiberal, unconstitutional and obnoxious to the rule of law.8 Others impugn it as undemocratic, paternalistic, and corrupt.9 Yet without some kind of agent to carry out collective solutions, these perils may very well proceed unabated.

Pushing an anti-administravist agenda, libertarians continue their “long war”11 against government agencies by insisting that they are an unconstitutional fourth branch of government. For them, administration is a kind of “absolutism”12 that violates the separation of powers and defies the principle of limited government.13 They contend that agencies’ discretionary rulemaking offends the liberal commitment to the rule of law. 14 Accordingly, they would punt agencies’ responsibility for social, economic, and environmental problems to courts and legislatures. 15 Regulation would thus be placed at the mercy of an undemocratic judiciary who increasingly “weaponizes” the First Amendment in favor of big business16 – or of a Congress whose already inefficient decision-making is crippled by hyperpolarization17 and distorted by the kind of material inequalities that the welfare state is meant to ameliorate. 18

Conservatives with a more authoritarian inflection seek to recall administration from its constitutional exile by subsuming it under presidential power. 19 Such critics would lend administration some democratic credentials by bootstrapping them to the president’s electoral accountability. Yet ridding agencies of their independence by placing them under the discretion of the president grants the president personal control over agency policymaking and adjudication without the checks provided by Congress, the courts, or an independent civil service.20 It thus, arguably, solves a separation-of-powers problem by introducing a new one.21 More ominously, empowering the president with the patina of democratic legitimacy emits a strong whiff of Schmittian politics.22 The prospect of a largely unbound executive officer claiming a popular mandate to hire and fire civil servants on a whim should alarm any that followed the Trump Administration’s treatment of refugees, civil protestors, polluters, and political cronies.

Agency power likewise fares poorly in the hands of the left. 23 They blame administrative technocracy for a variety of social and political ailments: the reification of social differences and the juridification of human nature24; corruption, privatization and regulatory capture25; the depoliticization of economic issues and the subsidization of globalized financial capitalism26 and, ultimately, the constellation of conspiratorial populist politics currently threatening liberal democratic states.27 Their preferred solutions include democratizing agency decision-making28 and constraining Congress’ capacity to delegate its lawmaking function. 29 While their interventions are welcome, they may deprive government of the nimble expertise necessary to address environmental and economic crises.30 Moreover, as illustrated by the president’s extraordinary powers to shape national immigration policy despite its “notoriously complex and detailed statutory structure,” increasing the amount of formal legislation may only expand agencies’ enforcement discretion.31 Agency democratization, furthermore, risks reproducing, perhaps under the cover of ostensible public consensus, the same social, economic and political inequalities that distort Congressional lawmaking. 32

In this essay, I contend that this multi-pronged anti-administravist attack stands upon shaky conceptual foundations. Each builds atop a theory of constitutionalism that embraces a too-literal conception of popular sovereignty.33 It is a conception that posits that there is, in fact, a “people” with a sovereign “will.” It is a “will” that can be clearly identified (through elections); straightforwardly transcribed (through lawmaking); mechanically applied (by administrators) and constrained (by judges). 34 But in a country of hundreds of millions, the diverse multiplicity of citizens could never find a common will.35 It is even more impossible that it could ever be accurately expressed through the lawmaking of elected representatives.36 As a result, critics of administration often grant statutory lawmaking more democratic credentials than it deserves. 37 The non-delegation doctrine purports to prevent the delegation of something that simply may not exist.

Critics commit another mistake when they invoke a theory of constitutionalism that analytically divides functions that cannot, as either a moral or empirical matter, be disentangled. First, they incorrectly posit two separate, autonomous processes: the collective formation of ends (lawmaking) and the implementation (execution) and application (adjudication) of those ends. 38 But we cannot presume that judges and administrators can mechanically apply and enforce the law without importing into the process their own value-laden, and therefore political, judgments.39 “They who will the end will the means” is a naïve argument that occludes the power wielded by unelected actors.40 It is also a mistake to presume that the legislative branch concerns itself only with value-laden final ends, and not with the means required to execute them.41 Indeed, most of our most bitter political fights are fights conducted precisely over means: how best to grow the economy; how best to care for the sick; how best to mitigate climate change, etc. 42 As a result, the theories overemphasize and distort the purpose of separating powers.43

Critics commit yet another mistake when they divorce the constitutional functions of (1) protecting rights and limiting government power, and (2) providing the decision-making procedures necessary for democratic will-formation. 44 They isolate elections and lawmaking from the process of enforcing rights and the rule of law – as if they have nothing to do with one another. Yet quarantining rights from democracy requires reliance on an outsourced moral order external to the political system itself – a reliance inappropriate for contemporary secular polities.45 They therefore lend judges too many liberal credentials while denying any to mechanisms of popular feedback.

Rather than critiquing agencies for violating the separation of powers, for their over-reliance on unelected technocrats, or for their indifference to universalizable legal principles, I argue that administration does indeed carry constitutional liberal democratic credentials – credentials borne out by political theory’s “representative turn.”46 By understanding agencies as embedded in a system of representative democracy that aims to set the conditions by which citizens can relate to each other as political equals, we can assess the legitimacy of government agencies without any “idolatrous”47 commitments to a fictitious popular sovereign or legal formalism. I suggest that agency institutions should be measured against the notion that popular sovereignty demands not consensus and consent, but instead institutions that permit citizens to understand themselves as co-equal participants in the collective decision-making process.

This essay will proceed as follows. Part I situates administrative agencies in an understanding of liberal democratic constitutionalism that (A) eschews outmoded notions of popular sovereignty and (B) natural law. It will then (C) explain how adequately conceived notions of the separation of powers and the rule of law cannot serve as indefeasible objections to administration. Part II makes a positive case for agency authority by drawing from the insights gained from political theory’s representative turn. It will first (A) define this important intellectual development and then (B) explain how administrative agencies might fit comfortably within a representative system. The essay (C) concludes by showing how theories of representation can inform some enduring debates in administrative law and suggesting some changes that might enhance the legitimacy of agency action.

PART I: ADMINISTRATION, POPULAR SOVEREIGNTY AND RIGHTS

Democracy promises the rule of “we the people.”48 Democratic citizens, possessing inalienable rights, are to come together, deliberate,49 and jointly create the laws that bind them. The administrative agency, with its unaccountable expert technocrats, policymaking autonomy, and immunity from micromanaging judicial review, looks like an unwelcome uncle at the constitutional dinner table.

Intuitively, these knee-jerk objections cannot be quite correct. Agencies carry some obviously democratic credentials. As Adrian Vermeule points out, they are, after all, the creation of statutory lawmaking.50 At least as early as 1798, Congress has delegated coercive rule-making power to Federal bureaucracy on matters as diverse as tax inspections, territorial governance, veterans’ pensions, mail delivery, intellectual property, and the payment of public debts.51 In McCullough v. Maryland,52 the U.S. Supreme Court interpreted the “necessary and proper” clause53 to anticipate Congress’ desire to create such agencies – in this case, a national bank. Bruce Ackerman,54 in his seminal work, argues that our contemporary agencies carry Constitutional credentials. Many were birthed through multiple hyperpolitical elections and constitutional challenges within the courts. Further, from their very inception, agencies struggled internally to accommodate their actions to constitutional requirements.55 The Administrative Procedure Act56 (“APA”), for example, imposes upon agencies principles of due process and the rule of law.57

Regardless, if democratic lawmaking is to shape the community of those that make it, there must be some kind of agent or instrumentality to carry it out.58 A Congressional decision to levy a tax is meaningless without an Internal Revenue Service to collect it.59 Yet it is impossible to imagine that such agencies might operate like mindless, loyal robots. Whether performed by court or administrator, the application of laws will inevitably involve controversial policy judgments.60 Lawmaking is, by its nature, always more abstract than we would like. Such “general propositions do not,” noted Justice Holmes, Jr. in his influential Lochner v. New York61 dissent, “decide concrete cases.” The required elaboration almost always imports values that are not clearly and unambiguously identified in any statutory text.62 The task of accommodating administration to constitutional democracy cannot, therefore, aim at eliminating the agency costs implicit in the application of law. It can only seek to understand how they might comfortably fit within a constitutional order.

The next two sections will elaborate upon these intuitions. Many objections to agency power presume antiquated conceptions of sovereignty and rights. They juxtapose the will of a powerful organ-body sovereign63 against a governed mass of subjects who hold an array of pre-political liberties that require judicial protection. This all-powerful body is thought to be represented by Congress64 as the commissioned agent (or embodiment?) of the popular sovereign. To preserve citizens’ natural, pre-political liberties, this agent of the popular sovereign is constrained by a separation of powers, checks and balances, a Bill of Rights, etc. – each policed by independent courts capable of identifying and enforcing citizens’ inalienable liberties.65 If this is indeed the rubric of the liberal democratic constitutional state, it is difficult to see how agencies pass constitutional muster. They are not Congress – and so their policymaking cannot be legitimate expressions of the popular will. They often avoid substantial judicial review, and so they might violate natural liberties with impunity. Fortunately, this rubric is wrong.

A. The Mind and Body of the Democratic Sovereign

True, for much of modern Western history, sovereignty, understood as the supreme, absolute and indivisible power to make law, was thought to be held by a specific body: the one wearing the crown.66 To constitute and justify public power, Hobbes, for example, imagined a state of nature full of individuals authorizing and relinquishing their natural liberties to a “Mortall God,”67 i.e., the modern corporate state, represented (or re-presented) in the flesh-and-blood bodies of the king or legislature.68 During the democratic revolutions, radical69 theorists merged the monarch with her subjects.70 They imagined “the people” not only replacing the king as sovereign, but also governing itself as a subject, thereby creating an identity between ruler and ruled. Rousseau’s volonté générale71 serves as a model for this kind of logic.72 Montesquieu, whose thinking influenced the American founders,73 likewise held that the “people as a body have sovereign power” in a republic.74 Even A.V. Dicey, despite his fame as a rule of law scholar, believed that a representative legislature would “produce coincidence between the wishes of the sovereign and the wishes of the subjects.”75 It is a sovereign-subject hat trick: the ruled become the ruler, the democratic “people,” understood as a body, a “unitary macro-subject,”76 come to occupy what was once occupied by the body of the king. Carl Schmitt likewise endorsed a scrupulous identity between governed and governor - with homogenizing and fascist implications.77 For Schmitt, it was impossible to imagine a leader speaking with the voice of the people unless the people themselves first sang in perfect harmony.

