# 1NC --- Rutgers RR R4

## OFF

### OFF

#### Undisclosed new plans and advantages are a voter --- Skews neg prep, makes debate impossible, and creates a moral hazard for aff terrorism --- Disclosing 30 minutes before the round solves their argument --- Independently justifies neg terrorism

### OFF

#### Our interpretation is that the aff can’t be the courts ---

#### Courts cannot create “antitrust law” and cannot “increase prohibitions”

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

#### Violation – the plan fiats the courts

#### Vote neg for limits and grounds --- Multiplies the # of aff’s by 2, removes any core checks on small aff’s, and allows the aff to circumvent any public backlash

#### Non aspec is a voter - Spec is key to neg ground for specific links, and prevents the Aff from shifting out of Neg offense in the 2A

### OFF

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

#### -declare that their official position vis-à-vis anticompetitive effects of all regulatory policies and bodies is one of neutrality

#### -reform state licensing boards.

#### Plank 1 solves---their ev

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

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

#### Plank 2 solves---their ev

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

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

**[[THEIR EV ENDS]]**

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

### OFF

#### The aff is sua sponte – it makes a decision in absence of arguments presented before the court – that crushes court legitimacy

Milani & Smith 02 (Adam and Michael, both are Assistant Professors, Mercer University School of Law, “Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts,” 69 Tenn. L. Rev. 245, Winter, lexis)

The heart of the American legal system is the adversary process in which trained advocates present the parties’ facts and arguments to neutral decision makers. The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system.3 The adversary process is also said to “promote[] litigant and societal acceptance of decisions rendered by the courts”4 because a party who “is intimately involved in the adjudicatory process and feels that he has [they have] been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not.”5 Indeed, the Joint Conference on Responsibility of the American Bar Association and the Association of American Law Schools stated that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate.”6 Accordingly, most lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties. But we all know it happens. We even have a name for such a decision: [is] sua sponte. Translated from its original Latin, “sua sponte” means “on his or its own motion.”7 In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion8 as opposed to an action or decision done in response to a party’s request or argument. As such, the concept of “sua sponte” is an important exception to two basic [the] principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive.9 One of the clearest manifestations of these principles is that the parties themselves, not the decision maker, determine what issues will be adjudicated. In the context of judicial decision making, a court deviates from its traditional “passive” role in the adjudicatory process when it raises an issue not identified by the parties but which it deems relevant to the legal controversy before it. Nonetheless, raising issues sua sponte is not an uncommon practice.10 In fact, legal scholars have identified several kinds of issues that are commonly raised by courts on their own. First, both trial and appellate courts often raise jurisdictional issues such as standing, subject matter jurisdiction, and mootness sua sponte.1

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson ’17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard. A. Failure to Provide Due Process Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it: When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court. The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking: [I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6 The situation is even harder to defend when there is no hearing at all. 9 B. Undermining Respect for the Legal System The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2 Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next: The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved. This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).a

### OFF

#### The United States judiciary should adopt a constitutional principle against anticompetitive state regulation parochialism

#### Solves by using constitutional scrutiny on regulatory regimes – doesn’t expand antitrust law

Crane, 19 (Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1213-1214)//babcii

CONCLUSION This Article has presented the case for heightening judicial and/or administrative scrutiny of state and local regulations that impair competition for the benefit of favored producers and to the detriment of consumers. Particularly in markets characterized by entrenched technological incumbents facing the threat of disruptive technologies, a series of structural factors makes it far too easy for the incumbents to hold off the new entrants through the force of often outdated regulation.183 The important policy question is whether—in light of this nation’s controversial, and now broadly maligned, experiment with economic substantive due process during the Lochner era—the evils of such anticompetitive regulations are simply the price of democracy, or whether steps could be taken to heighten judicial or administrative review without threatening a return to Lochnerism. This Article has compared two potential tools—a constitutional antiparochialism principle and heightened preemptive powers for the FTC. Both could potentially be effective to address anticompetitive regulations; both pose distinctive risks. On balance, relaxing state action immunity in FTC cases and thereby granting the Commission heightened preemptive powers probably raises fewer concerns about Lochernizing than does a broader promotion of the antiparochialism equal protection principle recognized in a handful of appellate decisions. On the other hand, granting the FTC expanded powers of this kind raises some other political risks—particularly backlash from state and local governments leading to a loss of support for the Commission in Washington, D.C., or excessive entanglement with state and local politics.

### OFF

#### Business confidence and investment are key to meet high consumer demand and drive economic growth

Entenmann, 1-3 (Kenneth J. Entenmann is chief economist and chief investment officer at NBT Wealth Management, “Despite labor constraints and inflation, cautious optimism expressed for 2022”, Hartford Business, 1-3-22, https://www.hartfordbusiness.com/article/despite-labor-constraints-and-inflation-cautious-optimism-expressed-for-2022)//babcii

The term “cautiously optimistic” comes to mind with the seemingly collective reservations regarding supply chains and labor — and I have to say I agree with the sentiment. I think you’re on to something, Connecticut.

The 2021 economy fought through significant challenges but has still improved materially. The U.S. GDP is estimated to have grown by 5.6% in 2021 and the consensus forecast for 2022 calls for 4.1% growth.

Both numbers are considerably better than the pre-COVID pace of 2% to 3%. So, it is more than just a positive attitude — there is good reason to be optimistic.

As a result of our collective COVID experience, consumers and companies were forced to adjust their behavior. That adjustment resulted in a great deleveraging of consumer and corporate balance sheets.

The personal savings rate skyrocketed to 35% during the initial COVID lockdown and still hovers around 10%. Many consumers took the COVID lockdown as an opportunity to pay down their debt; credit card, home equity and mortgage balances all declined significantly.

On the corporate front, a similar deleveraging has occurred. The original CARES Act provided a material safety net for companies of all sizes. Most significantly, the act created the Paycheck Protection Program that provided loans ($350 billion, mostly forgiven) to small businesses. The PPP loans allowed companies to remain solvent while adjusting to the new COVID world.

While the PPP loans provided support for revenue shortfalls and supported employment levels, non-labor expenses dropped materially. Expenses such as marketing, travel, training and development, fleet expenses and entertainment all plummeted.

Today, companies are flush with cash, expenses continue to run below “normal,” and debt has been paid down. Why is this great deleveraging important? It provides plenty of ammunition for economic growth when the uncertainties surrounding COVID diminish.

The combination of strong balance sheets, a continuing reopening of the economy and historically low interest rates provide fuel for growth and reason for cautious optimism as the economy works through a host of challenges.

#### Antitrust regs causes uncertainty and expands rent-seeking

Crews and Young 19 (Clyde Wayne Crews, Vice President for Policy and Senior Fellow @ Competitive Enterprise Institute, Ryan Young is a Senior Fellow @ Competitive Enterprise Institute, “The Case against Antitrust Law”, Competitive Enterprise Institute, 04/16/2019, <https://cei.org/studies/the-case-against-antitrust-law/>)//babcii

Uncertainty. Antitrust regulation creates an enormous amount of economic uncertainty. Nobody knows how it will be used at a given time. If antitrust statutes are interpreted literally, potentially any firm, no matter how small, can be charged with an antitrust violation—or for dominating its relevant market, however defined. If a business sells goods at a lower price than its competitors, it can be charged with predatory pricing. If it sells goods at the same price as its competitors, it can be charged with collusion. And if it sells goods at a higher price than its competitors, it can be charged with abusing market power. A century of case law has evolved some guidelines, but judicial precedents can be overturned any time a new case is brought. There are few bright-line legislative or judicial standards for antitrust enforcement. It is mostly guided by a mix of inconsistently enforced judicial precedents, regulators’ personal discretion, and political factors unrelated to market competition. Even the mere threat of antitrust enforcement can have a preemptive chilling effect on innovation, business strategies, and potential efficiency-enhancing arrangements. Rent-seeking. Neo-Brandeisians rightly want to reduce rent-seeking, but they routinely propose policies that will backfire because of a common misunderstanding of how governments work in practice. Government employees do not operate with only the public interest in mind. They are human beings, with the same incentives and flaws as other human beings. They want to increase their budgets and power and enjoy the publicity that accompanies big cases. It also makes regulators especially vulnerable to what is known as a Baptist-and-boot- legger dynamic. In Clemson University economist Bruce Yandle’s classic example, a moralizing Baptist and a profit-seeking bootlegger will both favor a law requiring liquor stores to close on Sundays, though for different reasons. A true-believing “Baptist” in Congress or at the Justice Department or the FTC would be inclined to listen seriously to the entreaties of corporate “bootleggers” who can come up with virtuous-sounding reasons for why regulators should give their businesses special favorable treatment.36 Oracle, one of Microsoft’s rivals, ran its own independent Microsoft investigation during that company’s antitrust case, for what it alleged were Baptist-style reasons. “All we did is try to take information that was hidden and bring it to light,” said Oracle CEO Larry Ellison. “I don’t think that was arrogance. I think it was a public service.”37 Former Sen. Orrin Hatch (R-UT), who counted Oracle among his constituents, was one of the loudest anti-Microsoft voices in Congress. Around that time, he also received $17,500 donations from executives at Netscape, AOL, and Sun Microsystems. Perhaps heeding Hatch’s admonition that, “If you want to get involved in business, you should get involved in politics,” Microsoft expanded its presence in Washington from a small outpost at a Bethesda, Maryland, sales office to a large downtown Washington office with a full-time staff plus multiple outside lobbyists.38 Microsoft quickly went from a virtual non-entity in Washington to the 10th-largest corporate soft money campaign donor by the 1997-1998 election cycle. Sen. Hatch’s campaign was among the beneficiaries.39 The lines between Baptist and boot- legger can be blurry, and some actors play both parts. But such ethical dynamics are an integral part of antitrust regulation in practice.

#### slow growth goes nuclear – breaks down global cooperation

**Landay 17** (Jonathan – Reuters National Security Correspondent, 1/9/17, “U.S. intelligence study warns of growing conflict risk”, <https://www.reuters.com/article/us-usa-intelligence-future-idUSKBN14T1J4>)

WASHINGTON (Reuters) - The risk of **conflicts** between and within **nations** will **increase** over the next five years to levels not seen since the Cold War as **global growth slows**, the post-World War Two order erodes and **anti-globalization** fuels **nationalism**, said a U.S. intelligence report released on Monday. “These **trends** will converge at an unprecedented pace to make governing and **cooperation** harder and to change the **nature of power** – fundamentally altering the **global landscape**,” said “Global Trends: Paradox of Progress,” the sixth in a series of quadrennial studies by the U.S. National Intelligence Council. The findings, published less than two weeks before U.S. President-elect Donald Trump takes office on Jan. 20, outlined factors shaping a “dark and difficult near future,” including a more assertive **Russia** and **China**, **regional conflicts**, **terrorism**, rising **income inequality**, **climate change** and **sluggish economic growth**. Global Trends reports deliberately avoid analyzing U.S. policies or choices, but the latest study underscored the complex difficulties Trump must address in order to fulfill his vows to improve relations with Russia, level the economic playing field with China, return jobs to the United States and defeat terrorism. The National Intelligence Council comprises the senior U.S. regional and subject-matter intelligence analysts. It oversees the drafting of National Intelligence Estimates, which often synthesize work by all 17 intelligence agencies and are the most comprehensive analytic products of U.S intelligence. The study, which included interviews with academic experts as well as financial and political leaders worldwide, examined political, social, economic and technological trends that the authors project will shape the world from the present to 2035, and their potential impact. ‘INWARD-LOOKING WEST’ It said the threat of **terrorism** would grow in coming decades as small groups and individuals harnessed “**new technologies**, ideas and relationships.” **Uncertainty** about the **U**nited **S**tates, coupled with an “inward-looking West” and the weakening of international human rights and conflict prevention standards, will encourage **China** and **Russia** to challenge **American influence**, the study added. Those challenges “will stay below the threshold of hot war but bring **profound risks** of **miscalculation**,” the study warned. “Overconfidence that material strength can manage escalation will **increase** the **risks** of **interstate conflict** to levels not seen since the Cold War.” While “hot war” may be avoided, differences in values and interests among states and drives for regional dominance “are leading to a **spheres of influence** world,” it said, The latest Global Trends, the subject of a Washington conference, added that the situation also offered opportunities to governments, societies, groups and individuals to make choices that could bring “more hopeful, secure futures.” “As the paradox of progress implies, the same trends generating near-term risks also can create opportunities for better outcomes over the long term,” the study said. THE HOME FRONT The report also said that while globalization and technological advances had “enriched the richest” and raised billions from poverty, they had also “hollowed out” Western middle classes and ignited backlashes against globalization. Those trends have been compounded by the largest migrant flows in seven decades, which are stoking “nativist, anti-elite impulses.” “**Slow growth** plus technology-induced **disruptions** in **job markets** will threaten poverty reduction and **drive tensions** within countries in the years to come, fueling the very **nationalism** that contributes to tension between counties,” it said. The trends shaping the future include contractions in the working-age populations of wealthy countries and expansions in the same group in poorer nations, especially in Africa and South Asia, increasing **economic**, employment, urbanization and welfare **pressures**, the study said. The world will also continue to experience weak **near-term growth** as governments, institutions and businesses struggle to overcome **fallout** from the Great **Recession**, the study said. “**Major economies** will confront **shrinking workforces** and **diminishing productivity** gains while recovering from the 2008-09 financial **crisis** with **high debt**, **weak demand**, and doubts about globalization,” said the study. “China will attempt to shift to a consumer-driven economy from its longstanding export and investment focus. **Lower growth** will **threaten poverty reduction** in developing counties.” **Governance** will become **more difficult** as issues, including global **climate change**, **environmental degradation** and **health threats** demand **collective action**, the study added, while such cooperation **becomes harder**.

