# R5 Harvard Disclosure

# 1NC R5 Harvard

### 1NC---T

T Prohibit---

#### “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

#### Prohibition requires completely ending a practice

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

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

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

#### They don’t meet---they do not

#### 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---T

T Expand---

#### Expansion of scope requires an increase

Clements 08 – Judge, Virginia Appeals Court

Jean Harrison Clements, Wise v. Velazquez, 2008 Va. App. LEXIS 489, Court of Appeals of Virginia, November 2008, LexisNexis

Discounting the terms of the award subject entirely to father's discretion, it is clear that the trial court awarded grandmother essentially the same visitation it had previously awarded her in the July 30, 2004 consent order--a minimum each month of two full days--except that father now had complete discretionary control over when the two days of visitation would occur since the visitation was no longer required to be on Saturdays. Thus, in light of the fact that the current visitation order provides the same amount of visitation that the original consent order did, and actually provides father more discretionary control over that visitation, we cannot say that the trial court's award of visitation to grandmother constitutes an expansion of the scope of visitation beyond what was originally agreed upon by the parties and ordered by the court in the July 30, 2004 consent visitation order.

#### They don’t meet---Sherman act scope ALREADY INCLUDES anticompetitive practices within states---in fact, the aff RESTRICTS the scope of Sherman by making it apply only to conduct that harms other states

**Meese 15** --- Ball Professor of Law and Cabell Research Professor, William and Mary Law School.

Alan J., 2015, "Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp," Iowa Law Review, https://ilr.law.uiowa.edu/print/volume-100-issue-5/antitrust-federalism-and-state-restraints-of-interstate-commerce-an-essay-for-professor-hovenkamp/

The constitutional framework in place in 1890 collapsed in the late 1930s, creating a regime of overlapping state and federal powers in which states are free to impose wealth-destroying restraints of interstate commerce, so long as such restraints do not expressly discriminate against interstate commerce. These fundamental changes in the constitutional landscape force courts to consider whether the Sherman Act preempts state-imposed restraints that produce the same economic harm as private restrains that violate the Act. This Essay contends that the case for such preemption is stronger than many have recognized, given the long-recognized authority of courts to alter the scope of the Sherman Act in response to changed circumstances. At the same time, the Essay proposes an approach that is less radical than Sherman Act preemption of all state-imposed restraints currently within Congress’s jurisdiction. Instead, the Essay proposes that the Court restrict the scope of the Sherman Act so that the statute reaches only that conduct which produces harm in more than one state. Such an approach would restore the original federal–state balance where antitrust regulation is concerned and eliminate many potential conflicts between the Sherman Act and purely local regulation. At the same time, the Court should revitalize Dormant Commerce Clause jurisprudence so as to invalidate those state-imposed restraints that impose significant harm on consumers in other states. Like the proposed reduction in the scope of the Sherman Act, such revitalization will help restore the allocation of regulatory authority extant when Congress passed the Sherman Act.

#### Vote neg for limits ---they allow innumerable affs that tinker with small burdens in courts which makes negative prep exponentially more difficult

### 1NC---T

T Core Antitrust---

#### The core antitrust laws are only 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.

#### Violation: the aff amends the FTC Act---that’s not an antitrust law

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

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

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

#### Vote neg---

#### [A]---Limits---the FTC Act includes an entirely separate mechanism for enforcing antitrust---functionally doubles the topic

#### [B]---Ground---core neg strategies like the Section 5 counterplan and disads to treble damages are predicated on an aff change to Sherman or Clayton

### 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---CP

The fifty states and all relevant sub-federal entities should:

* adopt laws that exactly mirror the Sherman Act, Clayton Act, and FTC Act
* declare that interstate anticompetitive effects should be weighed equally to procompetitive intrastate effects
* enforce antitrust violations against state and municipality regulatory actions that are anticompetitive
* declare that their official position vis-à-vis anticompetitive effects of all regulatory policies and bodies is one of neutrality
* reform state licensing boards.

