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### Cyber DA—1NC

#### Cybersecurity is the FTC’s top focus and priority but bringing full force is key

Fath, 10-20-2021 – Kyle, counsel in the Data Privacy & Cybersecurity Practice, "Data Privacy and Cybersecurity FTC Priorities Going Forward," National Law Review, Volume XI, Number 293, <https://www.natlawreview.com/article/data-privacy-and-cybersecurity-ftc-priorities-going-forward> -- Iowa

The Federal Trade Commission (FTC) has made it clear: data privacy and cybersecurity are now a priority and will be for years to come. In the wake of PrivacyCon 2021, the FTC’s sixth annual privacy, cybersecurity and consumer protection summit, held this summer, the FTC finally took official and sweeping action on privacy and cybersecurity. In particular, the Commission recently designated eight key areas of focus for enforcement and regulatory action, three of which directly implicate privacy, cybersecurity, and consumer protection. Below, we discuss the FTC’s action and what it means for businesses, the three key areas of interest to consumer privacy that are now in the FTC’s spotlight, as well as their relation to state privacy legislation and their anticipated impact to civil litigation. Full details on PrivacyCon 2021 and the FTC’s resolutions following the summit can be found on the FTC’s website, linked here for your convenience.

The FTC’s Actions and Areas of Focus

In mid-September, the FTC voted to approve a series of resolutions, directed at key enforcement areas, including the following, each discussed in further detail below:

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

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

Deceptive and Manipulative Conduct on the Internet: This includes, but is not limited to, the “manipulation of user interfaces,” including but not limited to dark patterns, also the subject of a recent FTC workshop.

The approval of this series of resolutions will enable the Commission “to efficiently and expeditiously investigate conduct in core FTC priority areas. Through the passage of the resolutions, the FTC has now directed that all “compulsory processes” available to it be used in connection with COPPA enforcement. This omnibus resolution mobilizes the full force of the FTC for the next ten years and gives FTC staff full authority to conduct investigations and commence enforcement actions in pursuit of this goal. The FTC has offered very little elaboration on this front, however, regarding how it will use such “compulsory processes,” which include subpoenas, civil investigative demands, and other demands for documents or testimony.

What does seems clear, however, is that the FTC is buckling down on the enforceability of its own actions. Previous remarks by Chair Lina M. Khan before the House Energy and Commerce Committee expressed frustration at the frequent hamstringing of the agency at the hands of courts in its enforcement efforts in the past. With this declaration of renewed energy, the FTC is summoning all the power it can to do its job, and we should expect to see an energized FTC kick up its patrol efforts in the near future. Businesses that conduct activities that implicate these renewed areas should be aware of the FTC’s focus and penchant for investigations and enforcement in such areas.

#### The plan derails the FTC

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

D. Political Backlash

As we have already indicated, the government’s prosecution of high stakes antitrust cases often inspires defendants to lobby elected officials to rein in the enforcement agency. Targets of cases that seek to impose powerful remedies have several possible paths to encourage politicians to blunt enforcement measures. One path is to seek intervention from the President. The Assistant Attorney General of the Antitrust Division serves at the will of the President, making DOJ policy dependent on the President’s continuing support. The White House ordinarily does not guide the Antitrust Division’s selection of cases, but there have been instances in which the President pressured the Division to alter course on behalf of a defendant, and did so successfully.125

The second path is to lobby the Congress. The FTC is called an “independent” regulatory agency, but Congress interprets independence in an idiosyncratic way.126 Legislators believe independence means insulation from the executive branch, not from the legislature. The FTC is dependent on a good relationship with Congress, which controls its budget and can react with hostility, and forcefully, when it disapproves of FTC litigation—particularly where it adversely affects the interests of members’ constituents. Controversial and contested cases may consequently be derailed or muted if political support for them wanes and politicians become more sympathetic to commercial interests. The FTC’s sometimes tempestuous relationship with Congress demonstrates that political coalitions favoring bold enforcement can be volatile, unpredictable, and evanescent.127 If the FTC does not manage its relationship with Congress carefully, its litigation opponents may mobilize legislative intervention that causes ambitious enforcement measures to the founder.

#### **FTC is vital to stopping imminent Log4j attacks against critical infrastructure**

Pfefferkorn, 1-13-22 – Riana, research scholar at the Stanford Internet Observatory. “Why the FTC is telling companies to patch Log4j vulnerabilities,” Brookings Institute – Tech Stream, <https://www.brookings.edu/techstream/why-the-ftc-is-telling-companies-to-patch-log4j-vulnerabilities/> -- Iowa

For cybersecurity workers, 2021 ended with a bang. On Dec. 9, a severe zero-day vulnerability was publicly disclosed in Log4j, a widely used Java logging utility. Dubbed Log4Shell, the flaw allowed an attacker to remotely gain control of a vulnerable device that used the utility. Given Java’s ubiquity, this meant that hundreds of millions of devices were at risk, ranging from servers for enterprise software, cloud hosting, and web applications, to consumer devices such as smart TVs and internet-connected security cameras. What’s more, the flaw was easy to exploit, rendering it accessible to bad actors with no need for high levels of skill, sophistication, or resources. The head of the U.S. Cybersecurity and Infrastructure Security Agency (CISA), Jen Easterly, called the Log4j flaw one of the most serious vulnerabilities she’d ever seen.

As 2022 begins, the crisis shows no sign of abating. Remediation efforts continue, while attackers are probing systems looking for Log4j vulnerabilities. On Jan. 3, security experts at Microsoft wrote that they expect this issue “to have a long tail for remediation, requiring ongoing, sustainable vigilance.” The company has already observed state-backed hackers from China, Iran, and North Korea attempting to exploit the Log4j vulnerability, and Easterly foresees that attackers will keep doing so “well into the future.” The coming year is likely to see more attacks on critical infrastructure, more ransomware attacks against public and private networks—and increased risk to the security of Americans’ personal, financial, and other sensitive data. That’s because, like it or not, private-sector companies hold vast amounts of information about us, on systems whose security is beyond our control. Yet the United States doesn’t yet have a generally applicable federal law that would impose minimum data security requirements on the private sector. So how will our government defend Americans’ data security against the Log4j threat?

In the absence of broad data-security rules, several U.S. regulators are stepping up to address Log4j. CISA, for example, has mandated that the sprawling array of civilian federal computer networks be updated to address the Log4j vulnerability. The deadline to do so was Dec. 23, but the work is ongoing. The Federal Trade Commission, for its part, is engaging with the private sector by warning companies that they could be subject to legal action if they fail to remediate the Log4j vulnerability.

On Jan. 4, the FTC published a blog post reminding companies that they have a legal “duty to take reasonable steps to mitigate known software vulnerabilities.” It threatened to bring the full force of the agency’s authority against “companies that fail to take reasonable steps to protect consumer data from exposure as a result of Log4j, or similar known vulnerabilities in the future.” The warning cited the $700 million it cost Equifax to settle multiple enforcement actions stemming from a 2017 data breach that affected 147 million people due to the company’s failure to patch a known security vulnerability.

You might be wondering: why the FTC? And why Jan. 4, almost four weeks after Log4Shell’s public disclosure? CISA has been all over the Log4j vulnerabilities since at least Dec. 11. Indeed, the FTC’s post encourages companies to consult CISA’s guidance on mitigating them. What’s the use of this somewhat belated contribution to the conversation?

The reason is that the FTC has enforcement powers over private-sector wrongdoing that CISA doesn’t. By law, CISA’s remit is limited to the federal government and critical infrastructure, even though its alerts and guidance are used by others outside of those sectors too. Controversially, the young agency has little in the way of enforcement authority outside of the federal government; proposed expansions thereof still focus on critical infrastructure, not the private sector writ large. By contrast, the FTC has over 80 years of experience acting as the nation’s consumer protection watchdog. Federal law gives it the power to police and punish “unfair or deceptive acts or practices in or affecting commerce.” In recent years, the agency has relied on that authority to assume the mantle of Americans’ data-security defender. This application of its authority was challenged in court, but the agency prevailed. It’s brought multiple enforcement actions in the area of data security since then under both the “unfair” and “deceptive” prongs of the law. At this point, it’s well-established that shoddy cybersecurity is within the scope of the FTC’s enforcement powers.

In evaluating companies’ data security practices, the agency uses “reasonableness” as its touchstone. The trouble is that what’s “reasonable” or “unreasonable” is hard to pin down. Best practices change over time as both technology and threats evolve. A cybersecurity program that’s reasonable for a tiny company might be unreasonable for a huge one. And even otherwise comparable companies may not be similarly situated in a particular circumstance such as the Log4j issue: There’s a difference between companies that make the conscious decision not to patch Log4j and just accept the risk (to themselves and their customers), those that can’t patch for whatever reason, and those that don’t patch because they don’t even realize they use Log4j. The FTC’s blog post doesn’t draw these distinctions, but they should factor into any FTC analysis of whether to institute enforcement proceedings over Log4j lapses.

If a company has no way of knowing that the FTC considers a particular security practice “unreasonable,” that’s a problem for the agency. An important concept in U.S. law is that of “notice”: Everyone has the right to know, in advance, what conduct will subject them to government punishment, so they can conform their behavior accordingly. It’s not OK for the government to penalize conduct which it hadn’t put the public “on notice” was illegal.

That’s why the FTC must give notice of what business acts or practices are “unfair” under the law. It can do this by formally promulgating rules or by litigating on a case-by-case basis to establish an act or practice as “unfair.” In the cybersecurity context, companies targeted by the FTC have sometimes argued that the agency hadn’t given fair notice that their security practices were unreasonable. Sometimes the courts have rejected this argument, as in the FTC’s case against Wyndham Hotels, which had been hacked three times and had used security practices that the FTC had specifically denounced in its prior guidance and adjudications. Since the agency hasn’t batted a thousand in court, however, in the last few years it’s made an effort to improve its data security guidance to companies.

It’s this history that underlies the Jan. 4 missive, which the FTC’s chief technologist’s office posted to the “Tech@FTC” blog and disseminated on social media. I interpret this as the FTC’s attempt to put the country on notice that failure to patch the Log4j vulnerabilities risks subjecting a company to punishment. That said, as one cybersecurity law scholar observed, a blog post by the chief technologist’s office does leave something to be desired in terms of formality. That could leave the FTC open to the argument that the blog post doesn’t provide sufficient notice, unlike, say, official agency rulemaking. Nevertheless, should any company subsequently claim it didn’t know it was supposed to patch a flaw that’s typically been described in terms that “border on the apocalyptic,” the FTC can point to this warning, together with its other, formal past actions such as the Equifax proceeding, to refute that assertion.

#### That goes nuclear, even if it fails

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Not hundred per cent of the dialogue has been frozen, fortunately. Certain informal, mostly offthe-record, meetings of US and Russian experts on cyber agenda continue taking place, both through Track 2 and Track 1.5. One of the most intellectually stimulating meetings, with frank exchanges, took place in Vienna in December 2018. The report produced after the meeting stressed “the significant risk […] that cyber-attacks could conceivably lead to a military escalation that may further trigger a nuclear weapons exchange, a fact that became more explicit with the adoption of the current Nuclear Posture Review. This issue gets complicated given that third parties may have the capabilities to invoke a cyber conflict between Russia and the United States. Whether a country or a non-state actor, they could put the two countries on the verge of an armed conflict by attacking critical infrastructure of either of them and making it look as if the aggressor were the other one”[22]. However, one should have no illusion: such informal meetings may be fully fruitful only when their reports and policy recommendations are utilized by the governments. And for that, a warmer climate in bilateral relations is a must. So far, we see exactly the opposite: mercury falling to freezing levels.

Risk of cyber clashes growing into a chaotic global cyber war has been emphasized by the UN Secretary-General Antonio Guterres in his Agenda for Disarmament: “Malicious acts in cyberspace are contributing to diminishing trust among States… States should implement the recommendations elaborated under the auspices of the General Assembly, which aim at building international confidence and greater responsibility in the use of cyberspace.[23]” However, as the members of the US-Russian Track 1.5 working group on strategic stability recently concluded, “without a constructive dialogue on cyber issues between the United States and Russia, the world would most likely fail to agree on any norms of responsible behavior of states in cyber space”[24].

Do we really have to survive a cyber equivalent of the Cuban Missile Crisis to realize the importance of achieving some kind of agreement on cyber issues, and on the broader agenda of international information security?[25] Or is that kind of talk plain old alarmism?

I don’t want to sound a fatalist, but I am even less keen on sounding like an ostrich that’s buried its head in the sand. We cannot ignore the obvious: whether the world’s most powerful actors like it or not, the world is sliding to another major crisis like the one in 1962. The cyber war is already raging. There are no rules of engagement in that war. The uncertainty is high. The spiral of tension is getting out of control. The cyber arms race is gaining momentum. And there are no guarantees that the next crisis will be controllable, or that it will result in a catharsis as far as international information security regulation is concerned. There’s no telling what will happen once the cyber genie is out of the bottle.

### Undisclosed Advantages Bad

#### New, undisclosed advantages are bad –

#### Education–preparation enables more effective research, clash and depth–new Affs only have negative educational externalities—forces zero-sum choices between flowing and reading at the expense of the 2NR

#### Disclosing the aff when we ask after the pairing rewards new research while allowing some neg prep.

### T

#### “Private sector” means all non-government businesses

Cambridge Dictionary N.D. (Cambridge Dictionary, No Date, Cambridge University Press has been publishing dictionaries for learners of English since 1995, this is the second definition, “private sector,” [https://dictionary.cambridge.org/us/dictionary/english/private-sector)](https://dictionary.cambridge.org/us/dictionary/english/private-sector)1st)

private sector

noun [[ C usually sing ]](https://dictionary.cambridge.org/us/help/codes.html)

US

 /ˈprɑɪ·vɪt ˈsek·tər/

all the [businesses](https://dictionary.cambridge.org/us/dictionary/english/business) that are not [owned](https://dictionary.cambridge.org/us/dictionary/english/own) and [controlled](https://dictionary.cambridge.org/us/dictionary/english/controlled) by the [government](https://dictionary.cambridge.org/us/dictionary/english/government):

#### “Antitrust laws” are aimed at all businesses in the marketplace---defer to the Supreme Court

Breyer 15 (Stephen Breyer, associate justice on the Supreme Court, April 21, 2015*, ONEOK, INC., ET AL. PETITIONERS v. LEARJET, INC., ET AL*., 7-2 Opinion of the Supreme Court of the United States, https://www.supremecourt.gov/opinions/14pdf/13-271\_j4ek.pdf)

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. See ibid. They are far broader in their application than, for example, the regulations at issue in Northern Natural, which applied only to entities buying gas from fields within the State. See 372 U. S., at 85–86, n. 1; contra, post, at 5–6 (stating that Northern Natural concerned “background market conditions”). This broad applicability of state antitrust law supports a finding of no pre-emption here.

#### Violation---the plan is specific to pharmaceutical patents.

#### That’s a voting issue for limits and ground---allowing specific sectors shrinks neg ground by blasting links to core generics like business confidence and innovation---forces us to go for sketchy counterplans every round, which makes debates stale and decreases the quality of clash.

### Cap K

#### Profit-driven public health is unsustainable---causes war, disease, and collapse

Bhabani Shankar Nayak 20, political economist and Professor in Business Management and Programme Director of Business, Management and Marketing, University for the Creative Arts, UK, “Globalization Of Capitalist Crises – OpEd,” Eurasia Review 7/30/20, https://www.eurasiareview.com/30072020-globalization-of-capitalist-crises-oped/

The post pandemic economic recovery looks uncertain and the economic growth projections look gloomy in every stretch of policy paradigm within capitalist imaginations. The strong and existing multilateral cooperation within the Westphalian international system is falling apart and facing its existential threats due to its entrenched Eurocentric bias, democratic deficits and institutional dominance by the erstwhile colonial powers. The world is moving into a long-term crisis within capitalism. The capitalist system has failed to offer any viable alternatives to recover from the crises. It is rather deepening the globalisation of crises and miseries among the masses. The predicaments of hunger, homelessness and unemployment are growing. The idea of accessibility, availability and distribution of essential goods and services are becoming difficult. The markets are shrinking and sinking. Both the producers and consumers are facing the crises in their everyday lives.

The follies of globalisation and its flickers continue to be in denial mode. These illiberal charlatans of power live in the cocoons of their privileged ghettos and argue vehemently that the current crisis is not a capitalist crisis or crisis of globalisation. There is concocted propaganda that the crisis is a product of greedy and irrational individuals, inefficient governments and unproductive states. The free market led systems are only viable and competent alternatives. These reactionary and ahistorical narratives help capitalism by arguing that the current economic, social, political, environmental and Coronavirus led global health crises are products of state and government failures.

The right-wing economists, liberal commentators, salary seeking intellectuals and consultants in different thinktanks continue to glorify and provide ideological justification to capitalist globalisation by hiding its absolute failures in deepening egalitarian democracy, peace and prosperity.

The globalisation of crises under capitalism serves four objectives of the ruling and non-ruling classes. Firstly, these ridiculous propaganda makes people reject the state and government they have formed with the help of their collective will. Secondly, it diminishes citizens faith in their own abilities and own intellect. It weakens and diverts them to analyse and reflect on their own realities. Thirdly, it weakens the state and destroys the capabilities of the governments as instruments of social, economic, political and cultural change for common good based on scientific spirit and progressive future. Finally, it destroys democratic cultures by replacing it with authoritarianism that is concomitant with the requirements of capitalism for its growth. In this way, the fake narratives of reactionary politics and global capitalism helps to achieve these four specific objectives, which are central pillars in establishing authoritarianism accelerated by crises. The globalisation of capitalist crises means globalisation of authoritarian politics and vice versa.

The world is facing six major immanent capitalist crises i.e. i) Coronavirus pandemic led global health crises, ii) environmental crises, iii) economic crises, iv) political crises, v) military crises, and vi) crises of governance. These six crises are integral to each other. One crisis triggers the other. It is impossible to address them separately. Therefore, it needs an integrated and pluriversal approach to understand and address these crises together and find reliable alternatives.

Coronavirus pandemic led global health crises

The Coronavirus pandemic reveals that spill over of virus from their natural habitat to human body is associated with the burgeoning wildlife trade, deforestation and loss of natural wildlife habitat due to over exploitation of nature under capitalism. The monetisation of nature for profit is the foundation of health pandemics.

According to a recent research, two viruses enter into human body from their natural hosts every year for a century now. The Coronavirus led health crisis and other forms of global health crises are products of capitalism, which considers human body and nature as resources to be used for the expansion of capitalist profit. It also uses sickness as business opportunities for health insurance and pharmaceutical corporations. The profit driven healthcare and economic system breeds health crises across the globe. The Coronavirus led pandemic is aggravating existing health crises due to privatisation of public health infrastructures and corporatisation of health services. The alternative is to look at health as human rights and abandon the economic model that seeks profit from illness and business of sickness. The nationalisation and universalisation of healthcare is the only alternative.

Environmental crises

The unprecedented environmental crisis is not natural. The environment is degraded and destabilised by the growth of a desire-based society under capitalism. The magnitude and severity of environmental crisis reveals that capitalist economic system creates grave imbalance within the ecosystem by over exploiting natural resources. From global warming to pollutions and contaminations are the products of the productivist and utilitarian ideology of capitalism, which monetised the environment for the maximisation of profit. It has ruined the land, water and air. The outbreak of air and waterborne diseases are products of environmental crisis manufactured by capitalist system. The irreparable damage to environment is a threat to human lives. The environmental crisis aggravates global economic and health crisis. The reversal of profit driven desire-based capitalist economy is inevitable for a sustainable economic and social future.

Economic crises

Economic crisis is integral to capitalism. The faux neoliberal narrative of austerity as an economic policy alternative to recover from economic crisis is the logic of market on steroids. Austerity is not an economic policy but it is an economic project of the capitalist classes, which enforces economic miseries, political despondency and social alienation on majority of population. The voodoo of austerity and its alconomics culture reproduces crisis and empowers market forces by transferring public resources to the private pockets of the capitalist classes. The only way to recover from the crisis in short run is to abandon austerity driven neoliberal economic policies. The permanent alternative from crisis is to destroy capitalism and all its cultures with the help of popular struggles for a sustainable economy and society based on community and democratic control over resources.

Political crises

The neoliberal shift in economy led to the shift from welfarists social democracy to bourgeois democracy, where uninhibited market forces rule with their invisible free hand. The growth of island of prosperity and continents of miseries are the net outcomes of such a system, which led to the declining legitimacy of the democratic political forces. In this context, there is the rise of reactionary religious and conservative social forces are not only filling the vacuum but also providing legitimacy to the rule of capitalist politics in the name of culture, religion, and nationalism. The recent political upheavals within liberal democracies in different parts of the globe reflects this right-wing shift and reactionary trend in politics. The political crisis is an opportunity for the capitalist classes to dismantle all democratic norms and values in support of authoritarianism. In this decisive period of structural crisis of capitalism, it is only authoritarian politics that can help capitalism to further accumulate at this stage of its growth. The collective politics with collective vision is the only alternative for the survival of the masses.

Military crises

The authoritarian and reactionary political regimes breed conflicts, disputes and wars to stay in power and control resources. The global growth of nationalist war hysteria is producing military crises in land, ocean, air and space. It is also fuelling international arms trade. The colonial, imperialist and capitalist powers consider military crisis is an opportunity to expand their economic base by selling weapons of mass destruction. The guns and capitalist globalisation move together. The military-industrial complex is deepening the idea of security state led by the defence forces that ensures security to capital at the cost of human lives. The states and governments are spending all their resources on military equipment when citizens are suffering in hunger and homelessness. The military crisis puts citizens welfare in the dustbin. The global growth of defence spending is a threat to environment, human lives, peace and prosperity in the world.