There are flaws in this equation. The “people,” understood literally, cannot rule. They do not possess a primordial collective will existing outside and independent of their political institutions.78 Moreover, the entire population of a diverse community of hundreds of millions cannot be present within those institutions. Nor can that population ever find a unanimous general will, a non-controversial understanding of the common good, no matter how constrained and qualified their public reasoning or how universal and general its aspirations.79 Thus, no coherent popular will can obtain even after undertaking the decision-making processes of political institutions.80 Just as the contractual “meeting of the minds” is a legal fiction of private law,81 a popular “meeting of the minds” is a political fiction of public law. As a result, despite the democratic revolutions, the old gap between ruler and ruled remains.82 In other words, the merger between governed and governor attempted by the democratic revolutions did not remove the danger of heteronomy,83 even if the offices of government might be staffed by elected representatives and even as constitutional systems split powers and limited legal authority.84 Some (body) would wield public power, and the rest would be subject to its rules. Even Rousseau downgraded the popular sovereign to a silent, passive actor that left the actual business of governing to functionaries.85 Like the client of a travel agent, Rousseau’s democratic citizen was meant only to approve or disapprove the prepackaged plans presented by ministers.86

Lawmaking under constitutional liberal democracy is thus not a question of ascertaining the existence of some non-existent popular “will” to be left in the hands of loyal fiduciaries in government87 to carry out like mindless automatons. Nor is it comprised of the dictates of a caesarist leader purporting to speak with the unified voice of the sovereign people.88 Instead, it a question of developing transparent and accessible collective decision- making procedures that ensure that all citizens can understand themselves as equal participants in their collective ordering; that ordinary people are involved in public life and have a say in their collective destiny.89 They do not rule. Rather, they are equal players in the game of representative democracy.90

Thus, although contemporary notions of constitutional liberal democracy ascribe the highest legitimate source of authority to “the people,” they do not understand “the people” as a reified, homogenous whole with an identifiable will that pre-exists whatever governing apparatus might be laid atop it. Though “popular sovereignty” is a political fiction, it is a useful one – at least if it is used as a standard of justification and critique, not as a proper noun. It is an aspirational, regulative idea intended to depersonalize and distribute public power in a way that serves the entire community.91 It is a Kantian “as if” principle.92 Namely, if we try to think like a popular sovereign might think, if such a thing could ever exist, we will orient our public reasoning not towards our individual self-interest alone, but in terms of inclusivity, human equality and the public good.93 Because if the sovereign is a “we,” then governing involves more than the interests and preferences of single individuals. We will therefore demand that political institutions remain accountable and accessible to popular complaints. We will adopt a Weberian politics of responsibility, remembering that our decisions might inflict unforeseen costs upon others.94

This figurative idea of popular sovereignty also unlocks the closed doors of power and forces the inclusion of voices previously ignored.95 Whosoever happens to be governing at any given time, that person is not “the people” precisely because “the people” cannot ever be present. As a result, anyone denied an audience can appeal to popular sovereignty as they seek admission to political decision-making. Importantly, popular sovereignty demands, as French philosopher Claude Lefort96 notes, that this place of power remain an empty one – or at least one with a revolving door – where no body at all is permitted to rule permanently. For to fill that void would allow for a part to speak on behalf of the whole. “We the People” might become, as political theorist Nadia Urbinati notes, “Me the People.”97 It would thus force homogeneity upon plural societies as leaders with controversial viewpoints purport to represent everyone as they make and implement policy. Moreover, the usurpation of this space would undermine the depersonalization of power inherent in the idea of a fictional popular sovereign and, importantly, the rule of law and not of men.98 If the place of power remains empty because all citizens contribute in some way to lawmaking, then we can credibly claim that it is law, not our politicians, who rule.

As a result, it can be no objection to agency policymaking that it usurps authority from the popular sovereign. Because if we take popular sovereignty literally, so, too, do elected representatives. They likewise cannot logically or credibly speak with the voice of the sovereign people.99 Thus, insofar as theories of non-delegation and legislative primacy rely on an organ-body theory of popular sovereignty,100 they are misplaced. Attacks against the “technocratic” power wielded by administrative officers may likewise overstate the democratic credentials of the Congressional legislation against which such power is compared – and found wanting. Indeed, it is at least possible that administrative agencies can be made consistent with the requirements of constitutional popular sovereignty.101 Namely, the question is whether and to what extent they operate according to procedures that allow citizens to understand themselves as co-equal participants in shaping agency action. Finally, that independent administration is “headless” is not, as feared by contemporary New Deal critics, fascist or totalitarian.102 It may in fact be a necessary precondition for liberal democracy. A Leviathan with a single head with a single mouth, purporting to speak for all, can be monstrous indeed.

### Adv 1

#### Plan only gives FTC authority to challenge practices shielded by state regulation—agency won’t pursue and courts are skeptical

Crane, MSU 1ac author, Frederick Paul Furth Sr. Professor of Law, University of Michigan, ‘19

(Daniel A. "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214)

Someone strongly committed to a systematic challenge of anticompetitive regulations might advocate for a simultaneous charge on both fronts-reinvigorating equal protection, substantive due process, and perhaps negative Commerce Clause review, even while also curbing the Parker doctrine and empowering the FTC to undertake more trenchant review. However, even if such an approach were desirable in principle, there is reason to believe that it would be politically, institutionally, and doctrinally challenging to ramp up both tools at once. As is often the case when expanding potency of legal doctrines or institutions runs into background concerns about overreaching-here Lochner-courts and other agencies of government have a tendency to justify timidity by observing that the problem in question could be better addressed by another institution or legal doctrine." Thus, presented with the possibility of reinvigorating constitutional restraints on competitively parochial regulations, the courts might demur on the grounds that, if there is a serious problem, then it can be addressed by an administrative institution such as the FTC, thereby avoiding the specter of Lochner. Conversely, if urged to whittle down Parker immunity in an FTC case, the reviewing courts might also demur, observing that any sufficiently serious problem might be addressed under constitutional principles.

#### R&D and immigration shortages thump innovation.

Vaswani 20, Asia business correspondent. (Karishma, 9-11-2020, "Ex-Google boss: US 'dropped the ball' on innovation", *BBC News*, https://www.bbc.com/news/business-54100001)

In the battle for tech supremacy between the US and China, America has "dropped the ball" in funding for basic research, according to former Google chief executive Eric Schmidt. And that's one of the key reasons why China has been able to catch up. Dr Schmidt, who is currently the Chairman of the National Security Commission on Artificial Intelligence, said he thinks the US is still ahead of China in tech innovation, for now. But that the gap is narrowing fast. "There's a real focus in China around invention and new AI techniques," he told the BBC's Talking Business Asia programme. "In the race for publishing papers China has now caught up." China displaced the US as the world's top research publisher in science and engineering in 2018, according to data from the World Economic Forum. That's significant because it shows how much China is focusing on research and development in comparison to the US.For example, Chinese telecoms infrastructure giant Huawei spends as much as $20bn (£15.6bn) on research and development - one of the highest budgets in the world. Dr Schmidt blames the narrowing of the innovation gap between the US and China on the lack of funding in the US. "For my whole life, the US has been the unquestioned leader of R&D," the former Google boss said. "Funding was the equivalent of 2% or so of GDP of the country. Recently R&D has fallen to a lower percentage number than was there before Sputnik." According to Information Technology and Innovation Foundation, a US research institute, the US government now invests less in R&D compared to the size of the economy than it has in more than 60 years. This has resulted in "stagnant productivity growth, lagging competitiveness and reduced innovation". Dr Schmidt also said the US's tech supremacy has been built on the back of the international talent that's been allowed to work and study in the US - and warns the US risks falling further behind if this kind of talent isn't allowed into the country. Tech war "This high skills immigration is crucial to American competitiveness, global competitiveness, building these new companies and so forth," he said. "America does not have enough people with those skills." The US has been embroiled in a tech cold war with China and in recent months has stepped up its anti-China rhetoric. This week it revoked the visas of 1,000 Chinese students it claims have military links and accused Chinese tech firms of acting as agents for the Chinese Communist Party - claims Beijing and these companies reject. The Trump administration has also taken steps to block Chinese tech firms like Huawei and Chinese apps including TikTok and WeChat, saying they pose threats to national security. Beijing has said this is "naked bullying", and Dr Schmidt says the bans will mean China will be even more likely to invest in its own domestic manufacturing. Dr Schmidt says the right strategy for a US-China relationship is what is called a 'rivalry partnership' where the US needs to be able to "collaborate with China, while also competing with them". "When we're rivals, we are rough, we are pursuing things. We're competing hard, we're trying to get advantage - real competition - which the US can do well, and which China can do well. But there's also plenty of areas where we need to be partners."

#### No empirical correlation between heg and global stability---if anything, heg causes wars.

Fettweis ’17 (Christopher J.; is Associate Professor of Political Science at Tulane University; May 8th; *Unipolarity, Hegemony, and the New Peace*; <https://www.tandfonline.com/doi/abs/10.1080/09636412.2017.1306394?journalCode=fsst20>; accessed 5/3/19; MSCOTT)

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

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

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

Conflict and US Military Spending

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

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

#### No China tech impact.

Zhen 20 (Zhen Han, Postdoctoral Scholar at the Centre for International Environment and Resource Policy (CIERP), The Fletcher School, Tufts University; T V Paul, James McGill Professor of International Relations, the Department of Political Science, McGill University, “China’s Rise and Balance of Power Politics”, The Chinese Journal of International Politics, Volume 13, Issue 1, Spring 2020, Pages 1–26, https://doi.org/10.1093/cjip/poz018)

Compared with the hard balancing against the Soviet Union during the Cold War, one can see the key difference today is that China has yet to be perceived as posing an existential threat similar to that by the Soviet Union. Chinese and Western strategies and economic interdependence propelled by economic globalization allow this.

The dominant approach of the great powers today consists in somewhat defensive and deterrent strategies and doctrines, suggesting that balancing against threats as opposed to power seems to be the dominant approach in contemporary world politics. Rising states, especially China in the post-Cold War era, have been following defensive and deterrent strategies and doctrines as opposed to an offensive strategy. And the deterrent and defensive technologies of today make it extremely hard for a state to lose its sovereignty and physical existence through another power’s aggrandisement. The presence of nuclear weapons allows states to engage in limited expansion without evoking much of a backlash. No substantial technological breakthroughs have taken place that could compare to the introduction of the tank or the aircraft, which made offensive doctrines and strategies such as blitzkrieg feasible for expansionism.93 Nor are rising powers incorporating new offensive technologies into new war strategies such as Nazi Germany’s development of the blitzkrieg strategy.94

#### No disease impact

– intervening actors check, resilience, burnout, and adaptation – this ev smokes them

Amesh 16 — (AMESH ADALJA is an infectious-disease physician at the University of Pittsburgh, 6-17-2016, "Why Hasn't Disease Wiped out the Human Race?," *The Atlantic*, http://www.theatlantic.com/health/archive/2016/06/infectious-diseases-extinction/487514/, Accessed 7-30-2016, HWilson) \*\*\*we do not endorse the problematic language in this evidence