#### Plank 1-3 solve---their Crane ev

#### Plank 4 solves---their ev

**Weber 16**, “Brief of the Cato Institute as Amicus Curiae in Support of Plaintiffs-Appellees,” https://www.cato.org/sites/cato.org/files/pubs/pdf/teladoc-285th-cir-29.pdf

To give the states an avenue to indicate clearly when they intend to confer Parker immunity on a non-sovereign actor, the Supreme Court has outlined two requirements: the restraint must be both “clearly articulated and affirmatively expressed as state policy” as well as “actively supervised” by the state itself. Midcal, 445 U.S. at 105. This test cannot be satisfied “when the State’s position is one of mere neutrality” toward the anticompetitive conduct in question, and thus a state’s simply general grant of power to a non-sovereign actor cannot be read to confer immunity. Cmty. Commc’ns Co., Inc. v. City of Boulder, 455 U.S. 40, 55 (1982). States must exercise “sufficient independent judgment and control” to ensure that the anticompetitive acts in question are the “product of deliberate state intervention,” Ticor, 504 U.S. at 634 (emphasis added), instead of the private self-interest of existing firms.

#### Plank 5 solves---their ev

**Weber 16**, “Brief of the Cato Institute as Amicus Curiae in Support of Plaintiffs-Appellees,” https://www.cato.org/sites/cato.org/files/pubs/pdf/teladoc-285th-cir-29.pdf

If a state intends a specific anticompetitive result, it may clearly articulate that result—or make it plainly foreseeable, see id. at 1011— giving voters the chance to oppose immunity-creating legislation before it becomes law and making it easier to hold legislators accountable. Otherwise, states would be impeded in their freedom of action because they would have to act “in the shadow of state-action immunity whenever they enter[ed] the realm of economic regulation.” Ticor, 504 U.S. at 636. The limited and careful application of the state-action immunity doctrine gives states the most freedom in delegating power and crafting regulatory entities, ensuring legislatures that they will not accidentally confer immunity and allow regulatory bodies to go rogue with anticompetitive conduct that deviates from the states’ interest of preserving robust marketplace competition for the benefit of their residents.

**[[THEIR EV ENDS]]**

Nor is it necessary for a state wishing to obtain the specialized knowledge of professionals to establish a regulatory system that merely rubber-stamps the often self-interested assertions of these professionals. One can easily imagine such alternatives. See Edlin & Haw, Cartels by Another Name, 162 U. Pa. L. Rev. at 1155. The agency could be staffed by independent state officials who invite comment and input from professionals while retaining final decision-making authority in official hands. (Agencies already routinely do this.) Or, agencies could be made up of retired members of the profession, or could include existing members without their making up the majority of the board. States could adopt private certification requirements, an alternative to statutory licensing that allows consumers to choose what services to purchase and what practitioners to patronize. These and other “active supervision” alternatives would easily accommodate the state’s legitimate interests in obtaining specialized knowledge while also resisting the danger of private exploitation of public power.

### 1NC---DA

Innovation DA---

#### Frenzy of M&A now because Biden’s executive order won’t be implemented for years

David French and Sierra Jackson, Reuters, July 12, 2021, Analysis: Dealmakers see M&A rush, then chills, in Biden's antitrust crackdown, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

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

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

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

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

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

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

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

**Immediately expanding scope of antitrust liability brings mergers to a halt---undermines dynamism and global competitiveness**

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

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

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

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

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

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

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

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

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

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

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

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

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

GOP divided over bills targeting tech giants

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

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

**Internal link goes one way---large-firm dynamism is the only way to maintain tech leadership**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Tech innovation prevents nuclear conflict---US leadership is key

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

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

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

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

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

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

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

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

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

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

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

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

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

### 1NC---DA

FTC Tradeoff DA---

#### The FTC is fundamentally constrained---priority changes drag resources away from current merger investigations

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.

#### Current resource allocation allows effective regulation of hospital mergers---plan decimates FTC success

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

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(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.

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#### 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

**Kuttner 19** – Co-founder and co-editor of The American Prospect, and professor at Brandeis University’s Heller School

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.