### OFF

#### FTC’s increasing enforcement in privacy now – it’s focused on algorithmic bias

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

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

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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.

#### Lack of privacy laws and scamming defense makes geopolitical conflict inevitable

Casey Newton 20. Verge contributing editor. "The massive Twitter hack could be a global security crisis". Verge. 7-15-2020. https://www.theverge.com/interface/2020/7/15/21325708/twitter-hack-global-security-crisis-nuclear-war-bitcoin-scam

Beginning in the spring of 2018, scammers began to impersonate noted cryptocurrency enthusiast Elon Musk. They would use his profile photo, select a user name similar to his, and tweet out an offer that was effective despite being too good to be true: send him a little cryptocurrency, and he’ll send you a lot back. Sometimes the scammer would reply to a connected, verified account — Musk-owned SpaceX, for example — giving it additional legitimacy. Scammers would also amplify the fake tweet via bot networks, for the same purpose. The events of 2018 showed us three things. One, at least some people fell for the scam, every single time — certainly enough to incentivize further attempts. Two, Twitter was slow to respond to the threat, which persisted well beyond the company’s initial comments that it was taking the issue seriously. And three, the demand from scammers coupled with Twitter’s initial measures to fight back set up a cat-and-mouse game that incentivized bad actors to take more drastic measures to wreak havoc. That brings us to today. The story picks up with Nick Statt in The Verge: The Twitter accounts of major companies and individuals have been compromised in one of the most widespread and confounding hacks the platform has ever seen, all in service of promoting a bitcoin scam that appears to be earning its creator quite a bit of money. We don’t know how it’s happened or even to what extent Twitter’s own systems may have been compromised. The hack appears to have subsided, but new scam tweets were posting to verified accounts on a regular basis starting shortly after 4PM ET and lasting more than two hours. Twitter acknowledged the situation after more than an hour of silence, writing on its support account at 5:45PM ET, “We are aware of a security incident impacting accounts on Twitter. We are investigating and taking steps to fix it. We will update everyone shortly.” Among the hacked accounts were President Barack Obama, Joe Biden, Amazon CEO Jeff Bezos, Bill Gates, the Apple and Uber corporate accounts, and pop star Kanye West. But they came later. The first prominent individual account to be compromised? Elon Musk, of course. Within the first hours of the attack, people were duped into sending more than $118,000 to the hackers. It also seems possible that a great number of sensitive direct messages could have been accessed by the attackers. Of even greater concern, though, is the speed and scale at which the attack unfolded — and the national security concerns it raises, which are profound. The first and most obvious question is, of course, who did this and how? And at press time, we don’t know. At Vice, Joseph Cox, one of the best security reporters I know, reported that members of the underground hacking community are sharing screenshots suggesting someone gained access to an internal Twitter tool used for account management. Cox writes: Two sources close to or inside the underground hacking community provided Motherboard with screenshots of an internal panel they claim is used by Twitter workers to interact with user accounts. One source said the Twitter panel was also used to change ownership of some so-called OG accounts—accounts that have a handle consisting of only one or two characters—as well as facilitating the tweeting of the cryptocurrency scams from the high profile accounts. Twitter has been deleting screenshots of the panel and has suspended users who have tweeted the screenshots, claiming that the tweets violate its rules. To speculate much further would be irresponsible, but Cox’s reporting suggests that this is not a garden-variety hack in which a bunch of people reused their passwords, or a hacker used social engineering to convince AT&T to swap a SIM card. One possibility is that hackers accessed internal Twitter tools; another that Cox raises is that a Twitter employee was involved in the incident — which, if true, would make this the second inside job revealed at Twitter this year. In any case, Twitter’s response to the incident offered further cause for distress. The company’s initial tweet on the subject said almost nothing, and two hours later it had followed only to say what many users were forced to discover for themselves: that Twitter had disabled the ability of many verified users to tweet or reset their passwords while it worked to resolve the hack’s underlying cause. The near-silencing of politicians, celebrities, and the national press corps led to much merriment on the service — see this, along with Those good tweets below, for some fun — but the move had other, darker implications. Twitter is, for better and worse, one of the world’s most important communications systems, and among its users are accounts linked to emergency medical services. The National Weather Service in Lincoln, IL, for example, had just tweeted a tornado warning before suddenly going dark. To the extent that anyone was relying on that account for further information about those tornadoes, they were out of luck. Of course, Twitter’s move to stop verified accounts from tweeting represents a difficult balancing on equities. You would probably rather the National Weather Service not tweet than a hacker sell the account to a bad actor who logs in and falsely suggests that tornadoes are sweeping through every city in America. But the ham-fisted approach to resolving the issue — banning a huge portion of 359,000 verified accounts — reflects the staggering scale of the breach. This is as close to pulling the plug on Twitter as Twitter itself has ever come. And that makes you wonder what contingencies the company has put into place in the event that it is someday taken over not by greedy Bitcoin con artists, but state-level actors or psychopaths. After today it is no longer unthinkable, if it ever truly was, that someone take over the account of a world leader and attempt to start a nuclear war. (A report on that subject from King’s College London came out just last week.) It is in such a world that I find myself in the unusual position of agreeing with Sen. Josh Hawley, the Missouri Republican who among other things wants to end content moderation. He wrote a letter to Twitter CEO Jack Dorsey, and I found myself agreeing with all of it: “I am concerned that this event may represent not merely a coordinated set of separate hacking incidents but rather a successful attack on the security of Twitter itself. As you know, millions of your users rely on your service not just to tweet publicly but also to communicate privately through your direct message service. A successful attack on your system’s servers represents a threat to all of your users’ privacy and data security.” And yet even Hawley doesn’t go far enough. The threat here is not simply user privacy and data security, though those threats are real and substantial. It is about the striking potential of Twitter to incite real-world chaos through impersonation and fraud. As of today, that potential has been realized. And I can only worry about how, with a presidential election now less than four months away, it might be realized further. Twitter will likely spend the next several days investigating how this incident took place. A criminal investigation seems likely, during which the company may not be able to fully describe Wednesday’s events to our satisfaction. But it is vital that as soon as possible, Twitter share as much about what happened today as it can — and, just as importantly, what it will do to ensure that it never happens again. After Wednesday’s catastrophe, it hardly seems like hyperbole to suggest that our world could hang in the balance.

### OFF

#### The United States Federal Government should expand the scope of its core antitrust laws to cover anticompetitive business practices immunized by state action immunity only if the president determines it does not pose a direct threat to national defense or preparedness programs

#### The counterplan maintains DPA authority --- the plan eliminates it.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Authorities Under Title VII of the DPA

Title VII of the DPA contains various provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Some significant provisions of Title VII are summarized below.

Special Preference for Small Businesses

Two provisions in the DPA direct the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 reiterates89 and expands upon a requirement in Section 108 of Title I directing the President to "accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor."90

Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.91 Though national defense is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.92 Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, most recently in 2009, when Congress added a definition for homeland security93 to place it within the context of national defense.94

Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and therefore need to obtain extensive information from private industries. Under Section 705 of the DPA, the President may "by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA]."95 This authority is delegated to the Secretary of Commerce in E.O. 13603.96 Though this authority has many potential implications and uses, it is most commonly associated with what the DOC's Bureau of Industry and Security calls "industrial base assessments."97 These assessments are often conducted in coordination with other federal agencies and the private sector to "monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities."98 The statute requires the President to issue regulations to insure that the authority is used only after "the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."99 This regulation has been issued by DOC.100

Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA authorizes the President to "consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."101 The President must determine that a "condition exists which may pose a direct threat to the national defense or its preparedness programs"102 prior to engaging in the consultation process. Following the consultation process, the President or presidential delegate may approve and implement the agreement or plan of action.103 Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.104 Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to "enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes," among other examples.105 It could also be used, for example, to develop a plan of action with private industry for the repair and reconstruction of major critical infrastructure systems following a domestic disaster.

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect.

The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110

Nucleus Executive Reserve

Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112

The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114

Authorization of Appropriations, as amended by P.L. 113-72

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116

Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations).

Committee on Foreign Investment in the United States118

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.

CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute.

On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls.

Termination of the Act

Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are

* 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
* 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
* 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and
* 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4.

Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA.

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129

The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

Impact of Offsets Report

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

Congress may consider whether to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. These reporting or notification requirements could be added to the existing law, or could be included in conference or committee reports accompanying germane legislation, such as appropriations bills or the National Defense Authorization Act. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities under specific circumstances. For example, Congress may consider whether to require the President to notify Congress (or the oversight committees) when the priorities and allocations authority is used on a contract valued above a threshold dollar amount.132 Congress might also consider expanding the existing reporting requirements of the DPAC, to include semi-annual updates on the recent use of authorities or explanations about controversial determinations made by the President. Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees.

Enforce and Revise Rulemaking Requirements

Congress may consider reviewing the agencies' compliance with existing rulemaking requirements. A rulemaking requirement exists for the voluntary agreement authority in Title VII that has been completed by DHS, but it has not been updated since 1981 and may be in need of an update given changes to the authority and government reorganizations since that date.133 One of the agencies responsible for issuing a rulemaking on the use of Title I authorities has yet to do so. Congress may also consider potentially expanding regulatory requirements for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities. In addition to formalizing the executive branch's policies and procedures for using DPA authorities, these regulations could also serve an important function by offering an opportunity for private citizens and industry to comment on and understand the impact of DPA authorities on their personal interests.

Broaden Committee Oversight Jurisdiction

Since its enactment, the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and their predecessors have exercised legislative oversight of the Defense Production Act. The statutory authorities granted in the various titles have been vested in the President, who has delegated some of these authorities to various agency officials through E.O. 13603. As an example of the scope of delegations, the membership of the Defense Production Act Committee (DPAC), created in 2009 and amended in 2014, includes the Secretaries of Agriculture, Commerce, Defense, Energy, Labor, Health and Human Services, Homeland Security, the Interior, Transportation, the Treasury, and State; the Attorney General; the Administrators of the National Aeronautics and Space Administration and of General Services, the Chair of the Council of Economic Advisers; and the Directors of the Central Intelligence Agency and National Intelligence.

In order to complement existing oversight, given the number of agencies that currently use or could potentially use the array of DPA authorities to support national defense missions, Congress may consider reestablishing a select committee with a purpose similar to the former Joint Committee on Defense Production.134 As an alternative to the creation of a new committee, Congress may consider formally broadening DPA oversight responsibilities to include all relevant standing committees when developing its committee oversight plan.

Should DPA oversight be broadened, Congress might consider ways to enhance inter-committee communication and coordination of its related activities. This coordination could include periodic meetings to prepare for oversight hearings or ensuring that DPA-related communications from agencies are shared appropriately. Finally, because the DPA was enacted at a time when the organization and rules of both chambers were markedly different to current practice, Congress may consider the joint referral of proposed DPA-related legislation to the appropriate oversight committees.

Amending the Defense Production Act of 1950

While the act in its current form may remain in force until September 30, 2025, the legislature could amend the DPA at any time to extend, expand, restrict, or otherwise clarify the powers it grants to the President. For example, Congress could eliminate certain authorities altogether. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.

#### Key to pandemic response.

J. Mark Gidley et al. 20. J. Mark Gidley chairs the White & Case Global Antitrust/Competition practice. Martin M. Toto and Sean Sigillito. “A Novel Antitrust Defense for COVID-19 Agreements: Section 708 of the Defense Production Act” <https://www.whitecase.com/sites/default/files/2020-04/novel-antitrust-defense-covid-19-agreements-section-708-defense-production-act.pdf>

There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States’ response to the COVID-19 health emergency. The Government’s recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President’s delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act’s antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

#### Disease causes extinction and turns every impact --- it’s an *IMPACT MAGNFIER*

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A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the **risk of a civilisation collapse** would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

## Case

### Advantage 1

#### No future gen tech impact

Brad Allenby, December 2015. Lincoln Professor of Engineering and Ethics; President’s Professor of Civil, Environmental, and Sustainable Engineering, and of Law; and founding chair of the Consortium for Emerging Technologies, Military Operations and National Security at Arizona State University. “Emerging technologies and the future of humanity.” Bulletin of the Atomic Scientists 71(6): 29-38. Emory Libraries.