“You’ll tell us when you’re worried, right?” That was the question posed to me countless times at the height of the 2014 West African Ebola outbreak. As an infectious disease physician, I was interviewed on outlets such as CNN, NPR, and Fox News about the dangers of the virus, and the answer I gave was always the same: “Ebola is a deadly, scary disease, but it is not that contagious. It will not find the U.S. or other industrialized nations hospitable.” In other words, no, I wasn’t worried—and not because I have a rosy outlook on infectious diseases. I’m well-aware of the damage these diseases are causing around the world: HIV, malaria, tuberculosis; the influenza pandemic that took the world by surprise in 2009; the anti-vaccine movement bumping cases of measles to an all-time post-vaccine-era high; antibiotic-resistant bacteria threatening to collapse the entire structure of modern medicine—all these, like Ebola, are continuously placing an enormous number of lives at risk. But when people ask me if I’m worried about infectious diseases, they’re often not asking about the threat to human lives; they’re asking about the threat to human life. With each outbreak of a headline-grabbing emerging infectious disease comes a fear of extinction itself. The fear envisions a large proportion of humans succumbing to infection, leaving no survivors or so few that the species can’t be sustained. I’m not afraid of this apocalyptic scenario, but I do understand the impulse. Worry about the end is a quintessentially human trait. Thankfully, so is our resilience. For most of mankind’s history, infectious diseases were the existential threat to humanity—and for good reason. They were quite successful at killing people: The 6th century’s Plague of Justinian knocked out an estimated 17 percent of the world’s population; the 14th century Black Death decimated a third of Europe; the 1918 influenza pandemic killed 5 percent of the world; malaria is estimated to have killed half of all humans who have ever lived. Any yet, of course, humanity continued to flourish. Our species’ recent explosion in lifespan is almost exclusively the result of the control of infectious diseases through sanitation, vaccination, and antimicrobial therapies. Only in the modern era, in which many infectious diseases have been tamed in the industrial world, do people have the luxury of death from cancer, heart disease, or stroke in the 8th decade of life. Childhoods are free from watching siblings and friends die from outbreaks of typhoid, scarlet fever, smallpox, measles, and the like. So what would it take for a disease to wipe out humanity now? In Michael Crichton’s The Andromeda Strain, the canonical book in the disease-outbreak genre, an alien microbe threatens the human race with extinction, and humanity’s best minds are marshaled to combat the enemy organism. Fortunately, outside of fiction, there’s no reason to expect alien pathogens to wage war on the human race any time soon, and my analysis suggests that any real-life domestic microbe reaching an extinction level of threat probably is just as unlikely. Any apocalyptic pathogen would need to possess a very special combination of two attributes. First, it would have to be so unfamiliar that no existing therapy or vaccine could be applied to it. Second, it would need to have a high and surreptitious transmissibility before symptoms occur. The first is essential because any microbe from a known class of pathogens would, by definition, have family members that could serve as models for containment and countermeasures. The second would allow the hypothetical disease to spread without being detected by even the most astute clinicians. The three infectious diseases most likely to be considered extinction-level threats in the world today—influenza, HIV, and Ebola—don’t meet these two requirements. Influenza, for instance, despite its well-established ability to kill on a large scale, its contagiousness, and its unrivaled ability to shift and drift away from our vaccines, is still what I would call a “known unknown.” While there are many mysteries about how new flu strains emerge, from at least the time of Hippocrates, humans have been attuned to its risk. And in the modern era, a full-fledged industry of influenza preparedness exists, with effective vaccine strategies and antiviral therapies. HIV, which has killed 39 million people over several decades, is similarly limited due to several factors. Most importantly, HIV’s dependency on blood and body fluid for transmission (similar to Ebola) requires intimate human-to-human contact, which limits contagion. Highly potent antiviral therapy allows most people to live normally with the disease, and a substantial group of the population has genetic mutations that render them impervious to infection in the first place. Lastly, simple prevention strategies such as needle exchange for injection drug users and barrier contraceptives—when available—can curtail transmission risk. Ebola, for many of the same reasons as HIV as well as several others, also falls short of the mark. This is especially due to the fact that it spreads almost exclusively through people with easily recognizable symptoms, plus the taming of its once unfathomable 90 percent mortality rate by simple supportive care. Beyond those three, every other known disease falls short of what seems required to wipe out humans—which is, of course, why we’re still here. And it’s not that diseases are ineffective. On the contrary, diseases’ failure to knock us out is a testament to just how resilient humans are. Part of our evolutionary heritage is our immune system, one of the most complex on the planet, even without the benefit of vaccines or the helping hand of antimicrobial drugs. This system, when viewed at a species level, can adapt to almost any enemy imaginable. Coupled to genetic variations amongst humans—which open up the possibility for a range of advantages, from imperviousness to infection to a tendency for mild symptoms—this adaptability ensures that almost any infectious disease onslaught will leave a large proportion of the population alive to rebuild, in contrast to the fictional Hollywood versions. While the immune system’s role can never be understated, an even more powerful protector is the faculty of consciousness. Humans are not the most prolific, quickly evolving, or strongest organisms on the planet, but as Aristotle identified, humans are the rational animals—and it is this fundamental distinguishing characteristic that allows humans to form abstractions, think in principles, and plan long-range. These capacities, in turn, allow humans to modify, alter, and improve themselves and their environments. Consciousness equips us, at an individual and a species level, to make nature safe for the species through such technological marvels as antibiotics, antivirals, vaccines, and sanitation. When humans began to focus their minds on the problems posed by infectious disease, human life ceased being nasty, brutish, and short. In many ways, human consciousness became infectious diseases’ worthiest adversary. None of this is meant to allay all fears of infectious diseases. To totally adopt a Panglossian viewpoint would be foolish—and dangerous. Humans do face countless threats from infectious diseases: witness Zika. And if not handled appropriately, severe calamity could, and will, ensue. The West African Ebola outbreak, for instance, festered for months before major efforts to bring it under control were initiated. When it comes to infectious diseases, I’m worried about the failure of institutions to understand the full impact of outbreaks. I’m worried about countries that don’t have the infrastructure or resources to combat these outbreaks when they come. But as long as we can keep adapting, I’m not worried about the future of the human race.

#### No extinction from ABR – future tech solves but the plan doesn’t

Cara 17

Ed Cara, science writer for The Atlantic, Newsweek, and Vocativ, Vocactiv, January 27, 2017, “The Attack Of The Superbugs”, http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here.

Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives.

For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty.

Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess.

“There has been a lot of work done the last couple of years, much of it spurred by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture.

In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains.

Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging.

Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC.

Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race.

But barring the cavalry showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability.

The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

### Adv 2

#### Complete disconnect—the aff does not state why the spillover effects of state antitrust law undermine our model of federalism

#### Instead, they propose granting the FTC preemption power—this is worse for federalism

HLR, Harvard Law Review Note, Antitrust Federalism, Preemption, and Judge-Made Law, June 10, 2020, 133 Harv. L. Rev. 2557

To be clear, the problem with preemption based on a regulatory regime created through congressional delegation to the judiciary is not that that delegation is unconstitutional. Some scholars do argue that the judicial creation of federal antitrust common law breaches the Constitution’s separation of powers.98 The Supreme Court, however, has not been persuaded by this argument. After all, the Sherman Act still reigns supreme after over a century of fleshing out by the federal judiciary.99

As a policy matter, however, the undemocratic nature of the federal judiciary makes preemption by federal judge-made law more troubling than legislative preemption. In most instances of preemption, state interests are protected through process federalism. Process federalism protects the states from federal encroachment through political and procedural safeguards.100 The states’ political safeguard is that state representatives pervade the federal system: “States are represented in Congress; states participate in the election of the President through the Electoral College;” and, in a cooperative-federalist manner, “state officials may . . . participate in the administration of federal programs.”101 The hope is that the states’ defenders in Washington will prevent the degradation of state interests.102 The states’ procedural safeguards add to their political safeguard: “Even if members of Congress have the will to encroach upon or displace state prerogatives, . . . the legislative gauntlet makes it difficult for Congress to do so.”103 Any attempt at preemption would require that legislation survive bicameralism, presentment, and Congress’s internal rules.104

Preemption by judge-made law, however, avoids these constraints.105 On the political front, it is far easier for a state to lobby Congress than it is for a state to lobby a federal judge. Moreover, it is certain that the Supreme Court will not have representatives from all fifty states. Finally, whereas voters displeased with federal encroachment into the state sphere can vote out their congressional delegation, they are stuck with federal judges for life.106 On the procedural front, a judicial opinion has no checks aside from appeal.107 In fact, the ability of judges to subvert procedural safeguards could encourage Congress to delegate more to the judiciary.108

It is true that, in order to expressly preempt state antitrust law in favor of federal judge-made antitrust law, Congress would first have to overcome process federalism’s dual safeguards. There is reason to believe that the safeguards have worked so far. Even in the face of influential detractors like Judge Posner, Congress has only expanded the states’ antitrust role.109 However, whereas purely legislative preemption would require Congress to pass through the safeguards every time it decided to meddle with state antitrust policies, preemption by judgemade law would require Congress to overcome the safeguards only once. After express preemption passed through, the courts could go about frequently changing federal antitrust law without political or procedural checks, and states would have little recourse.

#### Its inefficient to design nanotech in a way that will kill humanity – no extinction

Zeeberg 5/18/2009, Amos is a writer for Discover “[Codex Futurius: Why Gray Goo Is a Great Dud](http://blogs.discovermagazine.com/sciencenotfiction/2009/05/18/codex-futurius-why-gray-goo-is-a-great-dud/)”, (<http://blogs.discovermagazine.com/sciencenotfiction/2009/05/18/codex-futurius-why-gray-goo-is-a-great-dud/>) KL

The Codex Futurius project, this blog’s never-ending quest to explore the timeless scientific questions raised by science fiction, is back—and this time we have reinforcements. The NAS’ [Science and Entertainment Exchange (SEEx)](http://www.scienceandentertainmentexchange.org/), a group dedicated to bringing real science into entertainment, has agreed to help us find experts who can tackle these ineffable sci-fi questions. Our first expert-answered Codex question goes to [J Storrs Hall](http://autogeny.org/), an independent scientist and author who’s also president of the [Foresight Institute](http://www.foresight.org/), a nanotech-oriented think tank. Thanks especially to [Jennifer Ouellette](http://blogs.discovery.com/twisted_physics/), a science writer and the director of SEEx, for connecting us with Hall. Without further ado, here’s the question of the day, asked by an (imagined) big-time Hollywood director/producer who thinks getting the science right might help nail down that elusive Oscar: “How could nanotechnology transform the world? Most importantly, how could I stop a plague of nanorobots from eating my spaceship/research facility/planet?” Nanotechnology is going to transform the physical world in much the same way that computers and the Internet have transformed the informational world. In the long run, that means that physical things like cars and houses will see the rates of improvement that we are used to with computers. New capabilities, such as super-light, super-tough materials, will appear. Existing capabilities that are expensive, such as photovoltaic solar cells, will become cheap enough for everyone to use. In some cases, these both will happen—it might, for example, be possible to surface the roads with photovoltaics that are tough enough to drive on but gather enough energy to power your car as it goes. The latter half of the 20th Century was one of the most exciting times in the history of science, because it brought the solution to one of the great mysteries: the nature of life. We discovered that the almost magical properties of living things—the abilities to grow, heal, and reproduce—were because they were full of molecular machinery. (The fourth property of life, burning fuel to power useful motion, was captured in the Industrial Revolution.) Nanotechnology research and development is slowly unraveling the principles and techniques by which we will ultimately engineer new molecular machines that will be able to make high-tech products as cheaply and cleanly as biology makes potatoes. Plagues of nanorobots, under the name of “gray goo,” were first considered in detail by the Nanotechnology Study Group at MIT in the 1980s. Their concern was that these would be mechanical bacteria. Of course, the whole Earth is covered with biological bacteria, just as small, with machinery just as molecular, as anything nanotechnology could ever make. So why was anyone worrying about a few more mechanical ones? The main worry was that the mechanical version might be more efficient and thus more dangerous. A car can go 10 times as fast as a horse. Perhaps a mechanical bacterium could be faster, tougher, or more efficient than a biological one. On further analysis, it turned out that the situation wasn’t that simple. Horses eat hay and grain and leaves and other naturally occurring energy sources, while cars need highly refined and expensive fuel. One reason cars are more efficient is that their “digestion” is outsourced to refineries. Similarly, cars outsource their healing to repair shops and their reproduction to factories. They need roads and other infrastructure to be built for them. Any sensibly designed nanorobot would work the same way, for the same reason: It’s much more efficient. But that leaves the nanorobot, like the car, completely unable to go foraging in the wild and form a “plague.” Imagine trying to build a car that ran on hay which it harvested itself, graded its own roads, made its own parts with which it repaired itself, and built new cars. Plagues of nanorobots are about as likely as plagues of hay-eating cars. And in the unlikely eventuality someone ever actually did build them, such nanorobots wouldn’t be much more efficient than bacteria, and could be controlled easily by efficient, faster, more powerful, fuel-using, non-reproducing nanomachines. — J Storrs Hall