#### Extinction---the alt is to organize around nodes of anti-capitalist resistance.

Monbiot, 19 – George, author, *Guardian* columnist and environmental campaigner. “Dare to declare capitalism dead – before it takes us all down with it,” *The Guardian*, <https://www.theguardian.com/commentisfree/2019/apr/25/capitalism-economic-system-survival-earth> -- Iowa

For most of my adult life I’ve railed against “corporate capitalism”, “consumer capitalism” and “crony capitalism”. It took me a long time to see that the problem is not the adjective but the noun. While some people have rejected capitalism gladly and swiftly, I’ve done so slowly and reluctantly. Part of the reason was that I could see no clear alternative: unlike some anti-capitalists, I have never been an enthusiast for state communism. I was also inhibited by its religious status. To say “capitalism is failing” in the 21st century is like saying “God is dead” in the 19th: it is secular blasphemy. It requires a degree of self-confidence I did not possess.

But as I’ve grown older, I’ve come to recognise two things. First, that it is the system, rather than any variant of the system, that drives us inexorably towards disaster. Second, that you do not have to produce a definitive alternative to say that capitalism is failing. The statement stands in its own right. But it also demands another, and different, effort to develop a new system.

Capitalism’s failures arise from two of its defining elements. The first is perpetual growth. Economic growth is the aggregate effect of the quest to accumulate capital and extract profit. Capitalism collapses without growth, yet perpetual growth on a finite planet leads inexorably to environmental calamity.

Those who defend capitalism argue that, as consumption switches from goods to services, economic growth can be decoupled from the use of material resources. Last week a paper in the journal New Political Economy, by Jason Hickel and Giorgos Kallis, examined this premise. They found that while some relative decoupling took place in the 20th century (material resource consumption grew, but not as quickly as economic growth), in the 21st century there has been a recoupling: rising resource consumption has so far matched or exceeded the rate of economic growth. The absolute decoupling needed to avert environmental catastrophe (a reduction in material resource use) has never been achieved, and appears impossible while economic growth continues. Green growth is an illusion.

A system based on perpetual growth cannot function without peripheries and externalities. There must always be an extraction zone – from which materials are taken without full payment – and a disposal zone, where costs are dumped in the form of waste and pollution. As the scale of economic activity increases until capitalism affects everything, from the atmosphere to the deep ocean floor, the entire planet becomes a sacrifice zone: we all inhabit the periphery of the profit-making machine.

This drives us towards cataclysm on such a scale that most people have no means of imagining it. The threatened collapse of our life-support systems is bigger by far than war, famine, pestilence or economic crisis, though it is likely to incorporate all four. Societies can recover from these apocalyptic events, but not from the loss of soil, an abundant biosphere and a habitable climate.

The second defining element is the bizarre assumption that a person is entitled to as great a share of the world’s natural wealth as their money can buy. This seizure of common goods causes three further dislocations. First, the scramble for exclusive control of non-reproducible assets, which implies either violence or legislative truncations of other people’s rights. Second, the immiseration of other people by an economy based on looting across both space and time. Third, the translation of economic power into political power, as control over essential resources leads to control over the social relations that surround them.

In the New York Times on Sunday, the Nobel economist Joseph Stiglitz sought to distinguish between good capitalism, which he called “wealth creation”, and bad capitalism, which he called “wealth grabbing” (extracting rent). I understand his distinction. But from the environmental point of view, wealth creation is wealth grabbing. Economic growth, intrinsically linked to the increasing use of material resources, means seizing natural wealth from both living systems and future generations.

To point to such problems is to invite a barrage of accusations, many of which are based on this premise: capitalism has rescued hundreds of millions of people from poverty – now you want to impoverish them again. It is true that capitalism, and the economic growth it drives, has radically improved the prosperity of vast numbers of people, while simultaneously destroying the prosperity of many others: those whose land, labour and resources were seized to fuel growth elsewhere. Much of the wealth of the rich nations was – and is – built on slavery and colonial expropriation.

Like coal, capitalism has brought many benefits. But, like coal, it now causes more harm than good. Just as we have found means of generating useful energy that are better and less damaging than coal, so we need to find means of generating human wellbeing that are better and less damaging than capitalism.

There is no going back: the alternative to capitalism is neither feudalism nor state communism. Soviet communism had more in common with capitalism than the advocates of either system would care to admit. Both systems are (or were) obsessed with generating economic growth. Both are willing to inflict astonishing levels of harm in pursuit of this and other ends. Both promised a future in which we would need to work for only a few hours a week, but instead demand endless, brutal labour. Both are dehumanising. Both are absolutist, insisting that theirs and theirs alone is the one true God.

So what does a better system look like? I don’t have a complete answer, and I don’t believe any one person does. But I think I see a rough framework emerging. Part of it is provided by the ecological civilisation proposed by Jeremy Lent, one of the greatest thinkers of our age. Other elements come from Kate Raworth’s doughnut economics and the environmental thinking of Naomi Klein, Amitav Ghosh, Angaangaq Angakkorsuaq, Raj Patel and Bill McKibben. Part of the answer lies in the notion of “private sufficiency, public luxury”. Another part arises from the creation of a new conception of justice based on this simple principle: every generation, everywhere, shall have an equal right to the enjoyment of natural wealth.

I believe our task is to identify the best proposals from many different thinkers and shape them into a coherent alternative. Because no economic system is only an economic system but intrudes into every aspect of our lives, we need many minds from various disciplines – economic, environmental, political, cultural, social and logistical – working **collaboratively** to create a better way of organising ourselves that meets our needs without destroying our home.

Our choice comes down to this. Do we stop life to allow capitalism to continue, or stop capitalism to allow life to continue?

### Taxes CP

#### The United States federal government should expand the application of its core antitrust laws to anticompetitive settlements related to pharmaceutical patents enforced by applying a substantial progressive tax on rents from those practices.

#### Solves without prohibition through a tax on anticompetitive rents---causes follow-on.

Yonah ’21 [Reuven Avi; July 29; Irwin I. Cohn Professor of Law and Director of the International Tax LLM Program at the University of Michigan Law School, PhD in History from Harvard University, AM in History from Harvard University, JD from Harvard Law School; Tax Notes Federal, “A New Corporate Tax,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3743202]

If we can regulate our corporations simply through the medium of taxation, we can destroy every trust in a fortnight. It would be a great deal better for the Finance Committee to turn its attention to the imposition of such a tax upon corporations and the persons who actually need regulation, who are exercising powers that are injurious to the American people, destroying competition and invading our prosperity, than to attempt to levy a revenue tax upon all the little shareholders of all the little corporations throughout the length and breadth of the United States.1

I. Introduction: Why Tax Corporations?

Should the U.S. tax corporations? For many academic and political observers, the answer is no.2 The corporate tax is a strange tax because by definition it is not borne by the corporate taxpayer, because corporations are legal entities and cannot economically bear the burden of taxation. Moreover, unlike other indirect taxes (for example, consumption taxes that are passed on to consumers or the employer’s portion of the payroll tax that is passed on to employees), economists after over 50 years of debate are not sure who bears the burden of the corporate tax: shareholders, all capital providers, corporate employees, or consumers. The most likely answer is that all of the above do in varying ratios depending on the current elasticities of capital, labor, and demand in the global economy, and on the degree to which the U.S. economy is open.3

The general public, on the other hand, is convinced that the corporate tax is borne by large corporations, and politicians respond by maintaining the corporate tax as a tax paid by someone other than the voters. But this fiscal illusion, the opponents of the tax pronounce, is hardly a valid reason to maintain a very complicated tax that is the cause of significant deadweight loss (changes in behavior caused by the tax) and transaction costs (tax compliance and avoidance costs).4

This article will argue that we do need a corporate tax, but not for the traditional reason, which is that if we do not tax corporations, rich shareholders will be able to defer tax on their income. Instead, the article will argue that we should tax corporations for the same reason we originally adopted the corporate tax in 1909: to limit the power and regulate the behavior of our largest corporations, which are monopolies or quasi-monopolies that dominate their respective fields and drive their competitors out of business (the best example being Big Tech — that is, Amazon, Apple, Facebook, Google, and Microsoft). But if that is the reason to have a corporate tax, it should have a different structure from the current flat corporate tax of 21 percent. Instead, the tax should be set at zero for normal returns by allowing the expensing of physical capital, but at a sharply progressive rate for supernormal returns (rents), culminating at a rate of 80 percent for income above $10 billion a year.5 After this introduction, Section II of the article discusses and rejects the traditional reason given for taxing corporations. Section III argues that the only reason to maintain a corporate tax is as a tax on monopolistic rents. Section IV develops this proposal in some detail and Section V provides a conclusion.

II. A Tax on Shareholders?

The traditional reason for taxing corporations is that if we did not, rich shareholders would be able to earn their income through corporations and defer the tax until there is a dividend distribution or they sell the shares, or even avoid the tax altogether by holding their shares until death and having their heirs sell at a stepped-up basis.

That is not a valid reason for keeping alive a tax as complicated and costly as the corporate tax, which is why many academic observers have called for its abolition. Given that the corporate tax rate has been sharply cut to 21 percent and that the revenue from the corporate tax is at $230 billion (in 2019) and only a small fraction (below 7 percent) of total federal revenues of $3.4 trillion, it does not appear impossible that some future president could successfully argue for abolishing the corporate tax, despite its public popularity.

There are three reasons why the corporate tax is not a valid way of taxing shareholders. First, despite over 50 years of economic research, economists are still unsure of who bears the burden of the corporate tax.6 Plausible candidates are (a) the shareholders, if the corporate tax reduces corporate profits available to them as dividends or is reflected in the price of their shares (although even that assumes that the tax was not priced in when they bought the shares, in which case only the original shareholders in an initial public offering bear the burden); (b) all capital providers, if the tax causes capital to flow from the corporate to the noncorporate sector, which is influenced by the ever-changing relative tax rates on corporate versus passthrough businesses; (c) employees, if the corporations can effectively reduce wages in response to the tax by, for example, threatening to move production overseas; or (d) consumers, if corporations enjoy a monopolistic or quasimonopolistic position and therefore can raise prices to include the tax without fear of being undercut by competition. The true answer is probably that all of the above bear the burden in different ratios over time depending on the elasticities (response to the tax) of capital, labor, and demand.

Second, as economists have recently emphasized, many shareholders are tax exempt. In fact, a recent study has shown that 70 percent of U.S. equities are held by tax-exempt institutions or individuals (for example, through retirement accounts).7 The authors of the study argue that this is a reason to tax corporations because otherwise capital would not be taxed at all, but it seems to me that if we believe in the reason that we exempt these individuals and institutions from tax, there is no reason to tax them indirectly through a corporate tax (assuming that they do in fact bear the tax burden).

Third, even for taxable shareholders, there are better ways of taxing the shareholders directly, thereby eliminating the incidence issue. For closely held corporations, the answer is to tax the shareholders on their income earned through the corporation — that is, to make passthrough treatment mandatory — because there are no administrability issues for those corporations and most of them are passthroughs in any case. For publicly traded corporations and partnerships, passthrough taxation is not administratively feasible. Instead, the shareholders should be taxed on the changing value of their shares, because liquidity and valuation are not issues for publicly traded shares, and the same tax can be collected on a withholding basis on foreign shareholders and if necessary on tax-exempt domestic shareholders (the government can impose a lien on some of the shares and sell them if the tax is not paid by foreign shareholders).8 Pre-enactment unrealized appreciation can be reached by applying the tax in the year of enactment to the difference between the end-ofyear share value and original basis.

For these reasons, if the only rationale for having a corporate tax is to indirectly tax shareholders, it is not clear that it is worth fighting for against the many voices calling for its abolition. But that is in fact not the only rationale, as the next section explains.

III. A Tax on Monopolistic Rents

When the corporate tax was enacted in 1909, taxing shareholders was not the reason. In fact, taxing shareholders would in 1909 have been unconstitutional under the Supreme Court’s 1895 Pollock decision9 which both President Taft and then-Senate Majority Leader Nelson Aldrich believed precluded a tax on shareholders, although to placate the Progressives they also introduced a constitutional amendment to allow Congress to tax individual income, which neither expected to pass. Instead, the corporate tax was designated as an excise tax on the privilege of conducting business through the corporate form, since the Supreme Court had held such excise taxes on corporations to be constitutional in 1898; but neither Taft nor Aldrich thought that was a good reason to impose a federal tax on corporations, because the privileges of the corporate form derived from state, not federal, law.

Instead, as I have shown elsewhere by examining the legislative history, the corporate tax of 1909 was primarily seen as a vehicle for limiting the power of and regulating the great trusts such as John D. Rockefeller’s Standard Oil Co. or J.P. Morgan’s U.S. Steel Corp.10 The Taft administration was at the same time litigating against Standard Oil and American Tobacco (among many other trusts) to break them up under the Sherman Act of 1890, but the prospects of the litigation were uncertain (the government had lost the E.C. Knight case in the Supreme Court in 1895 and only narrowly won the Northern Securities case in 1904). Thus, as Taft said in his message to Congress, we should have a corporate tax to curb the trusts:

Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power.11

The corporate tax of 1909 had several features that were considered potentially effective as antitrust measures. First, even though the tax rate was only 1 percent, both supporters and opponents knew the rate could be increased (as it ultimately was, reaching 52.8 percent in 1968) and the threat of those changes might deter the trusts. Second, the tax returns were to be made public, thus alerting the press and the voters to which corporations were the most profitable and therefore the likeliest targets for antitrust enforcement actions. Third, while intercorporate dividends were exempt (a controversial feature, because the trusts were holding corporations), there were no tax-free reorganizations and no consolidated returns.

Unfortunately, all these antitrust features of the corporate tax were eliminated by 1928. The publicity feature was eliminated in 1910, taxexempt reorganizations were adopted in 1919, and consolidated returns were made elective in 1928. Also, various pro-corporate provisions like accelerated depreciation, percentage depletion, and the foreign tax credit were adopted in the same period. While the Franklin D. Roosevelt administration limited the dividends received deduction and tax-exempt reorganizations in the 1930s, it never eliminated them, and subsequent enactments like investment tax credits reduced the corporate tax even further. As for the rate, it never exceeded 52.8 percent (as opposed to the individual rate, which reached 94 percent during World War II and was still as high as 70 percent when Ronald Reagan was elected president). The effective corporate tax rate was much lower because of interest and depreciation deductions and investment tax credits. In 1986 the corporate rate was reduced from 46 percent to 34 percent (later raised to 35 percent), and despite various base-broadening measures, the effective corporate rate remained low. Corporate tax revenues consequently declined from 25 percent of total federal revenues in the 1960s to less than 10 percent in the 2000s. Finally, in 2017 the corporate tax rate was reduced to 21 percent, and it was a flat rate — all the previous progressivity, which applied only to small corporations with revenues below $15 million, was eliminated.

Other than the rates, we are unlikely to reverse these pro-trust features of the corporate tax, because they are old, well established, and benefit small as well as large corporations, which are not the proper subject of a corporate tax designated to limit the power of monopolies and quasi-monopolies.

Recent research by Edward Fox has shown, however, that most of the existing corporate tax falls on supernormal returns.12 Fox shows this by demonstrating from corporate tax returns for 1995-2013 that if expensing of capital expenditures were allowed before 2017, corporate tax revenues would have been almost identical to actual revenues. Because (as discussed later) expensing is equivalent to exempting the normal return, that means that the corporate tax has historically fallen primarily on supernormal returns, or rents. This finding is consistent with Laura Power and Austin Frerick’s evidence from 2016 that excess returns to corporations have been increasing over time.13 In the current environment, because expensing is in fact allowed until 2022, that finding is even more likely to be true.

In that case, and if the main reason to have a corporate tax is to tax rents and limit monopolies, then the tax should have a different rate structure than we have now. I would suggest that the effective tax rate on normal corporate profits be zero. On supernormal returns, because the main concern is monopolies and quasi-monopolies, the tax should be progressive, with a very high tax rate (for example, 80 percent) for profits above a very high threshold (for example, $10 billion). In between, there should be a series of graduated tax rates, similar to the individual rate schedule before 1980.

#### Independent use of taxes as a regulatory tool mainstreams them---solves extinction

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1. Introduction

Environmental problems are of all times. Yet, over the past two decades, climate change, air pollution, natural resource depletion and biodiversity loss have reached the status of worldwide persistent threats (Foxon, Reed, and Stringer 2009). There is increasing consensus in the literature that common policy responses, which are in the main incremental, will not provide structural solutions to those problems (Elzen and Wieczorek 2005). Transition theory links those challenges to socio-technical systems, which fulfil a societal function using technical components, infrastructure, regulations and networks of organisations (Geels and Kemp 2000). A transition is a radical and structural change with economic, cultural, ecological and institutional developments taking place at different levels of the socio-technical system (Rotmans and Loorbach 2009).

An important discussion in transition literature concerns the question of whether transitions, niches and regimes can be governed, or even steered, in a (sustainable) direction. Most transition scholars see an active role for government, but not in the classical way as the top-down commander who can steer at will using its toolbox of instruments (Paredis 2013). Rather, government is seen as just one group of actors (Geels, Elzen, and Green 2004), who are part of the regime but simultaneously shape its adaptive capacity (Smith, Stirling, and Berkhout 2005). Government actors exert a substantial influence on the functioning of the socio-technical system as they often maintain and reproduce regime functions in an intensive manner (Smith, Stirling, and Berkhout 2005).

To address the complexity and long-term focus (one to two generations) of transitions, “existing policy instruments need to be combined with new approaches” (Elzen and Wieczorek 2005, 657). In addition to command-and-control (CAC) instruments and communicative instruments, economic instruments are used in environmental policy (Howlett and Ramesh 2003; Perman et al. 2003). Geels (2012) indicates, in the context of transport systems, that economic instruments can be used to enhance pressure on an unsustainable regime. Chappin (2011) applies simulation models to study the influence of carbon taxes on energy transitions. Although these studies point at the potential of taxation, the theoretical dynamics behind the impact of a tax on the transition process are not yet well understood, and available studies on the topic are scarce. This paper aims to contribute to the growing literature of transition governance by means of an exploratory analysis of the potential of taxation as an instrument to support sustainability transitions. We will do so by combining the literature on environmental taxation with the literature on sustainability transitions, and by identifying the conditions for a tax to have that potential. In our theoretical exploration, we will combine two heuristic frameworks from transition thinking, the multi-level perspective (MLP) and the multi-phase perspective (MPP), with the neoclassical theory of Pigouvian taxation, which is the basis of environmental taxation theory.

This paper is organised as follows. The MLP and MPP are explained in Section 2, along with other transition concepts. In Section 3, an overview is provided of the theoretical foundations of regulatory taxation. Section 4 shows the results of the combination of the theoretical strands of transitions and environmental taxation. Section 5 is dedicated to the limitations and barriers to the potential of environmental taxation, and in Section 6, we draw conclusions and provide suggestions for future research.

2. Transition theory: the MLP and the MPP

The MLP on sustainability transitions distinguishes between three levels (Geels 2004; Verbong and Geels 2007). At the macro level, the landscape represents the external environment of the system. Changes at the landscape level influence the socio-technical system (Markard and Truffer 2008). Examples of such developments are global warming, global economic growth, political crises or demographic evolutions (Geels 2002). At the meso level, the regime is the dominant form of functioning in the socio-technical system (Avelino and Rotmans 2009). The regime can be a dominant technology, institution, policy, practice or culture. At the micro level, niches present alternative (sustainable) technologies, institutions, policies, practices or cultures that cause disruptions in the functioning of the socio-technical system. By experimenting and growing stronger, niches can eventually overtake the role of the regime and install a new dynamic balance in the socio-technical system (Kemp and Loorbach 2006; Loorbach and Wijsman 2013). For example, learning effects from experiments with niche technologies such as photovoltaic energy and wind power in the energy system may make those technologies increasingly successful. After the growing phase, they may also become cheaper than regime technologies such as nuclear and fossil fuel power generation. Those niches exert pressure on the regime, which could, in combination with other pressures from the landscape, policies, market developments and cultures, lead to a replacement of nuclear and fossil fuel-based power by renewables, ending up in a new equilibrium that will be more sustainable than the previous one.

A transition presents a radical and fundamental change in the dominant structure, culture and practices of a socio-technical system (Loorbach and Rotmans 2006). The structure of the system consists of institutional, infrastructure, legal and economic provisions that are inherent to the functioning of the socio-technical system (de Haan 2010). Culture is regarded as the shared values, norms and perspectives, which may be cognitive, normative or ideological in nature, and which underlie the socio-technical system (de Haan and Rotmans 2011). Practices are the routines, habits and procedures operated by the actors in the system, which interact with the structure and the culture of the system.

The change that is required for a transition will not come about in a linear way. Rather, periods of rapid and slow (or no) change can alternate (de Haan and Rotmans 2011). This implies that there are multiple phases in a transition process. Loorbach (2007) describes four phases that together depict an ideal–typical transition process, the MPP. In the first phase, the pre-development phase, actors are engaged in experiments (Kemp and Loorbach 2006). During the take-off phase, the second phase, the regime will show signs of destabilisation and niches will get an opportunity to position themselves as a viable alternative (van der Brugge and Rotmans 2007). Rapid structural and cultural changes in the socio-technical system become visible in the acceleration phase (van der Brugge 2009). In the last phase, the stabilisation phase, a new sustainable regime is established (Avelino and Rotmans 2009).