Although it was not clear at the time, Bill Joy’s article warning of the dangers of emerging technologies was to spawn a veritable “dystopia industry.” More recent contributions have tended to focus on artificial intelligence, or AI; electric car and space technology entrepreneur Elon Musk has warned that AI is “summoning the demon” (Mack, 2015), while physicist Stephen Hawking has argued that “the development of full artificial intelligence could spell the end of the human race” (Cellan-Jones, 2014). The Future of Life Institute (2015) recently released an open letter signed by many scientific and research notables urging a ban on “offensive autonomous weapons beyond meaningful human control.” Meanwhile, the UN holds conferences and European activists mount campaigns against what they characterize as “killer robots” (see, e.g., Human Rights Watch, 2012). Headlines reinforce a sense of existential crisis; in the military and security domain, cyber conflict runs rampant, with hackers accessing millions of US personnel records, including sensitive security clearance documents. Technologies such as uncrewed aerial vehicles, commonly referred to as “drones,” are highly contentious in both civil and conflict environments, for many different reasons. A recent US Army Research Laboratory report foresees genetically and technologically enhanced soldiers networked with their battlespace robotic partners and remarks that “the presence of super humans on the battlefield in the 2050 timeframe is highly likely because the various components needed to enable this development already exist and are undergoing rapid evolution” (Kott et al., 2015: 19). How is one to think about this outpouring of analysis, hypothesis, events, and existential angst? A useful first step is to realize that there are three levels to such discussions of technology.2 Level I is the instrumental level: a gun shoots a bullet and kills someone; a watch is used to tell time; a vaccine is used to prime an individual’s immune system to protect against a disease. Level II is the systems level: an uncrewed aerial vehicle conducting surveillance is part of a battlefield intelligence system; watches function in a globally standardized time system that was only institutionalized in the United States by an act of Congress in 1918; vaccinations are part of a public health system. Level III, the effect of a technology on individual psychology, society and culture, economic patterns, geopolitical status, and other Earth systems, is unpredictable and uncertain. One of the major drivers for standardized time, for example, was railroad technology, which was certainly not foreseen by those who first began developing steam locomotives. It is important to remember, however, that even if the specifics of Level III impacts cannot be predicted a priori, they will occur. Level I effects are usually not difficult to figure out: They are the reasons that a technology is commercialized. For example, the Level I effect of a bomb-dismantling robot is clear: It helps save the lives of soldiers who would otherwise have to be doing that job. Level II effects can be more complex and may point in different directions than first-order effects. A robotic hummingbird surveillance device may have entirely beneficial effects if used in counterinsurgency, because it can improve targeting and thus reduce collateral damage (Level I effect). But if the same technology becomes widely available to political parties and divorce lawyers, it could have very negative effects on privacy and public discourse (a Level II effect). And, hypothetically, robotic bugs and hummingbirds, combined with data-mining software and massive databases, could become important tools of techno-totalitarian elites, a possible, but hypothetical, Level III effect. This distinction among Level I, Level II, and Level III is useful because much of the confusion regarding emerging technologies comes from conflating relatively predictable Level I aspects of an emerging technology with highly unpredictable Level III hypotheticals, and treating them as equally valid insights into future technological trajectories. Not so. A concern about the use of drones to attack human targets in countries that are not participants in a conflict is qualitatively different than polemics against “killer robots,” and while conflating the two for purposes of argumentation may be effective, it is profoundly misleading. We have historical and operational data that enable us to evaluate the former; we don’t even know what a “killer robot” really is, except as an evocative term, and virtually no idea what would happen if such technologies became widespread in the real world. An analogous analytical mistake occurs when a particular use of a technology is treated as if it were separable from the technology itself. A medical advance in computer-brain interfaces in prosthetics, for example, is the same technology that might be used in the near future to directly connect a soldier to a remote weapons system. Any effort to ban “military AI” will fail because “military AI” is not a relevant technology category; rather, it is the advance of the underlying technology as a whole that ensures at some point that AI will be integrated into military devices. (Notably and presumably unintentionally, the proselytizing against “military AI” fails to admit that such a policy implicitly favors powers, such as Russia and ISIS, that are operating under doctrines of asymmetric warfare that privilege non-traditional tactics, technologies, and conflict.) It is precisely this confusion that one notes in the language used in many of the comments on and critiques of emerging technologies, including some of the examples given above. It is not so much a question of whether these popular dystopian visions are accurate predictions: They almost certainly are not, because the ability to predict the future paths and implications of complex and powerful technology systems is simply nonexistent. Level I assertions of knowledge are being extended to inherently unpredictable Level III systems without understanding that an important conceptual shark has been jumped. But it is useful to explore the assumptions underneath the current rage for dystopian visions of emerging technologies, which are not as implausible as some have suggested. To reduce such confusion, let me be clear from the beginning. Because much recent commentary regarding emerging technologies is generic and apocalyptic, that is what this essay will focus on. In other words, I will not concern myself with whether a particular weapon system, or smart phone app, or cyber worm, or AI tool is good or bad or competitively successful, a Level I question. Nor will I address the foreseeable Level II effects, an analysis which, as in the case of Level I, would focus on particular technological artifacts or applications and their systemic effects. Rather, since apocalyptic tends to be Level III stuff, that’s where we’ll go. Emerging technologies as an Earth system The first question to ask about emerging technologies is deceptively simple: Is today really that different? Is there something about today’s emerging technologies—which for purposes of this analysis include nanotechnology, biotechnology, information and communication technology (ICT), robotics, applied cognitive science, humtech (design and engineering of the human as a foundational emerging technology), and their various combinations and permutations—that is qualitatively different from those that characterized other eras of technological change? If there isn’t, much of today’s dramatic language can be understood as simply a reflection of the emphasis that all humans give to the particular era and landscape and culture within which they exist. Each generation tends to overemphasize the degree of change that it experiences, partly because of the immediacy of the stresses to which it is exposed, and partly because it is easy to underestimate how difficult and unpredictable life was in the past**,** since when one looks back at history it seems to flow logically and necessarily. Indeed, apocalyptic fears have been common when many major technology systems first emerged because of this immediacy, even as subsequent generations grew to view the technology as banal, even boring. In the early days of railroads, for example, there was a widespread belief that traveling at the heretofore unimaginable speed of 25 miles per hour would kill the passengers, in part because such technology was against the obvious will of God. As an Ohio school board put it, If God had designed that His intelligent creatures should travel at the frightful speed of 15 miles an hour by steam, He would have foretold it through His holy prophets. It is a device of Satan to lead immortal souls down to Hell. (Nye, 1994: 57)3 In this case, however, a strong argument can be made that emerging technologies today are different not just in degree, but in kind, from those of the past. To begin with, the scope, scale, and speed of technological change are unprecedented. Where previous waves of technological change have involved a few core technologies, such as railroads or electrification, today technological evolution is occurring across the entire technological frontier. Partially as a result of such technologies rippling across a population of seven billion people, we now live on a terraformed planet, the first world we know of anywhere that has been shaped by the deliberate activities of a single species. That is not a discontinuous process, but it is qualitatively new. Moreover, as the discussion of the engineered warrior of 2050 suggests, the human itself has become a design space. It is certainly true that people have always changed themselves in many ways, from consuming intoxicants of all kinds, to medicine, to education, but there is little question that the direct interventions that are now possible, combined with accelerating advances in fields such as neuroscience, genetics and molecular biology, and prosthetics, make virtually all aspects of the human, including cognitive and psychological domains, potentially subject to design. That the designer is not just engineering external systems, but him- or herself, adds a degree of reflexivity, nonlinearity, and complexity that makes simple predictions about particular technologies tangential and irrelevant at best. It is worth emphasizing in passing that the argument that humans are at risk from emerging technologies is in an important sense circular. Humans are increasingly both designer and designed; they are, in other words, increasingly an emerging technology in their own right. People are many things, but they are now, and certainly will be in the future, a design project. Thus, in a meaningful way the argument that people are at risk from emerging technologies becomes the argument that emerging technologies are at risk from emerging technologies, which makes little sense, and isn’t very helpful analytically, or in guiding policy or practice. Additionally, technological evolution is accelerating, which has significant implications. Past rates of technological change were slow enough that psychological, social, and institutional adjustments were possible, but today technology changes so rapidly that technology systems decouple from governance mechanisms of all kinds. All these factors, operating together, synergistically increase the impact, speed, and depth of change. Any technology potent enough to be interesting will inevitably destabilize existing institutions, power relationships, social structures, reigning economic and technological systems, and cultural assumptions. Previous waves of technological change—from steam and coal, to electricity, to rail and automotive technologies—have destabilized and restructured human and natural systems at all scales, interacting unpredictably with contemporary natural, human, and built systems. Railroads, for example, opened up continental interiors, creating the underlying transportation infrastructure necessary to support industrialized agriculture, which, coupled to advances in production of artificial fertilizers and innovation in farm machinery, created the potential for dramatic increases in global human population. It also dramatically changed ecologies and landscapes; the American Midwest is an agricultural breadbasket, not a large swamp, because railroads provided the link between that farming region and the demand of the East Coast and, via steamship, Europe. The Earth’s atmosphere has been in part restructured by development of internal combustion engine technology coupled to a psychologically potent automotive technology, which is in turn based on a massive fossil fuel infrastructure. Proposals to address climate change through so-called “geoengineering technologies,” from designing the atmosphere to reflect incoming sunlight to deploying devices that capture carbon dioxide in the atmosphere, are explicitly intended to engineer major natural systems and cycles. In short, major new technologies are not just about artifacts; rather, they represent an unpredictable, sometimes apparently discontinuous, shift in the structure of integrated Earth systems. Moreover, these shifts are not predictable a priori; railroads, for example, required new systems of time, of communication, and, more subtly, of finance and of corporate management. Development of a mass consumption economy, with washing machines from new merchandising giants and cars from Detroit, required innovation in the development of consumer credit, and massive coupled innovation in everything from road systems to supply-chain management. Widespread consumer credit, in turn, generated an ability to consume, and a concomitant quality of life, that was beyond imagining for those generations of humans that lived prior to the 20th century. It is thus highly likely that the first implicit assumption of the dystopian perspective is correct: Things are indeed different today, and the difference is fundamental and qualitative, not simply one of degree. Emerging technologies are making everything from individual molecules, to the human, to the planet itself, design spaces. Moreover, it is also likely that technological evolution, and all the concomitant changes in coupled institutional, social, economic, and cultural systems, will be more challenging and complex than anything humans have yet experienced. The remaining two issues, then, are: First, what can we do about it; and second, is this the end of humanity? What can we do about it? Precisely because new technologies are disruptive, they inevitably call forth opposition, both by conservative social forces and by threatened economic interests. Historical examples abound. With railroad technology, for example, conservative states such as the Austro-Hungarian Empire and Russia resisted rapid deployment, in part because it was feared that railroads might create social unrest in the still somewhat feudal and highly stratified cultures that characterized such countries; the French held back because of concerns it would destroy rural culture. The predictable result was that modernizing states that realized the commercial and military potential of railroad technology, such as Prussia, rapidly overtook the laggards in building rail infrastructure, with an eventual shift in geopolitical stature. In the United States, railroads were bitterly opposed by river transportation interests; in fact, Abraham Lincoln, when still a practicing lawyer, argued and won the seminal case for the Rock Island Railroad.4 (River shippers at the time were arguing that any railroad bridge over a river was an unlawful obstruction of commerce; had they been successful, railroads would have been limited to operating between rivers and streams, but not crossing them.) A more recent example is provided by the thousands of people sued by the Recording Industry Association of America in its vain effort to defend a technologically obsolete business model for the distribution of music. There are plenty of reasons, in other words, why emerging technologies might be regarded as dangerous and disruptive, and thus worth stifling. History, however, indicates that while local opposition can be successful, it will not halt the evolution of technology. Consider, for example, the Japanese attempt to limit gunpowder technology to preserve traditional Samurai culture; successful in the short term, it left Japan open to subjugation by Western naval forces with gunpowder technology. Similarly, environmentalists and governments in Europe have aggressively opposed genetic engineering (GMOs, or “genetically modified organisms”) in agriculture. Outside Europe, however, GMO technology has been one of the most rapidly adopted agricultural technologies in history. Efforts to regulate the proliferation of nuclear weapon technology have been somewhat successful, but it appears unrealistic to assume that the technology can be uninvented. Especially given today’s globalized culture, and the strategic and military advantages that emerging technologies can provide, it is highly unlikely that meaningful constraints on technological evolution, whether derived from cultural, competitive, or religious foundations, will be successful. That is particularly true as all players in the global Great Game understand that leadership in science and technology domains is a necessary, if not sufficient, prerequisite for dominance. Moreover, given the complexity of many emerging technology systems, especially as they co-evolve with other natural, built, and human systems, it is unfortunately also likely that projecting their effects and evolutionary paths before they are actually adopted and become embedded in their social and cultural context is not just hard, but for all practical purposes impossible. One can, and should, generate scenarios. But exhortations that purport to elevate hypotheticals to predictions and implications of certainty about future states are misplaced. In short, there is no certainty, and the genie is well and truly out of the bottle. However, that doesn’t necessarily imply that we can’t modulate future technological evolution, but that the way we think about it today may be too simple, and our institutions too slow and maladaptive, to be up to the task. Beyond simplistic dystopianism This analysis suggests that, as dystopians might argue, emerging technologies are indeed potent, and that, especially as the human is becoming an active design space, if AI doesn’t destroy humanity, something will. But this is a grossly incomplete perspective. Humanity, as it appears at any particular time, is always doomed. Foragers and hunter-gatherers were doomed, as were the serfs of medieval Europe with their small plots and lives lived within a radius of a few miles of where they were born. And so, in our turn, are we. Doom is, in other words, evolution, and it is unlikely that we will stop it—or, really, that we should want to. In fact, the images that we cling to, personally and institutionally and culturally, are already obsolete. The ethics and values that we insist we will impose on the future are not only historically and culturally contingent, but already obsolete as well. We want the physical and cultural landscape we live in now to propagate into tomorrow, because we all unconsciously privilege the present, but that is not how complex systems work. They evolve, and indeed our world is evolving at a remarkable and accelerating clip. The fallacy of the dystopians, then, is not in their analysis of the power of technology, or the accelerating and destabilizing rates of change. The fallacy is in equating evolution with dystopia, and, without admitting it, privileging the present over the promise and inevitability of the future. What is at risk is the limited mental model of “human” that all of us carry with us, not “humans” as an ongoing process. This is actually a common category mistake in modern discourse: Sustainability advocates and environmental activists often claim that “the planet is at risk,” but of course it is not. The planet is a large mass of rock and a film of various carbon compounds, and that is not at risk at all. What is at risk is a particular mental model of what the world should look like, a constructed snapshot. That does not mean that there aren’t many environmental issues that require attention; of course there are. But, as in the case of the emerging technology discourse, it does mean that existential catastrophe language is not only invalid, but can actually prevent seeking constructive adaptations to accelerating change. Our only recourse is neither technological fatalism nor ethical relativism. It is true that we have not yet appreciated, much less begun to respond to, the challenge of a future that will indeed be more complex and difficult than anything we have experienced as a species. Nonetheless, we can already identify several important principles. For example, we need to stop thinking of “problems” with “solutions,” and think more in terms of “conditions” that will require long-term, adaptive management. Challenges such as ISIS and climate change will not be solved, but they can and must be managed in light of other relevant goals. In this, the experience with nuclear weapons is instructive: They are not a problem that can be unmade, but they are a condition that can be, and has so far been, relatively successfully managed. We also need to focus on creating option spaces—portfolios of social, institutional, and technological choices that can be adaptively and flexibly deployed in complex environments. Similarly, we need to play with scenarios: If dystopian pronouncements are instead taken as scenarios—“What would you do if…?”—they are far more useful and informative than suggestions of doom. Socially and institutionally, we need to become more agile and adaptive. This is uncomfortable for many, because it implies a degree of contingency and uncertainty, but that is precisely why such skills are necessary. The rate of technological change is unforgiving and has already decoupled to a large extent from traditional governance mechanisms. So we need to develop new ones. Individually, we need to become far more humble about our ability to visualize and prognosticate on a complex and dynamic future. Cautionary scenarios and hypotheticals are welcome exercises in practicing to adjust to the unknowable that lies in front of us, but they are not appropriate foundations for policy or legal action in the present. Nightmares are seldom reality, and when bad things do happen they are seldom the ones we thought about. Fear and anger in the face of change are popular responses—witness the rise of far right and far left factions, and fundamentalisms of all stripes, around the world—but they are maladaptive, and those in responsible positions at least cannot afford such luxuries.