#### AI Impact is wrong

**Pinker 18** (Stephen, professor of psychology at Harvard, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress, EM)

Prominent among the existential risks that supposedly threaten the future of humanity is a 21st-century version of the Y2K bug. This is the danger that we will be subjugated, intentionally or accidentally, by artificial intelligence (AI), a disaster sometimes called the Robopocalypse and commonly illustrated with stills from the Terminator movies. As with Y2K, some smart people take it seriously. Elon Musk, whose company makes artificially intelligent self-driving cars, called the technology “more dangerous than nukes.” Stephen Hawking, speaking through his artificially intelligent synthesizer, warned that it could “spell the end of the human race.”19 But among the smart people who aren’t losing sleep are most experts in artificial intelligence and most experts in human intelligence. The Robopocalypse is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a modern scientific understanding.21 In this conception, intelligence is an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot of the future (“an AI,” in the new count-noun usage) will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its superintelligence to recursively improve its superintelligence (a scenario sometimes called “foom,” after the comic-book sound effect), from the instant it is turned on we will be powerless to stop it.22 But the scenario makes about as much sense as the worry that since jet planes have surpassed the flying ability of eagles, someday they will swoop out of the sky and seize our cattle. The first fallacy is a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, thinking with wanting. Even if we did invent superhumanly intelligent robots, why would they want to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: being smart is not the same as wanting something. It just so happens that the intelligence in one system, Homo sapiens, is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled (to varying degrees in different specimens) with goals such as dominating rivals and amassing resources. But it’s a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. An artificially intelligent system that was designed rather than evolved could just as easily think like shmoos, the blobby altruists in Al Capp’s comic strip Li’l Abner, who deploy their considerable ingenuity to barbecue themselves for the benefit of human eaters. There is no law of complex systems that says that intelligent agents must turn into ruthless conquistadors. Indeed, we know of one highly advanced form of intelligence that evolved without this defect. They’re called women. The second fallacy is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal.23 The fallacy leads to nonsensical questions like when an AI will “exceed human-level intelligence,” and to the image of an ultimate “Artificial General Intelligence” (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains.24 People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can’t solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different. Unlike Laplace’s demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future, a real-life knower has to acquire information about the messy world of objects and people by engaging with it one domain at a time. Understanding does not obey Moore’s Law: knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster.25 Devouring the information on the Internet will not confer omniscience either: big data is still finite data, and the universe of knowledge is infinite. For these reasons, many AI researchers are annoyed by the latest round of hype (the perennial bane of AI) which has misled observers into thinking that Artificial General Intelligence is just around the corner.26 As far as I know, there are no projects to build an AGI, not just because it would be commercially dubious but because the concept is barely coherent. The 2010s have, to be sure, brought us systems that can drive cars, caption photographs, recognize speech, and beat humans at Jeopardy!, Go, and Atari computer games. But the advances have not come from a better understanding of the workings of intelligence but from the brute-force power of faster chips and bigger data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. A photo-captioning program labels an impending plane crash “An airplane is parked on the tarmac”; a game-playing program is flummoxed by the slightest change in the scoring rules.27 Though the programs will surely get better, there are no signs of foom. Nor have any of these programs made a move toward taking over the lab or enslaving their programmers. Even if an AGI tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. The computer scientist Ramez Naam deflates the bubbles surrounding foom, a technological Singularity, and exponential self-improvement: Imagine that you are a superintelligent AI running on some sort of microprocessor (or perhaps, millions of such microprocessors). In an instant, you come up with a design for an even faster, more powerful microprocessor you can run on. Now . . . drat! You have to actually manufacture those microprocessors. And those fabs [fabrication plants] take tremendous energy, they take the input of materials imported from all around the world, they take highly controlled internal environments which require airlocks, filters, and all sorts of specialized equipment to maintain, and so on. All of this takes time and energy to acquire, transport, integrate, build housing for, build power plants for, test, and manufacture. The real world has gotten in the way of your upward spiral of self-transcendence.28 The real world gets in the way of many digital apocalypses. When HAL gets uppity, Dave disables it with a screwdriver, leaving it pathetically singing “A Bicycle Built for Two” to itself. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: don’t build one. As the prospect of evil robots started to seem too kitschy to take seriously, a new digital apocalypse was spotted by the existential guardians. This storyline is based not on Frankenstein or the Golem but on the Genie granting us three wishes, the third of which is needed to undo the first two, and on King Midas ruing his ability to turn everything he touched into gold, including his food and his family. The danger, sometimes called the Value Alignment Problem, is that we might give an AI a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.29 I am not making these up. These are the scenarios that supposedly illustrate the existential threat to the human species of advanced artificial intelligence. They are, fortunately, self-refuting.30 They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so moronic that they would give it control of the universe without testing how it works, and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might slap themselves in the forehead for forgetting to install; it is intelligence. So is the ability to interpret the intentions of a language user in context. Only in a television comedy like Get Smart does a robot respond to “Grab the waiter” by hefting the maître d’ over his head, or “Kill the light” by pulling out a pistol and shooting it. When we put aside fantasies like foom, digital megalomania, instant omniscience, and perfect control of every molecule in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety (chapter 12). As the AI expert Stuart Russell puts it, “No one in civil engineering talks about ‘building bridges that don’t fall down.’ They just call it ‘building bridges.’” Likewise, he notes, AI that is beneficial rather than dangerous is simply AI.

# 2NC

## T

#### a. Plan mandate is not enough—It only increases FTC *authority* to challenge *state regulatory schemes*, not private-sector conduct

Crane 19 [Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, 60 Wm. & Mary L. Rev. 1175, 2019, Lexis]

Antitrust preemption and constitutional review are differently situated in one significant way: Constitutional equal protection, substantive due process, and dormant commerce clause principles are privately enforceable by any party that meets the Article III standing requirements--which, in this context, means at least anyone directly affected by a regulation impairing competition. 160 Antitrust has its own private right of action standing rules, 161 as well as an additional institutional feature that might significantly limit some of the abuses associated with Lochnerizing. One proposed route for increasing the preemptive scope of federal antitrust law over anticompetitive state and local regulation is to hold the [\*1208] Parker doctrine inapplicable to the FTC. 162 This would give the FTC enhanced power to challenge anticompetitive state and local regulations. Not only would this limit the incidence of challenges to state regulation (the FTC Act is not privately enforceable and only the Commission can initiate an action under the Act), 163 but it would also put the Commission itself, rather than an Article III court, in the position of making an initial decision on the case. An Article III court could ultimately become involved, as adverse Commission decisions are appealable to any federal court of appeal in which the case could have been initially brought. 164 However, lodging the antitrust review function in the FTC would grant the Commission an initial regulatory review function and the power to make factual findings subject to "substantial evidence" review. 165

## Judiciary CP

#### [A]---'Expanding the scope’ requires Congressional action.

King 19 – Attorney, BurnsBarton PLC

Kathryn Hackett King, Defendants State of Arizona, Davidson, and Shannon’s Reply in Support of Motion to Dismiss Complaint, Toomey v. State of Arizona, et al., US District Court for the District of Arizona, January 2019, LexisNexis

In Title VII, Congress made clear it was unlawful for an employer to discriminate “because of sex.” Plaintiff claims the State Defendants discriminated against him because of his transgender status, but as explained in the Motion (with supporting case law), (i) courts cannot expand Title VII without congressional action, and (ii) Congress has repeatedly had the opportunity to enact legislation to add gender identity to Title VII, but has not done so. (Doc. 24, p.9-10). Plaintiff cannot refute that when Title VII does not protect a particular category, legislative action is required to change that.5 Plaintiff argues Congress’s failure to enact new legislation to add gender identity is not relevant because later acts of Congress are not probative of prior legislative intent. But the point is that expanding the scope of a federal statute requires congressional, not judicial, action. Gunnison v. Comm. of Int. Rev., 461 F.2d 496, 499 (7th Cir. 1972) (“Further expansion of the favored treatment specifically provided in §402(a)(2) as an exercise of legislative grace is a function for the Congress, not for the Courts”). Yet here, Congress has failed to act to expand Title VII. Congress’s failure to act demonstrates Title VII does not include unenumerated categories. Bibby v. Phil. Coca Cola, 260 F.3d 257, 265 (3d Cir. 2011) (“Harassment on the basis of sexual orientation has no place in our society….Congress has not yet seen fit, however, to provide protection against such harassment”).

#### [B]---The core antitrust laws are sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act

The Antitrust Division 07 – Law enforcement agency that enforces the U.S. antitrust laws

“Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report,” The Antitrust Division, Department of Justice, April 2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.

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

New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### Yes net benefit—the CP is uses constitutional, NOT antitrust, scrutiny

Crane, MSU 1ac author, Frederick Paul Furth Sr. Professor of Law, University of Michigan, ‘19

(Daniel A. "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214)

The purpose of this Article is to compare the deployment of constitutional and antitrust tools to scrutinize potentially anticompetitive state and local regulations against the backdrop of the ubiquitous concern about “Lochnerizing” under the auspices of either constitutional or statutory authority. Here is the question in a nutshell: If one believes that courts (or perhaps federal administrative agencies) should do somewhat more than they currently do to scrutinize and potentially invalidate anticompetitive state and local regulations, which lever should they pull—constitutional doctrines, antitrust preemption, or both? Because there are some overlapping, and some separate, institutional constraints and potential pathologies between constitutional and antitrust law, it is important to compare the two tools before deploying them.

This Article is organized as follows: Part I diagnoses the underlying features of democratic government that produce anticompetitive regulation. Some of this story is quite familiar, but I present some new observations with respect to the role of technological incumbency as a strong factor in invoking regulation to thwart innovation.

