# 1NC

## 1NC — Off

### 1NC — CP

#### The United States federal government should expand the scope of its core antitrust laws through strict scrutiny by limiting predatory and limit pricing by removing the requirement for recoupment and creating a presumption of predation for dominant platforms to instances in which the defendant can show the conduct achieves demonstrably procompetitive ends and that it is narrowly tailored to achieve those ends.

#### The counterplan competes by not prohibiting and solves via antitrust strict scrutiny

Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law (Donald, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality,” *Hastings Law Journal*, Lexis)

Since the earliest days of antitrust enforcement, courts have attempted to deal with the fact that certain types of behavior, on their face, present more of a threat to competition than others. This has unfortunately led to the development of a concept of per se illegality which addresses a genuine problem in an unrealistic way. The basic notion of per se illegality-that some types of behavior can be defined as always, or almost always, unjustifiable-is far too vulnerable to attack. In a field as complex as legal regulation of the competitive process, the development of counterexamples to refute any argument with such absolute pretensions is too easy. In response to recent attacks on per se rules, courts have clung to the term and to its absolutism by steadily narrowing the definitions of the types of behavior subject to those rules. The result has been not only much confusion, with words being used to designate things far narrower than their commonly understood meanings, but also the application of permissive rule of reason treatment to some behavior which, while not meriting absolute prohibition, clearly deserves careful antitrust analysis. The proper response to this confusion is to retain the valid insight of per se jurisprudence, that certain types of behavior should be treated as more suspect than others, while abandoning the indefensible absolutism of the term "per se." However, since terms carry with them not only precise meanings, but also more general attitudes, "per se" must be replaced with a term which does not carry the permissive connotations which have become associated with the "rule of reason." The best available term for this new test is strict antitrust scrutiny. The use of such a term, and the type of analysis it suggests, is well known in constitutional law, where it by no means is associated with leniency. When faced with conduct which would traditionally be labelled per se illegal under the antitrust laws, courts should apply strict antitrust scrutiny. They should ask whether the defendant can carry the heavy burden of demonstrating that its conduct is narrowly tailored to achieve a procompetitive end. By replacing a system which places absolute prohibitions on types of conduct which can be defined so narrowly as to be irrelevant with a system which places, not absolute prohibitions, but heavy negative presumptions, on a larger set of behaviors, strict scrutiny should, on the whole, lead to more vigorous antitrust enforcement. Strict antitrust scrutiny will not result in radical shifts in the outcome of antitrust cases. Recent per se analysis already contains the seeds of strict scrutiny. Indeed, strict scrutiny may be a better description of the reasoning actually underlying these cases than the term "per se." Little would be lost, apart from semantics, by the change to strict scrutiny. What would be gained would be a much more defensible and enduring standard of analysis for those who favor rigorous antitrust enforcement.

#### The counterplan is the ideal competitive balance and avoids the drawback of absolute prohibitions

Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law (Donald, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality,” *Hastings Law Journal*, Lexis)

The solution to this dilemma is to abandon the phrase "per se illegal," with its unrealistic connotations of absolute prohibition, yet retain a stringent test for particularly suspect activity. This new test must place a heavy burden of justification upon the defendant, yet not make justification impossible when the defendant's activity is clearly procompetitive. To abandon per se illegality with no alternative but rule of reason analysis would be to send an unwise message of government tolerance of practices threatening competition. But an alternative approach does exist. Rather than defend the absolutism of per se illegality, this Article argues that antitrust analysts should adopt a rule of strict antitrust scrutiny. Particular practices, including those currently subject to per se rules, should place the burden on the defendant to show first, that they were adopted to achieve demonstrable procompetitive ends and second, that they are narrowly tailored to achieve those ends. Unless the defendant can carry this burden, these practices should be declared illegal. Such an analysis preserves the valid insight of per se analysis that certain types of behavior are particularly suspicious without maintaining an indefensible attitude of absolutism with respect to those practices. This Article begins by sketching the history of the concept of per se illegality: its growth from 1940 until the mid-1970s, its retreat during the last decade, and the continuing attacks on it which threaten the existence of the concept as a form of analysis separate from rule of reason principles. The alternative approach of strict antitrust scrutiny will then be explained and the application of that concept to various types of antitrust behavior discussed. Strict antitrust scrutiny, it will be shown, is a far better way of approaching suspect anticompetitive conduct than either the lenient rule of reason or the unrealistically absolute concept of per se illegality.

### 1NC — DA

#### US tech leadership is secure, BUT antitrust cedes it.

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II. The United States Plays a Critical Role in 5G Standards Development

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

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

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

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory antitrust enforcement actions threaten the ability of U.S. companies to continue to be leaders in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the United States to compete in global markets by exacting high monetary penalties from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

Another way in which courts in China and other foreign countries are harming U.S. companies is through the use of anti-suit injunctions. One example of this is in the recent patent infringement lawsuit brought by InterDigital, an American high-tech company that has developed key technologies in wireless telecommunication, against Chinese company Xiaomi. In June 2020, Xiaomi filed a lawsuit in the Wuhan Intermediate Court in China requesting that the court set global licensing rates for InterDigital’s patents on standardized technologies. In July 2020, InterDigital sued Xiaomi in India for infringement of InterDigital’s Indian patents. The Wuhan Intermediate Court then ordered InterDigital to stop its lawsuit with its request for an injunction in India. The Chinese court further prohibited InterDigital from suing Xiaomi and requesting an injunction or damages in the form of reasonable licensing rates, or even to enforce a previously-issued injunction, in any other country. If InterDigital does not comply with this worldwide injunction against pursuing legal relief for the violation of its patents in any other country, the company faces a significant fine in China. The type of judicial order issued by the Wuhan court is known as an anti-suit injunction and its purpose is to force an intellectual property dispute to play out solely in a Chinese court at the behest of the Chinese government. These court orders demonstrate China’s desire to become the source of 5G innovation and to dictate the licensing terms of the technology, and the anti-suit injunctions hamstring U.S. companies like InterDigital from enforcing their intellectual property rights anywhere in the world.

The unfair use of antitrust enforcement and related legal actions like anti-suit injunctions to weaken U.S. intellectual property rights around the world risks diminishing U.S. global competitiveness in critical technologies like 5G, and further empowers China and others to expand their influence over the evolving 5G technological ecosystem. To the extent the U.S. cedes its dominance in 5G standards development, China will continue its focused efforts to fill that void. Huawei, a China-based company, has increased its R&D spending while growing its share of patents on the standardized technologies comprising 5G.24 The President’s Council on Science and Technology issued a report concluding that Chinese actions in the semiconductor industry, which include a range of policies backed by over $100 billion in government funds, threaten U.S. leadership in the industry and present risks to U.S. national security.25 China’s “Made in China 2025” plan called for China to become a leader in 5G technology, including in the development of the standards for the technology, by 2020.26 The plan expressly favors Chinese domestic producers, calling for raising the domestic content of core components in high-tech industries like 5G to 70% by 2025.27

This issue, however, extends far beyond simply the ability and willingness of U.S. companies to engage in the requisite R&D to participate in the 5G race. Reduced U.S. influence on 5G standard-setting would force the U.S. government to rely on untrusted foreign companies for its 5G product supply. The Department of the Treasury has expressed concern about the “well-known” U.S. national security risks posed by Huawei and other Chinese telecommunications companies.28

#### Chinese & Russia tech leadership causes nuclear war.

Kroenig & Gopalaswamy 18, \*Associate Professor of Government and Foreign Service at Georgetown University and Deputy Director for Strategy in the Scowcroft Center for Strategy and Security at the Atlantic Council. \*\*Director of the South Asia Center at the Atlantic Council. He holds a PhD in mechanical engineering with a specialization in numerical acoustics from Trinity College, Dublin. (Matthew & Bharath, 11-12-2018, "Will disruptive technology cause nuclear war?", *Bulletin of the Atomic Scientists*, <https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/>)

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

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

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

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

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

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

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

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

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

### 1NC — T

#### “The” refers to the entire group as a whole

Kentucky Supreme Court 3 (Opinion in Kotila v. Com., 114 SW 3d 226 - Ky: Supreme Court 2003. Google scholar caselaw, date accessed 9/26/21)

Whether a conviction under this statute requires possession of all (as opposed to any) of the chemicals or equipment necessary to manufacture methamphetamine under some manufacturing process is a matter of statutory construction. First, we examine the language of the statute, itself. United States v. Health Possibilities, P.S.C., 207 F.3d 335, 338-39 (6th Cir.2000) ("The starting point in a statutory interpretation case is the language of the statute itself."). Obviously, the multiple manufacturing methods and the availability of a broad range of readily available chemicals and equipment necessary for each manufacturing process militates against itemizing within the statute all of the possible chemical and equipment combinations by which methamphetamine could be manufactured. Nevertheless, KRS 218A.1432(1)(b) does not read "[p]ossesses chemicals or equipment," or "[p]ossesses some of the chemicals or equipment," or "[p]ossesses any of the chemicals or equipment." It reads "[p]ossesses the chemicals or equipment for the manufacture of methamphetamine." The presence of the article "the" is significant because, grammatically speaking, possession of some but not all of the chemicals or equipment does not satisfy the statutory language. "The" is "[u]sed as a function word before a plural noun denoting a group to indicate reference to the group as a whole." Webster's Third New International Dictionary 2369 (1993).

In decisions spanning three different centuries, the appellate courts of this Commonwealth have found use of the word "the" to have a significant effect upon meaning. See Revenue Cabinet v. Hubbard, Ky., 37 S.W.3d 717, 719-20 (2000) ("[U]se of the definite article `the' indicates that the statute refers to the entire body and not to discrete parts or components ...."); Cardwell v. Haycraft, Ky., 268 S.W.2d 916, 918 (1954) (the trial court's contributory negligence instruction was erroneous in that it contained the definite article "the" before the words "proximate cause" and "such language indicates that `the sole' rather than `a contributing' cause was meant."); Schardein v. Harrison, 230 Ky. 1, 18 S.W.2d 316, 319 (1929) ("[I]f the makers of the Constitution had intended to qualify the word `office' [in Ky. Const. § 161] they would have inserted the definite article `the' before `office.'") (quotation omitted); Sheriff of Fayette v. Buckner, 11 Ky. (1 Litt.) 126, 128 (1822) (holding that legislative act referencing "the clerk of the court" intended a particular clerk of court referenced elsewhere in the legislation). For similar interpretations by other jurisdictions, see, e.g., State Farm Fire & Cas. Co. v. Old Republic Ins. Co., 466 Mich. 142, 644 N.W.2d 715, 718 (2002); Patricca v. Zoning Bd. of Adjustment, 527 Pa. 267, 590 A.2d 744, 751 (1991); McClanahan v. Woodward Constr. Co., 77 Wyo. 362, 316 P.2d 337, 341-42 (1957); Williams v. McComb, 38 N.C. (3 Ired. Eq.) 450 (1844) ("[G]rammatically speaking, `The,' is a definite article before nouns, which are specific or understood, and is used to limit or determine their extent."). We are directed by the General Assembly to construe our statutes "according to the common and approved usage of language." KRS 446.080(4). Following that directive, we construe "the chemicals or equipment" to mean all of the chemicals or all of the equipment necessary to manufacture methamphetamine.