Transitions are driven by various endogenous and exogenous developments. Exogenous developments are changes at the landscape level. Endogenous developments, on the other hand, are events occurring at the meso level (regimes) and micro level (niches). According to de Haan and Rotmans (2011), there are three groups of conditions for change: tensions, stress and pressure. Tensions are changes occurring at the landscape level threatening the position of the unsustainable regime. A regime that functions inadequately or inconsistently will experience stress, which can nurture the downfall of the regime. Regime pressure or selection pressure, finally, will appear when niches impose themselves on the regime's position by becoming viable alternatives or by making the regime's functioning obsolete. Regime pressure, along with the reactions of regime and niche actors, will create patterns of change (Frantzeskaki and de Haan 2009). When tensions dominate, a reconstellation pattern will appear. Stress and pressure will result in the patterns of, respectively, adaptation and empowerment. When certain patterns chain together, they create transition paths (de Haan 2010). Choices made in the past will affect the path along which transitions will move. Actors are confronted with path dependencies, which may turn into lock-ins. For example, the choice of the authorities of some countries to invest in nuclear power plants has created path dependencies in the energy systems of these countries, which function as lock-ins that prevent a breakthrough to an energy system based on renewable energy.

Two governance approaches within transition science indicate that belief in classical policy solutions is limited. The two most well-known governance models in transition literature are transition management (Loorbach 2007; Kemp and Loorbach 2006; Loorbach and Rotmans 2010) and strategic niche management (Hoogma 2000). Both these governance approaches emphasise the difficulties in steering socio-technical change. Strategic niche management sees the main role of government in process management, creating room for niche experimentation, making sure that the process is not dominated by certain actors, and in learning and facilitating other actors’ learning possibilities (Kemp, Schot, and Hoogma 1998). The other governance approach, transition management, departs from the same view, but presents a process management method for policy-makers wishing to influence burgeoning transition processes (Loorbach and Rotmans 2006). Transition management has been criticised, mainly because the term ‘management’ seems to suggest that it is possible to steer transitions by “deliberate intervention in pursuit of specific goals” in a top-down way (Shove and Walker 2007, 764). Although transition management scholars such as Loorbach and Rotmans develop a more nuanced perspective on the ‘steerability’ of a transition than the name ‘management’ suggests, they do assert that ‘goal-oriented transitions’, in which the policy goals guide the process, exist. This view is not shared by all transition scholars. For example, Dewulf et al. (2009) think that a multiplicity of theories is needed for addressing such complex issues as sustainability. Shove and Walker (2007) question the very starting point of transition management that it is possible to deliberately steer socio-technical system change in any direction.

Both strategic niche management and transition management focus on policies that are aimed at the level of the niches. However, they largely ignore that the destabilisation of incumbent regimes can equally be a valuable strategy, because this could speed up the upscaling of niche technologies (Kivimaa and Kern 2016). Policies discouraging certain niche technologies or practices can play a role here (Turnheim and Geels 2012). Taxation will be further examined as a regime destabilisation instrument, as the main subject of this paper. In addition, ‘policy mixes for creative destruction’ will be explored in Section 4.2.

3. Regulatory and environmental taxation

A basic idea in economics is that markets allocate resources in an efficient way. However, this thesis is only valid under the condition of the presence of well-defined and enforceable private property rights (Perman et al. 2003). If that condition is not met, the market is not capable of creating or maintaining a socially optimal or desirable situation, and market failures appear (Bator 1958). One example of a market failure is the existence of external costs or environmental externalities (Perman et al. 2003). Externalities are “benefits or costs generated as an unintended by-product of an economic1 activity that do not accrue to the parties involved in the activity and where no compensation takes place” (Owen 2004, 129). Pollution resulting from production activities is a typical example of a negative externality imposed on citizens, because the victims of the pollution have no legal rights to claim any compensation for the damage suffered. To resolve this market failure, governments can create property rights for ‘an unpolluted environment’ and give them to the victims, or even to the polluter. In the latter case, the polluter receives a ‘license to pollute’ a certain amount. Following the Coase theorem (Coase 1960), depending on the specific circumstances, this situation will lead to an equally efficient outcome as compared to victim property rights. However, from an equity point of view, the two solutions generate entirely different outcomes, as in the one case it is the polluter who pays, and in the other it is the victim (Perman et al. 2003). In theory, the polluter and the victims could bargain and agree on compensation for the damage based on the victim's or polluter's property rights, in which case government intervention becomes redundant (Coase 1960). In practice, however, the large number of victims and polluters and the costs of bargaining often prevent an optimal outcome of private bargaining. In that case, government regulation, through the use of CAC instruments, economic instruments or suasion, is needed (Perman et al. 2003). In this paper, we focus on the use of taxation as a regulatory2 policy instrument in response to existing market failures. Regulatory taxes aimed at environmental improvement are called environmental taxes.3 An alternative name is Pigouvian taxation, after the twentieth-century economist Arthur C. Pigou, who developed the idea to use taxation to tackle externalities (Pigou 1920). According to Pigou, an environmental tax equal to the marginal damage at the efficient pollution level maximises allocative efficiency and welfare. The theory of Pigouvian taxation belongs to the neoclassical economic perspective, which assumes that economic agents act in a rational way according to their individual preferences in such a way that their utility (or profit for companies) is maximised (rational choice theory). Moreover, neoclassical economics assumes that preferences are fixed, as an exogenous factor, which was the dominant assumption until the 1990s (Arnsperger and Varoufakis 2006). Later, some economists regarded preferences as fixed in the short run, but subject to change in the long run (Doyle 2004). Others completely dismissed the notion of fixed preferences stating that individual preferences change as a result of past outcomes, and sometimes even rapidly and systematically (Van Boven, Loewenstein, and Dunning 2003).

In a first-best world with no uncertainty, regulatory taxes are statically efficient because the emission reductions are achieved while using a minimum amount of resources (Sandmo 2000). They are dynamically efficient because taxpayers will be inclined to seek further reduction methods due to the fact that the undesirable behaviour remains taxed (Faure and Weishaar 2012). In this theoretically ideal situation, a tax always leads to a more efficient solution than a licence or other CAC type of instrument. However, if complexity or uncertainty is introduced, many authors criticise Pigou's theory on the optimal level of an externality tax. Although a complete review of this literature exceeds the scope of this paper, we present three of the most important critiques. First, Coase (1960) dismissed the idea that a tax equal to the marginal damage cost increases total welfare in all situations. When there is uncertainty about the marginal abatement cost curves of polluting firms, the comparison changes. Taxes keep the edge over CAC instruments when the (absolute value of the) slope of the marginal abatement cost curve is greater than the slope of the marginal damage curve. Conversely, when the marginal abatement cost curve is less steep than the marginal damage curve, CAC instruments are to be preferred to taxes (Perman et al. 2003; Baumol and Oates 1988). Second, Baumol and Oates (1988) add that it is often hard to calculate the monetary value of the marginal damage of the polluting activity, in which case a standard may also be the recommended instrument choice. And third, in case of monopoly or oligopoly, the optimal tax rate may vary from lower to higher than the marginal damage (Ebert and von dem Hagen 1998).

An important element in the discussion on the optimal tax rate is the price elasticity of demand, which is not static. The absolute value of demand elasticities tends to increase over time (Lipsey and Chrystal 2007; Pindyck and Rubinfeld 2009). The reason is that demand elasticity is, in fact, mainly determined by the availability of substitutes. Investment decisions are made with a long-term perspective, and in the long run, more options are available for developing new (clean) technologies than in the short run (OECD 2000). For example, Sterner (2007) estimated that the demand elasticity of petrol and diesel in the long run is about three times higher than in the short run.

In addition to determining the correct tax rate, other tax design elements need to be decided. First, the tax base, which is the object that is taxed (Sandmo 2000), needs to be chosen. This can be input products, output products, production factors (energy), production (processes, activities or techniques), consumption or emissions (Vollebergh 2008; Weber 2011). The most effective way of eliminating externalities is by choosing the externality itself (e.g. CO2 emissions) as the tax base (OECD 2010). In practice, emission-measuring problems often hinder direct taxation of emissions. Proxies, such as petrol sold as a transport fuel, then form alternative tax bases (Dias Soares 2011). Second, tax rates can be differentiated (Määttä 2006), in which case certain products, processes or groups of taxpayers are granted a lower tax rate or are exempt from the tax. Third, a tax can be implemented at one specific moment in time or in multiple phases whereby the tax rate is raised or reduced in each phase.

4.1. (In)compatibility arguments

The transition school sees public authorities as just one group of actors in a socio-technical system. They are an important actor, but they cannot steer a transition in a top-down way (Kemp, Rotmans, and Loorbach 2007). Traditional decision-making models, including neoclassical economics, are mostly rejected based on the following four arguments. First, traditional policy-making is deemed unfit for dealing with high-complexity, long-term, wicked societal problems, because the knowledge on ecological cause–effect relations is often limited and political compromises inevitably lead to incrementalism as opposed to structural system change (Rotmans, Loorbach, and Van derBrugge 2005; Kemp, Rotmans, and Loorbach 2007; Mathijs 2008). Second, the existing policies are the result of outdated legislation, routines and institutional relations and are characterised by path dependency and technological lock-in (Rotmans, Loorbach, and Van der Brugge 2005). Third, the view of neoclassical economics on the preferences of individuals is too static, while instead a transition would require changing preferences (Kemp, Rotmans, and Loorbach 2007). Finally, steering a transition towards sustainability involves a subjective interpretation of sustainability, which “should arise from a multi-actor process, involving a balanced diversity of stakeholders” (van der Brugge, Rotmans, and Loorbach 2005, 167). Geels (2012) describes transitions as co-evolutionary processes, which require the involvement of many social groups. Network management in decision-making would be a step forward, but even those policy networks are not necessarily concerned with the long term (Kemp, Rotmans, and Loorbach 2007).

Transition management is a governance approach based on transition theory, which proposes a bottom-up approach to steer a transition, based on multi-actor involvement. However, it does not offer a full-fledged alternative to traditional policy-making, as it is “not directly solution-oriented, but explorative and design-oriented” (Rotmans, Loorbach, and Van der Brugge 2005, 6). Therefore, some transition scholars revert to other academic fields, such as evolutionary economics to analyse sustainability transitions and related policy strategies. Inspired by the field of biology, this field focuses on three central concepts: diversity, selection and innovation. Models from evolutionary economics can cope with complexity; they deviate from neoclassical economic theories by acknowledging that economic agent behaviour is explained by bounded rationality (van den Bergh, Hofkes, and Oosterhuis 2006). People's rationality is bounded because of a lack of appropriate and reliable information, limited cognitive capacities and limited decision-making time (Kahneman 2003; Simon 1955). Evolutionary economics leaves more room for environmental taxation than most transition studies, although it emphasises the need for a combination of policy instruments or policy mixes (van den Bergh et al. 2006). The role of policy mixes for sustainability transitions is further treated in Section 4.2.

So, if the neoclassical policy instrument of environmental taxation is so hard to reconcile with the bottom-up governance principles of transition theory, is it still worthwhile to study the combination? Four arguments support an affirmative answer. First, as we demonstrated in Section 3, the impact of environmental taxation is much higher in the long run than in the short run, which gives this instrument an interesting appeal considering the fundamental long-term change transition theory describes. Second, when the economy is (threatening to get) stuck in a technology that is not serving the long-run transition goal, a regulatory tax on that technology may unlock (further) lock-in, thus avoiding an important obstacle for a sustainability transition (den Butter and Hofkes 2006). Third, policy attention tends to go to supporting niches but much less to destabilising the dominant regime, which is politically more difficult. However, according to Kivimaa and Kern (2016), niche support policies will need to go hand-in-hand with regime destabilisation policies aimed at internalising externalities. A tax on the dominant regime technology is particularly suitable for that purpose (Geels and Schot 2007). Fourth, the bounded rationality concept embraced by transition theory still incorporates a level of rationality, implying that a price signal may still have an effect.

We conclude that there is no consensus on the use of regulatory taxes to enhance sustainability transitions. Some scholars see a role for taxation, but rather as one part of a more comprehensive policy mix (Geels 2006; Kemp, Schot, and Hoogma 1998; Markard and Truffer 2008).

### States CP

#### The 50 states and relevant territories should increase prohibitions on anticompetitive settlements related to pharmaceutical patents.

#### The 50 states and relevant territories should substantially increase their prohibitions on patent trolls.

### FDA CP

#### The United States federal government should

* Fund incentive mechanisms and prizes to stimulate new antibiotic development
* Increase drug importation from outside the U.S
* Fund a non-profit generic drug manufacturer and purchase single-source drugs in bulk
* Increase funding to the FDA approval process
* Regulate pay-for-delay settlements without regard to antitrust law
* Increase funding for bioterror resistance and other new pathogens

#### The fifty states and relevant territories should control drug prices through price transparency, reform of pharmacy benefit managers’ practices and Medicaid spending caps.

#### Their Silverman card is cut in the middle of a paragraph and concludes neg for the CP AND against case solvency---blue

1AC Silverman 16 (Rachel Silverman: Phil with Distinction in Public Health at the University of Cambridge; Senior Policy Analyst and Assistant Director of Global Health Policy at the Center for Global Development, 4-19-2016, “Confronting Antimicrobial Resistance: Can We Get to Collective Action?,” Center For Global Development, https://www.cgdev.org/blog/confronting-antimicrobial-resistance-can-we-get-collective-action)

**\*\*\*IOWA IS BLUE**

Antimicrobial resistance is already causing huge harm – and the worst is yet to come.

To open the panel, Dr. Chan issued a serious warning about the size and scope of the AMR threat: “everyone will be affected if we do not address this problem.” AMR is already responsible for an estimated 700,000 global deaths each year, 50,000 of which take place in the US and Europe. Extensively drug-resistant (XDR) tuberculosis—cases where the most effective first- and second-line drugs are rendered useless—infected an estimated 47,000 people worldwide in 2014, only one ‘last-line’ antimicrobial is available to reliably treat gonorrhea, and few new antimicrobial drugs are in the development pipeline. According to the latest review, AMR could cause 10 million deaths each year by 2050, with knock-on effects draining many trillions from the global economy. Summers suggested that AMR and potential pandemics, alongside climate change and nuclear proliferation, represent the top three existential threats to life on earth as we know it. And as Dr. Chan explained, the worst-case scenario implies the end of modern medicine as we know it.

Even worse, Summers suggested that AMR seems like a “quintessential non-linear phenomenon, and therefore more dangerous.” Year by year the effects are small and mostly invisible. But at some point in the future they could suddenly become catastrophic, like a “levee that doesn’t hold and unleashes a flood.” Dr. Chan concurred that “the tipping point is not predictable because…microbes are invisible. We don’t even know when they’re going to make the switch” to become resistant to existing drugs.

Antimicrobial efficacy is a global public good threatened by serious market failures.

In response to this huge threat, why don’t pharmaceutical companies invest in new antibiotics? “It does not pay” for them to do so, explained Osborne. Pharmaceutical companies want to invest in technologies that will make a lot of money, and soon; so long as other antibiotics remain effective, the market for new options will be tiny and unprofitable. **[THEIR CARD ENDS, IN THE MIDDLE OF A PARAGRAPH]** Even worse, as Summers pointed out, “markets don’t reward preparations for disaster.” Even if a company successfully developed a new option, public pressure would likely force the company to price the drug below market value at the time the drug is needed most.

On the other side, individual doctors, patients, and even countries have exceedingly weak incentives to conserve the existing stock of antimicrobial effectiveness. Patients want immediate relief from their symptoms, without waiting for test results; doctors want to serve their patients’ needs and meet their demands; and country governments are hesitant to devote political capital to propose and enforce unpopular policies to cut antibiotic use in medicine and agriculture—especially if other countries are refusing to follow suit. And unlike littering, Summers noted that few people feel any moral responsibility related to their use of antibiotics.

Collective action is needed to confront this global threat.

AMR is a global challenge, and collective action from global leaders is needed for an effective response. The AMR review estimates that $16 to $37 billion is needed over the next 10 years to stimulate new antibiotic development through incentive mechanisms, such as market entry rewards or the Advance Market Commitment approach pioneered by CGD. But countries also need to rationalize and regulate the use of existing antimicrobial resources, which can prove challenging for domestic policymakers.

Is there political will to tackle AMR? Panelists varied in their degrees of optimism. Subramanian noted that AMR must compete with other priorities for a slice of the “international good will” pie; to get sufficient attention, such global public goods will need to attract attention away from traditional aid and lending, for example. Summers disagreed, suggesting that we can expand the capacity for global cooperation over time through successful, cumulative efforts. Raising new money appears to be a particularly difficult task. Osborne noted that the overall amount needed is quite small when compared to the economic costs of AMR; however, he offered few specifics about where those funds might come from.

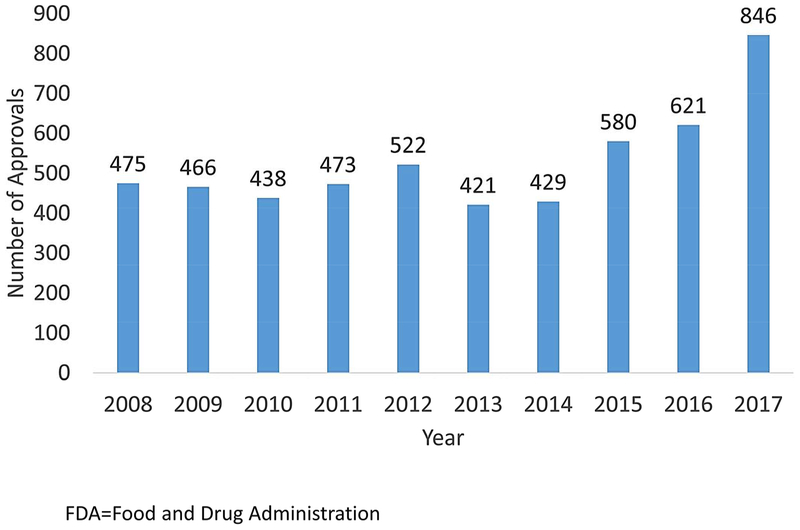
Political momentum to address the challenge is building. In 2015 the G20 affirmed the necessity of a coordinated international response to confront AMR. This past January, 98 companies and 11 industry associations from the pharmaceutical, biotechnology and diagnostics industries issued a joint declaration in support of efforts to conserve efficacy, accelerate drug development, and improve global coordination—including their own commitments to help that process along where possible. Global leaders and institutions must now expand these nascent efforts to effectively and collectively confront the worldwide AMR threat. **[END OF BLOG POST]**

#### Gupta is an advantage CP and advocates for states.

1ac Gupta et al. 21 (Ravi Gupta, MD,1 Nilay D. Shah, PhD,2 and Joseph S. Ross, MD, MHS3 1Department of Medicine, Johns Hopkins Hospital and Johns Hopkins School of Medicine, Baltimore, Maryland; 2Division of Health Care Policy and Research and Robert D. and Patricia E. Kern Center for the Science of Health Care Delivery, Mayo Clinic, Rochester, Minnesota; 3Section of General Internal Medicine, Department of Medicine, Yale University School of Medicine; Department of Health Policy and Management, Yale University School of Public Health; and the Center for Outcomes Research and Evaluation, Yale–New Haven Hospital, 2-1-2021, accessed on 7-17-2021, PubMed Central (PMC), "Generic Drugs In The United States: Policies To Address Pricing And Competition", <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/>)

ROLE OF FDA AND REVIEW PRIORITIZATION

The time and cost of FDA approval of generic drug applications can be an additional barrier to generic entry into drug markets. Due to under resourcing ([63](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R63)), prior to 2013 the FDA accumulated a large backlog of generic drug applications and review times increased to over 3 years, a long delay in drug approval. In 2012, Congress passed the Generic Drug User Fee Amendments, also known as GDUFA I, as part of the Food and Drug Administration Safety and Innovation Act, requiring the generic drug industry to pay $300 million per year for five years to the FDA. This legislation helped to nearly eliminate the majority of the backlog by the end of 2017 and decrease application review times to less than one year. Moreover, 2017 saw the largest number of generic drug approvals, of which 80 were first generics for brand-name drugs ([64](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R64), [65](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R65)) ([Figure 2](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/figure/F2/)).

[[](https://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=6355356_nihms-998327-f0002.jpg)](https://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=6355356_nihms-998327-f0002.jpg" \t "tileshopwindow)

[Open in a separate window](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/figure/F2/?report=objectonly)

[Figure 2.](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/figure/F2/)

FDA Generic Drug Approvals by Year

Though part of the delay in generic drug approval is due to the speed of the FDA, inadequate applications submitted by generic companies are also part of the problem. According to the FDA’s estimate, less than 10% of generic drug applications are approved in the first review cycle, compared to 90% of new drug applications for brand-name drugs ([66](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R66)). On average, in late 2017 generic drug applications required four review cycles for approval, often due to the applicant providing insufficient scientific evidence to support approval. Multiple review cycles further delay the availability of generic drugs, though the number of cycles needed for approval seems to be declining ([67](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R67)).