#### They’ve read no internal link to solving China tech dominance.

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

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 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 Prohibit

#### 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

## States CP

**Khan will enforce the aff even if states do as well---sees the need to reestablish the glory days of the FTC and pushes the envelope with litigation**

**Withrow 21** – Director of Technology Policy for the National Taxpayers Union Foundation

Josh Withrow, "Biden's First FTC Pick Another Ill Omen for Long-Respected Restraints on Antitrust," National Taxpayers Union, 3-10-2021, https://www.ntu.org/foundation/detail/bidens-first-ftc-pick-another-ill-omen-for-long-respected-restraints-on-antitrust

The Biden administration’s aggressive approach to antitrust, especially against tech companies, has come into sharper relief with the forthcoming nomination of Columbia Law School Professor Lina Khan to serve on the Federal Trade Commission (FTC). Khan has become one of the leading proponents of reestablishing the glory days of antitrust enforcement power as envisioned by progressives more than a century ago, and her appointment at the FTC would place her in a position to help make some of those goals a reality.

As a reminder, the “consumer welfare” standard that has guided antitrust enforcement for nearly half a century rose out of a consensus among economists and legal scholars across the ideological spectrum that the prior, “rule of reason” standard was unworkably vague. Placing the focus of competition policy on demonstrating that a company’s behavior is causing real harm to consumers brought a much-needed dose of objectivity and predictability in the use of one of the government’s most powerful tools for economic intervention.

Khan’s ascent to prominence stems directly from her boldness in challenging these constraints on antitrust usage head on. In 2017, shortly before earning her law degree from Yale, she published a lengthy legal note entitled “Amazon’s Antitrust Paradox,” that quickly went viral in competition circles and was met with widespread acclaim by progressives. With an obvious swipe at Judge Robert Bork’s influential The Antitrust Paradox, Khan’s paper starts from the premise that the consumer welfare standard is “unequipped to capture the architecture of market power in the modern economy.”

#### Even so, real world flows neg---this is the one topic where all 50 states uniformly create and enforce standards

Clayton 94 – Director of the Thomas S. Foley Institute for Public Policy and Public Service at Washington State University

Cornell W. Clayton, “Law, Politics and the New Federalism: State Attorneys General as National Policymakers,” The Review of Politics, Vol. 56, No. 3, Summer 1994, https://www.jstor.org/stable/pdf/1407967.pdf

NAAG was originally established in 1907 to assist state attorneys general deliver legal services to their states. During the last two decades however NAAG has consciously developed a more proactive role, aiming at the use of state laws and law enforcement policies to create national regulatory standards and to systematically challenge federal preemption.48 One way NAAG has facilitated the integration of state legal policy is by organizing interstate standing committees which address policy issues of common state concern. These committees encourage standardization of state enforcement standards under federal laws and draft model state statutes. Environmental protection, public land management, antitrust law, consumer protection, charitable trusts and solicitations, securities regulation, regulation of the insurance industry, and utility rate-making are some of the areas addressed by NAAG standing committees since 1980.

This type of integrated policymaking by state attorneys general can seriously threaten federal control over important areas of regulation. In 1985 for instance, in a challenge to the Reagan administration's antitrust law enforcement posture, all 50 states adopted a uniform set of antitrust enforcement guidelines for nonprice vertical restraints. Two years later in 1987, 48 states approved a set of horizontal merger guidelines for use in antitrust enforcement.49 Similarly in 1988, following the Carter administration's deregulation of the airline industry, all 50 states adopted a set of guidelines using state laws to regulate airline fare and rate advertising. These guidelines, opposed by both the Federal Trade Commission and the Department of Transportation, placed strict new controls on the advertising of fare and frequent flyer programs by the airline industry throughout the United States.50 When uniformly enforced, coordinated state law enforcement policies such as NAAG's antitrust and airline advertising guidelines establish a de facto system of national law, having the effect of preemption in reverse.

## 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

## 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

# 1NR

## FTC Tradeoff 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.

#### AND, link turns case.

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Bernard Nigro Jr, Aleksandr B. Livshits is a special counsel in the Antitrust Department, resident in Fried Frank's New York office, where he is a member of the Antitrust and Competition Practice, Nathaniel L. Asker is a partner in the Antitrust Department, resident in Fried Frank's New York office, “Managing Antitrust Risk in the Biden Administration” Lexology, January 5, 2021, <https://www.lexology.com/library/detail.aspx?g=8f2eaf8e-db8e-47d5-80c5-c912e3042591>

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.

#### 2] Enforcers are power hungry---they’ll exploit new authority to the max.

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

Justice, ‘20

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

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

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

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

#### 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.

#### They’re focusing on healthcare because they know they can win those suits, but the plan forces FTC resources onto cases they’re likely to lose.