#### Private sector means all non-governmental persons or entities, including non-profits

Senate Report 95 (Senate Report. 104-1, “UNFUNDED MANDATE REFORM ACT OF 1995,” <https://www.congress.gov/congressional-report/104th-congress/senate-report/1> , date accessed 9/10/21)

"Private sector" is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

#### A topical aff could change a universally-applied standard, like the CWS [Consumer Welfare Standard]

Phillips 18, commissioner on the Federal Trade Commission. (Noah J. November 1, 2018, Before the Federal Trade Commission, “Competition and Consumer Protection in the 21st Century,” <https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf>)

Our second topic today is the consumer welfare standard. And I think most folks even out in the public know, this is the standard that we use across the board, mergers and conduct in courts and at agencies, to judge anticompetitive conduct. It is not only a standard that we in the U.S. apply, it is a standard that is used by competition agencies around the world. It is an economically-grounded standard, and it requires that there be harm to consumers for conduct to be condemned. Mere harm to competitors is considered insufficient. So let me repeat that again. There has to be harm to consumers, not just competitors. The reason that is so, the reason harm to competitors is considered insufficient is because sometimes a less-efficient firm losing sales or market share to a cheaper, more innovative or efficient rival, can be and often is consistent with vibrant competition and with outcomes that benefit consumers. Courts and agencies have embraced this standard for decades. Today, there are two very important discussions going on about the consumer welfare standard, and they are happening simultaneously. And I think it is important that we understand that there are two conversations going on. One is a continuing discussion about how we apply the standard, regarding whether enforcement is at the appropriate level, whether it is properly targeted. This is an introspective question on some level, in which scholars, economists, practitioners, and enforcers all ask ourselves, are we bringing the right kinds of cases? Are we using the right kinds of evidence? Should we be doing more or less in certain places? The antitrust bar, the business community, and others benefit from this ongoing and active analysis. The second discussion happening now, and the one on which today’s consumer welfare standard panels will focus, is whether the standard is itself the right metric we ought to use in antitrust enforcement and in antitrust law; some argue that enforcement under the consumer welfare standard has failed because of the law, and accordingly, that we should reform the law.

#### Violation: the aff applies exclusively to conduct by dominant platforms.

#### Vote neg:

#### FIRST---limits and ground---the number of potential subsets is infinite---any industry, product, single companies, individuals---undermines clash. Only big affs have link uniqueness.

#### SECOND----precision---our interp has intent to define, exclude and is in legislative context.

### 1NC — DA

#### DOJ-Antitrust Division criminal enforcement of price-fixing generics is a sufficiently funded priority now.

Murphy 21, partner in the firm’s Regulatory Practice Group. A former federal prosecutor, Justin counsels and represents corporate and individual clients involved in government enforcement of complex antitrust, fraud and all phases of white-collar criminal and related civil matters, including internal corporate investigations, False Claims Act (FCA), Foreign Corrupt Practices Act (FCPA), e-discovery, data privacy, cybersecurity, securities enforcement, federal grand jury, inspector general investigations and trials and appeals (Justin, “Expect More Criminal Enforcement & What you Can do to Minimize Your Risk,” *The National Law Review*, <https://www.natlawreview.com/article/expect-more-criminal-enforcement-what-you-can-do-to-minimize-your-risk>)

Antitrust cartel and related collusive scheme enforcement is poised to increase. Several factors support this: (1) the Antitrust Division (the Division) has a 10% budget increase for Fiscal Year (FY) 2021; (2) proposed legislation that would increase its budget by $300 million; (3) Democratic administrations have traditionally been more aggressive in enforcing antitrust laws; (4) according to the US Department of Justice (DOJ), last year the Division opened the most grand jury investigations in almost 20 years and by the end of 2020 had the most open grand jury investigations in a decade; (5) increased coordination with international law enforcement agencies, including the Division recently signing a number of cross-border agreements, maintaining active memberships in multilateral organizations dedicated to cross-border antitrust enforcement cooperation and a DOJ official recently noting they have been working at strengthening their relationships with international law enforcement agencies during the pandemic and they expect this to benefit international coordination on investigations and (6) as pandemic limitations on in-person investigative tactics subside (including search warrants and knock and talk interviews, among others), expect a return to overt tactics related to open grand jury investigations. Historically, cartel enforcement has increased following economic downturns and substantial federal stimulus packages. For example, after the 2008 financial crisis and the 2009 Recovery Act, the DOJ filed 60% more criminal cases than in prior years. We expect this trend to continue in the wake of the unprecedented government stimulus packages passed in 2020 and 2021 and additional potential government spending on infrastructure. In addition to the increased resources, the Division has stepped up its criminal enforcement program with the creation and recent expansion of the Procurement Collusion Strike Force (PCSF), the expansion of criminal investigations and prosecutions into labor markets, higher expectations for corporate cooperators and new potential benefits for corporate entities with compliance programs addressing antitrust violations. Below we discuss the sectors most likely to be implicated by increased criminal antitrust enforcement, the PCSF and what steps can be taken to prepare and minimize risk in this environment. Based on the trends described above and our recent experience at the DOJ, we expect antitrust criminal enforcement to focus in at least the following industries: Healthcare – The DOJ remains active in this sector with its ongoing generics investigations and prosecutions and other cases relating to market allocation and labor markets. In fact, all of the charged labor market cases thus far have been in the healthcare industry. The DOJ has stated that investigations and prosecutions for violations in the healthcare sector remain its top focus and stimulus spending will likely serve to increase the DOJ’s attention to healthcare markets. Although healthcare compliance policies have often focused on other fraud and abuse issues, such as the Anti-Kickback Statute and Stark Law, compliance with antitrust laws – including for human resources – is now more critical than ever. In addition, the recently signed Competitive Health Insurance Reform Act significantly narrows the exemption for health and dental insurers from the federal antitrust laws.

#### ONLY per se violations are policed by the criminal components of the Antitrust Division

Fishman 19 (Todd, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement,” *JD Supra*, <https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/>)

Under stated policy, the Antitrust Division does not criminally prosecute cases under the more permissive rule of reason standard, but reserves its discretion only to charge conduct considered to be per se illegal—that is, restraints of trade classified as unlawful without assessing potential precompetitive benefits and overall market impact. So a judicial finding that charged conduct comprises an offense that should be evaluated under the rule of reason effectively amounts to a dismissal. The trial court’s ruling in Kemp precluding antitrust prosecutors from proceeding on a per se theory, and the Tenth Circuit’s criticism of that ruling, provide unique insight into the modern use of the Sherman Act as a criminal statute. The Sherman Act, and in particular a per se violation of the Sherman Act, often functions as a blunt prosecutorial instrument. The Sherman Act tends to limit the per se rule of illegality to those restraints among horizontal competitors, with which courts have had considerable experience and where the restraints are deemed facially anticompetitive and lack any plausible business justification. But such condemnation is not static. The principles animating antitrust law have evolved with the century-old Sherman Act, dynamically moving from the formalistic approach towards horizontal price-fixing agreements applied in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), to the recognition that not all price-fixing arrangements unreasonably eliminate competition in Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1, 23 (1979), to more complex notions that emphasize economic realities of business relationships as set forth in Business Electronics v. Sharp Electronics, 485 U.S. 717, 726 (1988). As with antitrust doctrines themselves, the judgment that guides prosecutorial discretion should take into consideration the complexities and nuances of markets. This article reviews a series of criminal antitrust cases in which indicted defendants have challenged the application of the per se rule of illegality, with only a small degree of success. Still, to the extent the Sherman Act continues to be a weapon of choice for U.S. prosecutors, practitioners should consider whether the rule of reason can function as a useful tool in pre-charging discussions and, if need be, seeking dismissal of an indictment. Policy and Provenance The DOJ’s policy on prosecuting antitrust crimes focuses, as a matter of institutional discretion, on per se unlawful conduct. The current version of the U.S. Attorneys’ Antitrust Manual provides that “current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.” U.S. Dep’t of Justice, Antitrust Division, Manual at III-12 (5th ed. 2018). The Antitrust Manual, however, states that “[t]here are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate.” According to the Manual, those “situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.”

#### That trades off. The criminal Antitrust Division has limited resources and will triage when faced with resource constraints

Powers 19, Acting Assistant Attorney General @ DOJ Antitrust Division (Richard, “Deputy Assistant Attorney General Richard A. Powers Delivers Remarks at the American Bar Association Public Contract Law Section's 2019 Procurement Symposium,” <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-american-bar>)