In 2017, as part of the Food and Drug Administration Reauthorization Act, GDUFA was reauthorized for an additional 5 years, known as GDUFA II. Instead of requiring flat fees for all generic manufacturers, which favored large companies with multiple drug portfolios, GDUFA II introduced a tiered system in which the fees differed based on the number of drug portfolios held by the generic company, with the aim of reducing the barrier to entry for smaller companies. GDUFA II also set a goal of completing application reviews within eight months if no preapproval facility inspection was required and ten months if an inspection was deemed necessary. In 2017 the FDA also announced a Drug Competition Action Plan to streamline the generic drug approval process to address the issue of multiple review cycles and to prevent “gaming” of the system by brand-name manufacturers that impedes generic competition, such as by making it difficult for generic manufacturers to purchase drug samples to conduct bioequivalence studies ([68](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R68), [69](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R69)). The Action Plan also specifically aims to update the FDA’s scientific and regulatory capabilities to assess the bioequivalence of complex drugs, such as products that are difficult to measure in the blood or act locally on an organ ([69](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R69)).

The Food and Drug Administration Reauthorization Act also authorized the Office of Generic Drugs to expedite the review of generic drug applications for products with fewer than three competitors to help attract additional manufacturers to non-competitive drug markets ([70](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R70), [71](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R71)). In addition, the act created a new pathway for generic drug approval called the Competitive Generic Therapy (CGT) designation ([72](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R72)). A drug is eligible for this designation if the FDA determines there is “inadequate generic competition,” meaning that there is only one other approved, marketed drug product. As part of the pathway, the FDA will provide additional resources and advising to the applicant throughout the approval process. If approved, these CGT-designated drugs are awarded 180 days of exclusivity, a period in which no other drugs can be marketed, if the applicant begins to market the drug within 75 days of approval. Furthermore, in an effort to improve transparency and promote the competitiveness of monopolistic markets, the FDA published a publicly available list of off-patent drugs that have been approved for more than one year but still lack any generic competition ([18](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R18)). The FDA plans to update this list every six months.

These measures are encouraging though their effect is not yet clear. The FDA continues to approve generic drug applications at a higher rate than before, but whether this is due to the additional resources now available to the agency or because of incentives such as prioritization of review remains uncertain and requires additional investigation. The larger reason that certain markets contain few generic competitors is because of limited demand for the drug product and thus lower potential profits. Increasing the speed with which generic drug applications are approved by the FDA is a necessary step in promoting generic competition but it is not enough. Additional solutions are needed to help spur competition and thereby reduce prices of and shortages among generic drugs.

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/)

ADDITIONAL POLICY SOLUTIONS AND AREAS FOR RESEARCH

For drug markets with few competitors and limited demand to attract greater competition, one strategy could be the development of a non-profit generic drug manufacturer with the clear aim of providing a stable supply of affordable medicines ([73](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R73)). For example, a collaboration of Intermountain Healthcare, Trinity Health, SSM Health, and Ascension, together with the Department of Veteran Affairs, is forming a non-profit generic drug company called Project Rx that will either manufacturer generic drugs or sub-contract with other organizations ([74](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R74)). Such a non-profit manufacturer could rely on purchasing agreements that set a predetermined price and minimum volume to ensure stable demand and to prevent being driven out of the market by existing for-profit manufacturers that suddenly decrease the drug’s price. A similar arrangement could be led by the federal government through bulk purchasing of single-source drugs at a negotiated price in situations where drugs face dramatic price increases. Long-term contracts with the government ensuring stable demand could also be used to incentivize additional manufacturers to enter these markets.

Another strategy to increase competition for off-patent drugs with few U.S. versions is to import additional generic versions that have not been approved in the U.S. but have been approved in other countries with comparable regulatory approval standards and requirements. The FDA recently announced plans to create a working group to examine how to safely import drugs when there is a sharp price increase of an off-patent, single-source drug ([75](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R75)). Imported drugs are already widely used in the U.S., with drugs manufactured outside the U.S. constituting approximately one-quarter of the U.S. pharmaceutical market ([76](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R76)). One way that the FDA could accelerate the importation of generic drugs is through a mechanism known as reciprocal approval, in which the FDA would issue its approval of a drug based on the evidence of the drug’s prior approval by another stringent national regulatory authority. Such a system could incentivize the entry of previously non-FDA-approved generic versions of drugs manufactured by companies that may have otherwise been deterred by the cost of additional approval by the FDA ([77](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R77)). A recent analysis suggests that almost half of off-patent drugs approved by the FDA since 1939 with limited generic competition in the U.S. could reach four or more generic competitors through a system of reciprocal approval ([78](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R78)). Such a system would preclude the need for a manufacturer to newly enter the market by obtaining FDA approval and building new manufacturing capabilities. Further research is needed to better understand the ability of non-U.S. manufacturers to handle the increased demand that such a system would create, along with the price points of the drugs outside the U.S.

The FDA will also need to continue to work closely with the FTC to address anticompetitive mergers and acquisitions that lead to increasing industry concentration, as it did when Teva acquired Allergen’s generic business ([47](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R47)). The two agencies will also have to carefully monitor the acquisitions of small generic companies and individual off-patent drugs in monopolistic or duopolistic markets that face sudden price increases. The FDA and FTC recently held a joint public meeting to discuss shared efforts in addressing rising generic drug prices ([79](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R79)).

Furthermore, when there are no approved generic versions for off-patent drugs, promoting the substitution of in-class generic drugs, known as therapeutic substitution, could be one potential solution. One study found that between 2010 and 2012, more than $73 billion was spent on brand-name drugs when there was no FDA-approved generic, but a within-class generic was available ([80](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R80)). Where clinically appropriate, such therapeutic substitution could result in substantial savings for patients and for the health system. Moreover, allowing for therapeutic substitution of the generic constituents of brand-name combination drugs could also generate savings. As most states have enacted pharmacy-level generic substitution laws to promote generic drug use when available, additional research is needed to further understand when therapeutic substitutions are safe, beneficial, and feasibly implementable, based on patient and clinician preferences, as well as outcomes.

Addressing the anticompetitive strategies utilized by brand-name manufacturers to hamper the approval of generic competitors is also essential. An initial step is to require manufacturers to provide drug samples to generic manufacturers to conduct bioequivalence steps. More efficient mechanisms are also needed to address trivial citizen petitions filed by brand-name manufacturers that exhaust resources and also delay generic approval. Finally, given the rise of inconsequential secondary patents filed by brand-name manufacturers, the use of inter partes review could help allow for quicker and less expensive patent challenges by providing an alternative to court litigation ([81](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R81)). Inter partes review is a mechanism through which any U.S. citizen can challenge a patent’s validity through an administrative body called the Patent Trial and Appeal Board.

States have increasingly crafted legislation to control drug prices through various mechanisms, including greater drug price transparency, reform of pharmacy benefit managers’ practices, drug importation from outside the U.S., and Medicaid spending caps. For example, California, Connecticut, and Vermont have passed legislation requiring companies to justify price increases beyond a certain threshold ([82](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R82)–[84](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R84)). California also prohibits the use of drug manufacturer drug coupons if it makes a drug cheaper than another drug version covered by the patient’s insurance ([85](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R85)). Maryland passed a similar transparency law that required price increase justifications and also allowed for the prosecution of companies that engaged in “price gouging” ([86](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R86)), though the law was ultimately overturned based on the commerce clause. Vermont has also passed a law allowing for the wholesale importation of drugs from Canada ([87](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R87)). New York’s Fiscal Year 2018 budget includes a cap provision on Medicaid’s drug spending ([88](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R88)). If the spending cap is surpassed, the state can negotiate supplemental rebates with drug manufacturers to lower the spending.

Furthermore, the Know the Lowest Price Act of 2018 was recently signed into law, which prohibits the pharmacy “gag clause” that restricts pharmacists from informing patients if a drug is cheaper if not paid for through insurance. However, this applies only if the patient directly asks the pharmacist about pricing. Many states are continuing to work on their own legislation pertaining to the pharmacy “gag clause”. The recently released blueprint to lower drug prices by the current administration also calls for greater price transparency and for considering changes to the regulation of drug copay discount cards ([89](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R89)), though some observers report that the plan offers incomplete solutions to rising generic drug prices ([90](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/#R90)).

[Go to:](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6355356/)

CONCLUSION

To ensure continued patient access to affordable medications, particularly once the period of patent and exclusivity protections has ended, a deeper understanding of the strategies used by brand-name manufacturers to undermine generic competition and the reasons underlying the price increases of off-patent drugs is needed. Ensuring the availability of affordable medications is a complex problem requiring multiple solutions and the joint efforts of multiple stakeholders. The FDA in particular continues to play a unique role in guaranteeing the timely approval of life-saving brand-name and generic medications, especially in markets that lack sufficient competition. Building on initiatives currently being led by the FDA, other branches of the federal government, and multiple states, policymakers must utilize a variety of policy solutions to directly address continued price increases and shortages of generic drugs.

## Econ Advantage

### Alt Causes

#### Too many alt causes to the econ advantage---omicron, supply chains, war, other rising costs in health care, insurance premiums, etc.

#### Product hopping thumps the aff – Their solvency source

Michael A. Carrier 21. Rutgers Law School. “Pharmaceutical Antitrust: What the Biden Administration Can Do” Rutgers Law School Research Paper No. Forthcoming. 01-27-21. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771055>

9. A second issue that threatens harms in the pharmaceutical industry is “product hopping,” which occurs when a brand firm switches from one version of a drug to another. Most reformulations, especially those made when a generic is not about to enter the market, do not raise significant anticompetitive concerns. But some do. By reformulating a drug and switching the prescription base to the new product, a brand firm could evade regulatory regimes designed to encourage generic entry—namely, the Hatch-Waxman Act (which allows generics to rely on brand firms’ clinical studies) and state drug product substitution laws (which allow or require pharmacists, absent a doctor’s contrary instructions, to substitute generic versions when brands are prescribed).14 10. The courts have distinguished between “hard switches,” viewed as anticompetitive because the brand removes the original drug from the market, and “soft switches,” viewed as not concerning because the original remains on the market.15 But this distinction should not be accorded dispositive significance, as both types of behavior could violate antitrust law. 11. In particular, even when a brand firm leaves the original drug on the market, it can harm competition by combining a reformulation that destroys generic substitutability with an encouragement to write prescriptions for the reformulated (rather than original) product when the only reason is to impair generic entry.16 Because these soft switches could present competitive concern, the FTC should consider challenging this conduct. The Commission’s first activity in this area was a $50 million settlement with Reckitt Benckiser for shifting prescriptions for opioid-addiction-treating Suboxone from a tablet to a film version while falsely claiming that the film version was safer.17 The FTC should continue its efforts by engaging in activities like bringing a case, filing amicus briefs,18 issuing guidelines, or holding hearings. Given the nuanced harms of soft switches, the attention of the leading agency focused on drug competition would be valuable.

### Impact

#### Decline doesn’t cause wars

* War can occur at any stage of expansion, crisis, recession, and recovery
* Doesn’t happen at one particular stage, despite recessions being quick
* Decision to go to war based on military gains – not germane to recession
* Econ explanation for war is downward pressure – happens during prosperity because of unfounded worry for recessions

Liao 19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

First, war can occur at any stage of expansion, crisis, recession, recovery, so it is unrealistic to assume that wars occur at any particular stage of the business cycle. On the one hand, although the domestic economic problems in the crisis/recession/depression period break out and become prominent in a short time, in fact, such challenge exists at all stages of the business cycle. When countries cannot manage to solve these problems through conventional approaches, including fiscal and monetary policies, they may resort to military expansion to achieve their goals, a theory known as Lateral Pressure. [13] Under such circumstances, even countries in the period of economic expansion are facing downward pressure on the economy and may try to solve the problem through expansion. On the other hand, although the resources required for foreign wars are huge for countries in economic depression, the decision to wage wars depends largely on the consideration of the gain and loss of wars. Even during depression, governments can raise funding for war by issuing bonds. Argentina, for example, was mired in economic stagflation before the war on the Malvinas islands (also known as the Falkland islands in the UK). In fact, many governments would dramatically increase their expenditure to stimulate the economy during the recession, and economically war is the same as these policies, so the claim that a depressed economy cannot support a war is unfounded. In addition, during the crisis period of the business cycle, which is the early stage of the economic downturn, despite the economic crisis and potential depression, the country still retains the ability to start wars based on its economic and military power. Based on the above understanding, war has the conditions and reasons for its outbreak in all stages of the business cycle. Second, the economic origin for the outbreak of war is downward pressure on the economy rather than optimism or competition for monopoly capital, which may exist during economic recession or economic prosperity. This is due to a fact that during economic prosperity, people are also worried about a potential economic recession. Blainey pointed out that wars often occur in the economic upturn, which is caused by the optimism in people's mind [14], that is, the confidence to prevail. This interpretation linking optimism and war ignores the strength contrast between the warring parties. Not all wars are equally comprehensive, and there have always been wars of unequal strength. In such a war, one of the parties tends to have an absolute advantage, so the expectation of the outcome of the war is not directly related to the economic situation of the country. Optimism is not a major factor leading to war, but may somewhat serve as stimulation. In addition, Lenin attributed the war to competition between monopoly capital. This theory may seem plausible, but its scope of application is obviously too narrow. Lenin's theory of imperialism is only applicable to developed capitalist countries in the late stage of the development capitalism, but in reality, many wars take place among developing countries whose economies are still at their beginning stages. Therefore, the theory centered on competition among monopoly capital cannot explain most foreign wars. Moreover, even wars that occur during periods of economic expansion are likely to result from the potential expectation of economic recession, the "limits of growth" [15] faced during prosperity — a potential deficiency of market demand. So the downward pressure on the economy is the cause of war.

### Turn

#### Growth thriving now---expansion decks growth

Wright and Rybnicek 21 (Joshua D. Wright, University Professor of Law at the Antonin Scalia Law School at George Mason University; J.D. and PhD in Economics from the University of California, Los Angeles; Executive Director of the Global Antitrust Institute and former FTC Official, and Jan M. Rybnicek, Adjunct Professor at the Antonin Scalia Law School at George Mason University; JD, magna cum laude, Antonin Scalia Law School at George Mason University; member of the American Bar Association Section of Antitrust Law and Editor of the Antitrust Law Journal, Summer 2021, "A Time for Choosing: The Conservative Case Against Weaponizing Antitrust," National Affairs, <https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust>)

It has long been vogue among liberal advocates to champion expansion of government control over firms, their decisions, and internal workings. Perhaps no better present example can be found than in the area of antitrust, where the policy landscape looks eerily similar to the progressive view articulated 60 years ago, littered with a hodgepodge of proposals to “break up” large firms, prohibit all mergers and acquisitions, assign burdens of proof to the accused, and control the design of products. Today’s progressives offer much of the same medicine for what allegedly ails the modern economy. Senator Warren has proposed, for example, to “break up big tech” platforms such as Amazon, Apple, Facebook, and Google, and to make technology companies criminally liable for misinformation presented on their platforms.[ii] While the large and successful American tech firms—the envy of the global economy—make a convenient target for these proposals, do not be fooled. This wolf comes as a wolf. The modern progressive antitrust agenda is part of a broader, more radical program—self-described as Neo-Brandeisian Antitrust—to turn antitrust law upside down so that it may be weaponized to shape and plan all sectors of the economy.

These proposals, while unfortunate and misguided, draw heavily upon standard liberal orthodoxy that has tended to be largely suspect of markets and the agency of individuals. One can hardly be surprised to see a staunch progressive like Senator Warren or Bernie Sanders advocate greater government control over private life. Perhaps one even grows to expect it.

What is more surprising, however, is the company Senator Warren and the Neo-Brandeisian Antitrust movement have attracted with the siren call of using the antitrust laws to centrally plan the tech sector (among others things), and to achieve greater government control of the interactions between individuals and the technology we use in our daily lives. Stalwart conservatives like Senator Hawley, for example, among others, have offered policy proposals to “deal” with “Big Tech” that eerily mimic those of Senator Warren and the command and control left. Senator Hawley has proposed legislation that would rewrite Section 230 of the Communications Decency Act and usher in a quasi-Conservative Fairness Doctrine for the internet.[iii] Indeed, Hawley’s proposal would place the Federal Trade Commission in the Big Brother position of determining when a social media platform’s moderation decision was “designed to” or “motivated by an intent to” negatively impact a political party. Attorney General Barr has offered a similar refrain, announcing that antitrust is an appropriate tool to police political bias.[iv] And President Trump recently signed an executive order that directs the Federal Trade Commission to explore using its consumer protection authority to sue social media platforms for content moderation decisions.[v]

Without question, the emotional appeal undergirding these actions is understandable. Conservative voices and opinions too often face a stacked deck when dealing with technology companies and social media, in particular. And this bias against conservative voices has taken on new life in the Trump era. But the hallmark of conservative values has been to rightfully eschew government control over economic life and to value principle over expediency. What is at stake, however, with the current proposals to upend modern antitrust to address tech markets is more important than whatever fleeting satisfaction is gained from exacting policy revenge on firms perceived to squelch conservative voices and ideas. At stake are conservative commitments to the rule of law and the role of the judiciary—newly stocked with immense talent by the Trump administration—in preventing government expansion and overreach. And if we resign ourselves to transient political wins, and debase the belief that entrepreneurs rather than bureaucrats should shape technology markets, we risk not only undermining these great causes conservatives have championed for decades but also the enormous economic gains to Americans that arise in our highly competitive tech markets.

Readers less familiar with antitrust law may not understand its critical role in the conservative legal movement. Modern antitrust law—and its consumer welfare standard—is a complex product of powerful ideas, extant economic evidence, and jurists like Bork, Thomas, Scalia, Easterbrook, and Doug Ginsburg taking on the wobbly intellectual foundations of 1960s competition law. That their efforts were so successful in persuading their liberal counterparts on the Supreme Court and lesser federal courts to join in the dismantling of the stale and obsolete antitrust that was then the law of the land is powerful evidence of the force of their ideas. It is difficult to find an area of law where the conservative legal movement enjoyed as much success as quickly and with such resounding results.

No doubt it helped that yesteryear’s antitrust was intellectually bankrupt and an insult to the rule of law. It pursued an unfortunate amalgamation of contradictory doctrines, including undefined notions of populism, protection of individual industries, and reducing firm size, that could be used to justify nearly any result. For instance, antitrust law allowed the market-leading frozen pie manufacturer in Utah to successfully sue its three national-brand competitors for eroding its high market share through a series of price cuts—thereby preventing precisely the type of competition the law was intended to protect. Antitrust law was so unprincipled and incoherent at the time that it led Justice Potter Stewart to observe while reviewing a government suit to block a merger between two grocery stores with a combined market share of 7.5% that, “The sole consistency that I can find is that, in litigation under [the merger laws], the Government always wins.”[vi]

The conservative legal movement, powered by the intersection of economic analysis and law, brought the rule of law to the wild and untamed progressive antitrust vision of the 1960s. Grounding antitrust law in a disciplined and tractable framework not only promotes the rule of law while preventing arbitrary and capricious enforcement, it also creates a stable and predictable environment for private actors and firms to invest and innovate. Of course, no doctrine is perfect and today’s antitrust is not without its own flaws. But it is tethered to robust economic evidence and common-law developments that promote competitive outcomes and, like the common law, has built-in mechanisms to improve and evolve in response to empirical evidence. But the coherent and principled makeup of antitrust should not and cannot be taken for granted.

Proposals today that are attracting conservatives and liberals alike aim to unwind these gains in exchange for granting those who happen to have power in the government a dominant hand in controlling tech firms on the fleeting hope that the power will be deployed for the greater social good. We have experience with this approach to antitrust in the United States. It is what we used to do. And we know better. Shifting power from judges to regulators, and then allowing those regulators to pick winners and losers to achieve political and social goals, is a recipe for abandoning conservative commitment to the rule of law while simultaneously sacrificing economic growth and innovation. The price is too high, with little or nothing to offer those who value individual liberty, the rule of law, and economic growth. While progressive ideology is contiguous with increasing government control over economic and social interactions in technology markets for its own sake, conservative principles are not. The proposed bargain is also remarkably short-sighted. It should go without saying that empowering partisan regulators to enforce a Fairness Doctrine for conservatives is not likely to work out so well when the other side is in control.

Conservatives traditionally have been wary of proposals by liberals and other big government proponents seeking to substitute the judgment of regulators and bureaucrats for those of entrepreneurs and innovators. And rightfully so. Such proposals, even when well intentioned, risk making Americans worse off. Progressives and populists now seek to commandeer antitrust to usher in a new era of central planning in order to achieve social policy objectives that they could not accomplish otherwise. But at what cost? The risks are not trivial. Using antitrust to redesign tech companies and their products will undermine the competitive dynamics that have brought Americans countless modern benefits, including smartphones, fast and easy online shopping, on-demand ride hailing, easy-to-access streaming media, and a bevy of free services including email, maps, and video conferencing. It also will threaten the incredible economic growth and job creation that these companies have brought to America’s shores. And while politicians surely will make promises akin to, “if you like the digital platform you have, you’ll get to keep it,” it is all too clear that when you expand government discretion and limit judicial oversight, those in positions of power will increasingly impose their preferences on the broader society. Ask yourself, do you really want the government designing the iPhone?