Baye ’18 - Bert Elwert Professor of Business Economics, Kelley School of Business, Indiana University, and former Director of the Bureau of Economics at the Federal Trade Commission

Michael Baye, Joshua D. Wright is University Professor, Scalia Law School at George Mason University, and former Commissioner, Federal Trade Commission, “How to Economize Consumer Protection,” The Antitrust Source, American Bar Association, <https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb18_baye_2_15f.pdf>

Ensuring that Actions Are in the Public Interest. Enforcement actions are not costless. Economic analysis can help target Commission enforcement to its best uses. The Commission has limited resources to devote across investigations, enforcement actions, and actual litigations. Economics can help the agency to enhance its enforcement efforts by identifying those areas where the Commission’s scarce resources can best protect consumers. For instance, economic analysis can help illuminate which matters under investigation involve the most consumer harm and for which of those matters agency enforcement would offer the most benefits.

Of course, comprehensive economic analysis will not be warranted in every case. But closely incorporating economic analysis into consumer protection enforcement more generally would elucidate when in-depth economic investigations are and are not useful. Economic analysis has helped us to learn where best to target resources on the antitrust side—for instance, merger retrospectives help us to better understand and predict outcomes and to identify where intervention has helped or hurt, leading the Commission to focus heavily upon, among other things, hospital mergers. Just as economic analysis has helped the Commission target its antitrust resources, it can assist in putting consumer protection resources to their best uses.

Conclusion

Consumer protection enforcement efforts are fundamentally important to a well-functioning economy, but can also have adverse, unintended consequences on competition that ultimately harm the very people they are designed to protect. Deeper integration of economic thinking and economic analysis into consumer protection matters offers value to all stakeholders—agencies, private plaintiffs, state attorneys general, and defendants—from case development to litigation and settlement.

#### 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.

#### 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.

#### Hospitals were already the priority and now they’re doubling down post Biden XO.

Liss 7/12/2021 – senior reporter at HealthCare Dive

Samantha Liss, “Hospital mergers to get added scrutiny under Biden order” Healthcare Dive, <https://www.healthcaredive.com/news/hospital-mergers-to-get-added-scrutiny-under-biden-order/603094/>

Dive Brief:

President Joe Biden on Friday announced he would call on the Department of Justice and Federal Trade Commission "to enforce the antitrust laws vigorously" in healthcare and other key industries. The White House said it's urging antitrust regulators to recognize that "the law allows them to challenge prior bad mergers that past Administrations did not previously challenge."

The executive order instructs antitrust regulators to "review and revise" their merger guidelines to ensure patients are not harmed by a potential tie-up.

The rule also directs HHS to finish implementing rules on the surprise billing ban, continue to support price transparency efforts and standardize health plans on the Affordable Care Act marketplace to make it easier to comparison shop.

Dive Insight:

Consolidation in healthcare is a persistent issue as mergers and acquisitions have continued at a steady clip for years, with a slew of research finding the unions lead to higher prices.

Biden's executive order notes that lack of competition in the healthcare market can lead to price increases without improving quality of care.

"Thanks to unchecked mergers, the ten largest healthcare systems now control a quarter of the market," the release from the White House said, citing research from Deloitte.

So far this year, there have been 27 health system mergers and acquisitions, representing total revenue of $17.2 billion. Although the number of deals are below last year's levels, the deals are larger, according to the latest report from consultancy Kaufman Hall.

Although the executive order calls on regulators to make the healthcare industry a priority, the FTC has signaled it is already doing so in various ways.

Earlier this month, the FTC said it is prioritizing healthcare as part of its enforcement strategy over the next decade. After a vote of the commissioners, the agency agreed to focus on a number of key sectors, including technology companies and healthcare, which includes hospitals, pharmacy benefit managers and pharmaceuticals companies.

Last year, the FTC said it was expanding its retrospective merger review program to consider and research new areas of study that could ultimately help the agency police future deals.

The price transparency rule requiring hospitals to publish some of the rates they negotiate with insurance companies went into effect at the beginning of this year, but various reviews have found most hospitals are not complying in full. The penalty for noncompliance is $300 a day, which researchers have said may be too low give the requirement teeth.

The executive order also tackles prescription drugs, calling on regulators to ban "pay for delay" arrangements, and instructs the FDA to work with states to import drugs from Canada.