Instead, I will focus my comments on the criminal program. As the DAAG responsible for criminal enforcement, I supervise approximately 100 prosecutors who are located in Washington, DC, New York, Chicago, and San Francisco. Divided into five sections that are responsible for different regions of the country, these dedicated prosecutors conduct grand jury investigations into possible violations of antitrust laws and related criminal conduct, and prosecute resulting criminal cases in federal district courts across the nation. Much like our fellow prosecutors in other parts of the Department of Justice, we work with several law enforcement partners to investigate suspected criminal violations, including the Federal Bureau of Investigation and agents from the Offices of Inspector General from agencies like the Department of Defense, Postal Service, Department of Transportation, and Internal Revenue Service, among others. So that is who we are, and now I’ll turn briefly to what it is we do on the criminal side of antitrust law enforcement. In the words of a former Assistant Attorney General who headed the Division, Anne Bingaman, “[c]riminal enforcement against the most serious antitrust offenses is our core mission.” The heart of our criminal program is the 1890 Sherman Act, which provides that “[e]very . . . conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” In practice, we prosecute criminally only certain types of conspiracies to restrain trade. Specifically, we prosecute conspiracies between horizontal competitors to fix prices, rig bids, or allocate markets. These are the types of agreements the Supreme Court has recognized as categorically or “per se” illegal. And these are the types of agreements “that unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free-market system.” Over the years, we have found that the range of industries, products, and services affected by criminal antitrust conspiracies is as expansive as peoples’ temptation to cheat for profit. From conspiring to fix the prices of the canned tuna you buy in the grocery store, to rigging the bids for financial products, we have seen a lot in the history of the program. And our experience has taught us that this type of criminal behavior is not limited to commercial businesses that impact private consumers directly. Rather, we have seen—and continue to see—a large volume of cases affecting public procurement. Along with other forms of fraud and public corruption, criminal antitrust conspiracies pose a grave threat to the integrity of government procurement processes. From an enforcer’s standpoint, we care about criminal antitrust conduct in this area because of the harm it poses to government agencies, and by extension the taxpayers. (I’ll address that further in a moment.) But why should you care, as professionals involved in public procurement? I’ll tell you: because your employer or client could be subject to severe penalties for illegal conduct. Violations of criminal antitrust laws result in significant fines for companies and prison time for individuals. The maximum term of imprisonment is 10 years for individuals, and companies can face fines of up to $100 million or twice the gain or loss resulting from the conspiracy offense. To give you a recent example, just last month StarKist Co. was sentenced to pay a criminal fine of $100 million, the statutory maximum, for its role in a conspiracy to fix prices for canned tuna sold in the United States. And for individuals, the threat of jail time is real. To give another recent example, in June two executives were sentenced to 18 months and 15 months respectively for their role in an international freight forwarding price-fixing conspiracy. Moreover, in addition to criminal penalties, there are often other collateral effects, as well. Civil lawsuits often follow criminal investigations and can result in treble damages. And, importantly for those in the public procurement field, a criminal conviction nearly always leads to debarment. Having described the significant risks companies and individuals face when they collude to fix prices, rig bids, or allocate markets, I want to pause for a moment and highlight a unique enforcement tool used by the Antitrust Division that provides a significant incentive to self-report participation in these schemes. Under the Division’s Leniency Program, the first to self-report can receive a complete pass in return for cooperating with the Division’s investigation and meeting the Program’s other requirements. That means no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees. Moreover, companies that win the race to the door and receive leniency can achieve de-trebling and removal of joint and several liability under the Antitrust Criminal Penalty Enhancement and Reform Act for providing timely and satisfactory cooperation in any follow-on litigation. While the benefits of leniency speak for themselves, it’s worth considering the other side of the equation. For those who don’t win the race for leniency, the Division will pursue the prosecution of all remaining members of the conspiracy, especially the culpable executives. So, the choice is stark: a complete pass, or else face severe monetary penalties, potential criminal conviction, and the associated risks such as debarment, lengthy prison sentences for culpable executives, and substantial exposure in private litigation. The last point I want to make about our leniency program is our firm commitment to both the transparency of its application and the predictability of outcomes. To that end, our Division’s public website contains a number of documents relating to leniency, including the Corporate Leniency Policy, the Individual Leniency Policy, a set of frequently asked questions, and other helpful documents. Now that I’ve given you some background on who we are and what we do, I want to focus the rest of my remarks on the public procurement space and antitrust risks. Like any enforcer, the Antitrust Division’s criminal program must decide where to allocate limited resources. What should we prioritize, and why? I am an Infantry Officer by training, and one of the things I learned in the Army is that first you have to identify what the problem is before you can devise a plan to solve it. Having served as the DAAG for criminal enforcement for 18 months now, I have concluded that criminal antitrust conduct in the public procurement area is a distinct problem that demands attention. And I’m here to give you the message that we are giving a hard look at the public procurement space, and we will be devoting significant investigative resources to it going forward. Why? Our experience investigating antitrust conspiracies in various industries, along with plain common sense, tell us that the public procurement space is particularly vulnerable to collusion. Moreover, when antitrust violations do happen, they result in significant financial harm to American taxpayers, due to the dollar values involved. Let’s talk about vulnerabilities first. Bid rigging is the typical form of collusion we see in public contracting—that is, an agreement among competitors that limits competition in the bidding process. In a typical scenario, bidders agree among themselves who should win the contract and then arrange their bids in a way—such as through complementary bidding or bid rotation—to ensure the designated company wins the bid. Since such conspiracies often last for years, government purchasers—and ultimately, the taxpayers—pay more for goods or services than they otherwise would have in a truly competitive market. The bidding processes involved in public procurement make this area uniquely vulnerable to collusion for several reasons. For one, the sheer monetary value of government projects presents an enticing opportunity for greed to prevail over ethical conduct. Next, regulatory requirements governing procurement procedures can make the process predictable and thus subject to manipulation through collusion. Many agencies have repetitive or regularly scheduled purchases, for instance. Another factor that makes it easier for sellers to collude is that there are often relatively few qualified sellers for a given project, given that government agencies often require specialized goods and services. In addition, rush or emergency projects arise in government procurement, such as disaster-relief projects, and the exigency creates opportunities to cheat. Finally, the large volume of goods and services contracted by the government creates monitoring difficulties, even with the existence of 72 statutory Inspectors General across the U.S. federal government. Given the growth in government spending over time, it is difficult for audit and investigation resources within agencies to keep pace. So why do these vulnerabilities pose a problem? Setting aside the inherent importance of deterring, detecting, and prosecuting illegal conduct wherever it’s found, those of you in the audience today know that the sheer amount of money flowing from the government to contractors to purchase a broad array of goods and services makes any criminal conduct that cheats the taxpayer especially impactful. Let’s look at a current snapshot. Roughly one out of every ten dollars of federal government spending is allocated to government contracting. Following a brief downward trend between 2010 and 2015, federal contract spending rebounded and climbed from $440 billion in 2015, to $470 billion in 2016, to $510 billion in fiscal year 2017. The growth continues: in fiscal year 2018, the federal government spent more than $550 billion—or about 40% of all discretionary spending—on contracts for goods and services. This represents more than a $100 billion increase from 2015, largely due to defense spending. In 2018, the Department of Defense alone spent nearly $113 billion on procurement. Of course, federal money spent on goods and services is not confined to federal agencies. The 2018 federal budget included more than $696 billion in grants to state and local governments. While healthcare accounts for much of that total, more than $79 billion of this money went to fund major public physical capital investment. Since we are in California today, I’ll highlight that the state of California received approximately $84.6 billion in grants from the federal government in 2018, with about $21.9 billion for non-healthcare spending. With all of this money flowing to government contracts, therefore, even a small percentage lost to bid rigging or price fixing or other types of related criminal conduct inflicts great harm on the government and the taxpayers. So here is another eye-popping number: the Organisation for Economic Co-operation and Development (OECD) estimates that eliminating bid rigging could help reduce procurement costs by 20% or more. Twenty percent. While precise estimates are hard to come by, if OECD’s estimate is even half-way accurate, reducing illegal and anticompetitive collusion in procurement could save U.S. taxpayers tens of billions of dollars per year. In short, even the most conservative estimates of illegal conduct in the public procurement space lead one to the conclude that the aggregate harm to the public fisc is enormous. But let’s drill down past abstractions and generalities. We know collusion in public procurement is a problem. We know because “[w]hat’s past is prologue”: we have seen this conduct before, and we are seeing it now in our investigations. The Antitrust Division has a long history of prosecuting criminal antitrust conspiracies that target government contracts, ranging from construction and disaster recovery projects to food and hardware. Let me point you to just a few examples from over the last few decades: From the late 1970s into the 1980s, the Division prosecuted hundreds of corporations and individuals for bid rigging in road construction projects in multiple states around the country. In the early 1990s, we uncovered a decade-long conspiracy to rig bids on frozen seafood contracts awarded by a Department of Defense purchasing center and prosecuted the multiple individuals and companies responsible. After Typhoon Paka struck the island of Guam in December 1997 and caused hundreds of millions of dollars in damage, a government official conspired with contractors to award reconstruction projects through rigged bids and took bribes to line his pockets. As a result of our investigation, five individuals pled guilty to rigging bids for these emergency repair contracts, and that government official was convicted at trial and sentenced to 8 years in prison—one of the longest prison sentences ever imposed in an antitrust case. Moving to the early 2000s, we rooted out bid rigging in humanitarian aid water treatment construction projects in Egypt, which were funded by the U.S. Agency for International Development. The successful prosecution resulted in guilty pleas by four companies, fines of over $140 million, and a three-year prison sentence for a defendant who was convicted at trial. We uncovered yet more criminal conduct taking advantage of government aid programs in the mid-2000s, when the Division and our investigative partners prosecuted multiple individuals in multiple states for schemes to rig bids in connection with the E-Rate Program, which provides discounts to help schools and libraries in disadvantaged areas obtain internet access and telecommunication services. In one prominent case, a consultant was convicted at trial of 22 counts of bid rigging and fraud, sentenced to 7.5 years in prison, and debarred for 10 years. Which brings me to the present day. Recently, we prosecuted one of the more significant procurement-related cases in the Division’s history—one that has helped inform our renewed focus on this area. In November 2018 and March 2019, five South Korean oil companies agreed to plead guilty for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to U.S. military bases in South Korea. In total, the companies have agreed to pay $156 million in criminal fines and over $205 million in separate civil settlements. (These companion civil settlements are important for a reason to which I’ll return in a moment.) The Division also indicted seven individuals in this case for conspiring to rig bids and to defraud the government, and one executive was also charged with obstruction of justice. This investigation is the latest example of our commitment to holding corporations and individual executives accountable when they defraud the U.S. government, victimize taxpayers, and interfere with the integrity of our investigations. So, again, how do we know there’s a collusion problem in public procurement? Because we see the criminal conduct in this space. And common sense tells us there’s a lot more of it going on than we’ve detected. Right now, the Antitrust Division has over 100 open grand jury investigations—more than at any point since 2010. Of those, more than one third relate to public procurement or otherwise involve the government being victimized by criminal conduct. And we intend to take measures to increase our detection rate going forward. Having identified the problem as we see it, let me now turn to what the Antitrust Division is doing about it. The mission of our criminal program overall is to aggressively deter, detect, and prosecute individuals and organizations that collude and undermine competition. In the context of government procurement, specifically, our objective must be first to deter and prevent antitrust and related crimes on the front end of the procurement process. When crimes do happen, we must also effectively investigate and prosecute such conduct on the back end of the procurement process, both to punish the wrongdoers and deter others from following the same path. Deterrence must be a primary aim of any prosecuting agency for a reason that is obvious but bears repeating: prosecution can never fully un-do the harm of a crime, whether it be a murder or a financial crime. Enforcement through prosecution is, inherently, of limited remedial value because the money is already out the door. No matter how large the fine or restitution in a successful prosecution, it is impossible to reverse the harm that has been done by anticompetitive conduct and recover every cent on the dollar. There are many ways government enforcers can seek to deter bad conduct. I want to talk about three: First, one important way enforcers can deter crime is by giving clear notice of what conduct they will prioritize investigating and prosecuting. Through our public statements and actions, government enforcers should be as transparent as possible about our investigative priorities and the ways in which individuals and companies can steer clear of illegal conduct.

#### Generic price-fixing spikes drug costs

Mulcahy 19, Senior Policy Researcher @ RAND (Andrew, “Price-Fixing Case Reveals Vulnerability of Generic Drug Policies,” *RAND*, <https://www.rand.org/blog/2019/07/price-fixing-case-reveals-vulnerability-of-generic.html>)

A massive lawsuit (PDF) filed in May by 44 states accuses 20 major drug makers of colluding for years to inflate prices on more than 100 generic drugs, including those to treat HIV, cancer, and depression. If true, the alleged behavior is not just a violation of antitrust law, but also a betrayal of the government policies that created and defended the entire generic drug industry. Most prescriptions in the U.S. today—9 in 10—are filled with generics, which are just as safe and effective as their brand-name equivalent. And yet generics account for only 22 percent of U.S. prescription drug spending. These prices are so low because of competition between makers of different versions of the same generic drug. The more competing generic alternatives, the lower the price, theoretically right down to the marginal cost of manufacturing the pill. This success is the result of decades of careful federal and state policymaking, all geared towards introducing competition in prescription drug markets. The entire generic industry has its origins in the Hatch-Waxman Act of 1984. Prior to Hatch-Waxman, a company that wanted to sell a competing version of a drug whose patents had expired had to conduct lengthy and expensive clinical trials to get approval from the U.S. Food and Drug Administration. Hatch-Waxman established a quicker, less-expensive path to FDA approval that leans on the scientific research supporting the already approved brand-name drugs. Hatch-Waxman also created incentives for generic drug makers to challenge drug patents that prevent competition. Successful challengers win a 180-day period of exclusivity during which their generic is the only one allowed to compete with the brand-name drug. The floodgates open and additional competition pushes prices down further after the 180-day period. Other policies—public and private—evolved to promote generic competition. State laws allow generics to be freely substituted for brand-name drugs by pharmacists. Health plans aggressively push generics by offering higher dispensing fees to pharmacies and lower copays to patients. All these policies aim to promote competition in order to reduce how much Americans spend on drugs. Overall, they've succeeded. One estimate puts savings to patients and health plans from generic drugs at $265 billion (PDF) in 2018 alone. Lower prices also improve adherence to treatment regimens for chronic conditions, which helps avoid downstream health care costs. But where patients and health plans benefit the most from competition, the profit margins realized by generic drug makers are the slimmest. Margins can be razor thin or nonexistent for run-of-the-mill generic pills or capsules. Generic drug makers have always had an eye out for opportunities to widen those margins. In the past, for example, the profits realized during the 180-day exclusivity period were so comparatively enormous that generic companies camped out in FDA's parking lot to be the first to file a challenge. But then after a policy change allowed it, companies began to share exclusivity (thereby shrinking the incentive to be first) and generic drug makers increasingly settled patent litigation with brand-name drug makers rather than fight to a final decision. The settlements usually allow the generic drug maker to enter the market—just not immediately—in exchange for a large lump-sum payment. While brand-name and generic drug makers claim these “pay for delay” deals benefit everyone, the Federal Trade Commission disagrees. Patients, after all, are left paying brand-name prices for years. The FTC has waged a campaign against such settlements for nearly a decade. Eventually, for most blockbuster drugs, there are many competing generic versions and therefore lower prices. But competition is more anemic—and sometimes absent—in lower-volume corners of the prescription drug market. Shortages and price spikes are common when there are only one or two manufacturers. Drugs with complex manufacturing requirements, such as injected and infused drugs, also typically have fewer generic competitors and higher prices. Likewise, competition from “biosimilar” versions of biologic drugs (which, despite important differences with generics, also aim to lower prices through competition) has yet to take off as hoped and prices for biologics remain high. The U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes. In short, it's no secret that the U.S. generic industry has its warts. But most of them are the result of loopholes and market forces that could be addressed with policy changes if policymakers choose to do so. The price-fixing allegations in the lawsuit, if correct, raise the level of concern. They suggest that failures of competition in the generic industry are more troubling—and more widespread—than anyone knew. If the alleged price increases—some up to 1000 percent—are true, patients and health plans have been overcharged to the tune of “many billions of dollars,” according to the lawsuit. The broader damage done to trust in generic drug makers may be irreparable. Especially as spending on prescriptions overall is increasing, the U.S. needs a fair, competitive generic drug industry. It shouldn't take more aggressive policing of antitrust laws to get one.