#### AI doesn’t cause extinction

Shermer 17 — Michael Shermer (Publisher of Skeptic magazine, a monthly columnist for Scientific American, and a Presidential Fellow at Chapman University), April 2017, “Why Artificial Intelligence Is Not an Existential Threat,” Skeptic, vol. 22, no. 2, pp. 29–35.

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

### Advantage 2

#### Consolidation is good for access and mortality rates --- And those numbers are going up! --- Our studies are comprehensive

**Johnson, 19** (Marie Johnson, Assosiate for American Hospital Association, 9-4-2019, accessed on 1-4-2022, American Hospital Association, "New Research Confirms: Hospital Mergers Reduce Costs, Enhance Quality of Care for Patients | AHA", https://www.aha.org/press-releases/2019-09-04-new-research-confirms-hospital-mergers-reduce-costs-enhance-quality-care)//Babcii

The newest analysis demonstrates that mergers can lead to enhanced quality through the expansion of clinical **best practices**, as evidenced by **statistically significant declines** in the **rates of readmission** and **mortality rates** following **mergers**. The study highlights how scale is increasingly critical to maintain and enhance the **infrastructure** necessary to address social determinants of health, adopt population health strategies and promote value-driven care.

In addition, integration can **ensure that local access to care and breadth of services are maintained for patients**, and in some cases expanded. Mergers can offer financial stability for struggling hospitals through operational efficiencies associated with shared costs for expensive IT infrastructures and purchasing, access to a robust network of system resources, equipment and facility upgrades. Newly integrated systems are also able to **provide patients with access** across the full continuum of care. This leads to more regular and convenient access to physicians, including specialists.

Key findings also include:

**Mergers decrease costs**. Due to increased scale, acquisitions decrease costs and are associated with a **statistically significant** 2.3% reduction in annual operating expenses.

Mergers often facilitate quality improvement through updating clinical operations across a health system, implementing consistent best practices and enhancing the promise of technology and data analytics.

Revenues per admission at acquired hospitals decline by a statistically significant 3.5% relative to non-merging hospitals, which suggests that “savings that accrue to merging hospitals **are passed on to patients** and their health plans.”

The report includes findings from structured interviews with 10 health systems, which identified a number of areas in which mergers and acquisitions have eased cost pressures and expanded access. The update also supplements previous econometric analysis with data on cost, quality and revenue measures for hospital transactions from 2015 to 2017.

#### No food wars---no causal evidence, only maybe true for the poorest countries, and government responses solve the impact

Mark W. Rosegrant 13, Director of the Environment and Production Technology Division at the International Food Policy Research Institute, et al., 2013, “The Future of the Global Food Economy: Scenarios for Supply, Demand, and Prices,” in Food Security and Sociopolitical Stability, p. 39-40

The food price spikes in the late 2000s caught the world’s attention, particularly when sharp increases in food and fuel prices in 2008 coincided with street demonstrations and riots in many countries. For 2008 and the two preceding years, researchers identified a significant number of countries (totaling 54) with protests during what was called the global food crisis (Benson et al. 2008). Violent protests occurred in 21 countries, and nonviolent protests occurred in 44 countries. Both types of protest took place in 11 countries. In a separate analysis, developing countries with low government effectiveness experienced more food price protests between 2007 and 2008 than countries with high government effectiveness (World Bank 201la). Although the incidence of violent protests was much higher in countries with less capable governance, many factors could be causing or contributing to these protests, such as government response tactics, rather than the initial food price spike.

Data on food riots and food prices have tracked together in recent years. Agricultural commodity prices started strengthening in international markets in 2006. In the latter half of 2007, as prices continued to rise, two or fewer food price riots per month were recorded (based on World Food Programme data, as reported in Brinkman and Hendrix 2011). As prices peaked and remained high during mid-2008, the number of riots increased dramatically, with a cumulative total of 84 by August 2008. Subsequently, both prices and the monthly number of protests declined.

Several researchers have studied the connection between food price shocks and conflict, finding at least some relationship between food prices and conflict. According to Dell et al. (2008), higher food prices lead to income declines and an increase in political instability, but only for poor countries. Researchers also found a positive and significant relationship between weather shocks (affecting food availability, prices, and real income) and the probability of suffering government repression or a civil war (Besley and Persson 2009). Arezki and Bruckner (2011) evaluated a constructed food price index and political variables, including data on riots and anti-government demonstrations and measures of civil unrest. Using data from 61 countries over the period 1970 to 2007, they found a direct connection between food price shocks and an increased likelihood of civil conflict, including riots and demonstrations.

Other researchers have broadened the analysis by considering government responses or underlying policies that affect local prices, and consequently influence outcomes and the linkage between food price shocks and conflict. Carter and Bates (2012) evaluated data from 30 developing countries for the time period 1961 to 2001, concluding that when governments mitigate the impact of food price shocks on urban consumers, the apparent relationship between food price shocks and civil war disappears. Moreover, when the urban consumers can expect a favorable response, the protests only serve as a motivation for a policy response rather than as a prelude to something more serious, such as violent demonstrations or even civil war.

Many in the international development community see war and conflict as a development issue, with a war or conflict severely damaging the local economy, which in turn leads to forced migration and dislocation, and ultimately acute food insecurity. Brinkman and Hendrix (2011) ask if it could be the other way around, with food insecurity causing conflict. Their answer, based on a review of the literature, is "a highly qualified yes," especially for intrastate conflict. The primary reason is that insecurity itself heightens the risk of democratic breakdown and civil conflict. The linkage connecting food insecurity to conflict is contingent on levels of economic development (a stronger linkage for poorer countries), existing political institutions, and other factors. The researchers say establishing causation directly is elusive, considering a lack of evidence for explaining individual behavior. The debate over cause and effect is ongoing.

Policies can nevertheless be implemented to reduce price variability. Less costly forms of stabilization, at least in terms of government outlays, include reducing import tariffs (and quotas) to lower prices and restricting exports to increase food availability. However, these types of policy responses, while perhaps helping an individual country's consumers in the short run, can lead to increased international price volatility, with potential for disproportionate adverse impacts on other countries that also may be experiencing food insecurity.

#### No ! to AIDS

De Waal, anthropology PhD, 10, Alex, Research Professor, Executive Director of the World Peace Foundation, the Fletcher School, Tufts University, January 2010, “Reframing governance, security and conflict in the light of HIV/AIDS: A synthesis of findings from the AIDS, security and conflict initiative,” Social Science & Medicine, Vol. 70, No. 1, p. 114-120

The findings of the ASCI research on HIV/AIDS and state fragility are synthesized by Barnett (2009). These papers are thematically, methodologically and geographically diverse. The case studies and approaches were selected by Barnett to represent a broad and illustrative range of issues and locations. ¶ Barnett discounts any direct link between HIV/AIDS and state fragility and instead searches for putative indirect linkages, whereby for example the impacts of the epidemic may play out through stresses on the labour force. One line of inquiry is large-n quantitative cross-country comparisons. Two exercises were conducted by Dutta and Barnett (2007) and Sato (2008) using a range of governance indicator variables (as used by the OECD and World Bank) to determine whether there is a measurable association between HIV prevalence and state fragility. Governance in this context includes measures of state capacity and the quality of government. Dutta and Barnett compared ‘fragile’ and non-‘fragile’ countries and Sato asked whether differences among fragile states could be accounted for by different levels of HIV prevalence. Neither study found any such association, although they both hint that a differently-framed inquiry might yield some links. For example, Dutta and Barnett found that Tuberculosis was associated with state weakness. The two studies used diverse datasets, indicators and methods, giving further reason for confidence that the negative finding is robust.¶ Several case studies underlined that national-level impacts have not materialized. Feshbach (2008) investigated Russian demography, focusing on the health of recruits into the army. He paints an alarming picture of the health of the population and documents how the military is struggling to find sufficient healthy young recruits for its ranks. Among the health problems are drug addiction (accounting for the ‘unfit’ diagnosis of 21,000 recruits), mental disorders (130,000), Tuberculosis (3000) and HIV (2100). HIV/AIDS is a serious second-order problem.

#### CMR is low, empirically denied, and no impact

James Jay **Carafano 15**. Ph.D. Vice President for the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, and the E. W. Richardson Fellow, Heritage Foundation. 04-29-15. “Memo to the President: How to Transform Civil-Military Relations.” http://www.heritage.org/research/commentary/2015/4/memo-to-the-president-how-to-transform-civil-military-relations

Relations among political leaders, civilian agencies and the military blow hot and cold. **At this point, things are rather chilly**.For more effective coordination between civilians and soldiers, the next occupant of the Oval Office will need to instill a better leadership style, review the command at the Pentagon, **and renew the ethical foundation of government service**.Managing the mix of civil-military affairs **always invites controversy.** The Constitution blends authority in way to prevent one from eclipsing the other, **delivering** both a delicate balance and **constant friction**. As chief executive officer of the federal government and commander-in-chief of the military, the president’s goal is always to maximize the competing virtues of both. The Constitution provides for a **strong** civilian **executive who can wield military power as a unified instrument**. On the other hand, the Founders didn't want an armed force that would be a mere tool of its political master. Hence, for example, members of the armed forces swear their allegiance to the Constitution rather than to the commander-in-chief. The constitutional framework leaves plenty of space for throwing sharp elbows. **The history of American c**ivil-**m**ilitary **r**elations **is replete with ups and downs**—from the uneasy triangle between Washington, Jefferson and Hamilton, to Truman’s firing of MacArthur, to Lyndon Johnson picking targets for the military in Vietnam. For most of America's history, the strains appeared most prominent under the pressure of wartime service. That changed during the Cold War, when a large standing military became a fixture of the American life. Since the 1950s, **concern over civilian control of the military has reappeared periodically like the recurring irritant of psoriasis.** Enter Samuel Huntington. In 1957, he published The Soldier and the State: The Theory and Politics of Civil Military Relations. Huntington neatly describes how civil-military activities work. The military operates in a separate but subordinate sphere, he concluded. Political leaders do the politics and provide the overarching guidance of what is to be done. The military sticks to its area of competence—the application of military power. If America were a car—the civilian leaders would steer, the military would be the wheels. Each would stick to its own function. The military loved Huntington. His framework gave them clear, precise guidance. In the wake of the Vietnam debacle, Huntington's influence became even more dominant. To many in uniform, that great failure was caused by politicians who not only failed to fulfill their responsibilities—mobilizing the nation for war and building public and political support for the effort—but also committed other blunders by intruding into military affairs, exceeding their competence, and micro-managing the conduct of conflicts. Yet, even after the bitter experience of Vietnam, **c**ivil-**m**ilitary **r**elations **continue to see sharp disconnects.** Carter had scant use for advice from the Joint Chiefs of Staff. Under Reagan and the first Bush, respect for the military surged, as did the influence of the Pentagon. During the Clinton years, critics complained that the military overstepped its bounds, wielding undue influence. Donald Rumsfeld, George W. Bush’s Secretary of Defense, promised to re-assert civilian control. Subsequently, President **Obama has been criticized for marginalizing military input into the most serious decisions**.