#### They are distinct

Crane, MSU 1ac author, Frederick Paul Furth Sr. Professor of Law, University of Michigan, ‘19

(Daniel A. "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1175-214)

The fear of a return to Lochnerism is in large part a fear that judicial review of economic regulatory decisions is a Pandora's box that, once open, would quickly unleash a full-scale movement toward a substitution of judicial economic philosophies for those of the democratically responsive branches.1 2 4 Hence, in the current constellation of Lochner-phobia, it is important to explain how any doctrine that invites increased judicial scrutiny of economic regulation would be cabined or restrained by a workable limitation principle. Both the antitrust and constitutional tools under consideration embody such a limitation principle insofar as they do not propose universal federal scrutiny of all undesirable state economic regulation. Instead, they limit the scrutiny to regulations that harm competition for the benefit of identifiable special interests. In other words, the prima facie case in either event requires demonstration of competitive harm as opposed to merely social undesirability.12 5

## Adv 1

#### Disease won’t cause extinction

Farquhar 17 – Sebastian Farquhar, Leader of the Global Priorities Project (GPP) at the Centre for Effective Altruism, et al., “Existential Risk: Diplomacy and Governance”, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

1.1.3 Engineered pandemics

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic. One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

#### Empirics and isolated populations prove

Beckstead 14 (Nick, Research Fellow at the Future of Humanity Institute, citing Peter Doherty, recipient of the 1996 Nobel Prize for Medicine, PhD in Immunology from the University of Edinburgh, Michael F. Tamer Chair of Biomedical Research at St. Jude Children’s Research Hospital, “How much could refuges help us recover from a global catastrophe?” in Futures, published online 18 Nov 2014, Science Direct)

That leaves pandemics and cobalt bombs, which will get a longer discussion. While there is little published work on human extinction risk from pandemics, it seems that it would be extremely challenging for any pandemic—whether natural or manmade—to leave the people in a specially constructed refuge as the sole survivors. In his introductory book on pandemics (Doherty, 2013, p. 197) argues:¶ “No pandemic is likely to wipe out the human species. Even without the protection provided by modern science, we survived smallpox, TB, and the plagues of recorded history. Way back when human numbers were very small, infections may have been responsible for some of the genetic bottlenecks inferred from evolutionary analysis, but there is no formal proof of this.”¶ Though some authors have vividly described worst-case scenarios for engineered pandemics (e.g. Rees, 2003 and Posner, 2004; and Myhrvold, 2013), it would take a special effort to infect people in highly isolated locations, especially the 100+ “largely uncontacted” peoples who prefer to be left alone. This is not to say it would be impossible. A madman intent on annihilating all human life could use cropduster-style delivery systems, flying over isolated peoples and infecting them. Or perhaps a pandemic could be engineered to be delivered through animal or environmental vectors that would reach all of these people.

## Adv 2

#### No emerging tech impact.

Sechser et al., 8-22 — \*Todd S. Sechser is the Pamela Feinour Edmonds and Franklin S. Edmonds, Jr. Discovery Professor of Politics and Public Policy at the University of Virginia and Senior Fellow at the Miller Center of Public Affairs. Dr. Sechser was previously a Stanton Nuclear Security Fellow at the Council on Foreign Relations and a John M. Olin National Security Fellow at Harvard University. He received his Ph.D. in political science from Stanford University. \*\*Neil Narang is an Associate Professor of Political Science at the University of California, Santa Barbara, and Senior Research Scholar at the Institute for Global Conflict and Cooperation at the University of California. From 2015-2016, he served as a Senior Advisor in the Office of the Secretary of Defense for Policy on a Council on Foreign Relations International Affairs Fellowship. Previously, he held positions at the Center for International Security and Cooperation at Stanford University, the University of Pennsylvania, and the Los Alamos National Laboratory. He received his Ph.D. in Political Science from the University of California, San Diego. \*\*\*Caitlin Talmadge is Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. Dr. Talmadge was previously a Stanton Nuclear Security Fellow at the Council on Foreign Relations and a John M. Olin National Security Fellow at Harvard University, as well as a consultant to the Office of Net Assessment at the U.S. Department of Defense. She is a graduate of Harvard (A.B., Government) and the Massachusetts Institute of Technology (Ph.D., Political Science). (“Emerging technologies and strategic stability in peacetime, crisis, and war;” *Journal of Strategic Studies*, 42:6; pg. 728-729; //GrRv)

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise, and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect. First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7 Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

#### No super intelligent AI

Eleni Vasilaki 18 {Professor of Computational Neuroscience, University of Sheffield. 9-24-2018. ”http://theconversation.com/worried-about-ai-taking-over-the-world-you-may-be-making-some-rather-unscientific-assumptions-103561}//JM

Should we be afraid of artificial intelligence? For me, this is a simple question with an even simpler, two letter answer: no. But not everyone agrees – many people, including the late physicist Stephen Hawking, have raised concerns that the rise of powerful AI systems could spell the end for humanity. Clearly, your view on whether AI will take over the world will depend on whether you think it can develop intelligent behaviour surpassing that of humans – something referred to as “super intelligence”. So let’s take a look at how likely this is, and why there is much concern about the future of AI. Humans tend to be afraid of what they don’t understand. Fear is often blamed for racism, homophobia and other sources of discrimination. So it’s no wonder it also applies to new technologies – they are often surrounded with a certain mystery. Some technological achievements seem almost unrealistic, clearly surpassing expectations and in some cases human performance. No ghost in the machine But let us demystify the most popular AI techniques, known collectively as “machine learning”. These allow a machine to learn a task without being programmed with explicit instructions. This may sound spooky but the truth is it is all down to some rather mundane statistics. The machine, which is a program, or rather an algorithm, is designed with the ability to discover relationships within provided data. There are many different methods that allow us to achieve this. For example, we can present to the machine images of handwritten letters (a-z), one by one, and ask it to tell us which letter we show each time in sequence. We have already provided the possible answers – it can only be one of (a-z). The machine at the beginning says a letter at random and we correct it, by providing the right answer. We have also programmed the machine to reconfigure itself so that next time, if presented with the same letter, it is more likely to give us the correct answer for the next one. As a consequence, the machine over time improves its performance and “learns” to recognise the alphabet. In essence, we have programmed the machine to exploit common relationships in the data in order to achieve the specific task. For instance, all versions of “a” look structurally similar, but different to “b”, and the algorithm can exploit this. Interestingly, after the training phase, the machine can apply the obtained knowledge on new letter samples, for example written by a person whose handwriting the machine has never seen before. Humans, however, are good at reading. Perhaps a more interesting example is Google Deepmind’s artificial Go player, which has surpassed every human player in their performance of the game. It clearly learns in a way different to humans – playing a number of games with itself that no human could play in their lifetime. It has been specifically instructed to win and told that the actions it takes determine whether it wins or not. It has also been told the rules of the game. By playing the game again and again it can discover in each situation what is the best action – inventing moves that no human has played before. Toddlers versus robots Now does that make the AI Go player smarter than a human? Certainly not. AI is very specialised to particular type of tasks and it doesn’t display the versatility that humans do. Humans develop an understanding of the world over years that no AI has achieved or seem likely to achieve anytime soon. The fact that AI is dubbed “intelligent” is ultimately down to the fact that it can learn. But even when it comes to learning, it is no match for humans. In fact, toddlers can learn by just watching somebody solving a problem once. An AI, on the other hand, needs tonnes of data and loads of tries to succeed on very specific problems, and it is difficult to generalise its knowledge on tasks very different to those trained upon. So while humans develop breathtaking intelligence rapidly in the first few years of life, the key concepts behind machine learning are not so different from what they were one or two decades ago. The success of modern AI is less due to a breakthrough in new techniques and more due to the vast amount of data and computational power available. Importantly, though, even an infinite amount of data won’t give AI human-like intelligence –

we need to make a significant progress on developing artificial “general intelligence” techniques first. Some approaches to doing this involve building a computer model of the human brain – which we’re not even close to achieving. Ultimately, just because an AI can learn, it doesn’t really follow that it will suddenly learn all aspects of human intelligence and outsmart us. There is no simple definition of what human intelligence even is and we certainly have little idea how exactly intelligence emerges in the brain. But even if we could work it out and then create an AI that could learn to become more intelligent, that doesn’t necessarily mean that it would be more successful.

# 1NR

## FTC Trade Off DA

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

#### Expanding the scope of antitrust laws without dedicating additional resources makes antitrust suits less likely to succeed in court---makes plan ineffective and proves another link.

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These examples reflect the current thinking at the federal and state antitrust enforcement agencies, which has evolved toward more enforcement and a greater willingness to tolerate litigation risk. With increased antitrust enforcement one of the few issues receiving widespread public and bipartisan support, the next Administration will likely be encouraged to push the limits of the law. Companies and their advisers should take note and recalibrate how they assess antitrust risk.

Prepare for a Possible Paradigm Shift

With antitrust very much in the political and popular spotlight, political leaders have proposed changes that could lead to a paradigm shift in enforcement:

The Biden-Sanders Unity Task Force recommended that the antitrust agencies re-review certain mergers that were approved under the Trump Administration to assess competitive and social effects.2

The US House of Representatives Task Force Report on the Digital Economy recommended codifying bright-line rules for structural presumptions, such as an anticompetitive presumption for mergers resulting in a 30% combined market share and a presumption of dominance for buyers and sellers with market shares of 25% and 30%, respectively, among other changes.3

Other proposals in the House include shifting the burden of proof to companies with a greater than 50% market share,4 imposing penalties of up to 15% of total U.S. revenues for anticompetitive conduct,5 changing the standard for illegal mergers from "substantially" to "materially" harmful, to show that anything more than de minimis harm is sufficient to block a deal, and establishing an anticompetitive presumption for any transaction involving a party with a $100 billion market capitalization.6

Apart from proposed legislative changes, any change in enforcement will depend on President-Elect Biden's appointments to lead the FTC and the DOJ. What is clear, however, is that the sitting Democratic-appointed FTC Commissioners support major changes in the next Administration's approach to antitrust. For example, Commissioner Chopra has been critical of the FTC's long-standing practice of approving pharmaceutical mergers with divestitures limited to overlap products and has argued that the Commission should also consider the overall impact of the size of the companies on competition.7 He has also been particularly critical of private equity, arguing that roll-up acquisitions by PE-backed firms allow them to quietly accumulate market share and harm competition. Commissioners Chopra and Slaughter recently dissented from the DOJ/FTC Vertical Merger Guidelines and Vertical Merger Commentary because they believe that vertical merger enforcement has been too lax, and strongly cautioned the market against relying on these guidelines as an indication of how the FTC will act going forward.8

While the agencies already are focused on acquisitions of nascent competitors in markets with significant entry barriers, such deals likely will get even more scrutiny as the agencies are careful not to repeat the controversial clearances of Facebook's acquisitions of Instagram and WhatsApp. This trend was apparent in Visa/Plaid and Sabre/Farelogix, where both deals were challenged despite the targets' extremely small market share.

Federal Courts and Budget Constraints Will Be Limiting Factors

Challenging transactions based on novel antitrust theories, without the benefit of precedent, means the agencies have the uphill battle of persuading a court that the transaction violates antitrust laws. The DOJ's unsuccessful challenges of the AT&T/Time Warner and Sabre/Farelogix mergers showed how difficult it can be to win a merger challenge that goes beyond the comfort of precedent and presumptions. Notably, in Sabre/Farelogix, the court found in favor of the parties based almost entirely on the precedent set in the Supreme Court's decision in Ohio v. American Express. Similarly, the FTC's Ninth Circuit loss in its lawsuit against Qualcomm will make it more difficult to bring an antitrust challenge to licensing practices for standard-essential patents. With the Trump Administration appointing almost a quarter of active federal judges and three Supreme Court justices, winning cases that push the boundaries of antitrust law will not be easy.

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

#### Current FTC authority allows them to nimbly enforce regardless of resource constraints---BUT they have to make pragmatic choices in case selection---the plan would force tons of issues down the docket.

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Chris Jay Hoofnagle, Woodrow Hartzog, and Daniel J. Solove, “The FTC can rise to the privacy challenge, but not without help from Congress,” Brookings, August 8, 2019, <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/>

THE FTC WIELDS GREAT POWERS TEMPERED WITH EXPERIENCE

The FTC has remarkable powers. At its creation a century ago, Congress gave it unprecedented investigatory and enforcement tools. These have been broadened over time as the FTC has faced new wrongs. Today, the FTC can examine business practices even where there is no investigatory predicate, and as a general-purpose consumer protection agency, it can sue almost any business.