#### High drug costs lead to ABR

Duff-Brown 15 - communications manager for the Center for Health Policy/Center for Primary Care and Outcomes Research, citing peer reviewed Stanford research (Beth, “Out-of-pocket health costs tied to antimicrobial resistance,” https://med.stanford.edu/news/all-news/2015/07/out-of-pocket-health-costs-tied-to-antimicrobial-resistance.html)

The data set for the main analysis is from the first global report by the World Health Organization on antibiotic resistance. The report, which came out last year, indicates that antimicrobial resistance is a “serious, worldwide threat to public health.” And the Stanford researchers believe this is, in part, due to high out-of-pocket costs. “To our knowledge, we are the first to emphasize the idea that copayments imposed in the public sector of a health-care system lead to overuse of a medication or product in the private sector,” the authors wrote. “Conventional teaching in health economics — which focuses on their effect on the demand for care within a single insurance system — is that copayments tend to discourage use.” The most prominent and convincing evidence for this, the authors wrote, was the 15-year RAND health insurance experiment conducted in six U.S. cities on 2,000 households. That study found that the increase in copayments led to a significant decline in the use of antibiotics, “providing evidence that the demand for health care is not completely inelastic.” However, when the regulated public sector and unregulated private sector are selling the same or similar products, a price increase in one does not necessarily reduce the overall demand, the authors found. In fact, it may increase demand because higher dosages of drugs will be required to fight more resistant microbes, which are the result of poorly made and prescribed drugs in the private sector “Even if total consumption of antibiotics were unchanged, the shift of more patients to less-regulated providers could lead to more antibiotic resistance,” the authors wrote. Global health challenge “Antimicrobial resistance is a growing, global public health challenge that could undo decades of progress in declining morbidity and mortality from infectious diseases,” the authors wrote. “Common bacterial pathogens have increasingly developed resistance to most of the currently available antibiotics. This phenomenon, coupled with a dry antibiotic pipeline, has led the World Health Organization to warn of a ‘post-antibiotic era, in which common infections and minor injuries can kill.’”

#### AMR causes extinction and outweighs---it’s systemic and non-linear

Silverman ’16 (Rachel Silverman – MPhil with Distinction in Public Health @ the University of Cambridge, Senior Policy Analyst and Assistant Director of Global Health Policy @ the Center for Global Development, focusing on global health financing and incentive structures, “Confronting Antimicrobial Resistance: Can We Get to Collective Action?” 19 April 2016, https://www.cgdev.org/blog/confronting-antimicrobial-resistance-can-we-get-collective-action)

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

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

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

### 1NC — CP

#### The United States federal government should provide fiscal support and grants to state and local governments to —

#### Expand openness and access to health care licensing for more individuals, beyond registered nurses

#### Reduce regulations that prevent licenses from applying across state lines

#### Develop interstate compacts for healthcare licenses to be portable across state lines

#### These grants should be paid for via Medicaid and Medicare reimbursement

#### substantially increase tax incentives and grants for technology research and development, immigration to the US, and STEM training programs; AND eliminate all restrictions on foreign trade.

#### establish crisis communication channels between the United States and the People’s Republic of China, for use as a crisis de-escalaion tool, and communicate peaceful intentions through all relevant diplomatic channels.

#### The first four planks solves health care innovation while avoiding the use of antitrust

Scheffler ’19 — Gabriel Scheffler (Regulation Fellow, Penn Program on Regulation, University of Pennsylvania Law School; Research Fellow, Solomon Center for Health Law and Policy, Yale Law School); “Unlocking Access To Health Care: A Federalist Approach to Reforming Occupational Licensing;” Health Matrix, Volume 29, Issue 1, 2019 \*\*edited for gendered language

Congress has taken a series of small steps to provide fiscal support to incentivize states to reform their licensing regimes to improve access to care. In 2002, Congress passed a law which authorized the Health Resources and Services Administration (HRSA) to award grants to state licensing boards to encourage cooperation and reduce barriers to telemedicine. 160 The 2009 American Recovery and Reinvestment Act (ARRA) created additional funding for the purpose of making licenses more portable across state lines. 161 The 2010 ACA established the National Health Care Workforce Commission and authorized a series of grants to states to address health care workforce issues, with a particular focus on licensure portability, 162 though Congress never appropriated the money requested by the Obama Administration to fund the commission.

HRSA's Licensure Portability Grant Program has contributed to an important and under-appreciated development: the formation of a number of "interstate compacts" for health care professionals. These interstate compacts are regulatory agreements among states and professional organizations aimed at making it easier for providers to relocate from one state to another and to ease the barriers to telehealth.

The first such compact was the Nurse Licensure Compact (NLC), developed by the National Council of State Boards of Nursing (NCSBN) in the 1990s and implemented in 2000.165 The NLC permits certain types of nurses in participating states to practice across state lines, either electronically or in person, without obtaining a new license. 166 It uses a system of "mutual recognition," in which a nurse located in a state that has adopted the NLC may acquire a single multi-state license that allows [them] ~~him or her~~ to practice in any other state that has adopted the NLC. 16 7 Of note, the NLC does not obviate all licensing barriers to interstate practice. For instance, nurses must still comply with the scope-of-practice regime in the state in which they are practicing.6 8 Although the compact was developed before the establishment of HRSA's Licensure Portability Grant Program, the NCSBN later received funding from the program to "[pursue] a range of activities to overcome the barriers to adopting the NLC."19 Currently 25 states participate in the NLC, 170 and in 2015, the NCSBN developed a similar compact for APNs, who were not included in the original agreement.171

HRSA's Licensure Portability Grant Program also supported the development of a similar interstate compact for physicians, the Interstate Medical Licensure Compact (IMLC). 172 The JMLC was developed by the Federation of State Medical Boards-an umbrella organization representing the various state medical and osteopathic licensing boards-and has been adopted in 25 states as of January 2019.173 Unlike the NLC, the JMLC still requires physicians in participating states to acquire a separate license for each state in which they practice, but it aims to make it easier for them to do So.174

In addition to nurses and physicians, a number of other health care professions have begun to form similar arrangements. Separate compacts are being developed for social workers, physical and occupational therapists, emergency medical services, psychologists, mental health counselors, pharmacists, and dentists.175 While it remains to be seen how effectively these compacts will ease the adoption of telehealth services and improve interstate mobility, they represent one potential means of improving access to health care.176

So far, the amount of federal funding provided to the states for licensing reform has been fairly minimal and narrowly targeted, and some scholars have urged the federal government to adopt a more ambitious program. Economist Morris Kleiner has proposed a competition modeled on the Department of Education's "Race to the Top" program.177 Others have proposed that the federal government utilize Medicaid and Medicare reimbursement as levers to influence states' licensing schemes.178

These fiscal incentives largely fit into the classic mode of "cooperative federalism," in which the federal government provides the states with fiscal support on the condition that they enact certain federal policy goals.179 Yet such measures can be more or less prescriptive, depending on how they are designed.8 0 To the extent that the government adopts a more prescriptive approach, it would have to be careful not to run afoul of the Supreme Court's holding in NFIB v. Sebelius that sufficiently coercive federal financial incentives can violate the Constitution. 181

#### Plank five invigorates innovation which solves the first scenario to advantage 1

Savchuk 19, journalist, MS in urbanization and development. Citing Nicholas A. Bloom, Professor of Economics, School of Humanities and Sciences @ Stanford. Senior Fellow, Stanford Institute for Economic Policy Research. (Katia, 10-7-2019, "The Five Best Policies to Promote Innovation — And One Policy to Avoid", *Stanford Graduate School of Business*, https://www.gsb.stanford.edu/insights/five-best-policies-promote-innovation-one-policy-avoid)

The Top Five Policies for Boosting Innovation

Outlined in a recent paper in the Journal of Economic Perspectives, here are five policies that Bloom and his colleagues say can effectively drive innovation:

1. Offer Tax Incentives for R&D

The research is clear: Government tax subsidies and grants are the most effective way to increase innovation as well as productivity. Studies show that reducing the price of R&D by 10% increases investment in innovation by 10% in the long run. The U.S. has one of the least generous tax credit policies among developed countries, only cutting the cost of R&D spending by around 5%. Countries like France, Portugal, and Chile are the most beneficent, slashing the cost of R&D spending by more than 30%.

2. Promote Free Trade

Existing evidence suggests that opening trade can spark innovation by increasing competition, allowing new ideas to spread faster and dividing the cost of innovation over a bigger market. For example, researchers who summarized the findings of more than 40 papers in 2018 concluded that freer trade generally increased innovation in South America, Asia, and Europe (results from North America are more mixed). This policy can bear fruit in the medium run and doesn’t cost much to implement, but can increase inequality.

3. Support Skilled Migration

Even if there’s more funding for innovation, you won’t see it unless you have more scientists to do the research. The most direct way to increase the supply of researchers is to allow more high-skilled immigrants into the country. One paper showed that increasing the population of immigrant college graduates in the U.S. by one percentage point increased patents per capita by up to 18%.

4. Train Workers in STEM Fields

Another way to increase the supply of researchers in the long term is to invest in training them domestically. One option is to promote programs that boost the number of people studying science, technology, engineering, and math (STEM). Another is to expose more would-be inventors from disadvantaged backgrounds to role models and mentoring.

5. Provide Direct Grants for R&D

Compared to tax incentives, government grants — often to university researchers — can target projects that are likely to have the most long-term benefits. Research shows that grants to academics in turn results in more patents filed by private firms. However, it’s tough to track the impact of grants, since it’s possible that private R&D funding would have stepped up in their absence.

#### Plank six solves miscalc and US-China escalation.

Campbell & Sullivan 19 – Kurt; Chair and CEO of the Asia Group, 2018-19 Kissinger Fellow at the McCain Institute, and former US Assistant Secretary of States for East Asian and Pacific Affairs. Jake; nonresident senior fellow at the Carnegie Endowment for International Peace, former National Security Adviser to the US Vice President in 2013-2014, and former Director of Policy Planning at the US Department of State. (“How America Can Both Challenge and Coexist With China” Foreign Affairs. September/October 2019. <https://www.foreignaffairs.com/articles/china/competition-with-china-without-catastrophe>) //LFS—SR

To achieve such coexistence, Washington will need to enhance both U.S.-Chinese crisis management and its own capacity for deterrence. Even as Cold War adversaries, the United States and the Soviet Union worked concertedly to reduce the risk that an accidental collision would escalate to nuclear war; they set up military hot lines, established codes of conduct, and signed arms control agreements. The United States and China lack similar instruments to manage crises at a time when new domains of potential conflict, such as space and cyber­space, have increased the risk of escalation. In every military domain, the two countries need agreements that are at least as formal and detailed as the [U.S.-Soviet Incidents at Sea Agreement](https://2009-2017.state.gov/t/isn/4791.htm), a 1972 deal that established a set of specific rules aimed at avoiding maritime misunderstandings. The United States and China also need more communication channels and mechanisms to avoid conflict—especially in the South China Sea—to allow each side to quickly clarify the other’s intentions during an incident. The bilateral military relationship should no longer be held hostage to political disagreements, and senior military officials on both sides should engage in more frequent and substantive discussions to build personal ties as well as understandings of each side’s operations. Historically, progress on some of these efforts, especially crisis communication, has proved difficult: Chinese leaders fear that crisis communication could embolden the United States to act with impunity and would require devolving too much authority to senior military officers in the field. But these worries may be easing, given China’s growing power and military reforms.