# 2NC

## T --- Courts

### 2NC --- O/V

#### 2. ‘Prohibitions’ must be legislative enactments

Benjamin Hill 7, Judge on the Georgia Appeals Court, “Rose v. State”, Court of Appeals of Georgia, 1 Ga. App. 596, 601-602, 58 S.E. 20, 22-23, 1907 Ga. App. LEXIS 47, 4/11/1907

The words "otherwise prohibited," relied on by the State, really mean nothing in this statute. When the legislature used the words "prohibited by law," it exhausted the subject, and the addition of the words "high license or [\*\*\*11] otherwise" was "wasteful and ridiculous excess." These general words are sometimes added to specific enumeration in statutes out of abundance of caution, but they usually mean nothing. Certainly such words must be "restricted to the same genus as the things enumerated," and the use of the word "otherwise," following the words "prohibited by law," meant that the "otherwise" prohibition of the sale of liquor was to be a legal prohibition, that is, prohibited by the law of high license, or otherwise prohibited by law. But we do not think this general word means anything in this statute. Whatever it was intended to mean, it could not by any rule of logic give to the failure of the commissioners to grant licenses the force and effect of a positive enactment prohibiting the sale. The word "prohibit" is an active, transitive verb. As defined by the Standard Dictionary, it means "to forbid, especially by authority or legal enactment; interdict; as, to prohibit liquor-selling, or a person from selling liquor." The word "prohibit," [\*\*23] in its legal sense, implies some legislative enactment forbidding something. "The laws of England, from the early Plantagenets, sternly prohibited the [\*\*\*12] conversion of malt into alcohol." "Prohibition," in the United States, specifically means "the forbidding [\*602] by legislative enactment of the manufacture and sale of alcoholic liquors for use as beverage." Giving, therefore, to the word "prohibited" its ordinary signification and its technical meaning, as applied to the particular subject-matter of the sale of spirituous liquors, it must involve some positive act done by authority.

#### 3. AND “the scope of antitrust law” is not governed by court action

**Utah Law Review, 63** (Utah Law Review, Leading law review for the university of Utah, 1963, accessed on 7-20-2021, Utah Law Review, "CASES NOTED" “GOVERNMENT CONTEMPT ORDER PROVIDES POSSIBLE PRIMA FACIE CASEFOR PRIVATE ANTITRUST ACTION", https://collections.lib.utah.edu/dl\_files/e6/34/e6346be7b172efa1c6d32d6e15d4f5094339c121.pdf)//Babcii

It does not, however, necessarily follow that the same is true for the purposes of a private litigant. It must be recognized that the private litigant's rights exist only by virtue of section 5. The term "antitrust laws" has been narrowly construed to **include only** the **statutory provisions** of the Sherman and Clayton Acts **and to exclude other** statutes which apply **broad antitrust policies** to specific segments of business. 22 If this interpretation be accepted, it is arguable that the term "antitrust laws" as used in section 5 excludes antitrust decrees on which the contempt violation was based. 23 Further, the statutory language here involved, "a final **judgment or decree** . . . rendered . . . under the antitrust laws to the effect that a defendant has violated said laws . . ." does not bear out the interpretation given the section by the instant court. From the literal language of the section it would appear that the complaint in the instant case was based upon a criminal contempt citation brought for violation of a court order and not for violation of the antitrust laws. In a similar case, another Federal District Court stated that "**the term 'antitrust laws' could not be construed as** pertaining to a judgment or decree entered by **a court** in connection with an antitrust case." 24

#### 4. AND Resolved implies a legislative instrument

LA House 5 (Lousiana House of Representatives, <http://house.louisiana.gov/house-glossary.htm>)

Resolution A legislative instrument that generally is used for making declarations, stating policies, and making decisions where some other form is not required. A bill includes the constitutionally required enacting clause; a resolution uses the term "resolved". Not subject to a time limit for introduction nor to governor's veto. ( Const. Art. III, §17(B) and House  Rules 8.11 , 13.1 , 6.8 , and 7.4)

## 2NC --- CP

### 2NC --- S (Gen)

#### CP solves interstate and intrastate anticompetitive actions

Crane, 19 (Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1195-1196)//babcii

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

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

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

### 2NC --- AT: PDB

#### Perm links – the CP explicitly doesn’t expand antitrust which is what all of our links are about AND courts will give enforcement to the FTC

Crane, 19 (Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1210-1211)//babcii

D. Interactions Between Constitutional and Antitrust Levers The final category for comparing the constitutional and antitrust tools as instruments for challenging anticompetitive state and local

regulations concerns the potential interaction between the two doctrines. Procedurally and institutionally, the two theories would need to run in parallel—they could not be brought simultaneously in the same case. The FTC cannot bring constitutional challenges, and no one other than the FTC can bring a case under Section 5 of the FTC Act.177 Therefore, to speak about the two theories as either substitutes or complements is not to imagine that they ever could be asserted in the same case or by the same set of actors. Rather, it is to observe that advocates of enhanced scrutiny of anticompetitive state and local regulations have choices about how and where to push for heightened review. Someone strongly committed to a systematic challenge of anticompetitive regulations might advocate for a simultaneous charge on both fronts—reinvigorating equal protection, substantive due process, and perhaps negative Commerce Clause review, even while also curbing the Parker doctrine and empowering the FTC to undertake more trenchant review. However, even if such an approach were desirable in principle, there is reason to believe that it would be politically, institutionally, and doctrinally challenging to ramp up both tools at once. As is often the case when expanding potency of legal doctrines or institutions runs into background concerns about overreaching—here Lochner—courts and other agencies of government have a tendency to justify timidity by observing that the problem in question could be better addressed by another institution or legal doctrine.178 Thus, presented with the possibility of reinvigorating constitutional restraints on competitively parochial regulations, the courts might demur on the grounds that, if there is a serious problem, then it can be addressed by an administrative institution such as the FTC, thereby avoiding the specter of Lochner. Conversely, if urged to whittle down Parker immunity in an FTC case, the reviewing courts might also demur, observing that any sufficiently serious problem might be addressed under constitutional principles.

### 2NC --- AT: PDCP

#### The perm is severance –

#### CP only sues the states – that’s not the private sector

Senate Manual 11 (Senate Document No. 112-1)//babcii

The term ``private sector'' means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.112 S. Doc. 1

#### core antitrust laws are the big three

FTC 13 [Federal Trade Commission; first saved on the Wayback Machine’s Internet Archive on December 14, 2013; “The Antitrust Laws,” https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws]

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

#### the CP uses constitutional tools, not core antitrust laws

Crane, 19 (Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1178)//babcii

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

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

#### Those are completely different

Crane, 19 (Daniel A. Crane, Frederick Paul Furth Sr. Professor of Law, University of Michigan, "Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses." Wm. & Mary L. Rev. 60, no. 4 (2019): 1207-1208)//babcii

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

## 2NC --- Advantage 1

### 2NC --- No Tech

#### No emerging tech impact.

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

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

### 2NC --- No AI !

#### no impact to ai – consensus

Baum 15 Seth D., executive director of the Global Catastrophic Risk Institute and Research Scientist @ the Blue Marble Space Institute of Science and an Affiliate Researcher @ the Columbia University Center for Research on Environmental Decisions, *Environment, Systems, and Decisions*, May 4th, “Risk and Resilience For Unknown, Unquantifiable, Systemic, and Unlikely/Catastrophic Threats,” http://sethbaum.com/ac/2015\_RiskResilience.pdf

3.2 More Examples: AI and Extraterrestrials∂ Two ongoing threats that come closer to being actually unknown are AI and extraterrestrials, or∂ rather certain AI and extraterrestrials scenarios. For AI, the relevant scenarios are those in which∂ a potential future “superintelligent” AI outsmarts humanity and takes over the world (Good∂ 1965; Eden et al. 2013; Bostrom 2014). Similarly, for extraterrestrials, the relevant scenarios are∂ those in which humanity encounters extraterrestrials that are more powerful than itself, and the∂ extraterrestrials take over the world (Michaud 2007; Baum et al. 2011a). Both scenarios are∂ somewhat speculative, which makes them good examples of relatively unknown threats.∂ For both scenarios, increasing resilience is of little use. If humanity loses control of the∂ planet, then traditional means of increasing resilience—such as creating redundant networks,∂ stockpiling resources, or planning to adapt and recover—do not help humanity retain its critical∂ functionality. This holds for any reasonable definition of humanity’s critical functionality:∂ humanity’s population, its civilization, and even its very existence are all threatened. The∂ situation here is much like the situation of those many species on Earth now extinct due to their∂ encounter with the vastly more powerful human species, or the situation of those species that∂ would now be extinct except that humanity chose to keep them alive. For all such species,∂ resilience does not help. So too for humanity in the face of vastly more powerful AI or∂ extraterrestrials.∂ Both threats are poorly known, even if they are not completely unknown. At this time, it is∂ not known whether it is possible to build such an AI, let alone which AI will be built and what∂ that AI would be like. Some leading AI researchers express skepticism that such AI is possible∂ (e.g., Horvitz and Selman 2009). Expert surveys indicate widely varying and conflicting∂ 4∂ projections about if and when such an AI would occur, and what the consequences would be∂ (Baum et al. 2011b; Armstrong and Sotala 2012; Müller and Bostrom forthcoming). The threat∂ of extraterrestrials may be even less well known. It is not known whether extraterrestrials exist,∂ or, if they do exist, whether it is possible for humanity to encounter them. It is likewise not∂ known which extraterrestrials humanity would encounter and what those extraterrestrials would∂ be like. All that is known is that no extraterrestrial encounter has previously occurred. Many∂ explanations have been proposed for why no extraterrestrial encounter has previously occurred,∂ the so-called Fermi paradox (Webb 2002). Likewise, speculations abound on what would happen∂ if an extraterrestrial encounter occurs, though there is limited basis for assessing which of these∂ are most likely (Michaud 2007; Baum et al. 2011a).∂ The examples of AI and extraterrestrials are threats that are relatively unknown, yet they may∂ not warrant a response of increasing resilience. Instead, the only viable response is to decrease∂ the probability of the threat manifesting. For AI, this can be done by abstaining from building∂ potentially dangerous types of AI (Joy 2000) or by seeking to build AIs that would not harm∂ humanity (Yudkowsky 2011). For extraterrestrials, this can be done by abstaining from∂ transmitting messages towards parts of the galaxy likely to house extraterrestrials (Brin undated;∂ Haqq-Misra et al. 2013) or, eventually, by abstaining from traveling around outer space. These∂ various response options would all decrease the risk from these relatively unknown threats, even∂ though they do not increase resilience.

# 1NR --- Rutgers RR R4

## 1NR --- Econ DA

### 2NC – O/V

#### Decline causes multilateral meltdown – causes nuclear war, climate change, Arctic and space war.

McLennan 21 – Strategic Partners Marsh McLennan SK Group Zurich Insurance Group, Academic Advisers National University of Singapore Oxford Martin School, University of Oxford Wharton Risk Management and Decision Processes Center, University of Pennsylvania, “The Global Risks Report 2021 16th Edition” “http://www3.weforum.org/docs/WEF\_The\_Global\_Risks\_Report\_2021.pdf

Forced to choose sides, governments may face economic or diplomatic consequences, as proxy disputes play out in control over economic or geographic resources. The deepening of geopolitical fault lines and the lack of viable middle power alternatives make it harder for countries to cultivate connective tissue with a diverse set of partner countries based on mutual values and maximizing efficiencies. Instead, networks will become thick in some directions and non-existent in others. The COVID-19 crisis has amplified this dynamic, as digital interactions represent a “huge loss in efficiency for diplomacy” compared with face-to-face discussions.23 With some alliances weakening, diplomatic relationships will become more unstable at points where superpower tectonic plates meet or withdraw.

At the same time, without superpower referees or middle power enforcement, global norms may no longer govern state behaviour. Some governments will thus see the solidification of rival blocs as an opportunity to engage in regional posturing, which will have destabilizing effects.24 Across societies, domestic discord and economic crises will increase the risk of autocracy, with corresponding censorship, surveillance, restriction of movement and abrogation of rights.25 Economic crises will also amplify the challenges for middle powers as they navigate geopolitical competition. ASEAN countries, for example, had offered a potential new manufacturing base as the United States and China decouple, but the pandemic has left these countries strapped for cash to invest in the necessary infrastructure and productive capacity.26 Economic fallout is pushing many countries to debt distress (see Chapter 1, Global Risks 2021). While G20 countries are supporting debt restructure for poorer nations,27 larger economies too may be at risk of default in the longer term;28 this would leave them further stranded—and unable to exercise leadership—on the global stage.

Multilateral meltdown Middle power weaknesses will be reinforced in weakened institutions, which may translate to more uncertainty and lagging progress on shared global challenges such as climate change, health, poverty reduction and technology governance. In the absence of strong regulating institutions, the Arctic and space represent new realms for potential conflict as the superpowers and middle powers alike compete to extract resources and secure strategic advantage.29 If the global superpowers continue to accumulate economic, military and technological power in a zero-sum playing field, some middle powers could increasingly fall behind. Without cooperation nor access to important innovations, middle powers will struggle to define solutions to the world’s problems. In the long term, GRPS respondents forecasted “weapons of mass destruction” and “state collapse” as the two top critical threats: in the absence of strong institutions or clear rules, clashes— such as those in Nagorno-Karabakh or the Galwan Valley—may more frequently flare into full-fledged interstate conflicts,30 which is particularly worrisome where unresolved tensions among nuclear powers are concerned. These conflicts may lead to state collapse, with weakened middle powers less willing or less able to step in to find a peaceful solution.

#### Agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### War rolls back antitrust reform AND enforcement

Dr. Bruce A. Khula 3, Juris Doctor Candidate at Notre Dame Law School, Ph.D. and MA from The Ohio State University, Associate General Counsel at Progressive Insurance, “Antitrust at the Water's Edge: National Security and Antitrust Enforcement”, Notre Dame Law Review, Volume 78, Issue 2, 78 Notre Dame L. Rev. 629, January 2003, Lexis

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work. [\*632] Besides, other scholars have already written quite excellent ones. Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful - indeed, in a great many cases, inexorable - influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture. The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law - and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

[\*633]

I. Antitrust Law: History and Development

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it is the history of words. And such a history - even an amateurish history, like that which follows - may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people call a thing can provide insight into the nature of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the Oxford English Dictionary (OED) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival." The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office … entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them." Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth." The OED affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust." Because of its descriptive nature, Bryce's passage is worth quoting in full:

Those anomalous giants called Trusts - groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.

[\*634] Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice. The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and The Federalist to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades. Facilitated by the advent and spread of the telegraph and railroad, big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations. Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic order." [\*635] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors." The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization, encouraged mass immigration from Southern and Eastern Europe, established new classes of industrial laborers and middle-class managers, and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption. Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century - namely, the labor movement, agrarian Populism, and Progressivism - all originated in the dislocations brought by the rise of big business. By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans not blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by [\*636] watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law. In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence." As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process. This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states. As Hans Thorelli notes, neither in England nor the [\*637] United States did common law competition policy accomplish very much. Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably. The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade. These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable. Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'" Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note. It suffices to note that deeply felt public sentiment - drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal - animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly [\*638] political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation - ostensibly the "antitrust movement" of which Hofstadter writes - dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues. Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act). In essence, literalists wanted the jurisprudence of United States v. Trans-Missouri Freight Ass'n to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in United States v. Addyston Pipe & Steel Co. This debate, it must be emphasized, was by no means strictly - or even principally - judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers. The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in Standard Oil Co. v. United States and the contemporaneous case, United States v. American Tobacco Co.

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War, and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed. Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large. Hooverian politics and "cooperative competition" managed to survive the early dark days [\*639] of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).

In the years after the U.S. Supreme Court scuttled NIRA, however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action. Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action." As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail. But this born-again antitrust zeal would not survive the coming of yet another global war.

### 2NC --- UQ

#### Inflation and omicron aren’t a threat – demand is super high due to covid saving and stimulus

Marshall, 1-20 (Elizabeth Dilts Marshall, Retail banks and consumer finance reporter at Reuters, “Big U.S. banks say spending patterns show consumers are in good shape”, Reuters, https://www.reuters.com/business/finance/big-us-banks-say-spending-patterns-show-consumers-are-good-shape-2022-01-20/)//babcii

NEW YORK, Jan 20 (Reuters) - Top executives at the biggest U.S. banks have been optimistic about the nation's economic outlook this earnings season, pointing to healthy consumers who have cash in the bank, are again eager to spend and also to borrow.

Consumer spending, a key driver of the U.S. economy, fell sharply during the start of the pandemic as Americans, fearing the worst, hoarded cash and saved money by staying at home.

At the same time, government aid padded many Americans' bank accounts, and many used the cash to pay off debts.

Now, JPMorgan Chase & Co [(JPM.N)](https://www.reuters.com/companies/JPM.N) and Bank of America [(BAC.N)](https://www.reuters.com/companies/BAC.N), the No. 1 and 2 largest U.S. banks which together reach around 140 million households, say consumers are in good shape, even if the Omicron variant dampened spenders' enthusiasm some late last year.

Some analysts also cautioned inflation had the potential to further dampen spending if it continues.

Bank of America, which provided the most comprehensive consumer spending data when it reported earnings on Wednesday, said its 67 million customers spent a record $3.8 trillion in 2021, a 24% increase from 2019, the pre-pandemic benchmark.

That figure includes all the ways in which the bank's customers spend money - credit and debit cards, ACH, wire transfers, cash, checks and money sent via platforms like Zelle.

Fourth quarter payments were up 28% on the same period in 2019, also a record jump. Spending has continued into January, with payments up 11% as of Jan. 17 compared to the beginning of January 2021, Bank of America said.

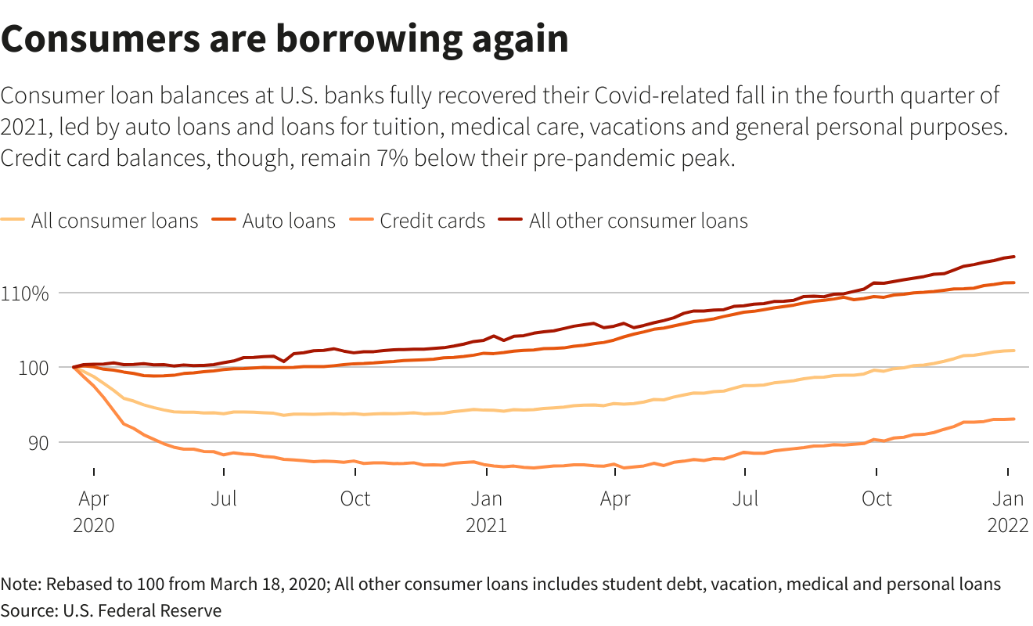
Nearly all customers' account balances grew from June to December, it added.

"We believe there's lots of potential spending capacity left as average deposit balances continue to move up to the end of the year despite the heavy spending you see," Bank of America Chief Executive Officer Brian Moynihan said on Wednesday.

JPMorgan said that combined debit and credit card spending was 27% higher in the fourth quarter last year compared to the fourth quarter 2019, with travel and entertainment spending up 13% over the same period.

Wells Fargo & Co said credit card spending and median account balances for the fourth quarter were both up 27% compared to pre-pandemic levels.

Consumer loan balances across the industry also fully recovered from their COVID fall in the fourth quarter, led by auto loans and loans for tuition, medical care, vacations and other purposes, according to Federal Reserve data.

"Seeing the results ... make us incrementally more optimistic about the loan growth trends," said Citigroup analyst Keith Horowitz.

### 2NC --- AT: Parker imm changes

#### The word ‘recent’ ≠ 7 years ago (JCCC Yellow)

Allensworth 16 [Rebecca Haw Allensworth, Associate Professor of Law, Vanderbilt Law School; J.D., Harvard Law School; M.Phil, University of Cambridge; B.A., Yale University, October 2016, ARTICLE: THE NEW ANTITRUST FEDERALISM, 102 Va. L. Rev. 1387]

Introduction

IN just three relatively obscure antitrust cases, 1

[Footnote 1] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) [hereinafter NC Dental]; FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013); FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

the U.S. Supreme Court has quietly revolutionized how states and the federal government share power. These cases addressed a doctrine - unfamiliar to those outside of the field of antitrust law - that grants "state action" immunity from federal antitrust liability 2 and thus marks the thin line that insulates state regulation from wholesale invalidation through federal antitrust lawsuits. 3 For decades, the Court conceived of this line, and the "antitrust federalism" it effected, as a formal question about where the state ended and antitrust liability began. This was the old antitrust federalism: a boundary-drawing exercise that gave strong deference to state regulation. The Court's state action revolution ushers in a new antitrust federalism, one that all but dispenses with the notion of separate spheres in favor of something less deferential to the states - procedural review of state regulation.

Antitrust federalism may be less familiar than its constitutional cousin, but it is just as important - if not more so - to the state-federal balance of power. The Sherman Act forbids anticompetitive restraints of trade and monopolization of markets, and it does not seem to limit these prohibitions to private citizens and corporations. 4 Because regulation often tinkers with the free market economy and tends to create competitive winners and losers, Sherman Act liability for state conduct would severely restrict a state's ability to regulate within its borders. 5 So when [\*1390] the Court extended the reach of the Sherman Act - along with all federal regulation passed under the Commerce Clause - during the New Deal, 6 it became necessary to define an exemption for "state action" or risk the demise of state regulatory autonomy altogether. And state action immunity from the Sherman Act was born. 7

#### This card is about a 2015 court case, say they won’t regulate states and that it will enforce current atr laws, and is about potential ftc actions

Bulusu 21 [Siri Bulusu, Reporter Bloomberg Law, 7-12-2021 https://news.bloomberglaw.com/antitrust/worker-license-rules-emerge-as-ftc-competition-oversight-priority]

President Joe Biden’s order, signed Friday, calls on the Federal Trade Commission to boost labor market competition by writing new rules that limit “unnecessary, cumbersome” licensing requirements, often imposed by states’ regulatory boards and quasi-public organizations.

“Some overly restrictive occupational licensing requirements can impede workers’ ability to find jobs and to move between states,” according to the order. The order comes amid a flurry of lawsuits against state or state-backed licensing bodies that accuse them of violating antitrust law by imposing expensive fees or threatening to shut down out-of-state businesses. The text of the order didn’t include specific directions for federal antitrust agencies. But the FTC’s anticipated actions and possible rulemaking could lead to streamlined licensing requirements across states, eliminating demands for worker information unrelated to the job, enforcement of interstate commerce rules, and levying of punitive fines, market watchers say. Licenses are expensive and requirements vary among states, even in the same industry. Reining in the requirements could remove a significant employment barrier, particularly for military families and others who frequently move between states or offer services across state lines. But it also could shift states’ calculations in cracking down on frauds and impostors. Cosmetology licenses can cost up to $15,000 and sometimes years of study, said Dick Carpenter, a senior director of strategic research for the Institute for Justice. Other jobs, ranging from public health and safety positions to interior designers, barbers, and manicurists, also require licensing. “Without any kind of standardization of different licensing requirements—even if you have the same requirements in different jurisdictions—you still have to get a license for each jurisdiction, which impedes an employee’s ability to be mobile,” said Tracey Diamond, a partner at Troutman Pepper LLP’s labor and employment practice.

Potential FTC Moves

The FTC’s options include writing new rules or heightening enforcement of interstate commerce rules in areas where they overlap with antitrust violations, labor market watchers say. Under this principle, restricting labor through onerous licensing requirements would be tantamount to limiting movement of services across borders.

“In the past, occupational licensing was a matter overseen by the Department of Labor, but they don’t quite have the teeth that the Federal Trade Commission has in terms of working in specific locations,” said Morris Kleiner, a University of Minnesota professor of labor policy.

The FTC could turn its limited resources toward scrutinizing occupational licensing programs that narrow the practice scope of a certain profession and limit competition, Kleiner said.

How the commission interprets which licensing requirements are “unnecessary” could be scrutinized. Those could include common requirements such as citizenship and a clean criminal record, said Bobby Chung, a postdoctoral research associate at the University of Illinois at Urbana-Champaign who focuses on licensing. .

“The required training, education and exams should confer the relevant skill sets,” Chung said. “If not, I would regard those requirements as unnecessary.” The agency also may impose specific guidelines that limit fees or frequency of license renewal, Kleiner said. “But more importantly, the FTC’s guidelines could be aimed specifically at states that have ratcheted up their requirements,” he said.

Gaining Attention

Burdensome licensing requirements have increasingly come under federal scrutiny as the labor market has shifted away from manufacturing jobs to service-oriented professions. States began imposing licensing requirements in order to protect consumers from bad actors and standardize services. “Licenses create a monopoly of workers who can provide a service,” Kleiner said. “But if you provide those services without a license, the police powers of the state can arrest and severely fine those individuals.” In 2020, roughly 23% of workers were required to have a license, according to the Bureau of Labor Statistics. Over the years, many states, including Arizona, Connecticut, Nebraska, and Tennessee, have modified their rules to lower what they considered to be burdensome barriers to obtaining licenses. Biden’s move is part of states’ broader push for changes, Carpenter said. “There is a momentum building to raise awareness to the issue.” Advocates for change also cite underemployment and unemployment stemming from the burdensome licensing requirements, as well as allegations that certain industries create occupational licensing to limit competition. Immigrants also can be affected by the licensing requirements, particularly if they hold foreign degrees but are performing lesser-skilled jobs in the U.S., according to a 2017 study by the Migration Policy Institute. Licensing particularly hurts foreign nationals with temporary work visas whose immigration status impedes them from seeking a license to work within their specialty, Chung said. That in turn impedes their path to permanent residency or citizenship, he said.