#### Treading on new turf magnifies the link---the agency will take time AND money to develop new proficiencies

Seth B. Sacher & John M. Yun 19, Sacher is an Economist, Washington, DC; Yun is from the Antonin Scalia Law School, George Mason University, “TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT,” 26 Geo. Mason L. Rev. 1491, 1493, Summer 2019, Lexis

VII. Fallacy Seven: Not Recognizing That Their Proposals Will Strain Competition Agency Resources, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how neo-antitrust proponents view the agencies, many of their proposals run a serious risk of adversely affecting competition agency performance.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own.

First, advocates of neo-antitrust would like to see the responsibilities of the antitrust agencies expanded in a number of ways. This includes more aggressively enforcing existing antitrust laws, as well as the consideration of issues beyond those currently within that purview. Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, will require significantly more active market supervision than is currently the case. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, there is certainly a point at which expanding the antitrust agencies will have "bureaucratic" diseconomies of scale. Fully following the recommendations of neo-antitrust advocates could very well require many antitrust agencies to expand beyond some critical point, which will inevitably lead to significantly larger bureaucracies and associated inefficiencies.

#### 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.

#### Enforcers have to be selective when prosecuting---expanding scope of antitrust prosecutions would lead to wasted resources.

Houck ’19 - Special Counsel to Offit Kurman, P.A., in New York City. While Chief of New York State’s Antitrust Bureau, he served as lead trial counsel to the 21 state plaintiffs and the District of Columbia during the liability phase of the government monopolization case against Microsoft. Subsequently, he represented the California Group of states with respect to the enforcement of their Final Judgment

Stephen Houck, “Exercising Antitrust Enforcement Discretion: Android,” February 14, 2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328827>

There can be little doubt that antitrust enforcement officials have broad discretion in deciding what civil cases to prosecute. Indeed, they must be selective in the cases they bring because they have finite enforcement resources. 4

[Footnote 4 Begins

4 This dictum applies not only to smaller antitrust enforcement agencies like those of the states, but also to the Antitrust Division and Federal Trade Commission which have limited human and material resources to discharge their myriad obligations, especially given the many large transactions and other complex matters within their purview

Footnote 4 Ends]

Thus, in the currently pending AT&T/Time Warner merger litigation, the District Court refused to allow discovery into the government’s motives for prosecuting the case, noting that each merger - and, by extension, virtually any antitrust - case is unique and observing that “prosecutors have broad discretion to enforce the law, and their decisions are presumed to be proper absent clear evidence to the contrary.” 5

What, then, are the factors that shape decisions by antitrust enforcement officials in selecting which cases to pursue? As discussed below, the principal considerations are the strength of the case on the merits; consumer harm and remedies; deterrence; and protecting competition, not competitors. The discussion is based on my many years litigating a variety of antitrust matters on behalf of both plaintiffs and defendants (with and against antitrust enforcement agencies), but especially on my more than four years making such decisions as Chief of the Antitrust Bureau in the New York State Attorney General’s Office.6

II. Strength of the case on the merits

The most critical factor impacting the decision whether to bring an antitrust enforcement action is, not surprisingly, the same as that confronting any potential plaintiff: what are the chances of succeeding? In other words, is there a good case on the merits given the relevant facts and applicable law? There are, however, considerations relevant to the decision calculus of antitrust enforcement officials that do not impact a private plaintiff in the same way.

First and foremost, the paramount obligation of government officials responsible for enforcing the law, antitrust or otherwise, is to do justice. By contrast, a private plaintiff might calculate that it makes sense to file a lawsuit, even one of questionable merit, if it is sufficiently threatening or burdensome that the defendant may agree to a monetary settlement or other relief. Government officials, however, should not succumb to such a temptation. 7 As stewards of the law, their litigation decisions convey a strong message to the antitrust bar about what they believe the law to be. Additionally, a government lawsuit, even a non-meritorious one, imposes a substantial burden on the defendant and may adversely affect its competitive position. Government officials should be mindful, therefore, of the considerable power they wield and take care not to file an enforcement action absent a good faith belief that it is well-founded on the facts and the law.