## 1NC — Innovation

### 1NC — Turn

#### New per se classifications destroy innovation

Schrepel 17, Ph.D. in international antitrust law. He has an LL.M. from Brooklyn Law School and a Master’s Degree from Paris Saclay in France (Thibault, “A New Structured Rule of Reason Approach for High-Tech Markets,” *SUFFOLK UNIVERSITY LAW REVIEW*, 103)

For more than thirty years, a new doctrinal trend has been developing that advocates for per se legality, particularly for all high-tech-market-related practices.10 Focusing on the New Economy, this Article demonstrates why both per se illegality and per se legality are not appropriate doctrines to apply in high-tech markets. Moreover, this Article explains how and under what circumstances monopolizations related to innovation should be judged under a more tailored and structured rule of reason. Courts must consider antitrust law standards and limitations in their judicial analyses. For instance, antitrust law constantly shifts as new technologies emerge, most notably with the sophistication of related analyses. These advances and changes are reshuffling the cards for judicial consideration. It is now necessary for courts to eliminate automaticity—and therefore, per se standards—from all their antitrust law analyses related to high-tech markets.11 In general, those supporting per se illegality often argue that this standard allows courts to issue rulings over a shorter time period, thereby saving parties money.12 On the other hand, per se illegality creates false positives and does not enable courts to apply progressive antitrust law, which is most important for innovation-related issues. Applying per se legal doctrines to innovation related issues can lead to drastically differing results. For instance, a practice formerly deemed anticompetitive could not be procompetitive under a strict per se doctrine analysis. This radical change from anticompetitive to procompetitive has to be avoided for innovation-related issues, primarily because some of these markets are a “winner-take-all” feature.13 Even though market shares are moving more quickly in high-tech markets than others, the judicial system must ensure that it is not creating winners by ruling unfairly.14 Furthermore, as Frank H. Easterbrook explained, a practice mistakenly condemned by a court is likely to be condemned in future cases, thus remaining illegal.15 The market, however, shows signs that it rather than the judiciary will eventually take charge of the illegal practices, similar to how a new rival takes down high prices.16 In other words, “the economic system corrects monopoly more readily than it corrects judicial errors.” 17 Therefore, per se illegality cannot be justified because, on balance, it creates more risk than benefits. Moreover, per se illegality has never proved to be efficient in regards to saving time and money. Those supporting per se legality essentially argue for the same benefits, adding that it makes provisions to avoid false positives.18 But what are the costs of such a policy? Can high-tech markets afford to legalize anticompetitive practices in the long run?

### 1NC — Warming

#### Their internal link card is about Free and Open Source Software, and preventing licensing schemes that prevent access — that’s not the aff — that was 1AC CX

#### No warming impact.

Ord 20, research fellow at the Future of Humanity Institute at Oxford University, has advised the World Health Organization, the World Bank, the World Economic Forum, and the UK Prime Minister’s Office and Cabinet Office. (Toby, “4. Anthropogenic Risks”, *The Precipice: Existential Risk and the Future of Humanity*, Oxford)

Major effects of climate change include reduced agricultural yields, sea level rises, water scarcity, increased tropical diseases, ocean acidification and the collapse of the Gulf Stream. While extremely important when assessing the overall risks of climate change, none of these threaten extinction or irrevocable collapse.

Crops are very sensitive to reductions in temperature (due to frosts), but less sensitive to increases. By all appearances we would still have food to support civilization.85 Even if sea levels rose hundreds of meters (over centuries), most of the Earth’s land area would remain. Similarly, while some areas might conceivably become uninhabitable due to water scarcity, other areas will have increased rainfall. More areas may become susceptible to tropical diseases, but we need only look to the tropics to see civilization flourish despite this. The main effect of a collapse of the system of Atlantic Ocean currents that includes the Gulf Stream is a 2°C cooling of Europe—something that poses no permanent threat to global civilization.

From an existential risk perspective, a more serious concern is that the high temperatures (and the rapidity of their change) might cause a large loss of biodiversity and subsequent ecosystem collapse. While the pathway is not entirely clear, a large enough collapse of ecosystems across the globe could perhaps threaten human extinction. The idea that climate change could cause widespread extinctions has some good theoretical support.86 Yet the evidence is mixed. For when we look at many of the past cases of extremely high global temperatures or extremely rapid warming we don’t see a corresponding loss of biodiversity.87

So the most important known effect of climate change from the perspective of direct existential risk is probably the most obvious: heat stress. We need an environment cooler than our body temperature to be able to rid ourselves of waste heat and stay alive. More precisely, we need to be able to lose heat by sweating, which depends on the humidity as well as the temperature.

A landmark paper by Steven Sherwood and Matthew Huber showed that with sufficient warming there would be parts of the world whose temperature and humidity combine to exceed the level where humans could survive without air conditioning.88 With 12°C of warming, a very large land area—where more than half of all people currently live and where much of our food is grown—would exceed this level at some point during a typical year. Sherwood and Huber suggest that such areas would be uninhabitable. This may not quite be true (particularly if air conditioning is possible during the hottest months), but their habitability is at least in question.

However, substantial regions would also remain below this threshold. Even with an extreme 20°C of warming there would be many coastal areas (and some elevated regions) that would have no days above the temperature/humidity threshold.89 So there would remain large areas in which humanity and civilization could continue. A world with 20°C of warming would be an unparalleled human and environmental tragedy, forcing mass migration and perhaps starvation too. This is reason enough to do our utmost to prevent anything like that from ever happening. However, our present task is identifying existential risks to humanity and it is hard to see how any realistic level of heat stress could pose such a risk. So the runaway and moist greenhouse effects remain the only known mechanisms through which climate change could directly cause our extinction or irrevocable collapse.

### 1NC — Pharma

#### Targeting Big Tech sets a precedent that chills innovation in every sector---specifically, pharma.

Turner 21, journalist @ The Well News. (Victoria, 2-23-2021, "Antitrust Reforms Could Kill Competition", *The Well News*, <https://www.thewellnews.com/law/antitrust/antitrust-reforms-could-kill-competition/>)

Four panelists warned today that proposed legislative reforms for more aggressive antitrust enforcement in Big Tech would likely spill over across all industries, hindering innovation and harming consumers. Strengthening the antitrust laws – federal and state statutes that restrict the formation of monopolies and prohibit dominant companies from abusing their market power – would deprive the public of the benefits of aggressive competition by putting business decisions further under the microscope of regulators, they said. Their remarks came during a NetChoice event, “The Bad Side of Breaking Up Big Tech,” the first of a monthly series the online businesses trade association will host to discuss different policy developments concerning the “Big Tech” firms – Alphabet’s Google, Amazon, Facebook and Apple. One of the most prominent critics of current antitrust policy is Sen. Amy Klobuchar, D-Minn., who earlier this month introduced the antitrust reform bill that was a central focus of the panelists’ discussion. Her proposed bill, the Competition and Antitrust Law Enforcement Reform Act, would seek a sweeping reform of antitrust laws. The legislation would shift the burden of proof in antitrust litigation to the companies charged by regulators with violating the competition laws. Klobuchar’s bill would also increase funding of the antitrust agencies and ease restrictions around their ability to seek monetary penalties in court. But the current legal framework did have its defenders. Asheesh Argawal, deputy general counsel at think tank TechFreedom said Congress should wait to see how current legal cases regulators have filed against Big Tech companies play out before making any dramatic changes to the law. He also took aim at Klobuchar’s bill, which he said would diminish competition by increasing civil fines to a point that would deter investments in the tech industry. Jennifer Huddleston, director of Tech and Innovation Policy at American Action Forum, an independent, center-right policy institute, was also critical of Klobuchar’s proposed reforms, saying they could cause companies to rethink planned mergers and acquisitions and prevent smaller, innovative companies from getting the lifelines they sometimes need to survive. Huddleston also warned that while the current proposed antitrust reforms target the tech industry almost exclusively, their sweeping nature means they will have serious ramifications for all kinds of businesses, including those in the pharmaceutical, agriculture, and energy sectors, among others.

#### COVID thumps — proves healthcare is resilient AND innovation has only improved

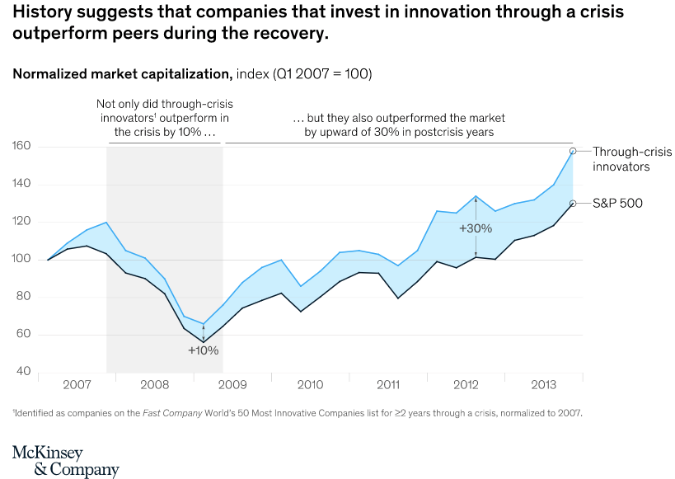
Jansen et al ’20 — Leigh Jansen (Associate Partner, McKinsey & Company); “Industry innovation: How has COVID-19 changed global healthcare?;” World Economic Forum; November 25th, 2020; <https://www.weforum.org/agenda/2020/11/healthcare-innovation-covid-coronavirus-pandemic-response-health>

[TITLE]: Industry Innovation: How has COVID-19 changed global healthcare?

While the COVID-19 pandemic has placed unparalleled demands on modern healthcare systems, the industry’s response has vividly demonstrated its resilience and ability to bring innovations to market quickly.

The effects of the pandemic on the industry continue to be profound. The shifts in consumer behavior, an [acceleration of established trends](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-great-acceleration), and the likely deep and lasting economic impact will potentially affect healthcare companies no less—and quite possibly more—than those in other sectors. Around the world, more than [90 percent of executives](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/innovation-in-a-crisis-why-it-is-more-critical-than-ever) we polled believe COVID-19 will fundamentally change their businesses, and 85 percent predict lasting changes in customers’ preferences. Among healthcare leaders, two-thirds expect this period to be the most challenging in their careers.1

To meet both the humanitarian challenge and the obligation to their stakeholders, leaders of healthcare organizations need to meet the innovation imperative. History tells us that organizations that invest in innovation during a crisis [outperform their peers in the recovery](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-great-acceleration) (exhibit). What’s more, a crisis can create an urgency that rallies collaborative effort, breaks through organizational silos, and overcomes institutional inertia.



During the course of this year, the healthcare industry has produced inspiring examples of innovation in products, services, processes, and business and delivery models, often in partnership with other sectors. For example, Sheba Medical Center in Israel is working with TytoCare to keep COVID-19 patients in their homes by supplying them with special stethoscopes that both listen to their hearts and transmit images of their lungs to a care team that can intervene as appropriate.2 In the United States, Zipline, which specializes in delivering medical supplies to remote areas, quickly formed a partnership with Novant Health in North Carolina to distribute supplies to hospitals via drones.3 The adoption of telehealth has exploded, from 11 percent of consumers using it in 2019 to [46 percent in April 2020](https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/telehealth-a-quarter-trillion-dollar-post-covid-19-reality), and well more than half of healthcare providers polled indicate higher comfort with this care-delivery method than before.