As a result, the FTC is nimble and can adapt to new technologies without an act of Congress. Founded in the days of misleading newspaper advertising, the FTC was quick to pivot to radio, television, and internet fraud. The breadth and generality of its powers are also a source of strength. Much more than just data protection, modern consumer problems involve platforms, power, information asymmetries, and market competition. In theory, the FTC has a broad enough jurisdiction and charge to handle diverse issues often labeled as “privacy,” such as algorithmic manipulation and accountability.

In the information economy, privacy is among the most important values that law and norms should protect. Yet at the same time, privacy must also accommodate other important values, including the risks inherent in economic development. In our view, privacy is a means to the ends of freedom and autonomy in our personal lives and in our polity. It is a key component for human flourishing.

THE FTC HAS ACHIEVED MUCH WITH LIMITED RESOURCES AND WITHOUT CONSISTENT CONGRESSIONAL SUPPORT

Many privacy issues are thought to be new. But the FTC has decades of experience handling privacy problems, particularly in credit reporting and debt collection. The FTC’s earliest information privacy matters, in 1951 and then a series of cases in the 1970s, recognized the general consumer preference against commercialization of personal data. Using its enforcement powers, the FTC sued companies for deceptive data collection, and for the sale of data collected in preparing tax returns. The agency brought its first internet-related fraud case in 1994, long before most consumers shopped online. Since then, the FTC has pursued the biggest names in internet commerce. It has steadily broadened the duties for fair information handling, particularly in the information security domain.

The FTC’s broadest jurisdiction is its enforcement against unfair and deceptive practices under Section 5 of the FTC Act. Despite a wide reach, however, Section 5 has some significant limits in power. The FTC generally cannot issue a fine for Section 5 violations initially—fines can only be issued for violations of consent decrees, as happened in the Facebook case.

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

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

Even with these severe limitations, it has managed to bolster important norms and send strong signals to industry that have influenced the practices of many companies. It has become a significant enforcement agency that industry pays attention to. It has an enforcement record that compares quite well to other agencies in the US as well as around the world.

Some critics of the Facebook settlement have focused only on its shortcomings. Despite flaws and limits in the consent order, the five-billion-dollar fine was the biggest privacy settlement worldwide by far. It is an order of magnitude greater than the highest fine under the EU’s General Data Protection Regulation so far (the UK ICO’s €183 million fine against British Airways) and roughly double the record fine under EU competition law, which privacy advocates have urged as the reference for privacy fines.

The settlement also contains significant and noteworthy measures, such as forcing Facebook to make privacy a board-level concern and requiring Mark Zuckerberg to verify compliance. As dissenting Commissioners Chopra and Slaughter note, the FTC’s settlement doesn’t solve every problem; Facebook’s structure and business model remain the same. But no existing enforcement agency has come close to matching the FTC’s impact in this case, and foreign data protection agencies similar to proposed in the U.S. as FTC alternatives have not demonstrated the power or political capital to do so. As privacy enforcers go, the FTC stacks up well to others in many regards.

#### They’re already at their limits---antitrust cases are already intensive enough---can’t just add a ton more.

Ohlhausen ’20 – former Commissioner of the Federal Trade Commission, JD from George Mason, partner at Baker Botts

Maureen Ohlhausen, “Letter by Maureen K. Ohlhausen to House Subcommittee on Antitrust,” April 17, 2020, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607303&download=yes>

As a former enforcer, I know the agencies work hard to enforce the antitrust laws and police the market for anticompetitive conduct. With much needed additional resources, the enforcement agencies will be able to accomplish even more.

For example, the FTC's recent enforcement efforts have forced the agency to work "at or near the limits of [its] resources ."24 During his congressional testimony last year, former FTC Bureau of Competition Director Bruce Hoffman explained that the FTC, during a two-year time period, conducted nine trials comprising over 132 days of trial time, thereby causing the agency attorneys to spend 1 out of every 5 business days in trial.25 In addition to the taxing demands of litigation and trial, the agency must also devote precious resources to its other enforcement responsibilities. Additional personnel would certainly help ease this burden.

Besides personnel, the agencies are also increasingly in need of additional expert resources. FTC Chairman Joseph Simmons specifically highlighted this request to Congress last year, explaining that economic experts "are a critical resource in every FfC competition case where litigation appears likely" and the cost has tripled in a five-year span causing the agency to come close to the point where it "will be unable" to hire experts "without compromising [its] ability to fulfill other aspects of the mission ."26

DOJ' s Antitrust Division similarly is making the most of its limited resources.27 However, it too needs additional resources to meet its responsibilities. DOJ's proposed budget for the next fiscal year requests $53 million in appropriations for the Antitrust Division, which represents a seventy-one percent increase in appropriations from the prior year.28

Greater funding will not only allow the agencies to continue to meet their current responsibilities but also enable them to expand their capabilities. For instance, because investigations can be quite resource intensive, additional funding provides the agencies with the ability to review a wider scope of transactions and market behavior and to undertake important research on competitive issues.

Therefore, Congress should help ensure the proper functioning of the market by providing the agencies with additional resources.

V. Conclusion

Our antitrust laws are designed to combat anticompetitive mergers and practices in the marketplace, but their application must be tied to the facts and evidence specific to each case. Calls to broaden the scope of antitrust law likewise must be based on reliable evidence that such changes are necessary to promote competition and will make consumers better off. Changing the goal of antitrust from protecting the competitive process to focus instead on company size or other issues, such as consumer privacy, may ultimately result in less competition and fewer benefits for consumers. Enforcing our antitrust laws is a resource-intensive endeavor, however, and our enforcers need more support.

#### It’s zero sum---plan forces focus on frivolous issues.

Rosenberg ‘20 – former head of the DEA, Adjunct Professor at Georgetown, served as the U.S. Attorney for the Eastern District of Virginia (EDVA) and for the Southern District of Texas, as a senior FBI official on the staff of two FBI Directors, as Counselor to the Attorney General, as the Chief of Staff to the Deputy Attorney General, as an Assistant U.S. Attorney in EDVA in Norfolk and Alexandria

Chuck Rosenberg, “Why the Attorney General's Meddling on Antitrust Issues Matters,” Lawfare, July 1, 2020, <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted,

[a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices.

There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

#### Limited resources make it necessary to properly target law enforcement activities.

FTC ‘18

FTC 2018-2022 Strategic Plan, February 2018, <https://www.ftc.gov/reports/2018-2022-strategic-plan>

The FTC protects consumers from unfair and deceptive practices in the marketplace. The FTC conducts investigations, sues companies and people that violate the law, develops rules to protect consumers, and educates consumers and businesses about their rights and responsibilities. The agency also collects complaints about a host of consumer issues, including fraud, identity theft, financial matters, and Do Not Call violations. The FTC makes these complaints available to law enforcement agencies worldwide.

Because the FTC has jurisdiction over a wide range of consumer protection issues in order to carry out its broad mission, it must make effective use of limited resources by targeting its law enforcement and education efforts to achieve maximum impact and by working closely with federal, state, international, and private sector partners in joint initiatives. In addition, the agency engages in dialogue with a variety of stakeholders to understand emerging issues. The FTC also conducts research on a variety of consumer protection topics.

The FTC focuses on investigating and litigating cases that cause or are likely to cause substantial injury to consumers. This includes not only monetary injury, but also, for example, unwarranted health and safety risks. By focusing on practices that are actually harming or likely to harm consumers, the FTC can best use its limited resources.

#### 2--- They barely have enough now---need to properly target resources to preserve competition.

Abbott ’21 – JD from Harvard, Senior Research Fellow focusing on anti-trust issues at Mercatus. Federal Trade Commission’s General Counsel Adjunct professor at Mason’s Antonin Scalia Law School from 1991 to 2018.

Alden Abbott, “Lack of Resources and Lack of Authority Over Nonprofit Organizations Are the Biggest Hindrances to Antitrust Enforcement in Healthcare,” Testimony before the US House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, <https://www.mercatus.org/publications/antitrust-and-competition/lack-resources-and-lack-authority-over-nonprofit>

I can attest to the accuracy of Slaughter’s observation, based on my experience as FTC general counsel in the Trump Administration. During my tenure, the FTC did indeed have to contend with resource limitations that adversely affected merger enforcement decision-making.

The problem of resource constraints is particularly acute in the case of healthcare merger reviews, given the increasing consolidation of healthcare institutions. As one noted healthcare scholar stated in 2019, “The Affordable Care Act did not start the consolidation rapidly occurring with hospitals/health systems and medical groups, but it most definitely accelerated the movement to combine. In the last five years, the number and size of consolidations have been at an all-time high.”3

Moreover, according to health policy analyst Brian Miller and coauthors, “experts have expressed concern regarding a new merger wave due to pandemic-induced financial distress driven by the temporary cessation of profitable elective care and decreased hospital use.”4 Antitrust enforcers will need additional resources to ensure that this trend does not yield mergers that undermine the competitive process and harm consumers.

#### Hospital competition is top FTC priority---Khan appointment and Biden XO mean more even more aggressive antitrust suits are coming.

Litvack 8/11/2021 – Partner at Davis Wright Tremaine LLP, focus on antitrust litigation, defending M&A transactions before the U.S. antitrust enforcement agencies, and antitrust counseling

Douglas Litvack, Kaj Rozga former Federal Trade Commission attorney with a breadth of antitrust experience representing clients in litigation, cartel, and transactional matters, “Antitrust State of Play for Healthcare Providers Under a New Administration - Part I: Mergers and Acquisitions” JD Supra, <https://www.jdsupra.com/legalnews/antitrust-state-of-play-for-healthcare-3757565/>

Antitrust scrutiny of large technology companies may be in the headlines, but what some have dubbed "Big Med" is being eyed by the Biden Administration and federal agencies for heightened antitrust enforcement. Hospitals, physician groups, and health plans already accustomed to an active antitrust enforcement climate may need to prepare for even choppier regulatory waters ahead as a new President and new leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ) turn their focus on healthcare provider markets.

In the first of a series of articles, we look at the latest developments in competition policy and enforcement in provider markets, before turning to their impact on dealmaking during a time of rapid change and consolidation in the healthcare industry.

Pro-Enforcement Era for Healthcare Antitrust

President Biden's appointment of Lina Khan, a progressive reformer and supporter of aggressive enforcement of the antitrust laws, as the swing vote and Chair of the FTC was the first major harbinger of the changes to come. At that point, the federal antitrust agencies had already stopped granting "early termination" of merger reviews.1 Without the discretionary practice, non-problematic deals have had to wait the full 30 days of an initial review period following their filing with the government, resulting in some delay.

But the first sign that the new FTC, under Chair Khan, would have its eyes on healthcare providers in particular came at an open meeting of the Commissioners held last month. At that meeting, a 3-2 majority voted to single out healthcare—including hospitals and other providers—among several other industries as "enforcement priorities" that would be subject to resolutions authorizing sweeping compulsory process probes.2 The resolutions were described as removing "red tape bureaucracy" during a "massive merger boom," with both proposed and consummated transactions as potential targets.

Next came the Biden Administration's Executive Order on Promoting Competition in the American Economy, which singled out healthcare markets impacted by "hospital consolidation" for heightened antitrust scrutiny.3 The Executive Order identifies lowering prices and improving quality and access to care, in particular in rural communities, as requiring more vigorous enforcement of federal antitrust laws. It directs the FTC and DOJ to "review and revise their merger guidelines," which influence how agency staff conduct merger investigations. Judges also rely on the guidelines to help them assess the legality of mergers.