State Action

The FTC has struggled to rein in licensing practices with antitrust violations partly because public entities, like state-controlled licensing boards, can claim state action immunity. Such immunity authorizes a state to carry out certain legitimate government functions, often in regulated industries that require licensing.

“Many of these state certifications don’t violate antitrust law and that’s because of this doctrine that displaces antitrust law,” said Jesse Markham, a partner at Baker & Miller PLLC’s San Francisco office. “And that’s why these certification requirements exist with impunity.”

In 2015, the Supreme Court ruled in North Carolina State Board of Dental Examiners v. FTC that the state board was operated by market participants. Without active supervision from the state, the board couldn’t claim state action immunity from federal antitrust actions.

The ruling unleashed “dozens of lawsuits"—seeking antitrust treble damages—against individual members of licensing boards, according an October 2020 statement from Reps. Mike Conaway (R-Texas), Jamie Raskin (D-Md.), and David Cicilline (D-R.I.) in support of a bill they introduced to shield board members from such suits.

Qualifying for state action immunity largely depends on whether a board is a true government actor or a private market participant. But this delineation becomes more complex if there’s a blurred line between a state agency handling its own actions or a private group acting under state guidance.

How the FTC handles that blurred line will be one issue the agency tackles as it implements the president’s order.

\*\*\*MSU CARD ENDS\*\*\*

The FTC may not be able to restrict states’ regulatory powers, but it could seek to impose penalties where it can enforce antitrust law, attorneys say.

### 2NC --- AT --- FTC/XO

#### Courts constrain FTC’s agenda

Tara L. Reinhart et al. 10/4/21, Partner, Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates’s D.C. office, “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb,” 10/4/21, https://www.skadden.com/insights/publications/2021/10/ftc-chair-khan-highlights-policy-priorities

Practical Limitations on Implementation of Chair Khan’s Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as “robust,” and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan’s memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan’s vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2

#### Biden’s XO and FTC rulemaking will be rejected by the courts.

Carl W. Hittinger and Marc G. Schildkraut 11/24/21, Hittinger is a senior partner at BakerHostetler and serves as the firm’s antitrust and competition practice national team leader, Schildkraut is a senior partner in the firm’s antitrust and competition practice, “Don’t Wait Up for the Biden Antitrust Revolution,” https://www.bakerlaw.com/webfiles/Hittinger-Schildkraut\_Legal-int-Nov\_p02.pdf

On July 9, President Joe Biden issued an executive order on Promoting Competition in the American Economy. According to the fact sheet that accompanied the order, in over 75% of U.S. industries concentration is higher than 20 years ago. Markups have tripled. Advertised wages have decreased by as much as 17%. Higher prices and lower wages cost the median American household $5,000 per year. The rate of new business formation has fallen almost 50% since the 1970s. Productivity growth has slowed. Business innovation has declined. Income wealth and racial inequality has widened. To remedy the situation, the executive order proposes a raft of initiatives at more than a dozen agencies to foster more competition across the economy. We focus here on the order’s recommendations to the Antitrust Division of the Department of Justice and the Federal Trade Commission in particular because the FTC has had a Biden-selected chair for a considerable time. The new head of the Antitrust Division, Jonathan Kanter, just arrived this November.

The president asks the DOJ and the FTC to reconsider the scope of certain of their guidelines, including the Horizontal Merger Guidelines, the Vertical Merger Guidelines and the Antitrust Guidance for Human Resource Professionals of October 2016. The president also recommended rules relating to the use of non-competes and other clauses that may limit worker mobility, data collection and surveillance that may harm competition, restrictions by manufacturers that prevent farmers from repairing their own equipment, agreements to delay market entry in the pharmaceutical industry by generic and biosimilar suppliers, unfair competition in the Internet marketplace, unfair occupational licensing restrictions and exclusionary practices in real estate brokerage.

Lina Khan, the new chair of the FTC, has picked up the cudgel on several of these recommendations and has added many of her own initiates. The FTC, thus far, under her stewardship, has withdrawn the vertical merger guidelines. It has also withdrawn the policy statement on the use of Section 5 of the Federal Trade Commission Act, which prohibits “unfair methods of competition.” It has suspended the availability of early termination of the waiting period for mergers filed pursuant to the Hart-Scott-Rodino Act. It has also reversed a policy adopted by the FTC regarding prior approval of certain future acquisitions in consent orders covering alleged unlawful proposed acquisitions.

Khan’s writings and interviews make clear why she is in a hurry. It has to do in part with her perception that the antitrust laws have failed to protect the economy for the reasons set for in the fact sheet. Khan blames this on the “Chicago School” paradigm, which has been adopted and implemented by the antitrust agencies and courts over the last four decades. That paradigm focuses on the protection of customer welfare: providing society with the maximum output that can be achieved with the resources available; weighing efficiencies against anticompetitive effects; and emphasizing a commitment to economic methodology and evidence-based policy. According to Khan, “The fixation with efficiency theory … has largely blinded enforcers … to many of the harms caused by undue market power. … The resulting system is so warped that … according to recent studies, [the level of enforcement has] resulted in higher prices … meaning that this philosophy is failing even on its own terms.” Rather, Khan appears to align herself with the New Brandeisians who want to “refocus antitrust on structures and a broader set of measures to assess market power and return the law to focusing on the competitive process.” This includes less reliance on economic analysis. According to the FTC chair, “there’s nothing in the antitrust statutes about what econometric analysis to use.”

Khan, however, must find a way around 40 years of court precedents adopting Chicago School methodologies and rejecting the FTC when it appears to step beyond them. That is apparent in past efforts of the FTC but recent ones as well. As far as the past is concerned, in the 1970s, the commission instituted two shared monopoly cases, against major oil companies and cereal companies. Neither case was successful. The FTC also issued several complaints that were beyond the scope of the Sherman Act using its authority under Section 5. In theory, such cases were within the commission’s power. According to then U.S. Supreme Court in FTC v. Sperry & Hutchins, Section 5 “empowers the FTC to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws.” However, the FTC did not fare well when respondents appealed a series of Section 5 administrative decisions to the courts. One concern of the courts was a lack of evidence of anticompetitive effects.

The reason the FTC withdrew its Section 5 policy runs headlong into this concern. According to the FTC majority, the policy statement did not encompass incipient conduct; that is, conduct that has not manifested an actual adverse competitive effect, but might do so in the future. The policy statement of a likely anticompetitive effect, according to the FTC majority, “abrogated the commission’s statutory mandate to combat incipient wrongdoing before it becomes likely to harm consumers or competition.” But in coming to this conclusion, the commission did not confront the outcome of cases, such as Boise Cascade v. FTC. In that case, the commission challenged a delivered pricing system employed individually by each plywood producer in the southeastern United States pegged to the price of plywood producers in the northwestern United States. Because there was no allegation of collusion, the conduct did not violate the Sherman Act. The U.S. Court of Appeals for the Ninth Circuit held that the FTC provided “little more than a theory” of adverse effect. The court consequently refused to “sustain the FTC order on the basis of something less than substantial evidence of an anticompetitive effect.”

After a series of such decisions, the FTC pulled back and eventually acknowledged this pull back in 2015, announcing a narrow reading of its powers under Section 5. That was the reading that the FTC withdrew within days of Lina Khan’s becoming chair.

It is not just the distant past that will haunt the FTC’s efforts to break free of Chicago School jurisprudence. For instance, on June 11, the Second Circuit Court of Appeals in 1-800 Contacts v. Federal Trade Commission vacated an FTC administrative decision that had found the 1-800 Contacts liable regarding its agreements to protect its trademark in its web advertising. 1-800 Contacts is an internet-based retailer of contact lenses. The company, like its competitors, advertises its product online to potential customers using search advertising. Search engines sell paid search advertisements via a bidding system: advertisers bid on relevant keywords at an auction hosted by the search engines, and the highest bidder’s ads are displayed at the top of the Search Engine Results Page (SERP). 1-800 Contacts’ competitors had bid to place advertisements on the SERP that appears when online shoppers searched for “1-800 Contacts.” 1-800 Contacts began filing complaints and sending cease-and-desist letters to competitors alleging trademark infringement regarding the competitors’ searches for “1-800 Contacts.” Resulting settlement agreements prohibited the parties from using one another’s trademarks as search advertising keywords. The FTC issued an administrative complaint alleging that 1-800 Contacts trademark settlement agreements restrained trade in violation of Section 5 of the FTC Act. The commission alleged the agreements restrained advertising competition. Thereafter, the commission’s administrative opinion rejected the company’s argument that trademark settlements are immune from antitrust review. It then held that evidence of price increases and restrictions on truthful advertising supported a finding that the agreements were anticompetitive.

The Second Circuit, however, concluded that “agreements to protect trademark interests are ‘common, and favored, under the law.’” As a result, “it is difficult to show that an unfavorable trademark agreement creates antitrust concerns.” According to the court, even if the commission’s analysis of the trademark claim were correct, trademark agreements that “only marginally advance trademark policy can be procompetitive” because they “serve the competitive purpose of furthering trademark policy.” Therefore, “the parties determination of the scope of the needed trademark protections is entitled to substantial weight.” The court rejected outright the commission’s findings that the agreements had adverse price effects and apparently was not enamored by the commission’s findings that the limitation on truthful advertising was anticompetitive. This was enough for the court to conclude that the agreements do not violate the antitrust laws.

The FTC’s challenge to Qualcomm’s alleged manipulation of standard setting and its restricted licensing of patents suffered a similar fate. Qualcomm licensed its patent portfolio covering modem chips for cellular handsets to manufacturers of such handsets (OEMs). It refused to sell its modem chips to OEMs that did not take a license to the Qualcomm patent portfolio. While Qualcomm would not license its patents to competing chipmakers, it would not assert its patents when the competitor sold its chips to licensed OEMs. The district court agreed with the FTC that Qualcomm’s royalty rates on its portfolio were unreasonably high, that its refusal to license rival chipmakers broke a promise it made to a standard setting organization that it would license such chipmakers, and that Qualcomm’s high royalties to OEMs resulted in an anticompetitive surcharge on the competing chip maker sales to OEMs. In essence, Qualcomm was accused of squeezing the competing chip makers by making money on unduly high royalties on its patents and using that money to subsidize unduly low prices for its modem chips.

In FTC v. Qualcomm, the Ninth Circuit reversed the district judgment in favor of the FTC. The appeals court did not agree with the district court that the refusal to license competing chip makers amounted to a cognizable anticompetitive effect, explaining that competing chip makers could sell their modem chips to any licensed OEM. Further, the panel took a clear stand on the side of excluding antitrust remedies even if Qualcomm breached a promise to the standard-setting organization, pointing parties to seek contractual or tort remedies for these harms. In addition, based upon Supreme Court precedents, a dominant firm’s (Qualcomm’s) price squeeze on rivals was not a competitive concern unless the squeeze resulted in below-cost pricing (which was not established in this case). And, based on other Supreme Court precedents, Qualcomm had no duty to deal with rival modem chip manufacturers in any event. The FTC tried 1-800 Contacts and Qualcomm under traditional Sherman Act theories, not under challenging Section 5 theories. In both cases, the court was not impressed by the commission’s evidence of anticompetitive effects. This ought to give the FTC some pause about launching antitrust challenges to conduct under an incipient theory. Perhaps the commission should first focus on cases where the actual harm to consumers outweighs the benefits. Stay tuned.

### 2NC --- Link Wall (MSU)

#### 2. Only antitrust threatens to morph into economy-wide national policy.

Geoffrey A. Manne 18, President and Founder International Center for Law & Economics, “Why US Antitrust Law Should Not Emulate European Competition Policy,” ICLE, A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 12/19/18, https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf

A. The European approach to Facebook and Google as cautionary tale

The question of whether technology platforms should be regulated (and why) is a contentious one. But whatever the political, economic, or social rationale impelling regulation, it remains a crucial question whether antitrust — or competition policy implemented through other laws — is the proper regulatory lever. Despite many claims that European authorities, through their competition laws, have adopted a “better” approach toward regulating technology platforms, these claims are generally based on an a priori preference for the outcome — not on a careful assessment of the underlying legal interpretation and its broader implications.

Indeed, Europe’s recent (and ongoing) experience with applying antitrust to both Facebook and Google presents a cautionary tale, not a model. As these examples show, moving towards a more open-ended enforcement of antitrust law (potentially converging with EU competition law) entails significant risks.