#### COVID thumps any lethality warrant — the worst, global pandemic in a century had an extremely low lethality rate — natural pandemics cannot cause extinction

#### No extinction from disease.

Barratt 17, PhD in Pure Mathematics, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute. (Owen Cotton-Barratt et al, “Existential Risk: Diplomacy and Governance”, pg. 9, <https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf>)

1.1.3 Engineered pandemics

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

## 1NC — China

### 1NC — AT: China

#### They have zero internal link between tech competition and US-China war — you should do the Ctrl-F test — the Mastro card is just about confrontation in general while Sitaraman is about Chinese corporations — hold the line on aff re-articulations of these internal links

#### **No US-China war.**

Lei 20, PhD and MA in International Politics, associate research fellow with the China Institute of International Studies. (Cui, 7-24-2020, "Despite heated talk, risk of a US-China hot war is small", *South China Morning Post*, https://www.scmp.com/comment/opinion/article/3094121/why-risk-us-china-hot-war-small-despite-heated-talk)

Many observers are pessimistic about deteriorating US-China relations and believe the two countries are heading towards a cold war. Even worse, some argue that the situation might be more dangerous than the US-Soviet Union Cold War, and that a hot war might break out between the two. This argument is unconvincing. First of all, deterrents to a flare-up are much stronger in US-China relations than in US-Soviet relations. Although economic and people-to-people ties between China and the US are declining, they are still close compared to US-Soviet ties. It is hard to decouple two closely intertwined economies and societies. Take two examples. China is expected to become the world's largest consumer market, a temptation hard to resist for exporters, including those from the US. And in education, more than 300,000 Chinese students study in the US, bringing in huge revenues for the US education industry. Many universities go to great lengths to woo international students. Recently Harvard and the Massachusetts Institute of Technology even sued the government over its new visa restrictions, now aborted, on international students. Second, even if there is decoupling, the pain would not be too great and can be kept out of the national security sphere if properly handled. In fact, for national security reasons, a modest degree of isolation will make both sides more secure and comfortable. For instance, if China’s information technology equipment cannot capture Western markets, the US will be more relaxed. If China cannot get advanced technologies from the US and its technological progress slows down, the US will be less anxious. In the same vein, China feels assured knowing that if the Trump administration does impose a travel ban on Communist Party members, it would be abandoning one of the tools available to the US to promote “peaceful evolution” in China. Economic decoupling is undeniably more painful for China than for the US. But unlike Japan during WWII, which was hit hard by the US oil embargo because of its lack of natural resources, China has no such problems. Given its large domestic market, losing the US as a major customer is not a disaster for China, and can be compensated through more dynamic economic activities at home. China can also make up for being freezed out of technological exchanges by turning to indigenous innovation. As for the US, it can import goods from other developing countries, albeit less cheaply. The relative loss is acceptable when weighed against the heightened perception of economic independence and security. Third, the ideological confrontation between China and the US is less intense than that during the Cold War. Unlike the obsession with ideology in those days, the line between capitalism and socialism is blurred today. The market economy has become universally recognised as the best way to promote economic growth and, politically, many countries have embraced democracy. Even North Korea calls itself the Democratic People’s Republic of Korea. Although ideological hawks in the US still long for the day when the beacon of freedom will light up the world, after many years of fighting bloody wars overseas, most American people are not interested in promoting democracy abroad. Meanwhile, China just wants to preserve its political system and has no interest in exporting it to other countries, as the Soviet Union did. Thus, ideological antagonism in China-US relations can easily be eased by calculations of realistic interests, which create conditions for compromise and cooperation. Fourth, both China and the US have many options other than war to achieve their policy goals. While they have no allies to serve as a buffer, given the nature of the potential conflict in the South China Sea or Taiwan Strait, both countries are adept at operating in grey zones and fighting psychological, public opinion or diplomatic warfare below the threshold of war. The forced closure of the Chinese consulate in Houston by the US government is just the latest act of brinkmanship. In addition, given China’s huge economic and financial interests in the US, the latter can wield the stick of sanctions when use of force is highly risky or not worth it. When both sides have many tools and options, why would they rush to war to achieve their goals? Last but not least, the imbalance of power will act as a deterrent. Some say the US and Soviet Union did not fight a hot war because they were evenly matched. It was not the case, actually. At the beginning of the Cold War, the Soviet Union was at a relative military disadvantage. Moreover, a country needs the will to fight before going to war, even if it is stronger militarily than its adversary. Having fought years of meaningless wars, the US is weary of war. China, too, abhors war. Having a clear understanding of US strength, especially when its own economy is slowing down and it is facing various domestic challenges, China would not wish to recklessly start a war with the US. In summary, the possibility of a hot war between China and the US is very small. The greatest danger for China is not a cold or hot confrontation with the US, but policymakers’ interpretation of the momentary hostility towards Beijing of a portion of the American population and the larger world. An erroneous interpretation could end China’s march to further opening up, and see it turn instead towards self-isolation.

#### China isn’t revisionist.

McKinney 19, \*Jared Morgan; PhD candidate at the S. Rajaratnam School of International Studies, Nanyang Technological University (Singapore); \*\*Nicholas Butts; Center for Strategic and International Studies Pacific Forum Young Leader. He holds an LL.M. from Peking University, an MSc from The London School of Economics and an MPA from Harvard University where he was also a Crown Prince Frederik Scholar and a Cheng Fellow. (Winter 2019, “Bringing Balance to the Strategic Discourse on China’s Rise”, *Journal of Indo-Pacific Affairs*, pg. 75-76, https://www.airuniversity.af.edu/Portals/10/JIPA/journals/Volume-02\_Issue-4/McKinney.pdf)

In the abstract, such claims are alarming—in context, and in balance, rather humdrum. In fact, the evidence of any Chinese intention to destroy, or even merely undermine and exploit, the current order is slight. China is certainly using its growing military power to defend its claims in the SCS and even—on occasion— to coerce its neighbors. It uses protectionist economic policies to boost the prospects of Chinese companies and reduce competition. It employs economic statecraft

[marked]

to serve its interests abroad. And it certainly is opposed to America’s policy of global democracy promotion. However, none of these positions fundamentally challenge the existing order, none of them radically depart from America’s own actions when it was a rising power in the nineteenth century, and none of them obviously surpass America’s own contemporary record of order subversion.

When the United States was a rising power, it took half of Mexico and considered taking the rest, it colonized the Philippines and Hawaii, and it unilaterally seized the maritime choke points of the Caribbean (Puerto Rico and Cuba).21 The United States used tariffs—which by 1857 averaged 20 percent22 and by the end of the nineteenth century were “the highest import duties in the industrial world”23—to protect its industries. It stole intellectual property,24 and it ideologically challenged the governments of the “Old World.” Today, despite no longer being a rising power, the United States has launched two disastrous invasions, tortured prisoners, and dispatches drone strikes at a whim with little international legal authority.25 The point is not that two wrongs make a right; it is that international order is much more resilient than critics seem to realize,26 and it is utopian to expect any rising Great Power to act in a way that uniformly satisfies one’s moral scruples, evolving, in Friedberg’s words, “into a mellow, satisfied, ‘responsible’ status quo power.”27

Friedberg or Harris might object that America’s rise took place in the context of a different order. This is perfectly true, but the more important point is that the long nineteenth century (1815–1914)—the era of America’s rise—was the first iteration of the New Peace.28 The implication is that relative peace can and has coexisted with limited wars, property and territorial thefts, acts of coercion, and aggressive assertions of status. This does not mean any of these are desirable— they are not—but it shows that they need not be fatal to the system. Insofar as there is a lesson from that first period of relative peace, it is that Great Power confrontation is the one thing that is fatal. Accepting this does not mean capitulating in every instance, as implied by some,29 but it does mean rediscovering the rules of Great Power competition30 alongside the art of strategy.31

Focusing only on areas that China’s rise violates the scruples of the established powers, moreover, downplays the extent to which China, has, in fact, conformed to the existing order. As a RAND Corporation report published in 2018 concludes, China has been a supporter—albeit a conditional one—of the international order: “Since China undertook a policy of international engagement in the 1980s … the level and quality of its participation in the order rivals that of most other states.”32 The way in which Xi Jinping, following his 2017 Davos speech in defense of globalization, has been heralded as the most prominent champion of international order and defender of globalization underscores the fact that there are different elements of this order, and that China supports many, if not most, of them. Even in places where China is supposedly “altering” the current order, Beijing tends to simultaneously affirm that order. China’s Asian Infrastructure Investment Bank, for instance, actually mirrors existing structures, and China has intentionally copied elements and “best practices” of the World Bank and Asian Development Bank. China is playing the same game, even if it is seeking a bigger role within it.33

### 1NC — SD

#### No one would actually follow on the aff — courts take years, political will, Biden won’t, etc.

Hirsh 21 — Michael Hirsh (Senior Correspondent, Foreign Policy); “Big Talk on Big Tech—but Little Action;” Foreign Policy; April 6th, 2021; <https://foreignpolicy.com/2021/04/06/big-tech-regulation-facebook-google-amazon-us-eu/>

Problem is, that’s just about where the consensus ends. And even if you add more lawyers, antitrust cases move glacially, and federal judges are extremely cautious about punishing behavior deemed anti-competitive, especially in an era when antitrust experts disagree vehemently about remedies. Plus, now every case faces the prospect of being squelched by a very conservative Supreme Court.

Despite the documented actions of Facebook and other companies in crushing would-be competitors, there is also good reason for judicial caution. Consider the irony that Microsoft—itself the target of a major antitrust action a quarter century ago—now considers itself the aggrieved party in the recent Department of Justice case against Google, since it is trying to raise the profile of its Bing search engine, which has a meager 2.5 percent of the market. Or that Facebook’s own dominance may someday fall victim—without any help from government at all—to new blockchain technology that could allow users to run their own web services and applications. (Ironically, among the key innovators pushing for that are Zuckerberg’s old antagonists from Harvard University, Tyler and Cameron Winklevoss, who [famously claimed](https://www.forbes.com/sites/michaeldelcastillo/2021/04/05/revenge-of-the-winklevii-facebook-winklevoss-bitcoin-nft-billionaire-revenge/?sh=543f9e791572) that he stole the social network idea from them.) Even today, many antitrust experts say it’s probably a judicial and legislative bridge too far for the government to try to proactively promote competition in the tech world; let the markets take care of that instead.

But so changed is the political environment that U.S. President Joe Biden and some of his top regulators, such as Lina Khan, a Yale Law School wunderkind who was recently nominated to the FTC, might seek to break up the big tech firms. Biden, on the campaign trail, said that breaking up tech quasi-monopolies such as Facebook is “something we should take a really hard look at.”

That is almost certainly not going to happen: The political will simply isn’t there, even among many Democratic legislators influenced by Khan and other progressive thinkers.

“I don’t think Biden has the stomach for that,” said Herbert Hovenkamp, an antitrust expert at the University of Pennsylvania. The reason is simple: Today’s monopolistic abuses are quite unlike the monopoly power of old, when big cartels like John D. Rockefeller’s Standard Oil inflicted predatory high prices on consumers and political will was high to “bust trusts.” On the contrary: Most consumers love the fact that they can buy all kinds of inexpensive stuff on Amazon and have it delivered the next day, and that Facebook doesn’t charge them a cent, even as it makes a mint selling their private information to advertisers and market manipulators.

“The Democrats need to be cautious here,” Hovenkamp said. “Consumers are their constituency. And these companies are among the biggest producers of growth in the U.S. Biden certainly doesn’t want to ruin that.” Instead, the administration may well decide to focus more on smaller fish in other industries, as the FTC did last week by [challenging](https://www.barrons.com/articles/ftcs-challenge-of-illumina-is-a-boost-for-rivals-in-cancer-test-race-51617228262) Illumina’s $7 billion purchase of cancer test developer Grail. In a sign of how aggressive the FTC might be under Biden, it was the first time in decades that the commission sought to block a so-called vertical merger, alleging that ownership of Grail would incentivize Illumina, a gene-sequencing company, to raise costs on Grail’s competitors.

# 2NC

## CP — Strict Scrutiny

#### The counterplan is comparatively preferable. It punishes anticompetitive conduct while avoiding useless absolutism of per se rules

Beschle 87, Associate Professor of Law, The John Marshall School of Law. B.A., 1973, Fordham University; J.D., 1976, New York University School of Law; LL.M., 1983, Temple University School of Law (Donald, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality,” *Hastings Law Journal*, Lexis)

Absolutes, however, even when qualified with the word "almost," are hard to prove. In an area as complex as the effect of concerted business practices on competition, numerous counterexamples, both hypothetical and actual, may be advanced to rebut the contention that any such practice invariably injures competition. To defend per se illegality, then, is to defend something almost inevitably indefensible. The only possible way to defend the concept effectively is to resort to the course currently being taken by the Supreme Court: to narrow the categories so far as to make the question of categorization almost as complex as full rule of reason analysis. At that point, the defense of the per se concept becomes merely an exercise in semantics. If the concept of per se illegality is indefensible, except when so refined as to make it largely irrelevant, why continue to defend it at all? Why not simply abandon the field to the rule of reason? It seems clear that the battle over the per se rules is less a clash over those specific rules than a battle over basic attitudes toward antitrust enforcement. For better or worse, per se rules have become linked in most minds with vigorous enforcement; to favor one is to favor the other. The rule of reason, on the other hand, is associated with a tolerant attitude toward antitrust defendants. Rule of reason analysis often-perhaps usually-leads to a finding of no liability. Its complexity and uncertainty can deter plaintiffs from even attempting to challenge behavior which many would say should be challenged. Since, to so many, rule of reason analysis means a type of antitrust enforcement under which much anticompetitive activity will be permitted, per se analysis is defended, not so much for its own virtues, but rather because of fears of the permissive nature of its sole obvious rival. An alternative system of antitrust analysis would ideally avoid the indefensible and ultimately self-defeating absolutes of per se analysis, yet also avoid such complexity and uncertainty that harmful or suspect business activities would go unchallenged. Once formulated, such an alternative should be embraced by advocates of vigorous antitrust enforcement. Although some may be reluctant to abandon a concept such as per se illegality which has been defended for so long, if its defense is clearly doomed to failure by inherent flaws in the concept, the battle lines should be drawn around a new perimeter not only capable of being defended, but also worth defending.