The reality is that the U.S. digital economy is highly competitive and serves Americans well. Fueled by investment, innovation, and entrepreneurship, the digital economy has contributed substantially to America’s economic growth. According to the Bureau of Economic Analysis, the digital economy accounted for 6.9 percent of gross domestic product in 2017, growing at an annual rate of 9.9 percent since 1998 as compared to 2.3 percent for the economy overall.[vii] That economic growth has been driven by some of the world’s most successful tech companies, such as Amazon, Apple, Facebook, Intel, Google, and Microsoft, each of which calls the United States home. These firms are investing ever-increasing amounts on research and development to innovate new products and stay competitive. In fact, the United States leads the world in research and development spending, and tech companies lead in the United States—representing the nation’s top five spenders with investments totaling more than $75 billion in 2018.[viii] Tech companies rank second (behind the telecom sector) in U.S. capital expenditures, with Alphabet (Google’s parent company), Amazon, Apple, Facebook, Intel, and Microsoft together spending more than $45 billion in 2017.[ix] And these investment figures are only expected to continue to grow. These are hardly the actions of monopolists resting on their laurels, secure in belief that they are untouchable by competition.

And there is more good news. Tech has only touched a portion of the U.S. economy to date, meaning that there still are opportunities for tech companies to foster economic growth by transforming stagnant industries such as housing, transportation, manufacturing, and health care for the better. And where are the next generation of innovators and tech entrepreneurs calling home? The United States. Recognizing an economy that is dynamic and rewards creativity, venture capital investing has soared to record levels in the United States—surpassing $140 billion in 2018—providing startups with the capital necessary to innovate, compete, and grow.[x] Today the United States is home to half of all startups valued at more than $1 billion—so-called “unicorns”—outpacing every other country in the world by a wide margin.[xi]

Now, some conservatives chafe at recitations of facts and claim that technology companies exclusively benefit only the privileged. But this economic growth and investment have led to substantial benefits to ordinary American consumers and workers. You need only look to the numerous free services that tech has brought to consumers. Americans place significant value on these free services. One peer-reviewed study published by the National Academy of Sciences found that consumers would need to receive a yearly payment of $3,600 to give up free internet maps, $8,400 to give up free email, and $17,500 to give up free search engines.[xii]

Tech firms also have spurred change in long stagnant industries by developing new products that spark competition across quality, price, and other dimensions. Take for instance ride-sharing apps. Local cab companies long had a stranglehold on taxi services and saw little need to innovate or evolve. Ride-sharing apps like US-based Uber and Lyft disrupted the livery service industry by offering lower-cost and more convenient services. Cab companies have been forced to respond by offering easier payment methods and other innovative services that enhance the consumer experience. Proponents of using antitrust to restructure or even break up tech companies are unable to explain how their sweeping plans, however carefully scripted, would not undo the business models that made these services and their associated benefits possible. The burden should be on those seeking to use antitrust to remake the digital economy to demonstrate that the risk is justified. It is hard to believe how it could be.

The digital economy also has been an important source of job creation. According to one estimate, nearly 12 million people held tech jobs in the United States in 2018.[xiii] Today the largest U.S. tech companies have replaced the major American employers of the past. In just under two decades, Amazon, Apple, Facebook, Alphabet, and Microsoft have employed more than one million workers.[xiv] In 2016, Amazon became the fastest company to employ 300,000 Americans—surpassing Walmart and General Motors.[xv] Moreover, while the share of economic output going to workers has been declining steadily overall for many years both in the U.S. and globally, in the tech and telecom sectors the labor share has been steady and even has increased, suggesting improved worker welfare.[xvi]

But that is only part of the story. These major tech firms not only directly employ Americans, but through their investment and innovation, they have created entirely new markets that also have created millions of jobs. Take for instance the app economy—a more than $1 trillion global industry—that has created millions of U.S. jobs since Apple’s iPhone launched in 2007. According to one estimate, the U.S. had more than two million app-related jobs as of April 2019.[[xvii]](https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust#_edn17) America’s large tech companies also benefit small businesses in yet another way: by connecting them to new markets that they could not access before. Today small businesses are able to take advantage of the major tech firms’ size and scale to grow domestically and compete globally with affordable and secure services.  
  
None of this is lost on Americans. While politicians in Washington have used the tech industry as a punching bag, most Americans would prefer that legislators focus on other industries, including most prominently health care, an industry in which competition suffers despite (or because of) significant government involvement.[[xviii]](https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust#_edn18) In fact, a mere 17 percent of registered voters think that Congress should make regulating tech a top priority, placing it last among issues surveyed.[[xix]](https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust#_edn19) That is likely in part because Americans generally trust tech firms and acknowledge the benefits they have brought to U.S. workers and consumers. One study found that Amazon, Google, and Netflix ranked as the most loved brands in the United States.[[xx]](https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust#_edn20) Another study found that nearly 40 percent of Americans trusted Amazon and Google, which is striking given that only a mere 7 percent of Americans said they trusted the government.[[xxi]](https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust#_edn21) It is no wonder that a majority of Americans oppose breaking up the largest tech companies: the result would be putting faith in the unlikely proposition that the government can do better.  
  
None of this means that the tech sector should be immune from antitrust scrutiny, that there are not serious economic issues facing American businesses and workers, or that certain tech platforms have shown an unmistakable bias against conservative viewpoints. Where anticompetitive conduct exists, it can and should be challenged under the existing antitrust laws and legal doctrines, which are more than capable of protecting competition in the digital economy. And the antitrust agencies are right to be vigilant against potential anticompetitive behavior by the major U.S. tech companies given their significant presence across key parts of the US economy.

But conservatives should be skeptical of attempts by politicians and bureaucrats to reorder economies simply to appease current animosity against tech firms and put at risk the substantial benefits they have brought to American consumers and workers. And that is precisely what recent radical proposals would do. These proposals include abandoning the consumer welfare standard that has helped make antitrust a coherent and principled body of law. Liberals instead seek to untether antitrust from the rule of law and return it to its Stone Age by reintroducing vague new “public interest” tests with multiple conflicting goals or by reestablishing arbitrary and obsolete market share thresholds—either of which would serve only to increase government discretion. Others have called to overturn unanimous and supermajority judicial precedent that are the foundations of the modern economic approach to antitrust. Still others seek to abandon the principle that it is the government and not business firms that bears the burden of proof of demonstrating the legality of free enterprise. These proposals require businesses to affirmatively prove to regulatory bodies that commercial conduct is not only not harmful but also that it is beneficial—beneficial to whom exactly is still unclear. And, of course, there have been calls to ban nearly all mergers, even those like Amazon’s acquisition of Whole Foods, which did not consolidate two rival companies and has brought customers lower prices and better services. These efforts inevitably will only be the starting point; and with no limiting principle will increase the government's authority to substitute its own judgement for those of entrepreneurs.

Conservatives long have believed in competition, markets, and the rule of law. The late Justice Scalia famously noted that antitrust’s signature statute, the Sherman Act, is “indeed the ‘Magna Carta of free enterprise’ … but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.” The force of Justice Scalia’s admonition that the antitrust laws are not an appropriate vehicle for tinkering with the inner workings of private firms is even stronger when the tinkering is not even in furtherance of greater competition, but for political ends. Those core principles should not hastily be sacrificed now to achieve transient political satisfaction against America’s largest tech companies.

The tech sector is a centerpiece of the modern U.S. economy. America’s tech firms have innovated countless new products, created millions of U.S. jobs, and now are simultaneously envied and attacked by our counterparts abroad. As Ronald Reagan observed in 1964, the government rarely does anything as well or as economically as the private sector. And when the government does seek to control the economy it invariably does so through force or coercion of the people. An invitation to allow politicians and bureaucrats to use antitrust law to break up tech companies, to redesign digital products, or to moderate content for the “greater good” will end like most attempts at introducing just a little bit of liberal orthodoxy: the government’s discretion will grow and the people’s ability to check it will fade overtime until it is a figment of its former self. It is the camel’s nose under the tent. Now is the time for conservatives to choose whether they have a newfound faith in central planning or if they will recommit to principles of limited government and free markets.

## Disease Advantage

### Impact D

#### ABR won’t get close to extinction, intervening actors solve it, their internal link can’t

Ed Cara 17, Science Writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “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 spurned 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 calvary 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.

#### Turn---more generics cause overprescription which exacerbates antibiotic-resistance.

### Turn

#### Integration between pharma and biotech is accelerating, unlocking innovation.

Cancherini ’21 [Laura; April 30; Consultant in McKinsey’s Brussels office; McKinsey, “What’s ahead for biotech: Another wave or low tide?” https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/whats-ahead-for-biotech-another-wave-or-low-tide]

Fundamentals continue strong

When we asked executives and investors why the biotech sector had stayed so resilient during the worst economic crisis in decades, they cited innovation as the main reason. The number of assets transitioning to clinical phases is still rising, and further waves of innovation are on the horizon, driven by the convergence of biological and technological advances.

In the present day, many biotechs, along with the wider pharmaceutical industry, are taking steps to address the COVID-19 pandemic. Together, biotechs and pharma companies have [more than 250 vaccine candidates in their pipelines](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/on-pins-and-needles-will-covid-19-vaccines-save-the-world), along with a similar number of therapeutics. What’s more, the crisis has shone a spotlight on pharma as the public seeks to understand the roadblocks involved in delivering a vaccine at speed and the measures needed to maintain safety and efficacy standards. To that extent, the world has been living through a time of mass education in science research and development.

Biotech has also benefited from its innate financial resilience. Healthcare as a whole is less dependent on economic cycles than most other industries. Biotech is an innovator, actively identifying and addressing patients’ unmet needs. In addition, biotechs’ top-line revenues have been less affected by lockdowns than is the case in most other industries.

Another factor acting in the sector’s favor is that larger pharmaceutical companies still rely on biotechs as a source of innovation. With the [top dozen pharma companies](https://www.mckinsey.com/business-functions/m-and-a/our-insights/a-new-prescription-for-m-and-a-in-pharma) having more than $170 billion in excess reserves that could be available for spending on M&A, the prospects for further financing and deal making look promising.

For these and other reasons, many investors regard biotech as a safe haven. One interviewee felt it had benefited from a halo effect during the pandemic.

More innovation on the horizon

The investors and executives we interviewed agreed that biotech innovation continues to increase in quality and quantity despite the macroeconomic environment. Evidence can be seen in the accelerating pace of assets transitioning across the development lifecycle. When we tracked the number of assets transitioning to Phase I, Phase II, and Phase III clinical trials, we found that Phase I and Phase II assets have transitioned 50 percent faster since 2018 than between 2013 and 2018, whereas Phase III assets have maintained much the same pace. There could be many reasons for this, but it is worth noting that biotechs with Phase I and Phase II assets as their lead assets have accounted for more than half of biotech IPOs. Having an early IPO gives a biotech earlier access to capital and leaves it with more scope to concentrate on science.

Looking forward, the combination of advances in biological science and accelerating developments in technology and artificial intelligence has the potential to take innovation to a new level. A [recent report](https://www.mckinsey.com/industries/pharmaceuticals-and-medical-products/our-insights/the-bio-revolution-innovations-transforming-economies-societies-and-our-lives) from the McKinsey Global Institute analyzed the profound economic and social impact of biological innovation and found that biomolecules, biosystems, biomachines, and biocomputing could collectively produce up to 60 percent of the physical inputs to the global economy. The applications of this “Bio Revolution” range from agriculture (such as the production of nonanimal meat) to energy and materials, and from consumer goods (such as multi-omics tailored diets) to a multitude of health applications.

#### Antitrust law is a battering ram for innovation and chills patent stability.

Mosoff et al. ’19 [Adam, Kristen Osenga, Randall Rader, Mark Schultz, and Saurabh Vishnubhakat; January 28; Professor of Law at George Mason University; Regulatory Transparency Project, “How Antitrust Overreach is Threatening Healthcare Innovation,” <https://regproject.org/paper/how-antitrust-overreach-is-threatening-healthcare-innovation/>]

II. The FTC’s Heavy-Handed Meddling Upsets the Delicate Balance Between Branded and Generic Drug Companies, Hindering Innovation and Harming Consumers

Since the late 1990s, the FTC has devoted substantial resources to combating what it views as anticompetitive behavior on the part of drug companies in the healthcare market. The FTC has interposed its scrutiny even where the FDA has approved drugs and when the branded and generic companies have decided a legal fight is no longer worth having. The FTC’s meddling restricts behavior that is lawful under the Federal Food, Drug, and Cosmetic Act (FDCA). The FTC’s meddling also usurps the regime Congress carefully crafted for resolving patent disputes between branded and generic drug companies.

The FTC has devised a series of novel theories to justify treating lawful behavior as anticompetitive and worthy of enforcement action and legislative changes. These theories have been adopted—and adapted—by state antitrust enforcers as well as private antitrust plaintiffs. The FTC has conducted industry-wide investigations and prepared massive reports on supposed anticompetitive conduct to recommend legislative changes despite neither the branded nor generic drug industry seeking such changes. These changes to the law would restrict or punish patent owners and even patent challengers. The FTC has, on its own initiative, made the already volatile world of drug development more uncertain and more hostile, ultimately resulting in less innovation and fewer choices for consumers in the short term (e.g., generic options) and long term (e.g., new drugs).

The FTC’s aggression extends to the courtroom. For nearly two decades, the FTC and other antitrust plaintiffs have attacked patent settlements reached by branded and generic drug companies. As explained above, the regulatory scheme for new drugs gives rise to an unusual type of patent litigation in which the generic drug company—the defendant—is not at risk of money damages for infringement because litigation generally occurs before the generic drug has obtained FDA approval and enters the market. Because of this unusual arrangement, where each side had to yield something of value to the other at the settlement table, a patent owner occasionally pays a settlement to the defendant (rather than forgiveness of damages, which is typically not an option) in exchange for the defendant agreeing to slightly delay the launch of its generic drug. Other considerations, such as the generic company agreeing to source materials from the branded company or other business or research partnerships, are not uncommon.

Beginning in the 1990s, the FTC took the position that such settlements were a categorically illegal restraint of trade. Courts did not agree, as modern antitrust jurisprudence recognizes that declaring something categorically illegal in the absence of more facts and details is dubious. Courts generally concluded that a settlement within the scope of the patent—where the defendant agreed to remain off the market no more than already required by the patent but perhaps longer than a successful court challenge—did not itself violate the antitrust laws. Yet the FTC persisted in arguing its position to the Supreme Court. In the 2013 Actavis case, the Supreme Court declined the FTC’s invitation to find reverse payment settlements categorically anticompetitive, ruling instead that these settlements must be evaluated under antitrust law’s “rule of reason,”, which is a detailed look at all the relevant facts and circumstances of the individual case.7 Still undeterred in the wake of Actavis, the FTC continues to argue that a variety of patent settlements are anticompetitive and accuse district courts of misinterpreting Actavis.

The FTC’s basic position is that antitrust scrutiny is triggered when the patent owner offers anything of value beyond the litigation expenses that settlement would save. Any patent owner who tries to entice a generic competitor to settle by offering anything more than litigation costs is treated suspiciously by the FTC. Even if the settlement is a complex corporate transaction that involves manufacturing and promotion deals or other products—where both parties might benefit beyond merely the ending of a lawsuit—the FTC’s basic position is to presume an antitrust violation.

Not surprisingly, the FTC’s overzealous actions against drug makers make it very difficult to settle pharmaceutical patent litigation without branded and generic drug companies both expecting an antitrust case, which may itself end up effectively revisiting the patent issues the parties sought to move beyond by settling. Companies still try to craft agreements that eliminate the risk that both face in litigation while ensuring that generic market entry occurs well before patent expiry, but no matter the terms, the FTC stands ready to argue that the companies should not have settled. In the end, these parties seem to want patent litigation cases to continue to final judgment, even when this is not in the interest of the branded companies, generic drug companies, consumers or the federal court system.

The FTC has also started to interfere with the ordinary cycle of incremental innovation in the drug industry. Incremental drug innovation is both commonplace and can be medically important. New dosage forms and routes of administration can make life-sustaining drugs easier to administer to new populations. New formulations, such as extended release formulations, can simplify dosing, thus increasing patient compliance.

In recent years, however, the FTC has targeted these patents. The chief complaint advanced by the FTC is that incremental innovations are trivial advances and do not deserve patent protection. Where the branded company replaces an older version of its product with the patented new version, the FTC accuses the branded company of “product hopping” to force the market to move to new drugs. The problem with this argument is threefold. First, these innovations have satisfied the requirements of the Patent Act. Second, if they are indeed trivial, the patents will likely be held invalid in federal court when challenged by generic competitors.  Third, if the branded company’s new product does not provide better outcomes, insurers are unlikely to cover the product and will instead require a patient to use the generic version of the branded company’s first product. The FTC’s actions are thus a solution in search of a problem.

Conclusion

The FTC’s goals may be well-intentioned, but its intrusion into domains that other, more exper

t agencies already oversee and comprehensively regulate is troubling. By substituting its own agenda for the business judgment of sophisticated parties in the marketplace, the FTC has overreached its proper role and begun to disrupt the cycle of investment, product development, recoupment, further incremental advancement, and risk management that drives the creation of new drugs that save lives and promote greater public health.

## New Advantage

### 1NC AT: Climate Change

#### Alt causes to climate change---their evidence doesn’t say they solve countries like India and China

#### No internal link---uniqueness doesn’t say that trolls are preventing climate innovation

#### Climate doesn’t cause extinction.

Kerr et al. 19 – Dr. Amber Kerr, Energy and Resources PhD at the University of California-Berkeley, known agroecologist, former coordinator of the USDA California Climate Hub. Dr. Daniel Swain, Climate Science PhD at UCLA, climate scientist, a research fellow at the National Center for Atmospheric Research. Dr. Andrew King, Earth Sciences PhD, Climate Extremes Research Fellow at the University of Melbourne. Dr. Peter Kalmus, Physics PhD at the University of Colombia, climate scientist at NASA’s Jet Propulsion Lab. Professor Richard Betts, Chair in Climate Impacts at the University of Exeter, a lead author on the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in Working Group 1. Dr. William Huiskamp, Paleoclimatology PhD at the Climate Change Research Center, climate scientist at the Potsdam Institute for Climate Impact Research. [Claim that human civilization could end in 30 years is speculative, not supported with evidence, 6-4-2019, https://climatefeedback.org/evaluation/iflscience-story-on-speculative-report-provides-little-scientific-context-james-felton/]

There is no scientific basis to suggest that climate breakdown will “annihilate intelligent life” (by which I assume the report authors mean human extinction) by 2050.

However, climate breakdown does pose a grave threat to civilization as we know it, and the potential for mass suffering on a scale perhaps never before encountered by humankind. This should be enough reason for action without any need for exaggeration or misrepresentation!

A “Hothouse Earth” scenario plays out that sees Earth’s temperatures doomed to rise by a further 1°C (1.8°F) even if we stopped emissions immediately.

Peter Kalmus, Data Scientist, Jet Propulsion Laboratory:

This word choice perhaps reveals a bias on the part of the author of the article. A temperature can’t be doomed. And while I certainly do not encourage false optimism, assuming that humanity is doomed is lazy and counterproductive.

Fifty-five percent of the global population are subject to more than 20 days a year of lethal heat conditions beyond that which humans can survive

Richard Betts, Professor, Met Office Hadley Centre & University of Exeter:

This is clearly from Mora et al (2017) although the report does not include a citation of the paper as the source of that statement. The way it is written here (and in the report) is misleading because it gives the impression that everyone dies in those conditions. That is not actually how Mora et al define “deadly heat” – they merely looked for heatwaves when somebody died (not everybody) and then used that as the definition of a “deadly” heatwave.

North America suffers extreme weather events including wildfires, drought, and heatwaves. Monsoons in China fail, the great rivers of Asia virtually dry up, and rainfall in central America falls by half.

Andrew King, Research fellow, University of Melbourne:

Projections of extreme events such as these are very difficult to make and vary greatly between different climate models.

Deadly heat conditions across West Africa persist for over 100 days a year

Peter Kalmus, Data Scientist, Jet Propulsion Laboratory:

The deadly heat projections (this, and the one from the previous paragraph) come from Mora et al (2017)1.

It should be clarified that “deadly heat” here means heat and humidity beyond a two-dimension threshold where at least one person in the region subject to that heat and humidity dies (i.e., not everyone instantly dies). That said, in my opinion, the projections in Mora et al are conservative and the methods of Mora et al are sound. I did not check the claims in this report against Mora et al but I have no reason to think they are in error.

1- Mora et al (2017) Global risk of deadly heat, Nature Climate Change

The knock-on consequences affect national security, as the scale of the challenges involved, such as pandemic disease outbreaks, are overwhelming. Armed conflicts over resources may become a reality, and have the potential to escalate into nuclear war. In the worst case scenario, a scale of destruction the authors say is beyond their capacity to model, there is a ‘high likelihood of human civilization coming to an end’.

Willem Huiskamp, Postdoctoral research fellow, Potsdam Institute for Climate Impact Research:

This is a highly questionable conclusion. The reference provided in the report is for the “Global Catastrophic Risks 2018” report from the “Global Challenges Foundation” and not peer-reviewed literature. (It is worth noting that this latter report also provides no peer-reviewed evidence to support this claim).

Furthermore, if it is apparently beyond our capability to model these impacts, how can they assign a ‘high likelihood’ to this outcome?

While it is true that warming of this magnitude would be catastrophic, making claims such as this without evidence serves only to undermine the trust the public will have in the science.

Daniel Swain, Researcher, UCLA, and Research Fellow, National Center for Atmospheric Research:

It seems that the eye-catching headline-level claims in the report stem almost entirely from these knock-on effects, which the authors themselves admit are “beyond their capacity to model.” Thus, from a scientific perspective, the purported “high likelihood of civilization coming to an end by 2050” is essentially personal speculation on the part of the report’s authors, rather than a clear conclusion drawn from rigorous assessment of the available evidence.