Finally, at the most recent open meeting of the FTC, a majority of Commissioners voted to rescind a 1995 Policy Statement that had limited the use of "prior approval" requirements in merger consent decrees. These decrees are settlements that the agency sometimes reaches with merging parties as conditions for not opposing their deal in court.4 Prior approval provisions require giving the FTC advance notice (before closing the transaction) of certain future deals and can even require the parties when presenting future deals to prove to the agency that they are not anti-competitive. The latter in effect flips the burden of proof, which normally lies with the government to challenge a deal, to the merging parties.

Active Enforcement Against Healthcare Provider Mergers

None of the recent actions of the Biden Administration or FTC are significantly out of step with the recent trend of vigorous merger enforcement against healthcare providers.

The healthcare industry has grown accustomed in the last decade to close scrutiny and frequent challenges to hospital and physician practice deals. A 2019 report from the FTC detailed at least nine hospital mergers and six physician group acquisitions that the agency challenged going back to 2008.5 Since then, it has challenged at least three more hospital deals, in addition to launching a merger retrospective study earlier this year to analyze the market effects of physician group and hospital consolidation.6

But even with this recent history of active enforcement, there does seem to be some acceleration in the trendline. Following last summer's blockbuster "Big Tech" hearings, Congress held another round of less-publicized, though still significant, hearings that focused on healthcare markets. At two separate hearings in the Senate and House of Representatives, lawmakers elicited testimony seeking to show that hospital and physician practice acquisitions are driving up healthcare costs, failing to improve quality of care, and lowering employee wages.7 Participants called for more aggressive enforcement of merger laws.

What an Executive Branch on Antitrust High Alert Means for Healthcare Provider Dealmaking

With so much interest from the Oval Office, federal enforcers, and Congress, healthcare providers—hospitals, physician groups, and integrated health systems—should anticipate heightened scrutiny of mergers and acquisitions.

#### They’re massively expanding efforts focused on hospitals after their 20 year long win streak ended---they want to try and beat the old record!

Maas ’21 –Partner at Davis Wright and Tremaine LLP, concentrates his practice on antitrust, class action, and complex commercial litigation

David Maas, “FTC's Hospital Merger Win Streak Ends” March 4, 2021, <https://www.dwt.com/insights/2021/03/ftc-hospital-merger-defeat>

On Monday morning, the Federal Trade Commission quietly added a sentence to its web page dedicated to the Commission's challenge of a proposed merger of two health systems in Philadelphia's northern suburbs, Thomas Jefferson University and the Albert Einstein Healthcare Network:

The Commission vote to voluntarily dismiss its appeal to the 3rd Circuit of the district court decision declining to preliminarily enjoin the merger of Thomas Jefferson University and Albert Einstein Healthcare Network was 4-0.

The unanimous decision etches in stone that for the first time in the 21st Century the FTC has abandoned litigation to enjoin a hospital merger after failing to obtain a preliminary injunction from the district court.1 While the outcome showcases that healthcare provider transactions can overcome opposition from the state and federal antitrust enforcers, healthcare providers should expect aggressive enforcement to continue.

Just yesterday the FTC announced the end of its investigation of the proposed merger between Atrium Health Navicent, Inc., and Houston Healthcare System, Inc., because the parties abandoned the deal. That announcement comes not long after two hospital systems in Memphis, Tenn., abandoned a planned merger when the FTC sued to block their $350 million transaction.

Market Definition Central in Hospital Merger Litigation

The Jefferson-Einstein case should be somewhat heartening to hospitals and health systems in competitive urban areas. The key battleground—as in most hospital merger cases—was market definition.

The FTC defines geographic markets using the Hypothetical Monopolist Test (HMT), which assesses whether a hypothetical monopolist of inpatient hospital services could profitably raise prices if it controlled the hospitals in a defined geographic area. If so, that area is a relevant geographic market to assess the competitive effects of the merger based on market shares and concentration levels or actual effects.

The Commission's application of the HMT has produced some strange geographic markets in urban areas. For instance, the below map shows the market that passed the HMT in FTC's case challenging the proposed merger of Advocate Health Care Network and NorthShore University Health System in the Chicago area:

FTC Geographic Market chart

In Jefferson-Einstein, the district court found that the FTC's alleged markets in the northern Philadelphia area passed the HMT. The judge nonetheless held that the FTC failed to meet its burden because the alleged geographic markets did not "correspond to the commercial realities of southeastern Pennsylvania's competitive healthcare industry."2 In particular, the district judge was not persuaded that the testimony from commercial insurers supported the markets the FTC had proposed.

It will be important to watch how the FTC reacts to the decision. The Commission argued on appeal that the results of the HMT should be sufficient to carry the FTC's burden: "Courts must consider 'commercial realities' when formulating and applying the hypothetical monopolist test… A court may not, however, jettison undisputed results of a test that already incorporates the 'commercial realities' of the healthcare market."3

While the FTC appears committed to its current approach to market definition, expect there to be extra focus on the substance and credibility of payer testimony in hospital merger litigation ahead. Next up is the FTC's challenge to the proposed merger of New Jersey hospital systems Hackensack Meridian Health, Inc., and Englewood Healthcare merger, which is slated for trial in June 2021.

FTC Remains Committed to Enforcement in Healthcare

The Commission's decision to abandon the Jefferson-Einstein appeal was not terribly surprising, given the 3rd Circuit denial of the FTC's request to enjoin the merger while the appeal was pending.4 The parties were free to close the deal and begin integrating while the appeal was underway, and reached an agreement with the Pennsylvania attorney general in January 2021 to drop its challenge to the transaction in exchange for a commitment to invest at least $200 million in Einstein's facilities. Even if the FTC had won the appeal, it could have ended up in protracted litigation about whether (and how) to "unscramble the eggs."5

The FTC's first loss in two decades comes as the FTC has committed to aggressive antitrust enforcement in healthcare. Acting Chair Rebecca Slaughter and Commissioner Christine Wilson have both been outspoken about the Commission closely scrutinizing every hospital merger.

The FTC also recently authorized a retrospective on the consolidation of physician groups into the health systems.6 It is worth noting that after the FTC conducted a retrospective of hospital mergers in the early 2000s it emerged with a new approach to analyzing and challenging hospital mergers, which fueled the long winning streak that has now come to an end.

With that history in mind, it would be a mistake to read the FTC folding its hand in Philadelphia as a sign of less aggressive enforcement ahead. Just the opposite—expect redoubled enforcement efforts in healthcare, including increased focus on physician transactions.

#### FTC is aggressive and effective at enforcing antitrust in healthcare---recent court loss means the FTC is doubling down on actions against hospitals BUT it’s make or break.

Perna ’21 – Senior Manager of Digital Content at Health Evolution. Previously, he was at Chief Executive, Physicians Practice and Healthcare Informatics

Gabriel Perna, “Is the FTC increasing scrutiny amid high M&A levels in health care?” HealthEvolution, April 28, 2021, <https://www.healthevolution.com/insider/ftc-increasing-scrutiny-high-ma-levels-healthcare/>

As health care organizations emerge from the pandemic, a frenzy of merger and acquisition activity has begun and that can potentially bring the watchful eye of the Federal Trade Commission.

More than 700 deals took place in the first quarter of 2021, according to a recent estimate from Epstein Becker Green, KPMG and FocalPoint Partners. This represented a 50 percent increase over the same period in 2020. Leading the way was the life sciences industry with 126 transactions followed by the physician practice and services and health care IT sectors, each with more than 100 transactions.

“We’re seeing some crazy activity that’s going forward,” says Michael Buchanio, a Chicago-based senior principal of healthcare and life sciences at West Monroe Partners, a consulting firm that has already worked on many deals this year. A major reason for the increased activity, he says, is the virtual work environment spurred by the pandemic has transformed deal making into a more efficient process than conducting negotiations onsite.

“We’re getting greater access to [M&A] targets. While you miss some of that face-to-face time, a lot of times what used to be one day for 7-8 hours can be scheduled over 2-3 days at a few hours per pop. When that adds up, you get maybe 15-16 hours with an [M&A] target. You get more access via screen time,” Buchanio says.

Moreover, the financial ramifications of the pandemic have many health care organizations looking for deals and growth opportunities. This is particularly the case for health systems, says John Carroll, a partner in the Antitrust & Competition Practice Group in the Washington, D.C. office of Sheppard Mullin.

“You are seeing deals that were paused get un-paused. You are also seeing new deals as health systems aren’t just singularly focused on having enough ICU beds but looking at the strategy they were looking at before. This is getting scale, improving quality, lowering costs, entering into more value-based care arrangements, and growing their physician networks. There’s definitely a reinvigoration,” Carroll says.

Increased FTC enforcement activity

The increase in mergers and acquisitions has the potential to cause more enforcement activity from the FTC, experts say. Last year was the busiest for FTC enforcement in two decades, says Buchanio, as the agency challenged five different deals in the fourth quarter.

FTC may up the ante in 2021. In January, the agency announced its intent to study the effects of physician group and health care facility consolidation that occurred from 2015 through 2020. In March, it launched a working group with the Department of Justice and other government stakeholders to update theapproach to analyzing the effects of pharmaceutical mergers.

“Given the high volume of pharmaceutical mergers in recent years, amid skyrocketing drug prices and ongoing concerns about anticompetitive conduct in the industry, it is imperative that we rethink our approach toward pharmaceutical merger review,” FTC Acting Chair Rebecca Kelly Slaughter said in a statement.

This isn’t coming out of nowhere, experts say. In fact, the FTC and DOJ would say they aren’t doing anything different than they have in the past, suggests Carroll. “There are just more deals that are concerning to them. They are applying the same economic modeling that they’ve used for the last 20 years. More deals are problematic in their view, so they are investigating and challenging more deals,” he says.

David Maas, a partner at Davis Wright Tremaine who focuses on antitrust, class action, and complex commercial litigation, says that FTC involvement in M&A activity is zeroed in on health care and technology as of late. He points to the agency blocking the NorthShore-Advocate proposed merger in Chicago five years ago as a turning point. It allowed the agency to establish a precedent in blocking health system mergers in urban areas.

“For a period of about three years, it seemed the FTC’s winning record was going to slow down hospital-to-hospital transactions in a significant way and discourage parties from pursuing transactions that might run into this expensive investigative and litigation process,” Maas said. This meant the FTC has been able to focus its efforts elsewhere. “For a while, we saw enforcement activity in other areas of health care, including significant insurance and physician transactions that were blocked.”

New administration, new problems?

Per the recent guidance, Maas expects the FTC to be more aggressive

in potentially blocking physician group transactions. This ties into the rising number of vertical integration deals that have caught the eye of the agency. Along with the physician group mergers, a recent example in biopharma would be the FTC’s attempt to block an $8 billion merger between Illumina and Grail. Buchanio expects that with Democrats in charge of the FTC, health care organizations could see even more of an effort from the agency to block these deals.

“Just looking at where Biden and his administration may be heading, we expect government efforts to expand to further police the marketplace. [Acting FTC Chair Slaughter] has advocated for a much tougher stance against vertical deals,” Buchanio says.