#### FIRST---Prohibit, it’s per se — that was 1AC CX. The counterplan identifies the pathways for legal anticompetitive behavior, which may hinder it, but does NOT makt it impossible. That violates the core meaning of the word prohibit.

**Van Eaton** et al **17** (Joseph Van Eaton, Gail Karish Gerard Lavery Lederer, lawyers for BEST BEST & KRIEGER, LLP. Michael Watza, KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, “BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C”, COMMENTS OF SMART COMMUNITIES SITING COALITION, March 8, 2017 , https://tellusventure.com/downloads/policy/fcc\_row/smart\_communities\_siting\_coaltion\_comments\_mobilitie\_8mar2017.pdf)

2. What are at issue legally are prohibitions and effective prohibitions, and not hindrances, as the Commission seems to suggest in its Notice. The term “prohibit” is not defined in the Act, but it has an ordinary meaning: to formally forbid (something) by law, rule, or other authority; or to “prevent, stop, rule out, preclude, make impossible.” A mere “hindrance” “is simply not **in accord with** the ordinaryand fairmeaning” ofthe termprohibit,104 and can provide no basis for additional Commission intrusions on local authority over wireless facilities. Much of what Mobilitie complains about is a “hindrance” at most (and usually a hindrance magnified by its own actions).

#### There’s a clear test: can the practice described by the AFF ever legally occur after the plan? If it’s ever still allowed, it’s not prohibited!

Martin G. Vallespinos 20, LLM, University of Michigan Law School; Manager at Ernst & Young Detroit, “Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO,” 40 Va. Tax Rev. 93, Lexis

Prohibited subsidies, as described in Article 3 of the SCM Agreement, are disallowed outright, and WTO members can unilaterally impose countervailing measures against the country sponsoring them. This category [\*146] includes (i) subsidies that are contingent, in law 237or in fact 238upon export performance 239and (ii) subsidies that are contingent upon the use of domestic over imported goods.

Export contingency can be "de jure" or "de facto." De jure export contingency derives from "the very words of the relevant legislation, regulation[,] or other legal instrument constituting the measure." 240De facto export contingency is met when "the facts demonstrate that the granting of a subsidy ... is in fact tied to actual or anticipated exportation or export earnings." 241The WTO jurisprudence regarding "de facto" contingency, however, is not uniform and WTO panels have set forth various alternative tests. In Australia-Automotive Leather II, the Panel established a standard of "close connection" between the grant of a subsidy and export performance. 242In Canada-Aircraft, the Panel and the Appellate Body ("AB") implemented the so called but-for test, which interprets the "tied to" language to be equivalent to a relationship of "conditionality" between the grant of a subsidy and export performance. 243Therefore, de facto contingency is met when "the facts demonstrate that the tax benefit would not have been granted ... but for anticipated exportation or export earnings." 244In the same case, the AB clarified that "it does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result." 245This means that, in the AB's view, the granting authority's expectations on exports may not be sufficient to meet the standard, so the subsidy must be objectively contingent upon export [\*147] performance. 246In pursuit of a more objective criteria, the AB suggested that, "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product ... and on the other hand, the situation in the absence of the subsidy." 247But both the Panel and AB further clarified that an assessment based on ratios is incapable by itself of establishing that a given subsidy is de facto contingent on export performance "in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to [favor] export sales over domestic sales." 248

With respect to domestic use contingency, Article 3.1(b) contains no reference to contingency in law or in fact. Nevertheless, the AB has found that Article 3.1(b)'s scope covers both de jure and de facto contingency. 249Also, both the Panel and the AB have concluded that the general guidance regarding evaluations of de facto export contingency should be applicable to de facto domestic use contingency. Finally, it should be mentioned that the Panel and AB decisions are not binding precedential authority but rather can be only strongly persuasive authority. Therefore, countries should be aware of all these alternative tests when designing their tax policies, as there is no certainty as to which criteria WTO decision makers may apply in the event of a dispute (e.g. but-for test, close connection test, assessments based on ratios, etc.).

A subsidy that is not considered "prohibited" can still satisfy the specificity criteria and become an actionable subsidy if it meets the two following requirements:

(1) Specificity: an actionable subsidy is considered specific when the eligibility to receive the benefits is limited to certain enterprises, industries, or areas; 250and

(2) Adverse effect: an actionable subsidy is considered adverse when it produces a serious prejudice to the interests of another member, an injury to its domestic industry, or a nullification or impairment of benefits accruing directly or indirectly to other members under the GATT. 251

#### ‘Prohibition’ must ban all instances of anticompetitive behavior—it’s stronger than impeding or restricting

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

#### Prohibitions must be without exception

Erikson 42 (Leif Bernard Erikson-Judge, Supreme Court of Montana, dissenting opinion in “State ex rel. Stafford v. Fox-Great Falls Theatre Corp.,” 114 Mont. 52, Lexis)

In view of the fact that the majority has declared the constitutional [\*88] provision not self-executing, I feel it necessary to discuss this matter at some length. If the majority is right, the legislature could repeal section 11149, and thus legalize lotteries. Section 2 of Article XIX of our Constitution provides: "Legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in [\*\*707] this state." If it is self-executing, it constitutes merely a declaration of broad public policy and is advisory, and if the legislature fails to act, no remedy is available to [\*\*\*61] anyone. In other words, had the legislature failed to enact any provision concerning lotteries, then lotteries would be legal in this state despite the constitutional provision. No remedy would be available to anyone in that case, as mandamus will not lie to compel the legislature to enact any laws.

The general rule is that none of the provisions of the Constitution can be looked upon as merely advisory, and if the provision is capable of enforcement in any manner, it is to be regarded as self-executing. (1 Cooley, Constitutional Limitations, 8th Ed. 165.)

Our own court has spoken on this subject in State ex rel. Bennett v. State Board of Examiners, 40 Mont. 59, 104 P. 1055, 1058. The court said, "The question in such cases [that is, whether or not a constitutional provision is self-executing] is always one of intention, and to determine the intent the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances, and, to determine these questions from which the intention is to be gathered, the court will resort to extrinsic matters when this is necessary."

The majority misconstrues [\*\*\*62] the wording of the constitutional provision. If the language of the constitutional provision were as the opinion of the court construes it to be, that is, if it read "The legislature shall pass laws to prohibit lotteries and gift enterprises," there might be some merit to the view that the provision is not self-executing, although courts generally [\*89] hold otherwise. Affirmative action of the legislature would be contemplated by such language but the constitutional convention did not use that language. Instead, the language in section 2 positively prohibits affirmative action on the part of the legislature. The section does go on to direct the legislature to take affirmative action in prohibiting the sale of lottery and gift enterprise tickets, but it expressly forbids any other legislative action.

Applying the test found in State ex rel. Bennett v. State Board of Examiners, supra, it is clear that the intention of the constitutional convention was to prohibit lotteries and gift enterprises, or rather to maintain the status quo, and the object to be accomplished by the provision was to do just that. Any other view makes the provision meaningless. The provision [\*\*\*63] seeks to forbid lotteries by declaring the legislature shall not authorize them, and if an act purporting to do so were passed, would this court hesitate in applying the constitutional provision? But it here says the same result, i. e., authorized lotteries may be reached by inaction. To me this does not make sense. If the prohibition means anything, it means the result may not be accomplished in any way.

#### The counterplan regulates behavior by identifying the circumstances which it is legitimate. That’s not a prohibition.

Adelide Law Rev 64 "Potato Marketing Act - Statutory Interpretation - Ultra Vires - Prohibition as Distinct from Regulation" [1964] AdelLawRw 9; (1964) 2(2) Adelaide Law Review 252 <http://classic.austlii.edu.au/au/journals/AdelLawRw/1964/9.html>

The theoretical extent of the term has been defined in previous cases, allthough actual decision on the validity of any particular measure as a regulation may be difficult, since the distinction which must be drawn between regulation and prohibition is a subtle one, essentially a matter of degree. All regulation involves some measure of prohibition; but where the effect of the prohibition is to preclude the subject-matter of regulation from coming into existence will it be invalid. The authoritative statement of the rule in this context is contained in the judgment of Dixon J. (as he then was) in Su;anhill Corporation v. brad bur^.^ "Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it altogether, or subject to a dis cretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance, and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or conduct to be regulated."

#### SECOND---Substantially. It means per se illegal

Philip C. **Kissam 83**, Professor of Law, University of Kansas. B.A. 1963, Amherst College; LL.B. 1968, Yale University. "Antitrust Law and Professional Behavior", 62 Tex. L. Rev. 1

[[BEGIN FOOTNOTE 194]]

A federal district court in Florida adopted this view in Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976), rev'd on other grounds, 586 F.2d 530 (5th Cir. 1978). A group of fee-for-service obstetricians allegedly conspired against a low fee, outpatient abortion clinic by discouraging physicians from working at the clinic and by refusing to provide requested backup services at the obstetricians' hospital. The defendants claimed that their actions were motivated by a concern that the clinic was providing inferior quality services. Id. at 1269-70. On a motion for a preliminary injunction, the district court rejected this defense because there was no evidence of inferior quality and because there was a substantial difference between the fees charged by the clinic and those charged by the fee-for-service physicians for the same services. Id. The court in effect held that the defendants had acted with an anticompetitive purpose and that the plaintiff **properly relied on a per se theory**. See id. at 1263, 1270.

Commentators have noted other cases in which fee-for-service physicians have denied hospital staff privileges to physicians who were associated with prepaid medical practices (HMOs) that threatened to compete with the fee-for-service physicians. See, e.g., Goldberg & Greenberg, supra note 36, at 59-62; Havighurst, Health Maintenance Organizations and the Market for Health Services, 35 LAW & CONTEMP. PROBS. 716, 777-81 (1970). **There is no reason why an antitrust court should not apply the per se rule summarily in these cases if there are substantial anticompetitive purposes behind the** exclusionary **act**. See Kissam, supra note 188, at 503.

[[END FOOTNOTE 194]]

## CP — Advantage

## Advantage — Innovation

#### New per se laws chill procompetitive conduct

Henry 21, solo practitioner of antitrust law focusing on consulting, compliance, monitoring, opinions and representing individuals. A former Chair of the Antitrust Section of the American Bar Association, she has handled all aspects of competition law, including criminal defense, treble damage litigation, compliance advice, and merger and other civil investigations and, as lead counsel, won a rare corporate criminal antitrust jury acquittal. Her expertise and accomplishments have received repeated recognition, including by Chambers, Global Competition Review (Leading Attorney and Thought Leader), National Law Journal (M&A Antitrust Trailblazer Awards), Legal 500, and Best Lawyers in America (including Washington DC’s Top 50 Women Lawyers). She has practiced criminal antitrust defense for over forty years. (Roxann, “PER SE ANTITRUST PRESUMPTIONS IN CRIMINAL CASES,” Columbia Business Law Review, Lexis)

The Department of Justice, Antitrust Division is responsible for criminal antitrust prosecutions.

Start FN 118

Justice Manual Title 7: Antitrust, supra note 11 (“To ensure a consistent national, Department-wide policy on antitrust questions, the Assistant Attorney General for the Antitrust Division is responsible for supervising all federal antitrust investigations[.]”).