### Dominance High---1NC

#### American tech dominance is high. Only antitrust threatens it.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

# 2NC

## Taxes

#### The perm makes taxes and prohibitions co-dependent, denying a special status for regulatory taxation.

Kobylnik ’21 [Dmytro; January 4; PhD in Law, Associate Professor, Associate Professor of the Department of Financial Law of Yaroslav Mudryi National Law University; Law and Innovative Society, “The Impact of Tax Policy on the Implementation of the Regulatory Function of Tax Law,” <http://apir.org.ua/en/archives/1425>, translated via Google Translate]

Conclusions and prospects for the development. As we have shown, tax policy has its own meaning, it is organically linked to tax law, which by implementing the regulatory function implements the vectors indicated by the policy. Given the profound transformation of public relations that has taken place in our country in recent years, tax policy should be given a special role as a strong foundation for ensuring the effectiveness of tax and legal regulation.

Formulation of the problem. The social value, role and purpose of tax law are revealed in its functions as the main directions of its impact on public life. At the same time, the value potential of law is revealed by both general social and special legal functions. Scientists in the first group of functions through which law in general, and tax law in particular, influence the public consciousness, forming values, creating a certain dimension of social interaction, in which possible, appropriate and forbidden find their clear delineation in human actions, include the following : humanistic, organizational / organizational-managerial, epistemological / cognitive, informational / communicative, educational, orienting, evaluative / evaluative, security, economic, political, cultural [17, p. 32, 33]. As for the special legal functions of law, they usually include regulatory and protective. However, in their system, the prominent, defining place of these sciences give a regulatory function. So it is no coincidence that OS Emelyanov argues, reflecting on the functions of financial law, as follows: "expressed financial law in the form of regulations or financial planning acts, implemented in absolute or relative legal relations, or seeks to determine the legal status of participants in financial relations - in all these forms social purpose - to regulate public relations in the field of public finance "[1, p. 32]. The scientist sees specific features of this function, first of all, in the establishment of positive rules of conduct, organization of social relations, coordination of social relationships in the process of redistribution of social wealth [1,

p. 33]. At the same time, it is obvious that the implementation of the regulatory function of law is influenced by a number of factors, among which tax policy is important. Therefore, the purpose of the article is to characterize the impact of tax policy on the implementation of the regulatory function of tax law.

Analysis of recent research. Note that the question of the functions of tax law, tax policy and their interaction is not entirely new to the science of tax law, because to some extent resorted to their consideration OS Emelyanov, AA Kovalenko, MP Kucheryavenko, Yu. L. Smirnikov, VV Chaika and others. However, at present it cannot be said that they have received a proper scientific analysis, as the financial scientists did not resort to a comprehensive examination of them, but conducted fragmentary research. Thus, the purpose of the article is to consider the impact of tax policy on the implementation of the regulatory function of tax law.

Presenting main material. In the scientific literature it is noted that the content of the regulatory function of law is revealed through the separation of two aspects: static (establishment of legal norms) and dynamic (implementation of legal norms). In this regard, TM Radko argues that the regulatory function of law includes two components: regulatory-static function or the function of consolidation, stabilization of social relations and regulatory-dynamic, through which the law determines the future behavior of people [16, p. 31]. Other scientists say the same. Thus, Yu. L. Smirnikov notes that the regulatory function of financial law includes regulatory static and regulatory-dynamic subfunctions. Delimitation between them is due to the manifestation of two patterns of development of law - reflection in law and legal anticipatory reflection. From these positions, the regulatory-static function of financial law is manifested in the ability of financial law to reflect the essential properties of financial relations and to organize public relations in a particular period, which is expressed in the content of financial law. The regulatory and dynamic function of financial law provides an opportunity to predict the need for financial and legal influence on public relations, their transformation through public financial activities to ensure the public interest, finding the most effective means of legal influence based on monitoring financial legislation and its impact on society no relationship [18, p. 24].

As we can see, scholars characterizing the regulatory function of law emphasize the establishment of legal norms and the way of detecting the activity of law, calling the first aspect dynamic, and the second - static. At the same time, in our opinion, it is not entirely correct to call the corresponding phenomenon static or dynamic. First, the establishment of the rules of tax law, I and any law, is not a static phenomenon. Second, tax relationships, like any legal relationship, are hardly static in nature, but rather dynamic. They do not exist in statics as such, but are constantly in a certain motion, when in the presence of certain circumstances they arise, change and cease. Therefore, such a characteristic of the regulatory function is hardly logical.

However, there is no doubt that in any case, the tax law is able and intended precisely to regulate tax relations. "By enshrining in the sources of law the limits of the desired and permissible conduct for all subjects of law, grounds and types for the application of coercive measures to those of them that go beyond certain limits, the law (compared to other types of social norms) most effectively regulates social relations, giving them such features as organization, predictability, predictability, which ensures their stability and at the same time lays the foundation for development. This ultimately means awareness of its positive role for the individual, society, humanity in general [17, p. 32, 33].

The establishment of the norm of tax law is the most important kind of manifestation of the essence of tax law as a regulator of public relations. As VI Shcherbyna notes, the establishment of the rule of law is the definition of its content, the definition of real, adequate to social relations content of the rules of law as a guarantee of the viability of law [20, p. 55]. At the same time, the effective implementation of the considered function is possible under the condition of logical, consistent formulation of the prescriptions of tax and legal norms, which will ensure their effective implementation. Therefore, it is important to properly determine the content of the tax law, which largely depends on the tax policy that is implemented in the state. State tax policy is defined differently by scholars. For example, the activity of the state in the field of establishment, legal regulation and organization of collection of taxes and tax payments to the centralized funds of state resources [5], or systemic activities of public authorities and local governments to create and improve an effective mechanism for taxation. legal regulation aimed at mobilizing funds to public centralized funds to finance public expenditures and tasks and functions of the state, as well as based on balancing public and private tax interest [19, p. 85]. The state's tax policy covers the content of ideological, theoretical and activity-practical aspects of state management of the processes of functioning, improvement and development of the tax system of Ukraine. As a phenomenon of ideological and theoretical plan, it is a system of conceptually conscious ideas, goals, objectives, principles, programs that express the official position of the state on key issues of tax regulation and is the ideological and theoretical basis of tax activity in the state (tax policy in statics) . At the same time, tax policy is the activity of state and non-state institutions, citizens, which consists in developing, adjusting and implementing state legal strategy (tactics) in the field of tax regulation, creating conditions that ensure the state of legal protection of tax law subjects (tax politics in dynamics) [19, p. 86]. It is characteristic that scientists consider tax legislation to be the main, but not the only form of tax policy implementation [3, p. 57; 19, p. 90]. Therefore, we can talk about the corresponding dialectical dependence of tax and legal regulation and tax policy. This is manifested in two areas: (1) through the definition of the purpose, objectives, results of tax policy outlines the direction of regulation of tax relations, its subject, limits and methods, which establishes rules of conduct for taxpayers, ie the impact on lawmaking activities in the field of taxation, implementation of the regulatory function of tax law; (2) by determining the quality, effectiveness of tax legislation, assesses whether the tax policy has been fully implemented. This approach allows us to see deviations from the desired model of the tax system; establish the level of implementation of those provisions that you know strategically; identify shortcomings in both tax law and tax policy in general; to develop new approaches to ensuring the sustainable and efficient functioning of the state tax system.

Ensuring the formation and implementation of a unified state tax policy in our country is entrusted to the Ministry of Finance of Ukraine (paragraph 1 of the Regulation on the Ministry of Finance of Ukraine, approved by the Cabinet of Ministers of Ukraine dated August 20, 2014 № 375 [12]), as well as State Tax Service of Ukraine (paragraph 1 of the Regulation on the State Tax Service of Ukraine, approved by the resolution of the Cabinet of Ministers of Ukraine of March 6, 2019 № 227 [13]). The main tasks and directions of tax policy are defined in the Strategy for Reforming the Public Financial Management System for 2017-2020, which was approved by the order of the Cabinet of Ministers of Ukraine of February 8. 2017 № 142-r, which include: improving the quality and efficiency of administration of taxes and fees and the level of compliance with tax legislation; strengthening control over fiscal risks and implementing measures to minimize them, in particular with regard to state-owned enterprises, state guarantees and other contingent debt obligations, etc. [15].

Scholars rightly point out that the main contradiction of tax policy is to find a compromise between economic efficiency and social justice, the content of which long before the clear mathematical proofs of modern optimal taxation theory was formulated in the well-known aphorism of Jean-Baptiste Colbert: "Taxation goose so as to obtain the maximum number of feathers with a minimum of hissing. In modern scientific discourse, this contradiction should answer the question: what exactly should be formed tax system in terms of its composition of different taxes and elements of each individual tax, so that it provides funding for social needs and is the least harmful to economic growth [4, with. 7]. And in this context there are many problems, because on the agenda there are a number of issues, both regarding the establishment of a set of taxes and fees, their specific legal mechanisms, and control over the collection of taxes and fees, the powers of the tax administration and meetings, etc.

For example, let's look at a few aspects. Thus, one of the tasks in the Strategy for Reforming the Public Financial Management System for 2017–2020 is to increase the stability and predictability of the tax system. It is further noted that the Ministry of Finance will develop a Strategy for the development of the tax system in the medium term, which should be consistent with the strategy of economic development, reform of the budget process and the pension system. The control over the observance of the requirement to provide compensators of tax revenues or reduction of state budget expenditures in case of reduction of such revenues due to amendments to the tax legislation will be strengthened, as well as to ensure that changes to any elements of taxes and fees are not made later than six months before the start of the new budget period [15]. Taking into account the outlined direction of tax policy, this task should be implemented in tax and legal regulation. However, did it really happen? The answer is obvious, as at the end of 2020 the Strategy for the development of the tax system in the medium term has not been developed and approved. However, the report on the implementation of the action plan for the implementation of the Strategy for reforming the public financial management system for 2017–2020, approved by the order of the Cabinet of Ministers of Ukraine dated 24.05.2017 № 415-r, states that this aspect has been implemented [2]. The development of the mission and strategic goals of the State Tax Service until 2022, which was approved on December 10, can be attributed to the fulfillment of this task with a certain conditionality. 2019 by order № 205 of the State Tax Service of Ukraine [11]. However, as you can see, these are all such different regulations. As a result, we get unsystematic, frequent changes in tax legislation, because it is unlikely that a logical transformation of tax legislation can be achieved without a clear strategy, which indicates the state's chosen course for the future, aimed at solving tax issues. Therefore, the implementation of tax policy in this context has a negative impact on the implementation of the regulatory function of tax law.

#### ‘Prohibitions’ are an edict that forbids by law.

Mueller ’15 [Kimberly; February 25; Judge on the United States District Court California Eastern District; United States District Court for the Eastern District of California, “Peña v. Lindley,” Lexis]

The law does not, however, "prohibit[] the commercial sale of firearms." Marzzarella, 614 F.3d at 92 n.8; see also United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011) (noting Heller's distinction between "regulations" and "prohibitions"). Whereas the "imposi[tion] of conditions and qualifications on the commercial sale of arms" is "presumptively lawful," Heller, 554 U.S. at 627 n.26, the prohibition of commercial sale "would be untenable," Marzzarella, 614 F.3d at 92 n.8, because it would "effect[] a 'destruction of the [Second Amendment] right,'" Peruta, 742 F.3d at 1168 (quoting Heller, 554 U.S. at 629) (emphasis in original). As opposed to "conditions and qualifications," Heller, 554 U.S. at 627, "[a] 'prohibition' does more than merely alter or restrain a person's behavior; it is an edict, decree, or order which forbids, prevents, or excludes," Barton, 633 F.3d at 175 (internal quotation marks omitted); see also Jackson, 746 F.3d at 964 ("[A] ban is not merely regulatory; it prohibits . . . ." (internal quotation marks omitted, emphasis in original)). Thus, categorical prohibitions "go too far." Peruta, 742 F.3d at 1170. In Heller, for example, the Court invalidated the contested law, without subjecting it to constitutional scrutiny, because it was a "complete ban on handguns in the home . . . ." Id. at 1170 (citing Heller, 554 U.S. at 629). Similarly, in Peruta, the court summarily struck down the law in question because it was a "near-total prohibition on keeping [arms] . . . ." Id. In Silvester v. Harris, the subject of plaintiffs' second notice of supplemental authority, a fellow district judge found a ten-day waiting period to purchase a firearm an unconstitutional burden on the rights of those who already owned [\*34] firearms. 41 F. Supp. 3d 927, 2014 U.S. Dist. LEXIS 118284, 2014 WL 4209563, at \*28 (E.D. Cal. Aug. 25, 2014) (discussing longstanding presumptively lawful regulations as discussed in Heller, finding that waiting periods do not qualify, but noting laws "prohibiting the sale of certain types of firearms" may qualify).

#### Tax-based penalties are not a ‘prohibition.’

Gruodis ’16 [Povilas; June 3; Ph.D. and Lecturer at Vilnius University Faculty of Law, Attorney, JD in Law from Vilnius University; Social Transformations in Contemporary Society 2016, “Regulatory Function of the Tax Law: Methodological Origins and Specific Features,” ISSN: 2424-5631]

Abstract

It is common to think that the primary function of the tax law are fiscal which means that tax laws should be effective to collect budgetary income. Modern economics and modern tax law admit that tax law also has regulatory function which can be effectively used to regulate behavior. Every tax norm has strong regulatory impact which cannot be omitted. The regulatory function of the tax law is completely independent and cannot be originated from the fiscal function of the tax law. Tax laws can be very effective regulator and the fiscal function of the tax law is completely unnecessary for regulative purposes. The regulatory function and the regulatory impact of the tax norms are completely different from the regulatory function and regulatory impact of traditional “command and control” legal norms. In this research author analyzes the methodological origins and specific features of the regulatory function and the regulatory impact of the tax norms. As it is opposite to traditional “command and control” legal norms, tax norms can regulate behavior without setting any prohibitions or restrictions to taxpayers. That means that the regulatory function of the tax law are based on specific economically based self regulation mechanism which can be even more effective than traditional legal regulation based on sanctions and restrictions.

#### It's a disincentive but leaves the proscribed activity unprohibited.

Dagan ‘9 [Tsilly; Summer 2009; Faculty of Law at Bar Ilan University, LLM in Taxation from the New York University School of Law, LLB and JD from Tel Aviv University; Virginia Tax Review, “Itemizing Personhood,” vol. 29]

Tax liability produces powerful economic disincentives, which, in turn, entail behavioral consequences. If only commodified transactions are taxed whereas noncommodified activities go untaxed, people will have a marginal preference for the latter. Hence, perhaps paradoxically, tax law can provide an economic incentive for noncommodified activities by not taxing them. Likewise, tax law can create a disincentive for nonmarket activities by taxing them or disallowing expenses associated with them. Since taxation can encourage or discourage nonmarket activities, it can serve as a possible tool in any informed effort to commodify or decommodify certain aspects of our lives.

Unlike the "all or nothing approach" of either allowing or prohibiting exchanges, tax offers a more refined and sensitive tool for regulating commodification. Taxing only market goods, for example, affects commodification by making the relative price of market goods higher than the "price" 32 of the nonmarket benefits. Thus, tax adds a unique form of regulation - tinkering with market prices - to Radin's suggestions as to the various ways in which we might consider commodification a matter of degree. 33 Incentives and disincentives can also be generated by taking into account actual expenses that are paid to support noncommodified attributes (such as housing, childcare, and contributions to charitable associations). In other words, despite the fact that tax is well-anchored in the market realm (or, perhaps, due to this fact), the wide array of tax techniques can be used to create incentives for noncommodified interactions.

#### Defensive Expenses Link---businesses will divert resources to build up a legal war chest. Possibility of new suits is enough.

Elyse Dorsey 20, Adjunct Professor at Antonin Scalia Law School at George Mason University, JD from George Mason University, BA from Clemson University, et al., “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement”, Pepperdine Law Review, 47 Pepp. L. Rev. 861, Lexis

B. More Politicized Antitrust

The populist movement's effort to shift the economic constraints on modern antitrust jurisprudence to more open-ended enforcement would expose antitrust law to increased politicization. 277 If enforcers can call upon a large list of political justifications for their enforcement decisions, they will be able to pursue cases that best fit within a political agenda--which will necessarily change over time as political administrations change--rather than being forced consistently to focus upon the limited practices that are most injurious to consumers. In proposing such a political regime, the populist antitrust model thus largely fails to offer a definable set of metrics to distinguish strong cases from weak ones. What would stand in its place is political discretion.

But our lived experience is that political discretion is a poor substitute for economically-grounded antitrust enforcement. 278 As discussed above, United States antitrust struggled to incorporate a wide variety of often conflicting values throughout the early and mid-twentieth century--and it was anything but successful. 279

Despite our nation's negative experiences with politicized antitrust, many modern populist antitrust calls sound remarkably similar to earlier ones. 280 One particularly persistent effort relates to condemning market concentration and firm size independently of any evidence of actual anticompetitive effects, which is primarily rooted in a reflexive application of the largely-discredited 281 [\*910] structure-conduct-performance (SCP) paradigm. 282

Such calls are in vogue today, but it is far from the first time. 283 In 1973, for instance, "Michigan Senator Philip Hart introduced Senate Bill 1167, the Industrial Reorganization Act [(IRA)], 284in order to address perceived problems arising from industrial concentration." 285 Among other things, 286 the bill would have required the creation of an "Industrial Reorganization Commission" to "study the structure, performance, and control" of seven "[p]riority" industries, 287 and, for each, to "develop a plan of reorganization . . . whether or not any corporation [was determined to possess monopoly power]." 288 "The bill was [grounded] in the belief that industry concentration led inexorably to monopoly power; that monopoly power, however obtained, posed an inexorable threat to freedom and prosperity; and that the antitrust laws . . . were insufficient to address the purported problems." 289That sentiment has "resurfaced today as the asserted justification for similar . . . antitrust" reform legislation. 290 But as discussed, the populist movement fundamentally fails to grapple with the reality that "constraining firm size in an effort to promote the political and economic power" of consumers (or of [\*911] favored businesses) "may actually have the opposite of its intended effect." 291

Another driving force behind the IRA--which we also see echoed today--was the allegation that economic power leads to political power. This is, perhaps, the most consistently leveled attack today: that economic concentration and the presence of large firms lead inexorably to the subversion of democracy. 292 But this purported causal relationship has already been rejected as having no basis in reality; and no new evidence suggests otherwise. 293 As Henry G. Manne explained in his senate testimony on the IRA in 1974:

There is, however, a "political" argument that should also be considered. It is that some corporations are so large that they are able to "control" the Government, presumably as it were, to "buy" the protection, the subsidy, the transportation system, the war, or whatever they want from the Government. . . .

Unfortunately, the energy utilized in making these assertions is about the only force behind them, and again it does not require complicated empirical studies to show the error, or perhaps the mendacity . . . behind these assertions.

There is simply no correlation between the concentration ratio in an industry, or the size of its firms, and the effectiveness of the industry in the halls of Government.

This scare argument about the political power of large corporations [\*912] is a sham.

We all know that the institutions that influence policies in Washington are those that can deliver the votes or utilize their finances to secure votes.

And these are the very practices that large corporations are relatively weakest in performing, especially as compared to unions, farmers, consumer organizations, environmentalists, and other large voting blocks.

There is even less substance to this political argument about corporate concentration than there is to the economic ones. 294

Many things other than dollars influence political decision-making. It can hardly be said that any large company succeeds in all its efforts to influence politics--just as it must be acknowledged that relatively small companies, labor unions, activist organizations, and even well-connected individuals often succeed in theirs. 295 Not only is the risk of political influence arising from concentrated industry overstated, the risks and costs of adopting politicized enforcement are, as discussed, significantly understated.

Indeed, we have observed the costs of politicized antitrust, and our experience is that they are both real and significant. When "imbue[d] . . . with an ill-defined set of vague [socio-]political objectives," antitrust becomes a sort of "meta-legislation." 296 "As a result, the return on influencing a handful of government appoint[ees] with authority over antitrust becomes huge . . . [thereby] increasing [significantly] . . . the incentive[s] to do so." 297

[\*913] As Baumol and Ordover observe, antitrust law is inherently prone to rentseeking, especially protectionism. 298 This rent-seeking, in turn, leads to numerous harms, including the misallocation of resources (both government and private), less efficient firms, and a diversion of firms' energies towards less productive ends, including both offensive (aimed at having enforcers investigate and prosecute competitors) and defensive (protecting oneself from such endeavors and actions) efforts. 299 It can also lead to regulatory capture, whereby enforcers may be "captured" by certain interests and fail to act in a way that aligns with their stated objectives. 300 Explicitly incorporating opaque socio-political goals into antitrust enforcement only exacerbates these harmful tendencies--and simultaneously decreases the ability to hold captured enforcers responsible, as they can justify nearly any outcome. 301 Indeed, evidence drawn from analyzing early enforcement actions, arising before antitrust fully embraced the consumer welfare standard--and when it was seeking to further a wider set of socio-political goals--indicates that such public interest factors failed to explain significant percentages of enforcement actions. 302

The economically grounded consumer welfare standard helped substantially to cabin such harms and align enforcement with consumer interests. 303 But reintroducing a political dimension to antitrust law would reestablish a regime inherently prone to capture by rivals seeking to ride populist waves of protectionism to economic dominance. And so politicized antitrust is, quite contrary to the populist movement's stated goals, a recipe for a corporate welfare regime.