Second, government officials must take into account the lost opportunity costs entailed in any decision to file a lawsuit. Antitrust matters are often factually complex. 8 Typically, investigations, and even more so litigations, are resource intensive. Moreover, since almost all antitrust matters are factually unique, how a court will apply the law to a specific set of facts is often uncertain. To be sure, antitrust enforcement officials must devote the necessary time and attention to significant matters, no matter how complex. But they should never lose sight of the fact that litigating and losing such cases means that the resources thus expended are essentially wasted and, had a better decision been made, undoubtedly could have been put to more productive uses.

#### 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.

#### 4---Reactive and ad hoc resource reallocations inevitably fail.

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

These demands are imposing formidable expectations on the shoulders of competition agencies. Meeting them successfully will not happen by chance or through a reactive and ad hoc approach. Indeed, without careful planning an ambitious enforcement program involving a large number of complex litigations being pursued concurrently, would risk agency managers and case handlers becoming overrun, and the failure of the program. Consequently, we propose a more gradual and joined-up reform strategy that anticipates and addresses implementation obstacles through the study of past antitrust experience. A common, cooperative approach to planning should lead the public agencies to select a sensible number of ambitious, complementary litigation prototypes for each agency to pursue before the program is expanded in steps.

Both federal agencies have investigative powers, but we propose that the FTC should make full use of its fact-finding powers to collect information on industries or sectors selected for investigation. Further, that before prosecutions are launched a methodology is followed for selecting appropriate cases for prosecution, taking account of past achievements and failures, the goal(s) to be achieved in bringing the case, the chance of success (especially given current doctrinal limitations) and opportunities for reshaping law and policy, the prospect for achieving those goals through antitrust action and remedies (rather than, for example, advocacy or other mechanisms), which agency is best placed to act, and whether that agency has the tools and staff available to take on the case now (taking account of other agency commitments). Essential to all of the proposals is a need for the agencies to anticipate and account for political backlash and for the agencies’ human capital to be augmented, through recognizing the skills of existing staff and through finding realistic and achievable mechanisms to retain and recruit talented staff with the skill set diversity to take on sophisticated and powerful firms, backed by formidable teams of lawyers and experts.

#### 2] The FTC’s power-hungry---DOJ disputes prove.

David A. Hyman & William E. Kovacic 20, Hyman is Professor, Georgetown University Law Center; Kovacic is Global Competition Professor of Law and Policy, George Washington University School of Law, and a Non-Executive Director of the United Kingdom’s Competition and Markets Authority, “State Enforcement in a Polycentric World,” BYU Law Review, 9/1/20, Iss. 6, https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3248&context=lawreview

A. Competition Law

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have long shared regulatory authority over certain aspects of competition law. During the 1920s, there were cases where both agencies opened files to deal with the same conduct. For obvious reasons, this dynamic created repeated conflicts—so the agencies devised informal methods of consultation to avoid duplicative parallel inquiries. This “good fences make good neighbors” approach resulted in a written liaison arrangement (commonly called “clearance”) which allowed the agencies to avoid conflicts in the exercise of their concurrent regulatory power.8 A 2002 press release describes the clearance process, as well as some of the challenges that deregulation and technological chance posed to the smooth functioning of that process:

The FTC/DOJ clearance process was formally established in 1948; refinements were implemented in 1963, 1993, and 1995. The traditional methodology for allocating matters between the agencies has emphasized historical experience in addressing specific commercial sectors. As the boundaries that separate individual sectors have blurred in the face of rapid technological change, and as deregulation measures have allowed firms to diversify, this clearance methodology has begun to break down. In a growing number of important economic sectors of mutual concern to the FTC and the DOJ, the effectiveness of the experience-based allocation methodology that has anchored past clearance agreements has diminished significantly.9

The FTC and DOJ sought to resolve this dispute by negotiating and publishing a comprehensive statement that described the division of labor the two agencies intended to follow with respect to specific market sectors, and set out how future disagreements would be resolved.10 Although the DOJ ultimately abrogated the agreement under pressure from Senator Ernest Hollings, the underlying dynamics that gave rise to these problems have not changed materially in the intervening years.11 As such, it should not come as a surprise that in 2019 the FTC and DOJ negotiated a similar agreement focusing on the tech sector. Pursuant to that agreement, the FTC agreed to focus on Facebook and Amazon, and the DOJ agreed to focus on Google and Apple.12 (The irony of two competing competition agencies repeatedly negotiating over how best to divide a market does not escape us).