1. Facebook

The German Bundeskartellamt’s (Federal Cartel Office, or “FCO”) ongoing Facebook investigation, for which an infringement decision is said to be in the pipeline,28 is a stark case of the unprincipled extension of antitrust to attempt to reach a politically favored result. Indeed, in contrast to the European Commission — which at least often mentions economic analysis in its decisions — the FCO did not include any economic analysis or an attempt to gauge the actual effects of the complained-of conduct on users in its preliminary assessment. The FCO’s investigation thus bears all the traits of consumer protection enforcement (which, in Europe at least, tends to rely upon bright-line rules and little analysis of effects) rather than competition scrutiny (which nominally entails at least some inquiry into to the economic effect of firms’ conduct). The crux of the case concerns Facebook’s collection of users’ personal data outside its site — data that is then merged with Facebook’s user profiles.29 The German competition agency asserts in its preliminary assessment that Facebook (which it “assumes… is dominant”) is “abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user’s Facebook account.” 30 Note that the allegation on its face is not that Facebook forecloses other sites from amassing this external data, nor that its data collection amounts to anticompetitive harm (e.g., supracompetitive prices) to consumers. Rather, its allegation is that Facebook’s terms of service authorizing this data collection are simply not good for consumers, regardless of their acceptance of the terms, and thus constitute an abuse of dominance. “In the authority’s assessment, consumers must be given more control… and Facebook needs to provide [consumers] with suitable options to effectively limit this collection of data.” 31 The German competition authority is thus attempting to use its antitrust authority to impose on consumers (and Facebook) its idiosyncratic political preferences, in this case with regard to privacy. But turning voluntary contract terms that are not, in and of themselves, anticompetitive into an antitrust violation requires a remarkable and unprecedented sleight of hand. To begin with, the FCO asserts that this data — data collected from outside of Facebook — is “essential” for other social networks to compete with Facebook. But, despite asserting that its assessment is not based on how Facebook uses internal data collected from users’ interactions with Facebook directly, the FCO appears to convert this external data into an essentiality by condemning Facebook’s superior ability to combine it with its own internal data: Facebook has superior access to the personal data of its users and other competitionrelevant data. Because social networks are data-driven products, access to such data is an essential factor for competition in the market. The data are relevant for both[] the product design and the possibility to monetise the service. If other companies lack access to comparable data resources, this can be an additional barrier to market entry.32 The effect of this is to condemn Facebook’s success — and even, perhaps, to end up demanding that Facebook share its internal data — without saying so outright. The reference to “comparable data resources” is an unmistakable nod to the essential facilities doctrine, which can require access to a firm’s competition-relevant inputs where comparable inputs cannot be obtained elsewhere. Here the FCO appears to be asserting that competitors’ effective use of external data is thwarted if they do not have comparable internal data with which to combine it. But, of course, Facebook has this data only as a result of its success in bringing users to its platform. And it would be the height of unmoored antitrust enforcement to demand that other social networks, which do not operate through Facebook (in contrast, say, to advertisers, who do reach consumers via Facebook), must have access to Facebook’s internal data simply to give them a leg up in competing with a more successful rival. And yet, that is precisely what the authority seems to be suggesting — just indirectly by purporting to rest its claim on access to external data (which, like Facebook, competing social networks certainly do try to use). Of course, lack of access to a successful company’s resources is a form of barrier to entry in every case where a challenger wishes to enter a market where existing firms are long established. The same argument that the FCO makes with respect to Facebook and data could be applied to any firm that has a strong reputation, significant brand value, substantial customer loyalty, or even large real estate holdings or an established line of credit with a bank. For antitrust to require competitor access to these resources would be to undermine completely the competitive market forces that antitrust is supposed to support. And yet the FCO does not — and cannot — distinguish these valuable types of capital from that of access to a large pool of self-generated consumer data. The FCO also alleges that Facebook’s “exploitative business terms”33 constitute an antitrust violation because “[t]he damage for the users lies in a loss of control: they are no longer able to control how their personal data are used.” 34 But the allegedly exploitative nature of this loss of control is a function of European data protection laws, not antitrust law. The FCO appears to convert the alleged data protection law violation into an antitrust offence because, [a]ccording to the authority’s preliminary assessment, when operating this business model Facebook, as a dominant company, must consider that its users cannot switch to other social networks. Participation in Facebook’s network is conditional on registration and unrestricted approval of its terms of service. Users are given the choice of either accepting the “whole package” or doing without the service.35 But because of the essentiality of Facebook’s internal data, this choice is alleged to be a false one. And thus consumers “have no option to avoid the merging of their data” 36 — a violation, the FCO asserts, of data protection law. In this way the FCO uses data protection law as a foothold to build a convoluted antitrust case that really amounts to nothing more than the condemnation of Facebook’s size and success.

This is exactly the sort of uneasy merging of general social policy and the tools of competition policy that is so corrosive to the rule of law. Using the language of antitrust, the FCO is basically making a case that Facebook should be subject to competition law penalties for possessing more data than the FCO thinks is appropriate. Perhaps there are violations under other laws — data security or privacy laws, e.g. — but nothing in the FCO’s discussion of its preliminary assessment suggests anything recognizable in the economic literature as an abuse of dominance.

The FCO’s approach would dramatically expand the scope of German (and possibly European) competition law. As some commentators have observed, any dominant company that infringes any legal obligation aimed at protecting consumers — regardless of whether the violation actually results from the absence of competition, results in cognizable anticompetitive effects, or extends the company’s dominance — could be found to infringe competition law.37

Although particularly egregious here, the FCO’s efforts to reach beyond the limited constraints of competition law are not new. Starting in 2017, the FCO has been progressively urging for expansion of its powers into a broader consumer protection set of tools.38 Thus, even if it is unsuccessful in building its case under the current state of the law, the FCO is laying the foundations for convincing the German legislature why it needs vast new powers to combine consumer protection and competition into a single regulatory authority. Notably, even the US Federal Trade Commission (FTC) — which has both consumer protection and competition mandates — treats these missions separately, and regards competition cases to arise only under competition law, and not from the violation of specific consumer protection rules.

The implications of this approach are obvious. If competition law is unconstrained on its own terms — that is, it unmoored from a set of subject-specific constraints imposed by courts and legislatures — it threatens to become a large, sprawling, economy-wide set of regulations that resembles more closely a national industrial policy. The merits or demerits of actually having an economywide industrial policy aside, it is unquestionably a bastardization of antitrust 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.

And, although this is a German case, its antecedents in the prevailing orthodoxy of EU law are not hard to recognize. Though the Commission frequently makes noises about conducting an economic analysis, as I discuss below, the EU’s competition process is, at root, a political one. As such, a tremendous amount of leeway is afforded to EU competition regulators. This makes sense, on its own terms: the Commission is, after all, a policy-making body directly responsive to the policy preferences of the President of the European Commission.39 While the Commission may sometimes cite to economics in its decisions, it fundamentally structures its activities in a way that affords it a large degree of policy-making discretion.

The Bundeskartellamt’s action, although specific to Germany, makes (unfortunate) sense against this backdrop. Where, unlike in the US, antitrust enforcement is viewed as a political function of the state, regulators administering competition policy can surely be relied upon to turn it into a general regulatory apparatus, as much as possible. While this is precisely what some advocates seem to want for US antitrust, doing so entails enormous risk and the potential agglomeration of massive political power outside of our democratically elected branch of government.

#### 3. Uncertainty---abrupt expansion of antitrust generates major uncertainty that disrupts business planning.

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### 4. Follow-on---the plan creates the fear of future unrelated AND politicized amendments

Gregory E. Neppl 19, Partner at Foley and Lardner LLP, JD from Duke University School of Law, BA from Duke University, “Antitrust Enforcement “Reform” as a Political Issue: The Good, the Bad, and the Ugly”, 11/7/2019, https://www.foley.com/en/insights/publications/2019/11/antitrust-enforcement-reform-political-issue

New Merger Guidelines

New merger guidelines that reflect non-competition considerations (such as job security) would modify the consumer welfare standard discussed above and, in the absence of new statutory authority, likely contravene Section 7 of the Clayton Act as currently drafted. One problem with such “new guidelines” – unhinged from “competition” or “competitive effects” – is that successive administrations might amend (or reinterpret) such guidelines in response to whatever political issue du jour allowed that administration to win political power. While antitrust enforcement is not free of politics currently (i.e., the President does nominate the Assistant Attorney General (Antitrust Division), appoint the FTC Chairperson, and nominate FTC commissioners when openings arise, and the House and Senate subcommittees with antitrust enforcement oversight regularly hold hearings on high-profile mergers), both DOJ and FTC have a respectable history of pursuing enforcement efforts generally free from partisan politics. The issuance of new merger guidelines that reflect non-competition considerations may open the door to regular amendments to the guidelines and increase the likelihood that partisan politics could replace factual and economic analysis in merger evaluations. Such an outcome would not promote business confidence. Moreover, “bright-line” merger guidelines – setting caps for vertical mergers, horizontal mergers, and total market share – would ignore the fact that vertical foreclosure risks and “market power” are in practice not so easily quantifiable. The agencies already employ market share screens (such as HHI) to identify those mergers more likely to require close scrutiny. Bright-line caps, however, would necessarily threaten certain mergers that are competitively neutral, or even pro-competitive, through resulting efficiencies and synergies.

### 2NC --- IL

#### Business confidence is key to overall resiliency

Neil Irwin 21, senior economics correspondent for The New York Times, “17 Reasons to Let the Economic Optimism Begin,” NYT, 3/14/21, https://www.nytimes.com/2021/03/13/upshot/economy-optimism-boom.html

17. The post-pandemic era could start with a bang

The last year has been terrible on nearly every level. But it’s easy to see the potential for the economy to burst out of the starting gate like an Olympic sprinter.

That could have consequences beyond 2021. A rapid start to the post-pandemic economy could create a virtuous cycle in which consumers spend; companies hire and invest to fulfill that demand; and workers wind up having more money in their pockets to consume even more.

Americans have saved an extra $1.8 trillion during the pandemic, reflecting government help and lower spending. That is money that people can spend in the months ahead, or it could give them a comfort level that they have adequate savings and can spend more of their earnings.

Things are also primed for a boom time in the executive suite. C.E.O. confidence is at a 17-year high, and near-record stock market valuations imply that companies have access to very cheap capital. There is no reason corporate America can’t hire, invest and expand to take advantage of the post-pandemic surge in activity.

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#### Walt concedes that sustained economic depression triggers world war

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

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

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

#### Defense doesn’t assume the post-COVID landscape---the globe’s a tinderbox, primed for conflict

Elise Labott 21, Adjunct Professor at American University’s School of International Service, Columnist at Foreign Policy, MA in Media Studies, New School for Social Research, BA in International Relations from the University of Wisconsin-Madison, “Get Ready for a Spike in Global Unrest”, Foreign Policy, 7/22/2021, https://foreignpolicy.com/2021/07/22/covid-global-unrest-political-upheaval/

To call 2021 the summer of discontent would be a severe understatement. From Cuba to South Africa to Colombia to Haiti, often violent protests are sweeping every corner of the globe as angry citizens are taking to the streets.

Each country has different histories and realities on the ground, particularly in Haiti, where years of violence and government corruption culminated two weeks ago in the assassination of President Jovenel Moïse. But they all faced a perfect storm of preexisting social, economic, and political hardships, which fallout from the COVID-19 pandemic only inflamed further. And they are merely a foreshadowing of the post-coronavirus global tinderbox that’s looming as existing tensions in countries across the world morph into broader civil unrest and uprisings against economic hardships and inequality deepened by the pandemic.

The coronavirus pandemic was a once-in-a-century crisis that not only shocked countries’ existing health systems but also demanded a response that impacted—and was itself shaped by—economic, political, and security considerations. The efforts to contain it may have curbed fatalities in the short term but have inadvertently deepened vulnerabilities that laid the groundwork for longer-term violence, conflict, and political upheaval and should serve as a danger sign to world leaders as countries reopen—including in the United States.

History is full of examples of pandemics being incubators of social unrest, from the Black Death to the Spanish flu to the great cholera outbreak in Paris, immortalized in Victor Hugo’s Les Miserables. Underlying it all this time around is a pervasive inequality. COVID-19 has ripped open economic divides and made life harder for already vulnerable groups, including women and girls and minority communities.

It has also exposed weaknesses in food security and dramatically increased the number of people affected by chronic hunger. The United Nations estimates around one-tenth of the global population—between 720 million people and 811 million—were undernourished last year. The impacts of climate change and environmental degradation have only compounded the despair.

Take the Sahel, where, due to a toxic cocktail of conflict, COVID-19 lockdowns, and climate change, the scale and severity of food insecurity continues to rise. Countries such as Ethiopia and Sudan are among the world’s worst humanitarian crises, with catastrophic levels of hunger. Droughts and locusts are coming at a critical time for farmers ready to plant crops and are stopping herders in their tracks from driving their livestock to greener pastures.

The global vaccine shortage is fueling the instability. A majority of Africa is lagging far behind the world in vaccinations, meaning COVID-19 will continue to constrain national economies and, in turn, become a source of potential political instability. The same is true for much of Latin America and Asia, where countries don’t have enough vaccines to protect their populations and simmering sources of protest—such as rising living costs and deepening inequalities—are more likely to boil over.

The global risk firm Verisk Maplecroft has warned that as many as 37 countries could face large protest movements for up to three years. A new study by Mercy Corps examining the intersection of COVID-19 and conflict found concerning trends that warn of potential for new conflict, deepening existing conflict, and worsening insecurity and instability shaped by the pandemic response.

The group found a collapse of public confidence in governments and institutions was a key driver of instability. People in fragile states, already suffering from diminished trust in their government, have felt further abandoned as they face disruptions in public services, rising food prices, and massive economic hardships, such as unemployment and reduced wages. Supply chains disrupted during the pandemic have seen food prices skyrocket, while in the global recession humanitarian aid budgets are being slashed, bringing many countries to the brink of famine. For the first time in 22 years, extreme poverty—people living on less than $1.90 a day—was on the rise last year. Oxfam International estimates that “it could take more than a decade for the world’s poorest to recover from the economic impacts of the pandemic.”

The shocks caused by the pandemic have also eroded social cohesion, further fraying relations between communities and deepening polarization. That is especially true in the United States, where social and political pressures both deepened the health crisis and were themselves worsened by it. All of this should serve as a clarion call to countries that they can’t prepare for, or respond to, future health crises in a vacuum—but must anticipate an economic, political, and social crisis. This is true for any severe shock, which brings the potential for a breakdown in public order.