Moreover, as discussed, when antitrust policy is unmoored from economic analysis, it exhibits fundamental and highly problematic contradictions. 304 Perhaps most critically, attempting to promote socio-political goals [\*914] through competition laws tends to undermine competition itself. 305 If competition law is unconstrained on its own terms--that is, if it is unmoored from a set of subject-specific limitations imposed by courts and legislatures--it threatens to morph into a large, sprawling, economy-wide set of regulations resembling a national industrial policy. 306 The merits or demerits of actually having an economy-wide industrial policy aside, it is unquestionably a perversion of competition law to facilitate the imposition of policies from law and regulation outside of competition policy in ways that, of necessity, will promote other polices at the very expense of competition.

#### It can be tailored to specific practices AND solves by forcing companies to internalize the costs of lost competition.

Lemley ’21 [Mark and Andrew McCreary; January 2021; William H. Neukom Professor of Law and Stanford Law School, Partner at Durie Tangri LLP; J.D./M.B.A. Candidate, Stanford Law School and Stanford Graduate School of Business; Boston University Law Review, “Exit Strategy,” vol. 101]

1. Tax Transactions

One way to discourage anticompetitive mergers and to encourage companies to continue operating is to vary the tax treatment of those two options. 359

Right now, liquidity events are generally not taxed directly. When companies go public, they generate enormous amounts of money by selling stock, and that influx of cash isn't taxed at all. 360That might make sense; we want people to create and fund public companies. The same thing happens when companies merge. They usually do so by exchanging stock, again avoiding taxation when various conditions are met. 361But here the social value of giving them a tax exemption is less clear. Merging can be a good thing that creates savings or synergies within the merging companies. But it poses enough of a threat to competition that we require costly antitrust review for mergers of a certain size. 362If we think that incumbent acquisitions are worse for society than IPOs, one way to push people towards IPOs may be a Pigouvian tax on acquisitions. 363 We might tailor the tax to particular sectors or acquisitions and base it on an adequate proxy of an acquisition's likely social cost. 364

The problem may be worse than the equal tax treatment of options that are not equally good for society. Right now, mergers that threaten to reduce social welfare by decreasing market competition not only are not taxed but may also sometimes obtain tax breaks that separately managed firms cannot. This incentivizes mergers, including anticompetitive ones. 365Some of these breaks are achieved through structures that, on paper, are available to firms reorganizing for an IPO but that, in practice, may be most easily attained by firms reorganizing through merger. 366Performance-related subsidies might be most readily exploited through acquisition. 367And agreements once formed at arm's length can be set so that revenues accrue where taxed the least and expenses where they result in the greatest tax deductions. 368This doesn't encourage the acquisition of direct competitors, but it may drive the acquisition of companies that provide complements. And mergers offer other tax benefits as well. 369

Tax incentives matter to exit decisions. Startups become increasingly sensitive to tax issues the more they generate revenue and the later they are in their lifecycle. 370And past tax reforms appear to have changed merger activity. 371Right now, however, far from rewarding firms that resist incumbent acquisition - the mergers that may reduce competition and cause social harm - the tax system equally or in some cases especially rewards these exits.

We should closely consider ways we might tax mergers to force companies to internalize the cost that the merger imposes on society. 372A firm that sells out does not bring the same benefits to society as a firm that continues to compete. We might consider not only changes to tax law designed to entice individual GPs and founders involved with companies to continue to operate the firm, which we touched on above 373but also others to directly discourage companies from merging with incumbents. This kind of tax could be aimed at mergers by particular firms in particular sectors. And its basis could be set to capture the social harm likely to result. We propose a few approaches here to prompt discussion.

A one-time merger tax on the combined market value of merging companies could discourage acquisition, especially acquisition by large rivals, by raising the cost to the acquiring firm - complementing antitrust laws to discourage anticompetitive mergers. Taxing the combined value of the merging firms rather than the value of the acquired firm alone would make it more costly to merge as firms get bigger. 374That may be desirable as a matter of social policy in general, offering a market-based alternative to antitrust law as a means of promoting competition. And it would be a particularly good way to tackle the exit strategy problem because it would encourage startups that decide not to keep operating to merge with small rather than large firms. 375

## New

#### Finishing Abbott---broad application harms leadership---chills incentive to innovate

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### Free enterprise and reinvigorated alliances more than match challengers.

Mahaffee '21 [Dan; 7/29/21; senior vice president at the Center for the Study of the Presidency & Congress, M.A. in Security Studies from Georgetown University; James Kitfield; senior fellow at the Center for the Study of the Presidency & Congress; "Bipartisan policies put America back into the 5G race against China," <https://thehill.com/opinion/technology/565456-bipartisan-policies-put-america-back-into-the-5g-race-against-china/>]

Too often hyper-partisanship and political dysfunction in Washington, D.C. act as a drag on our nation’s ability to unite to confront major challenges. Yet in two promising areas a rare bipartisan consensus has recently emerged on Capitol Hill: the imperative of empowering U.S. leadership and innovation in the fierce competition with China over advanced technologies, and the key role infrastructure investments in areas such as high-speed digital connectivity play in that competition.

Fortunately, in strengthening our digital infrastructure at home and meeting the technological challenge from abroad, the United States has a successful playbook in the recent race to field fifth generation, or “5G,” mobile networks that are designed to connect virtually everyone and every electronic device, and are poised to change the way the world communicates.

Just a few years ago, China was so far ahead in deploying 5G networks that many experts believed the United States had already ceded the race. “China and other countries may be creating a 5G tsunami, making it near impossible [for America] to catch up,” analysts at the accounting firm Deloitte wrote. Analysts at Ernst & Young were equally blunt. “China is already in a leading role in the 5G development,” they wrote a few years ago, and “is poised to win the race to 5G.”

The math bore out those grim predictions. Excessive regulatory red tape meant that U.S. carriers were spending nearly three times as much as their counterparts in other countries to generate 5G network capacity. Between 2012 and 2016, the United States constructed on average three new cell sites a day when thousands are needed for 5G. At the time China was building roughly 460 new cell sites per day. As Federal Communications Commission (FCC) Commissioner Brendan Carr pointed out in a recent discussion hosted by the Center for the Study of the Presidency & Congress, “What it was taking us four years to do, China was doing every nine days.”

Fast forward to today. While the race for 5G leadership and onwards to 6G is far from over, the United States is now positioned to successfully compete thanks to measures that have empowered innovation, entrepreneurialism, and enterprise. Rather than trying to “be like China to beat China,” Carr noted, the FCC instead took steps to unleash America’s free enterprise mojo. The FCC thus moved to streamline approvals and cut the fees local governments levied on cell site construction. Freeing up spectrum across low-, mid-, and high-band frequencies allowed for U.S. carriers to innovate by using different frequencies and combinations of coverage.

Once again the numbers tell the tale. In 2019, with that more streamlined framework in place, U.S. carriers built over 46,000 new cell sites, a 65 fold increase. Meanwhile, internet speeds in the United States have more than tripled over the past four years, and more than 270 million Americans are now covered by 5G networks, helping to cut the digital divide separating the “haves” and “have nots” of this critical technology nearly in half.

In recent years both the Trump and Biden administrations have also taken a strong stand against reliance on Chinese companies such as Huawei and ZTE for 5G technology. Under China’s national intelligence law, these companies are legally required to conduct intelligence gathering when asked to by the Chinese Communist Party, which routinely engages in digital spying on dissidents, steals intellectual property, and hacks foreign governments and corporations.

With Huawei already having finalized more 5G contracts than any other telecom company, more still needs to be done to convince allies and partners of the serious risks of relying on Chinese firms for critical digital infrastructure. The Biden administration took a positive step in calling out Beijing’s digital transgressions when it recently rallied a broad and unprecedented group of allies — including the European Union and for the first time, the NATO alliance — to publicly condemn Beijing for malign activities in cyberspace that include hacking Microsoft email systems used by many governments and international corporations.

The good news is that the 5G race is afoot, and the United States is now in it to win it. That success offers clear lessons for the way forward. First, when it comes to infrastructure, we need to pair investments with streamlined deregulatory measures that ensure we are not, as Carr put it, “hitting the brake and the gas at the same time.” Thus unleashed, the American free enterprise system is more than a match for China’s centralized planning model and insistence on iron-gripped government control of the private sector.

The second lesson is that we must be clear-eyed about the geopolitical stakes in this technological competition. Washington, Brussels and Beijing are all jockeying for advantage in a commercial competition, but one informed by different core values and visions of the future. Those different world views should align the United States and its democratic allies closely as they confront Beijing’s authoritarianism and increasingly brazen challenges to the rules-based international order in Hong Kong, the Taiwan Straits and the South China Sea.

Put simply the stakes in this “geotech” competition could not be higher, and it is one that free societies cannot afford to lose.

## Econ

#### Data

Christopher Clary 15, Ph.D. in Political Science from MIT, Postdoctoral Fellow, Watson Institute for International Studies, Brown University, “Economic Stress and International Cooperation: Evidence from International Rivalries,” April 22, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2597712

Do economic downturns generate pressure for diversionary conflict? Or might downturns encourage austerity and economizing behavior in foreign policy? This paper provides new evidence that economic stress is associated with conciliatory policies between strategic rivals. For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. Drawing on data from 109 distinct rival dyads since 1950, 67 of which terminated, the evidence suggests rivalries were approximately twice as likely to terminate during economic downturns than they were during periods of economic normalcy. This is true controlling for all of the main alternative explanations for peaceful relations between foes (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international systemic changes), as well as many other possible confounding variables. This research questions existing theories claiming that economic downturns are associated with diversionary war, and instead argues that in certain circumstances peace may result from economic troubles.

Defining and Measuring Rivalry and Rivalry Termination

I define a rivalry as the perception by national elites of two states that the other state possesses conflicting interests and presents a military threat of sufficient severity that future military conflict is likely. Rivalry termination is the transition from a state of rivalry to one where conflicts of interest are not viewed as being so severe as to provoke interstate conflict and/or where a mutual recognition of the imbalance in military capabilities makes conflict-causing bargaining failures unlikely. In other words, rivalries terminate when the elites assess that the risks of military conflict between rivals has been reduced dramatically.

This definition draws on a growing quantitative literature most closely associated with the research programs of William Thompson, J. Joseph Hewitt, and James P. Klein, Gary Goertz, and Paul F. Diehl.1 My definition conforms to that of William Thompson. In work with Karen Rasler, they define rivalries as situations in which “[b]oth actors view each other as a significant political-military threat and, therefore, an enemy.”2 In other work, Thompson writing with Michael Colaresi, explains further:

The presumption is that decisionmakers explicitly identify who they think are their foreign enemies. They orient their military preparations and foreign policies toward meeting their threats. They assure their constituents that they will not let their adversaries take advantage. Usually, these activities are done in public. Hence, we should be able to follow the explicit cues in decisionmaker utterances and writings, as well as in the descriptive political histories written about the foreign policies of specific countries.3

Drawing from available records and histories, Thompson and David Dreyer have generated a universe of strategic rivalries from 1494 to 2010 that serves as the basis for this project’s empirical analysis.4 This project measures rivalry termination as occurring on the last year that Thompson and Dreyer record the existence of a rivalry.5

Why Might Economic Crisis Cause Rivalry Termination?

Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to austerity pressures, which in turn incent leaders to search for ways to cut defense expenditures. (2) Economic crises also encourage strategic reassessment, so that leaders can argue to their peers and their publics that defense spending can be arrested without endangering the state. This can lead to threat deflation, where elites attempt to downplay the seriousness of the threat posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to consider threat prioritization, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the political and economic benefit from international economic cooperation. Leaders seek foreign aid, enhanced trade, and increased investment from abroad during periods of economic trouble. This search is made easier if tensions are reduced with historic rivals. (5) Finally, during crises, elites are more prone to select leaders who are perceived as capable of resolving economic difficulties, permitting the emergence of leaders who hold heterodox foreign policy views. Collectively, these mechanisms make it much more likely that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this causal logic in greater detail, while also providing historical examples that these mechanisms recur in practice.

#### History.

Stephen Walt 20. Robert and Renée Belfer professor of international relations at Harvard University and a columnist for Foreign Policy. Will a Global Depression Trigger Another World War? Foreign Policy. 5-13-2020. https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

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

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

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

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

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

## Pharma

#### Err against disease impacts – tech and bias ensure they’re overestimated.

Pinker 18 Steven Arthur Pinker is a Canadian-American cognitive psychologist, Professor at Harvard University. [Enlightenment Now: The Case for Reason, Science, Humanism, and Progress, Viking, Penguin Group]

And crucially, advances in biology work the other way as well: they also make it easier for the good guys [public protectors] (and there are many more of them) to identify pathogens, invent antibiotics that overcome antibiotic resistance, and rapidly develop vaccines.63 An example is the Ebola vaccine, developed in the waning days of the 2014–15 emergency, after public health efforts had capped the toll at twelve thousand deaths rather than the millions that the media had foreseen. Ebola thus joined a list of other falsely predicted pandemics such as Lassa fever, hantavirus, SARS, mad cow disease, bird flu, and swine flu.64 Some of them never had the potential to go pandemic in the first place because they are contracted from animals or food rather than in an exponential tree of person-to-person infections. Others were nipped by medical and public health interventions. Of course no one knows for sure whether an evil genius will someday overcome the world’s defenses and loose a plague upon the world for fun, vengeance, or a sacred cause. But journalistic habits and the Availability and Negativity biases inflate the odds, which is why I have taken Sir Martin up on his bet. By the time you read this you may know who has won.65

#### No bioterrorism.

Blum & Neumann ’20 [Marc-Michael and Peter; June 22; Former Head of Laboratory at the Organisation for the Prohibition of Chemical Weapons. He holds a PhD in Biochemistry from the University of Frankfurt; Professor of Security Studies at King’s College London, and served as Director of its International Centre for the Study of Radicalisation from 2008-18. *War on the Rocks,* “CORONA AND BIOTERRORISM: HOW SERIOUS IS THE THREAT?” <https://warontherocks.com/2020/06/corona-and-bioterrorism-how-serious-is-the-threat/>] KS

The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are teeming with talk about “biological warfare.” ISIL even called the virus “one of Allah’s soldiers” because of its devastating effect on Western countries. According to a recent memo by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks.

How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the technical challenges associated with weaponizing biological agents have proven insurmountable. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy.

A History of Failures

Biological warfare, which uses organisms and pathogens to cause disease, is nearly as old as war itself. The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat).

Among terrorists, however, the use of biological weapons has been rarer, although groups from nearly all ideological persuasions have contemplated it. Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. No one died in any of these instances.

The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to buy, steal, or develop biological agents. For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop.

Yet none of these efforts succeeded. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that none of the toxin had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose only fatality was the hamster on which it was tested. Of the tens of thousands of people that jihadists have murdered, not a single one has died from biological agents.

It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as Bruce Ivins, a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents.

Technical Challenges

Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a technical level, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be isolated and disseminated. But this is more difficult than it seems. As well as advanced training in biology or chemistry, isolating the agent requires significant experience. It also has to be done in a safe, contained environment, to stop it from spreading within the terrorist group. Contrary to what al-Qaeda said in one of its online magazines, you can’t just make a (biological) weapon “in the kitchen of your mom!”

In addition, there is the challenge of dissemination. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in perfect conditions. In the case of the bacterium anthrax, for example, only spores of a particular size are likely to be effective in certain kinds of weather. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is unlikely that terrorist groups possess the resources, stable environment, and patience to do likewise.

Doomsday Scenarios

Even if terrorists somehow succeeded, it is nearly inconceivable that the resulting “weapon” would be as powerful as the recent coronavirus, SARS-CoV-2. One of its uniquely devastating features has been that people are infectious while experiencing no symptoms. As it spread across the globe, there was no treatment, no vaccine, an incomplete understanding of its pathological modes of action, and no easy, cheap and widely available testing. It was the viral equivalent of a “zero-day exploit” — a cyber-attack that happens before any patch is available.

None of the viruses on the U.S. Centers for Disease Control and Prevention’s list of the most dangerous biological agents could be easily “weaponized” or would have the same, devastating effects as SARS-CoV-2. Pathogenic viruses such as smallpox, Ebola, Marburg, and Lassa are extremely hard to find, isolate, and spread. Botulinum and ricin are dangerous toxins, but not contagious, while Tularemia cannot be transmitted from human to human. The plague is, of course, capable of causing pandemics, but most countries are nowadays well prepared for this particular virus, and will be able to limit — and cope with — localized outbreaks.

This leaves only anthrax, a soil bacterium which is relatively easy to obtain. Even so, isolating a highly pathogenic strain is difficult. More importantly, anthrax is not contagious, and while its spores are durable and affected areas can be hard to de-contaminate, it is unable to spread on its own.

Regarding SARS-CoV-2, it is important to distinguish between the possibility that the virus occurred naturally and escaped from a laboratory, and the idea that it was engineered for maximum infectiousness and deliberately released. The first remains a possibility, although other explanations are equally — if not more — plausible, while the second has been debunked by a comprehensive examination in the journal Nature Medicine, which concluded that SARS-CoV-2 was “not a laboratory construct or a purposefully manipulated virus.”

The chances that terrorists would be capable of engineering a virus such as SARS-CoV-2 without access to a state’s resources are virtually zero. If anything, the possibility of a lab escape — however remote — highlights the importance of biosafety. While governments have paid much attention to laboratories with the highest biosafety level (level 4), work on bat-born coronaviruses is regularly performed at lower levels (level 3, and even level 2), and should instead be subject to similar safety requirements.

In sum, small-scale attacks using anthrax or other agents may be possible, but the risk of a highly advanced, weaponized pathogen that spreads among large populations — a terrorist-initiated biological doomsday — is very low. The only exception, of course, is if terrorists received support from a state, acted as its proxies, or were able to draw on its resources — as in Ivins’ case.

# 1NR

## FTC

#### C – Every thumper is priced in and proves the link – the FTC devotes finite resources to major priorities – they’ve specifically dodged new antitrust legislation like the aff

Feiner, 1-19-22 – Lauren, “FTC Chair Lina Khan says agency won’t back down in the face of intimidation from Big Tech,” CNBC, <https://www.cnbc.com/2022/01/19/ftc-chair-lina-khan-says-agency-wont-back-down-in-the-face-of-intimidation.html> -- Iowa

Khan personally has faced pushback from Amazon and Facebook in particular, which petitioned for her recusal from antitrust matters involving their businesses. They argued that Khan’s past statements and work for the Open Markets Institute and the House Judiciary subcommittee on antitrust investigating tech firms, indicated she had prejudged their liability.

Khan also made a name for herself in academic circles through her 2017 Yale Law Journal article “Amazon’s Antitrust Paradox,” which argued for a more expansive interpretation of antitrust laws when applied to digital markets.

Just last week, a judge in the FTC’s antitrust lawsuit against Facebook affirmed that Khan did not need to recuse herself from the vote to file the amended complaint in the suit, ruling that she was not acting in an adjudicatory role. Khan said it was “terrific” to see the judge respond in that way.

Khan credited the forceful approach of some of these firms with the standards they had gotten used to from law enforcement historically. She said while they experienced “lighter touch treatment in the past,” they’re now responding to a pileup of enforcement actions.

Khan declined to throw her weight behind any particular bills that would reform antitrust law that are being considered in Congress, but she supported additional resources for the agency and generally welcomed congressional action to minimize certain hurdles enforcers must consider in bringing cases.

As it stands, Khan said the agency does have to choose its workload wisely, which often involves trade-offs about what it can pursue. Given those constraints, the question of which enforcement actions could have a deterrent effect becomes an important one, she said.

“We have to make very difficult choices about which billion-dollar deals we’re going to ensure we’re closely investigating, but there are very real trade-offs in terms of what that work is going to come at the expense of,” she said.

“What are instances in which certain types of actions could have a market-wide impact?” Khan said, giving an example of a question the agency might consider. “If we are able to obtain a particular settlement or consent decree or get a good outcome in court, what are instances in which that could really change the dynamic in the entire market rather than just, you know, here or there?”

Khan said the agency also considers which cases could involve unlawful practices that also have an “upstream source.”

“So certain types of intermediaries or companies that may be facilitating bad practices, going upstream and really try to nip it at the source can also be one way we try to channel our resources in ways that can be more efficient,” she said.

The FTC’s lawsuit against Facebook, first filed under Khan’s predecessor, is one example of a case the agency has chosen to pursue that could have broader implications for the industry as a whole. In the suit, the FTC claimed that Facebook used its acquisitions of then-nascent competitors Instagram and WhatsApp to amass power and create barriers that impede other firms from entering the market. If the FTC prevails in that case, it could make tech and other industries more skittish about pursuing such acquisitions in the future.

Khan said she recognizes the relatively short period of time she has to act on these issues, and aims to do so “with a fierce sense of urgency.”