Roughly two months later, a turf war broke out when the DOJ asserted it would be reviewing the behavior of “social media[] and some retail services online”—a statement that was “widely interpreted by the legal community to mean Facebook and Amazon, two companies that under the earlier agreement stood to have at least some of their conduct reviewed by the FTC.”13 Such claim-jumping heightened tensions between the two agencies, which were already inflamed by the DOJ’s recent intervention in a case the FTC brought against Qualcomm.14 Such disagreements are not new: any list would include the dispute in 2008 over the appropriate standards for enforcing Section 2 of the Sherman Act,15 the FTC’s opposition in 2007 to the granting of cert in a private antitrust case against Pacific Bell where the DOJ filed an amicus brief urging the granting of cert, the DOJ’s 2005 opposition to the granting of cert in the FTC’s case against Schering-Plough, and the DOJ’s refusal to represent the FTC before the Supreme Court in Indiana Federation of Dentists—prompting the FTC to pursue the case itself.16

# 2NR

## FTC Tradeoff DA

#### The FTC is fundamentally limited

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

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

But the FTC’s levers are limited.

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

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

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

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

**No new FTC rulings in the short term---the commission is split 2-2 along partisan lines**

**Krishan 21** – Washington Examiner

Nihal Krishan, "Biden progressive FTC agenda faces pause as Democratic member leaves," Denver Gazette, 10-3-2021, https://denvergazette.com/news/biden-progressive-ftc-agenda-faces-pause-as-democratic-member-leaves/article\_f693a392-04cf-5bb8-9e00-d2df0ef91b0c.html

Federal Trade Commission Chairwoman Lina Khan will have to pause elements of her ambitious, progressive agenda as a Democratic commissioner is leaving next week, meaning Democrats will no longer be in the majority.

The Senate Thursday confirmed FTC Commissioner Rohit Chopra to lead the Consumer Financial Protection Bureau, meaning the agency will once again be split along party lines with two Republican and two Democratic commissioners until Chopra is replaced by Biden nominee Alvaro Bedoya.

For a few months, the new dynamic will likely result in fewer controversial policy changes at the agency, more regular enforcement of the law, and a focus on investigations, cases, and actions that both parties agree on.

"There are many non-controversial areas that have always gotten things done on a bipartisan basis, like consumer protection cases, fraud, privacy, and antitrust cases," Republican Commissioner Noah Phillips told the Washington Examiner.

Phillips added that the agency had historically operated largely on a bipartisan basis, including under the leadership of Commissioner Rebecca Kelly Slaughter, who was acting chair of the trade commission for a few months before Khan took over.

Democratic Top Regulator Says Breaking Up Big Tech Could A Good, 'Conservative' Solution

He also said that he and Republican Commissioner Christine Wilson are not "monolithically aligned" and "could be split" on some issues and votes within the agency, possibly giving the Democrats an opportunity to team up with Republicans on certain issues.

Conservative antitrust lawyers say that Khan and the Democrats at the agency, while being in the majority for the past few months, have pursued an aggressive and partisan agenda thus far, pointing to their expansion of regulatory powers, tightening of the merger approval process, and revoking of certain Trump administration guidelines.

"The controversial remaking of FTC rules with new policy statements and other initiatives passed along partisan lines will no longer happen for a little while without the Democratic majority," said Neil Chilson, acting chief technologist at the trade commission for a year during the Trump administration.

Chilson said, though, that since Democrats removed the requirement to get the approval of a majority vote of the commission to start an investigation or issue a subpoena, Khan will still be able to pursue many parts of her agenda without any official agency votes.

"Khan can pursue her agenda even without a majority for many months. That's part of the reason she gave every commissioner the subpoena power for investigations, as stop gap in case she wasn't in the majority," said Chilson, who is now a senior research fellow at the Charles Koch Institute, a libertarian research organization.

Those who are in favor of Khan's antitrust agenda said they are optimistic that Chopra's replacement, Bedoya, will be confirmed soon by the Senate and that much of the Democratic agenda will proceed even without them being in the majority in the coming weeks or months.

"It's true that the FTC won't hold a lot of votes during this time and it's important to move quickly to get Bedoya confirmed, so we can start having important votes again," said Charlotte Slaiman, head of competition policy at open internet advocacy group Public Knowledge.