Beyond vertical integration, the arrival of a new administration could mean a swing in how the FTC views M&A in health care, experts say. The majority of FTC Commissioners are nominated by the President. At least one person President Biden has nominated, Lina Khan, is an aggressive voice in the antitrust space. Additionally, the President’s own Secretary of Health and Human Services, Xavier Becerra, was known for enforcing antitrust activity in health care as the Attorney General of California, most notably getting Sutter Health to pay a $575 million antitrust settlement.

“I think we are already seeing a more significant swing in connection with the Biden administration’s approach to enforcement. The nomination of [Khan] is an example of that,” Maas says. In particular, Khan has had an aggressive stance against big tech companies, many of which are attempting to make a dent in the health care industry. He says while it remains to be seen how Becerra will play a role in antitrust enforcement as HHS Secretary, his presence in the administration is very telling. “His place at HHS could have an antitrust impact.”

Carroll cautions that 90 percent of the lawyers at the FTC’s antitrust unit carry over from one administration to the next. Investigative and litigation efforts are often carried over as well. However, while he says too much may be made of this switch in administrations, the early signs show the agency may have an aggressive stance under Biden.

“It’s a lot of speculation but if you look at some of the rhetoric from the administration and you take that with the increased M&A activity, I think you’ll see more antitrust action,” Carroll says.

The case FTC lost

In the last year, FTC has knocked down a number of M&A deals, including Atrium Health Navicent and Houston Healthcare System in Georgia, which abandoned intentions to merge. But the most noteworthy ruling on health care M&A may have been the case FTC lost. After the Third Circuit Court of Appeals denied the FTC’s attempt to block Jefferson Health and Einstein Healthcare, the agency backed off and dropped its opposition. The ruling found that through an insurance carrier lens, Einstein and Jefferson were not seen as true competitors as they have different payer mixes.

“Before that, I don’t think FTC had lost a case in quite some time,” Buchanio says, adding the agency probably didn’t appeal this decision because it didn’t do too much damage to the precedent it set. “They’ve built up a number of economic and other analytic tools that they leverage in arguments to demonstrate that there are anti-competitive forces. There was an opportunity for the appellate court to take a fresh look at that. They probably recognized this case isn’t the best one to have that discussion.”

Buchanio adds that the FTC is challenging the Hackensack Meridian Health and Englewood Healthcare merger, with a decision to come in the next few months. “It probably makes more sense for them to take a better stab with the Hackensack Meridian case and go for it in a way that overcomes the decisions made in the Jefferson-Einstein case. They’ll use that as a stepping point,” he says.

Buchanio also suggests FTC likely decided to not appeal after the Pennsylvania Attorney General dropped the state’s opposition to the deal due to Jefferson’s $200 million promised investment into Einstein.

The downstream impact

Maas says that the Jefferson-Einstein case is a significant win for hospitals and health systems at a time when many are facing financial challenges. He expects in the years ahead that health systems putting together deals will try and win the support of insurance companies in advance. In some cases, he anticipates that providers will take on more risk in value-based arrangements with payers as a way to move mergers forward.

“It would be harder [for an insurance carrier] to say a transaction is going to harm competition if a large system has a history of driving down costs by taking on more risk, engaging in risk-sharing relationships with payers, and succeeding,” Maas says. “The Jefferson-Einstein was a watershed decision. I don’t think it will mean less enforcement, I do think it will mean more hospitals and health systems will try to navigate an aggressive enforcement landscape.”

Debbie Feinstein leads Arnold & Porter’s Global Antitrust group and previously worked at the FTC as the Director of the Bureau of Competition. During her stint at FTC, Feinstein was responsible for supervising the investigation and enforcement of the U.S. antitrust laws against anticompetitive mergers and conduct. She said that a given case isn’t going to change the commission’s approach to merger enforcement. Furthermore, the FTC has had decisions in various U.S. Circuit Courts that were favorable in recent times, she noted.

“Antitrust cases are always decided on the facts and this one didn’t go their way. But I don’t see it deterring them from bringing another case if they think it’s a good one. Hospitals need to be on alert that the commission is going to scrutinize deals carefully,” Feinstein said.

#### Continued hospital consolidation is the single biggest driver of high healthcare prices---comprehensive meta-analyses definitively go neg---all turns are written by the crony capitalist hospital industry.

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Avik Roy, “Affordable Hospital Care Through Competition and Price Transparency” FreeOpp, January 31, 2020, <https://freopp.org/affordable-hospital-care-through-competition-and-price-transparency-765714c69ed8>

Introduction

One of the greatest challenges to affordable health care is the high cost of American hospitals. The most important driver of higher prices for hospital care, in turn, is the rise of regional hospital monopolies. Hospitals are merging into large hospital systems, and using their market power to demand higher and higher prices from the privately insured and the uninsured.

A number of commentators have called attention to the vexing problem of “crony capitalism,” whereby politically connected industries persuade the government to give them financial and regulatory advantages over competitors and taxpayers. There is no better candidate for that description in the United States than the hospital industry.

In 2018, Americans spent $1.2 trillion on hospital care, representing 32.4 percent of national health expenditures, and far exceeding what the U.S. spends on national defense. That maps out to $14,613 for a family of four: fully one-quarter of median household income. By 2026, actuaries at the Centers for Medicare and Medicaid Services project hospital spending to exceed $1.8 trillion.

Given that roughly half of all U.S. health care spending is funneled through public programs, hospitals care a great deal about protecting their taxpayer-funded revenue streams. In 2017, hospitals and nursing homes together spent $101 million on lobbying, more than was spent by the automotive industry ($70 million), the defense aerospace industry ($69 million), and commercial banks ($67 million).

It’s the prices, stupid

Among the industrialized member countries of the OECD, the median hospital stay cost $10,530 and lasted 7.8 days in 2014. In the United States, the average hospital stay cost $21,063, despite lasting only 6.1 days. In other words, the average daily cost of a hospital stay in the U.S. was 2.6 times that of the OECD average of industrialized nations.

Not only are U.S. hospital stays shorter in length; Americans use hospitals less frequently than their industrialized peers. In 2014, the United States had 12,901 hospital discharges for every 100,000 residents. This compares favorably with the OECD average of 15,462. In 2015, 63 percent of U.S. hospital beds were occupied at any given time, compared to the OECD median of 74 percent.

As Gerard Anderson, Uwe Reinhardt, Peter Hussey, and Varduhi Petrosyan first explained in 2003, “on most measures of health services use, the United States is below the OECD median. These facts suggest that the difference in spending is caused mostly by higher prices for health care goods and services in the United States.” Further analyses of OECD data by Anderson et al. and Papanicolas et al. show that these disparities have continued.

Federal health care entitlements like Medicare and Medicaid have responded to the rising costs of hospital care by attempting to slow the growth of their reimbursement rates to hospitals for a wide range of services. Hospitals have sought to maintain their revenue growth, in turn, by raising the prices they charge to private insurers and the uninsured: a practice sometimes called cost-shifting.

However, while hospitals claim cost-shifting is necessary to compensate for the losses they claim they incur caring for Medicare and Medicaid patients, the overwhelming evidence is that hospitals are making money on all insured populations, and simply charging more to the privately insured because they can. For example, where Medicare rates have declined, rates for the privately insured have also declined: the opposite of what one would expect if lower Medicare rates were leading hospitals to charge higher rates to the privately insured.

Chart, line chart

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A 2015 study by researchers at the U.S. Agency for Healthcare Research and Quality found that hospitals were charging private insurers 106.1 percent of Medicare rates in 1996, but 175.3 percent of Medicare rates in 2012. A 2019 study by the RAND Corporation, reviewing employers’ claims data, found that hospitals on average were charging the privately insured 241 percent of Medicare rates in 2017.

In his landmark 2013 article “Bitter Pill: Why Medical Bills Are Killing Us,” Steven Brill described an uninsured patient who was charged $283 for chest X-rays by his Texas hospital; that hospital routinely bills Medicare $20 for the same service. The Texas hospital charged $15,000 for routine lab tests for which Medicare pays several hundred dollars. A Connecticut hospital charged another uninsured patient $158 for a routine test called a complete blood count, for which Medicare pays $11.

Hospital mergers do not improve patient outcomes

Furthermore, there is no identifiable relationship between what hospitals charge for health care services and the quality that those hospitals provide. An analysis by Joe Carlson of Modern Healthcare of hospitals in 12 cities found, as so many others have, that “there is no consistent relationship between hospitals spending more to perform a procedure and their achieving better patient outcomes.”

A 2006 meta-analysis by William Vogt and Robert Town found little evidence that hospital mergers led to higher quality, either, despite hospitals’ claims to the contrary. Of the 11 studies they reviewed, two found a modest increase in health outcomes, two found increases on some measures and decreases on others, four found no effect, and three found a decrease in health outcomes.

Table

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In 2020, a group of Harvard researchers led by Nancy Beaulieu published in the New England Journal of Medicine an examination of every hospital merger and acquisition that took place between 2009 and 2013, and compared their performance to a control group of standalone hospitals with similar characteristics. They found that these mergers “were associated with modest deterioration in performance on patient-experience measures and no detectable changes in readmission or mortality rates at acquired hospitals.”

Notably, the study compared 246 acquired hospitals to 1986 control hospitals, in effect the largest study of the clinical effects of hospital consolidation ever attempted. “Taken together,” the authors concluded, “these findings provide no evidence of quality improvement attributable to changes in ownership.”

Hospital consolidation is driving premiums upward

Hospitals have come to recognize that by consolidating their market power, they can force private insurers to accept higher prices.

In 2011, James Robinson of the University of California reviewed hospital prices charged to commercial insurers for six common procedures: angioplasty, pacemaker insertion, knee replacement, hip replacement, lumbar fusion, and cervical fusion. He found that, on average, procedures cost 44 percent more in hospital markets with an above-average degree of consolidation.

Chart, bar chart

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For example, as illustrated above, in competitive hospital markets, the average hospital charged $18,337 for a knee replacement; in a consolidated hospital market, the average hospital charged $26,713: a premium of 46 percent.

However, the average cost to the hospital for performing the knee replacement was nearly identical: $11,870 in competitive markets and $12,096 in consolidated markets.

In other words, nearly the entirety of the price premiums charged by consolidated hospitals flows down to the hospitals’ bottom lines in the form of profit, or what most hospitals call “contribution margin.” For the procedures studied by Robinson, consolidated hospitals earned more than twice their competitive peers in contribution margin.

A 2018 study by another group of researchers at the University of California, on behalf of Reed Abelson of the New York Times, examined the 25 metropolitan areas with the highest rate of hospital consolidation from 2010 to 2013. They found that the price of an average hospital stay increased between 11 and 54 percent in these regions.

The superior profitability of consolidated hospital systems leads to a vicious cycle, whereby weak hospitals in competitive markets either close or become vulnerable to acquisition by the larger, consolidated systems, making the problem even worse.

It is problematic enough that regional hospital monopolies have the power to demand high prices. But on top of this, many hospitals engage in additional anticompetitive practices. Anna Wilde Mathews of the Wall Street Journal obtained secret contracts between insurers and hospitals revealing that these contracts often barred insurers from sending patients to “less-expensive or higher-quality health care providers.” Other hospitals precluded insurers from excluding some of the system’s hospitals from the insurer’s networks. Some contract provisions, including those from New York-Presbyterian Hospital and BJC HealthCare of St. Louis, prevented insurers from disclosing a hospital’s prices to patients.