#### Plan is different.

Masuda et. al. 21. Funai, Eifert & Mitchell, Ltd. Masuda, Funai, Eifert & Mitchell, Ltd. is a U.S. law firm headquartered in Chicago, Illinois, “The Implications of President Biden's "Executive Order on Promoting Competition in the American Economy" 8.18.21. https://www.masudafunai.com/articles/the-implications-of-president-bidens-executive-order-on-promoting-competition-in-the-american-economy?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration

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

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

#### 1ac

Michael A. Carrier 21. Rutgers Law School. “Pharmaceutical Antitrust: What the Biden Administration Can Do” Rutgers Law School Research Paper No. Forthcoming. 01-27-21. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771055>

19. Every drug company profiting from a patented drug faces a moment of reckoning: the time its patent expires and it is subject to generic competition. Not surprisingly, the companies do everything they can to delay that moment as long as possible. The variety of conduct in which drug companies have engaged is wide-ranging and always changing. The FTC needs to be on its toes. 20. For example, who could have imagined in 2017 that the industry would reach into its bag of anticompetitive tricks to pull out. . .tribal immunity? Yes, Allergan transferred patents covering its dry-eye medicine Restasis to the Saint Regis Mohawk Tribe in an attempt to avoid re- view at the Patent Office.26 Such a shameless attempt to exploit immunity developed for a different purpose was not successful, as the Federal Circuit held that tribal im- munity did not apply to the proceedings at issue.27 But it is a reminder of drug firms’ creativity in avoiding competition.21. The latest ruse involves convincing courts to jettison a vital pathway by which generics have reached the market. In settings in which a drug can be used to treat multiple conditions, a generic can “carve out” the patented indications from its label.28 The resulting “skinny label” allows the generic to launch its product for uses not covered by the patent. 22. In October 2020, a Federal Circuit panel found that this long-recognized practice could form the basis for induced infringement, even though, as Chief Judge Prost explained in a 33-page dissent, generic company Teva “did everything right.”29 The dissent worried that the ruling rendered the “‘content’ of Teva’s skinny label alone (. . .) sufficient to prove induced infringement—even though Teva’s skinny label did not encourage, promote, recommend, or even suggest the patented method.”30 Such a “nullification”31 of the Hatch-Waxman Act “invites a claim of inducement for almost any generic that legally enters the market with a skinny label.”32 As shown by a lawsuit filed shortly after the decision, brand companies have wasted no time in doing this.33 23. One thing is for certain. The FTC needs to be nimble in assessing all the ever-changing ways the pharmaceutical industry can delay generics. V. Conclusion 24. The pharmaceutical industry often raises the argument that high drug prices are an inevitable result of innovation and that their conduct should avoid scrutiny because of the importance of drugs. But antitrust law allows us to have our cake and eat it too, ferreting out the “bad apples” while not harming innovation. The Biden administration can achieve these positive—in fact, life-altering—results by targeting conduct like pay-for-delay settlements, product hopping, biosimilar blockades, and the next frontier of anticompetitive conduct.

#### no

Ed Harvey 21, Thompson Coburn LLP, JD Supra, “HSR filers: Close at your own risk as FTC is overwhelmed by ‘tidal wave of merger filings’,” JD Supra, 8/19/21, https://www.jdsupra.com/legalnews/hsr-filers-close-at-your-own-risk-as-2651065/

Under the Hart-Scott-Rodino (“HSR”) Act, companies engaged in certain large transactions, commonly referred to as “mergers” or “acquisitions,” are required to notify the Federal Trade Commission and Department of Justice of certain large impending transactions by filing a prescribed notification and report form. The agencies then generally have 30 days to investigate, during which they can ask for more information (known as a “Second Request”) which extends the waiting period until the companies have substantially complied with the Second Request. If the reviewing agency grants early termination of the 30-day waiting period or does nothing, the transaction may close. The FTC has recently announced, however, that regardless of the expiration of the 30-day waiting period, its investigation of many transactions will remain open. Indefinitely.

Citing “astounding” monthly HSR filing statistics, on August 3, 2021, the Federal Trade Commission issued a blog announcement stating that it has been swamped “by a tidal wave of merger filings that is straining the agency’s capacity to rigorously investigate deals ahead of the statutory deadlines.” Desiring to “be upfront about these capacity constraints,” the agency announced that it will now send standard form letters to HSR filers whose deals cannot be “fully investigate[d]” within the 30 day waiting period. That letter (attached to the announcement) informs companies that “although the waiting period will expire imminently,” the investigation “remains open and ongoing.” The blog post, issued by Holly Vedova, Acting Bureau of Competition Director, concludes with this ominous warning:

Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to an HSR filing should not be construed as a determination that a deal is lawful.

In other words, no one should be comfortable that their transaction is lawful simply because the agencies have not objected within the statutory 30-day period.

In one sense, this is nothing new, as the agencies have always retained the right to determine a merger is unlawful after a premerger review. Although post-merger challenges have been less frequent than premerger challenges, the “close at your own risk” letter announcement, combined with a recent FTC resolution stating that use of compulsory process to investigate consummated mergers would extend to 10 years, suggests that the post-merger challenge may become a more often used weapon in the FTC’s arsenal. Parties engaged in HSR-level transactions should consider how to address the “close at your own risk” letters in their acquisition agreements. For example, if closing is conditioned on the absence of any open investigations, could a buyer delay closing? Or if closing is contingent on the expiration of the HSR waiting period, could a seller force a closing? Deal terminology going forward will need to be explicit regarding risk allocation under these new “close at your risk” circumstances.

The FTC’s announcement provides no hint of when — if ever — the parties will learn that an investigation is complete. Indeed the FTC’s form letter states that “no determination regarding the lawfulness of the transaction…could be made unless and until the Commission completes its investigation.” If the 2021 “tidal wave” of reportable transactions continues, the HSR filings and theoretical “ongoing investigations” will continue to pile up on the FTC’s shores, and who knows when the agencies will be able to sort through that debris.

#### Antitrust enforcement saps up FTC resources and personnel, which are finite.

Tara L. Reinhart, et al. 21. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing antitrust litigation is an expensive and laborious process, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a handful of antitrust matters at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the FTC will still have to pick its cases carefully and cannot challenge every deal or every instance of alleged unlawful conduct.

#### **FTC action on pay-for-delay in pharma causes serious battles – link turns case because it wrecks compliance** and enrages Congress

Gallagher, 1-28-22 – Michael Gallagher – accomplished trial and appellate litigator and trusted antitrust advisor with more than 25 years’ experience helping clients navigate their most important challenges along with partners Kevin C. Adam Eugene Hutchinson Constantin Nuernberger Shravya Govindgari Cassandra Calderon. “Drug Pricing Issues to Watch in 2022,” <https://www.whitecase.com/publications/alert/drug-pricing-issues-watch-2022> -- Iowa

Beyond BBBA, Dueling Congressional Reports Highlight Different Perspectives on Drug Pricing. Recent dueling majority and minority reports from the House Oversight and Reform Committee reflect why it has been—and may continue to be—difficult to advance federal legislation on the subject of drug pricing, with lawmakers unable to agree on which industry players should be targeted, let alone how to go about doing so.5 The December 2021 reports present findings from eight interim staff reports and five public hearings as part of the Committee's drug pricing investigation that kicked off in January 2019. The Democrats' Majority Staff Report focuses on "reverse payment" patent settlements, "product hopping," patent "thicketing," and other manufacturer conduct that the Majority Report concludes suppresses competition from less-expensive generic and biosimilar drugs, leading to higher prices.6 By contrast, the Republicans' Minority Staff Report takes aim at the role of PBMs and concludes that PBMs drive up drug prices by leveraging the influence these intermediaries have to force manufacturer price concessions for popular drugs.7 The Minority Report learned that pharmaceutical manufacturers must raise prices to pay these growing rebates and discounts, which PBMs then largely pocket rather than pass along to consumers.

Congress May Move on Efforts to Target Drug Pricing with Changes to Antitrust and Patent Law. Antitrust continues to receive attention in Congress, which may push forward with some or all of a package of pending legislation that seeks to bolster competition from generics and biosimilars by revising antitrust and patent law.8 Some of these bills, which were proposed back in April of 2021 (read more here), target conduct specifically referenced in the House Oversight and Reform Committee Majority Staff Report discussed above. The bills propose: (1) making "reverse payment" settlements presumptively illegal under the FTC Act, essentially overriding the rule-of-reason framework laid out by the U.S. Supreme court in FTC v. Actavis to evaluate "reverse payment" patent settlements and shifting the burden to disprove the presumption to defendants; (2) prohibiting so-called product hopping, including both "soft" switches and "hard" switches, potentially disincentivizing manufacturers from pursuing new products due to the burden to prove that launching the new product was done for procompetitive reasons; (3) penalizing brand drug manufacturers for filing so-called "sham" citizen petitions to delay generic and biosimilar entry into the market or otherwise dampen competition; and (4) limiting the number of patents a brand biological drug maker can assert to no more than 20 in an infringement action against a biosimilar following the "patent dance" information exchange created by the Biosimilar Products Competition Innovation Act. It remains to be seen whether Congress will move forward with any of these bills this year.

Potential for Increased FTC and State Focus on Pricing Conduct. The FTC has long been active in addressing conduct that it believes delays or suppresses entry in the drug industry, most notably in connection with "pay-for-delay" patent settlements. There are several indications, however, that the new leadership at FTC is taking an even closer look at the pharmaceutical industry.

In 2021, the Biden Administration pushed the FTC to be more aggressive on drug pricing. The President's July 9, 2021 Executive Order called on the FTC to take direct action regarding the prices of drugs and healthcare costs, with a specific focus on facilitating more competition from generic drugs and biosimilars and preventing allegedly anticompetitive agreements.9 President Biden reaffirmed this direction in remarks delivered on December 6, 2021.10

The FTC's regulatory agenda indicates that it has plans to follow this direction. Citing to the President's Executive Order, the FTC's December 10, 2021 Statement of Regulatory Priorities pledged to define rules to address "unfair methods of competition" linked to "pay-for-delay" agreements as well as other "unfair or deceptive acts or practices."11 Notably, the FTC Statement asserted that case-by-case antitrust enforcement "has proven insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches."12 The FTC also cleared the way for more expansive rulemaking earlier in the year by rescinding its 2015 policy statement that outlined enforcement principles regarding "unfair methods of competition" under Section 5 of the FTC Act.13 On August 5, 2021, the FTC also issued a solicitation for public comment on contract terms that may harm competition.14 Notably, the FTC's solicitation included a public petition that cited exclusive formulary agreements by allegedly dominant drugs as one example of problematic conduct to be addressed through rulemaking to prohibit exclusionary contracts.

FTC rulemaking of could trigger substantial changes and uncertainty for the industry and raise significant compliance challenges. Further, state enforcers may follow suit and increase attention towards these and related areas, as could private plaintiffs.

#### The status quo is goldilocks – it’s strong enough to induce pharma compliance but specifically hasn’t been priced in as a negative risk

Gardner, 6-10-2021, Jonathan, "'The lights are no longer green': Antitrust regulators reassess pharma deals," BioPharma Dive, <https://www.biopharmadive.com/news/ftc-pharma-biotech-deal-scrutiny-slaughter/601577/> -- Iowa

Biotech and pharmaceutical executives often describe dealmaking as the industry's lifeblood, arguing that acquisitions build pipelines, drive competition and give investors a reason to fund innovative startups. Drug company opponents dispute those points and their arguments may now have gained powerful allies in global antitrust regulators.

In March, the Federal Trade Commission and its counterparts in Europe, the U.K. and Canada announced they will reassess how they review drugmaker deals, pointing in particular to two recent multi-billion dollar buyouts, Bristol Myers Squibb's takeover of Celgene and AbbVie's purchase of Allergan.

Rebecca Kelly Slaughter, the FTC's acting chair, didn't detail how regulators' views might change. However, antitrust experts expect the agencies will scrutinize whether larger companies use their wider portfolio of drugs to force insurers to accept higher prices, as well as how acquisitions may discourage innovation by thwarting competition.

"This is a pretty clear signal that the lights are no longer green," said antitrust attorney David Balto, who represented unions and consumer groups in objecting to the Allergan deal. "They're now yellow or red, and companies need to be much more cautious about the deals they consider."

Illumina, the dominant provider of DNA sequencing in the U.S., has learned that first hand, as the FTC and the European Commission recently challenged its proposed acquisition of Grail, an up-and-coming rival.

The biotech and pharma sectors have taken notice, although there hasn't yet been a noticeable impact on investment or dealmaking activity. In April, for example, U.S. regulators cleared AstraZeneca's $39 billion buyout of rare disease drugmaker Alexion.

"We have to treat it as a credible threat," said Bruce Booth, partner in the venture capital firm Atlas Ventures. "[But] as a negative risk, it has yet to be priced into the financing world."

#### The FTC’s scaling back new obligations---but there’s no margin for error

Leah Nylen & Betsy Woodruff Swan 21, staff writers at POLITICO, “FTC staffers told to back out of public appearances,” POLITICO, 7/6/21, https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386

Less than a week into Lina Khan’s tenure as Federal Trade Commission chair, her chief of staff ordered the agency’s staff to cancel all public appearances, according to internal agency emails viewed by POLITICO.

In a June 22 email to more than two dozen of the FTC’s top staffers, Khan’s chief of staff, Jen Howard, announced a “moratorium on public events and press outreach.”

“For the time being I am putting a moratorium on staff participating in external events,” Howard wrote. The message was sent to the head of the FTC’s major offices, including those who oversee all of the agency’s economics, antitrust lawyers and consumer protection attorneys.

In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances.

“I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due to pressing matters at the FTC,” she wrote.

An FTC spokesperson confirmed that the agency has called off all staff public appearances for the time being.

"The FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment,” Howard said in a statement to POLITICO. “So the agency pushed pause on public speaking events that aren't focused on educating consumers to ensure staff time is being used to maximum benefit and productivity. The American public needs this agency solving problems, not speaking on panels."

The FTC, which enforces antitrust and consumer protection laws, has about 1,100 staffers, fewer employees than the agency had at the beginning of the Reagan administration. Only about 40 of the agency's lawyers are devoted to privacy and data security issues, the agency's former chair told Congress in 2019, in contrast to the United Kingdom, which has an agency of roughly 500 employees focused on privacy.

As recently as December, the FTC was discussing steps to deal with a possible cash shortage including freezing pay and cutting back on the number of lawsuits the agency files.

Since taking over three weeks ago, Khan has swiftly begun advancing her priorities, holding the FTC’s first open meeting in decades last week. In her opening comment, Khan pledged to provide transparency for the agency’s work and host open meetings “on a regular basis.”

#### **Log4j is a top priority and the FTC is aggressively pushing enforcement**

York et al, 2-16 – Lauren E. York, Natasha G. Kohne, and Michelle Reed, all with Akin Gump Strauss Hauer & Feld LLP. “FTC Issues Stern Warning To Companies To Address Known Cybersecurity Vulnerability,” Mondaq, <https://www.mondaq.com/unitedstates/security/1161812/ftc-issues-stern-warning-to-companies-to-address-known-cybersecurity-vulnerability> -- Iowa

The Federal Trade Commission (FTC) issued a surprisingly strong warning to companies that they may face potential regulatory action if they fail to address known vulnerabilities, focusing in particular on the Log4j cybersecurity vulnerability.

According to the January 4, 2022 alert (the FTC Alert), the FTC recognizes that the Log4j vulnerability poses a serious risk to consumer products and web applications, and if exploited, could cause serious irreversible harms, such as financial loss and loss of personal information.1 Citing its prior action over the vulnerability patching failure in Equifax, the FTC signaled its willingness to pursue companies that fail to mitigate Log4j or other known cybersecurity vulnerabilities.

The Log4j vulnerability is the very first matter scheduled for review by the newly formed Cyber Safety Review Board (CSRB), a public-private partnership created in response to the President's May Executive Order on Improving the Nation's Cybersecurity.2 This board is a collaboration of top cybersecurity leaders from both industry and government agencies, and will be delivering strategic recommendations to both the President and the Secretary of Homeland Security. The board's first review is scheduled to be released this summer (see the announcement for more details).

Background: What is Log4j?

Log4j is a Java-based logging library that documents user activity so that developers can keep track of what happens on their software applications and online services. Log4j is extremely popular across a wide variety of consumer and enterprise services, applications and websites. Early in December, several exploits were discovered affecting Log4j, but of particular note is one that allows an attacker to gain control of a system by submitting a request to execute arbitrary code.3 If left unfixed, an attacker can gain access to systems, steal passwords and logins, extract data and infect networks with malware.

The Duty to Patch Software

The FTC Alert points to federal laws such as the Federal Trade Commission Act and the Gramm-Leach-Bliley Act to indicate the responsibility companies have to "take reasonable steps to mitigate known software vulnerabilities."4 In the $700 million Equifax settlement, the FTC's complaint alleged that the failure to patch a known software vulnerability led to 147 million individuals having their personal information exposed (for more details, see our discussion on the Equifax breach here).

In addition to the FTC, the Security and Exchange Commission (SEC) has also voiced concern about the Log4j vulnerability in a recent cybersecurity update. While the SEC doesn't warn companies that enforcement actions may follow, the alert notes that the Cybersecurity and Infrastructure Security Agency (CISA) is "responding to active, widespread exploitation of a critical remote code execution vulnerability in the LOG4j software library." Companies would be wise to address the LOG4j issue, as the SEC has pursued companies for deficient disclosure and controls related to cybersecurity risks and incidents (see our discussion of SEC cybersecurity risk disclosure actions here).

Actions to Take

The FTC is urging companies to act quickly to take reasonable steps to protect their consumer data from known vulnerabilities, including the recently discovered Log4j vulnerability. Companies should start by confirming whether they use Log4j software. CISA has prepared specific Log4j guidance that can help determine if mitigation is necessary, which forms a key part of the FTC's recommended steps. If a company does use Log4j, the FTC advises the following:

If not up-to-date, begin updating the Log4j software package to the most current version.

Find out how to best mitigate the vulnerability using the CISA guidance.

Proceed promptly with mitigating steps in compliance with the law.

Make this information available to any relevant third-party subsidiaries that sell products or services to consumers who may be vulnerable.5

As always, companies should document mitigating steps taken and the remediation timeline in preparation for any questions regulators or stakeholders may have.

Conclusion

The FTC has issued a clear warning: companies must "take reasonable steps to mitigate known software vulnerabilities." Regular patching and vigilant monitoring of new cybersecurity threats will be required in order to maintain reasonable security under the FTC's watch.

In particular, the FTC warned of the significant risks associated with open-source software in the Internet ecosystem, indicating it will examine the often inadequate incident response for projects maintained by volunteers as part of the effort to address "root issues that endanger user security."6 Log4j is just one example of many such open-source services used by companies to perform a wide variety of critical tasks. It may be prudent for companies to take this time to examine the role open-source plays in their business and what data it utilizes.

More cybersecurity vulnerabilities like Log4j are sure to arise in the coming year, and agencies like the FTC and SEC are likely to continue their aggressive push against companies that fail to address them. Avoiding regulatory scrutiny will involve diligently maintaining information security policies that meet legal obligations, as well as keeping abreast of new developments in the cyberthreat landscape.

#### New cyber push is a top priority but enforcement is key

Alvarez, 11-10-2021 – Daniel K., Partner at Willkie Farr & Gallagher LLP, "FTC Establishes New Cybersecurity Benchmarks," Mondaq, <https://www.mondaq.com/unitedstates/security/1129442/ftc-establishes-new-cybersecurity-benchmarks> -- Iowa

Last week, the Federal Trade Commission ("FTC") amended its Gramm-Leach-Bliley Act ("GLBA") Safeguards Rule (or "Rule") to, among other things, modify the scope of companies to which the Rule applies and impose new, detailed and enforceable requirements as to the information security programs and practices those companies must adopt. The FTC's Safeguards Rule applies directly to any financial institutions that fall under the FTC's GLBA jurisdiction, and those companies must now evaluate whether their existing security controls and practices comply with the new Rule and implement any necessary new measures. More broadly, however, the amendments (1) reflect the Biden Administration's strategy to push companies to improve their cyber hygiene, and (2) create new benchmarks for data security that the FTC seems likely to incorporate into other data protection enforcement and rule-making activities and that may find their way into judicial interpretations of consumer protection and similar statutes in the context of proper handling of consumer data. As a result, even companies outside the financial industry may need to reconsider their data protection practices in the wake of these amendments. Modified Scope The GLBA regulates the privacy and data security practices of "financial institutions," defined to include not only banks but also mortgage brokers, payday lenders, real estate appraisers and non-bank lenders. The amended Rule modifies the scope of covered financial institutions in two ways: First, it includes "finders" as covered financial institutions, and defines this new concept as entities that "bring[] together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate;" and Second, it exempts smaller financial institutions that maintain customer information for fewer than 5,000 individuals from having to comply with some provisions of the Rule. Companies that may not have been subject to GLBA before will need to consider whether they are "finders" under the new definition. New Information Security Requirements The amended Rule sets forth specific criteria for financial institutions' information security programs, as well as other data protection requirements, that are new to the FTC's Safeguards Rule, though as discussed below some of these requirements may not be new to companies that have had to comply with certain state-level requirements. Examples of these requirements include: Designating a qualified individual to oversee and enforce the information security programs, and having that individual provide status reports to the board of directors or similar governing body; Conducting a risk assessment that identifies reasonably foreseeable risks to the security of customer information, as well as the sufficiency of existing controls and the risk of unauthorized use or disclosure of customer information, builds the information security program on that foundation, and revises the program based on regular risk assessments conducted moving forward; Conducting regular testing and monitoring of key security controls, systems, and procedures; Implementing specific tools for data protection, such as multi-factor authentication for accessing any information system, and encryption for customer information in transit over external networks and at rest, subject to certain exceptions; Crafting a written incident response plan that is designed to permit prompt response to and recovery from any material security event; Periodically reviewing access controls to authenticate and allow access only to authorized individuals and limit those individuals' access to information; Developing and maintaining data retention procedures that provide for the secure disposal of customer information within two years, unless the information is necessary for a legitimate business purpose or otherwise unfeasible; and Implementing controls to monitor the log activity of authorized users in order to detect unauthorized access or use.