End FN 118

Like the other branches of government, the executive branch recognizes the lack of clarity in the Act,119 as well as the difficulty of distinguishing its criminal from its civil enforcement.120 It further recognizes that the per se concept rests on savings of “time and expense”121 and creates the potential for overenforcement that chills procompetitive conduct.122 Nevertheless, the DOJ uses per se concepts in its exercise of prosecutorial discretion but also weaponizes per se case law to deprive the defense of evidence at trial and to direct the jury to presume illegality conclusively.

#### The impact on innovation is economy-wide

Weller 13, JD, 40+ years of antitrust experience (Charles, “The end of criminal antitrust's per se conclusive presumptions,” Antitrust Bulletin)

As a policy matter, since 1977, the Supreme Court has been extensively revising U.S. antitrust laws to better match the seismic shift of the U.S. economy to a global applied knowledge economy by eliminating the now dysfunctional antitrust law the Court developed when the U.S economy was industrial and dominant. (37) Thus ending the use of per se conclusive presumptions in criminal antitrust is consistent with what the Supreme Court has been doing for over thirty years, and will be a great advance in antitrust and competition policy (as well as for constitutional rights). Cases like DeMilta, which never should have been brought for the reasons shown and because sending its two top executives to jail would have eliminated one of few remaining competitors and imposed huge costs on two people and their small company, will no longer be pursued. Instead, the government will have to focus enforcement on real matters affecting today's global market system, rather than a theoretical world with artificial litigation leverage enabled by conclusive presumptions that are removed from actual evidence of anticompetitive impact. And the government will still be able to win criminal cases against the egregious offenders and real cartels the criminal sanction is intended to reach. (38) Finally, the United States and the world are at the crossroad between a "perfect storm" of opportunity with the shift to an applied knowledge and entrepreneurial economy, and a "perfect storm" of danger with economies worldwide producing dangerously high levels of unemployment and underemployment (twenty percent in the United States (39) and often worse overseas). Jim Clifton, the chief executive officer of Gallup, Inc., reported that "an increasing number of people in the world are miserable, hopeless, suffering, and becoming dangerously unhappy because they don't have a good job--and in most cases, no hope of getting one." (40) The tragic failure of government-run economies in Russia and Eastern Europe, China, India and elsewhere, and the thrilling success of countries like South Korea, Taiwan, Singapore, Malaysia and Indonesia, and, after they moved from a government-run economy toward a market economy, China and India, as well as most of America's history, demonstrate the "perfect storm" of opportunity of a market economy. (41) Indeed, the new Prime Minister of China, Li Keqiang, in a recent speech spoke eloquently of the powerful opportunity private markets provide for all (having witnessed first hand the tragedy of China's decades of government-run economics). He said, "The market is the creator of social wealth and the wellspring of self-sustaining economic development." (42) Accordingly, ending criminal antitrust's per se conclusive presumptions will significantly help antitrust policy to support, rather than continue to suppress, private market competition and innovation in the new reality of a global applied knowledge economy. Thus it will help seize this "perfect storm" of opportunity--and help prevent a "perfect storm" of danger from forming and raging.

## Advantage — China

# 1NR

## DA — DOJ Tradeoff

#### Horizontal gene transfer enhances virulence, which maximizes disease fitness

Schroeder et al, 17 - Meredith Schroeder, PhD candidate, Department of Microbiological Sciences, North Dakota State University; Benjamin D. Brooks, PhD, Department of Electrical and Computer Engineering, North Dakota State University; Amanda E. Brooks, PhD, Department of Pharmaceutical Sciences, North Dakota State University (Meredith Schroeder, Benjamin D. Brooks, and Amanda E. Brooks, “The Complex Relationship between Virulence and Antibiotic Resistance,” *Genes*, Vol. 8, No. 1, Page 39)

Antibiotic resistance, prompted by the overuse of antimicrobial agents, may arise from a variety of mechanisms, particularly horizontal gene transfer of virulence and antibiotic resistance genes, which is often facilitated by biofilm formation. The importance of phenotypic changes seen in a biofilm, which lead to genotypic alterations, cannot be overstated. Irrespective of if the biofilm is single microbe or polymicrobial, bacteria, protected within a biofilm from the external environment, communicate through signal transduction pathways (e.g., quorum sensing or two-component systems), leading to global changes in gene expression, enhancing virulence, and expediting the acquisition of antibiotic resistance. Thus, one must examine a genetic change in virulence and resistance not only in the context of the biofilm but also as inextricably linked pathologies. Observationally, it is clear that increased virulence and the advent of antibiotic resistance often arise almost simultaneously; however, their genetic connection has been relatively ignored. Although the complexities of genetic regulation in a multispecies community may obscure a causative relationship, uncovering key genetic interactions between virulence and resistance in biofilm bacteria is essential to identifying new druggable targets, ultimately providing a drug discovery and development pathway to improve treatment options for chronic and recurring infection.

1. Introduction

Until recently, conventional “antibiotic wisdom” suggesting the presence of a fitness cost associated with the development of antibiotic resistance that would eventually allow susceptible species to overtake resistant species was the predominating dogma in infectious diseases [1]. However, the ever-increasing threat of antibiotic resistant bacteria contradicts dogma and insinuates that the evolution of resistance may be associated with a fitness advantage, including enhanced virulence [2,3]. Although virulence has now been directly related to multidrug resistance in several animal infection models [2], the mechanism of virulence regulation in this climate of antibiotic resistance remains elusive. This review will explore the relationship between the mechanisms of acquired antibiotic resistance and enhanced virulence, a critical link in our war on the emergence of multidrug resistant bacteria.

#### AMR is existential---survivability and gene transfers overcome burnout — solves case defense which makes disease a functional add-on

Zaman 20, Interview with Muhammad H. Zaman, professor of international health and biomedical engineering at Boston University. Interviewed by Eric Allen Been. (5-12-2020, "Antibiotic-Resistant Superbugs Could Be Worse Than Covid-19", *Medium*, <https://onezero.medium.com/antibiotic-resistant-superbugs-could-be-worse-than-covid-19-a732bc3b944c>)

Do you think an outbreak of a superbug poses a bigger existential threat than what we’re currently facing with the coronavirus?

That’s something I’ve been thinking a lot about. My sense is it might. Again, we don’t know. And the reason I would say that is oftentimes what happens with the bacterial systems is bacteria and viruses survive very differently. A virus by definition needs a living host to multiply—a bacterial cell, a human cell, a skin cell, whatever—but you don’t need that with bacteria.

So, their ability to mutate, their ability to survive on surfaces and divide is very different. That’s one thing. Bacteria can survive in the water. They can be on surfaces for much longer periods of time. And then the bacterial infections we might end up dealing with are going to complicate all kinds of basic things—basic routine elective surgery, basic procedures—and it may be much, much harder to control.

I think the viral vaccine against Covid-19 is a hope and a dream for all of us and may be a year away, it may be six months away, it may be 18 months away. But for a wide variety of bacterial infections, it may be much, much harder. That’s one thing. The second thing is you have to also remember that some species of bacteria can transfer its genetic material to another species and make it resistant. In other words, it’s not just bacteria giving resistance to its next generation; it’s also one bacteria giving it to another horizontally. That’s a problem, and that can really speed it up quite a bit.

#### DOJ Antitrust Division has limited resources---they’ll kick cases if crunched

Harrington 15, Professor of Business Economics and Public Policy at Wharton (Joseph, “The Comity-Deterrence Tradeoff and the FTAIA: Motorola Mobility Revisited,” CPI Antitrust Chronicle January 2015 (2)

The preceding analysis was predicated on the critical assumption that the government prosecutes the cartel, but this may not occur for two reasons. First, the government may be unaware of the cartel’s existence. Lacking the right to bring a private case, cartels are less likely to be discovered because those harmed have weaker incentives to monitor for collusion. Nevertheless, they still do have some incentive to monitor and report a suspected cartel to the government in order to disrupt the harm that is being inflicted upon them. It is then unclear whether the loss of antitrust standing will substantively weaken the incentive to monitor to the point that it warrants interfering with comity. Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but chooses not to litigate. The Antitrust Division of the U.S. Department of Justice (“DOJ”) has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ’s caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a per se offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is per se unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion. While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:17 The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.

#### The DOJ Antitrust Division has limited resources---overload causes cuts to current priorities

Rosenberg 20, Chuck Rosenberg is a former U.S. attorney, senior FBI official and chief of the Drug Enforcement Administration. (Chuck, “Why the Attorney General's Meddling on Antitrust Issues Matters,” <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>)

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted, [a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices. There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

#### DOJ can’t do it all

**Palko** & Rand **19**, \*David, associate in Womble Bond Dickinson. \*\*Ripley, associate, one of the President’s United States Attorneys in North Carolina. (8/9/19, "Year One of Trump’s DOJ: An Overview of the Four Major Categories of Offenders", *JD Supra*, https://www.jdsupra.com/legalnews/year-one-of-trump-s-doj-an-overview-of-53913/)

Some of this decrease in the number of drug offenders can be attributed to the **zero-sum nature of DOJ resources** – the direction of **increased** **effort** toward offenses in **one** category will result in **fewer offenses** being prosecuted in **other categories**. But a part of this decrease is likely due to an increase in strategic prosecution of certain drug offenses in state court. In contrast to immigration offenses, which are crimes of exclusive federal jurisdiction, drug offenses are crimes of concurrent jurisdiction – they can be prosecuted either in state court or in federal court. In determining whether to prosecute a drug offense, federal prosecutors look at many factors, including whether the offense would likely be punished more seriously in state court or in federal court. Some state laws provide for harsher punishment for certain drug offenses than federal law does. For example, someone in North Carolina with no criminal record who possesses 28 grams of heroin is looking at a mandatory sentence under North Carolina law of 225-282 months in prison. In North Carolina’s federal courts, the guideline range for the same person with the same amount of heroin starts at 21-27 months. On the other hand, a person who has the highest level criminal record provided for under North Carolina law and who is in possession of 28 grams of crack cocaine is looking at a mandatory sentence under North Carolina law of 35-51 months in prison; the same person with the same amount of crack cocaine is looking at a federal advisory guideline range starting at 100-125 months.

#### The DOJ-AD is fully focused on criminal enforcement in health care now

Lynch 20, partner in the Global Antitrust & Competition Practice at Latham & Watkins LLP. A former prosecutor and assistant chief in the San Francisco Field Office for the Antitrust Division of the US Department of Justice, Lynch has deep experience in cartel matters, representing companies and individuals defending criminal and civil price-fixing investigations and litigations in the US and abroad. (Niall, “Antitrust Enforcement In Health Care: A Risky And Evolving Landscape,” et al, <https://www.lw.com/thoughtLeadership/antitrust-enforcement-health-care>)

Even the most casual observer of the health care industry can see that it faces enormous challenges in light of the COVID-19 pandemic. From accessing sufficient supplies of personal protective equipment and medication to the financial strains caused by the reduction or suspension of non-emergent treatment and care, medical providers, hospital systems, and health care suppliers are staring down tremendous financial and logistical pressures. What may have escaped notice, though, is that the industry is at the same time confronting a wave of enforcement by the US Department of Justice (DOJ) Antitrust Division and other antitrust enforcers. For instance, in the last 18 months, seven companies have been criminally charged in the DOJ’s investigation of antitrust violations in the generic pharmaceutical manufacturing industry, with monetary penalties thus far totaling over $426m. But these amounts are just the tip of the iceberg in terms of the financial exposure these companies face. Not only are there follow-on civil damages actions claiming trebled damages and other penalties, but also debarment and securities litigation threats, all arising from the same conduct. Four former and current executives from several generic pharmaceutical companies were also criminally charged in connection with this investigation The modern history of the health care industry is, of course, characterized by regulation and government scrutiny: from HIPAA to the Anti-Kickback Statute, the Affordable Care Act to workplace and patient safety regulations. But, until recently, the DOJ generally did not pursue criminal enforcement of the federal antitrust laws in the health care industry. Times have changed, and companies in the health care sector often operate in a manner that can make them vulnerable targets for antitrust enforcers, so special care should be taken in this environment. In Vivo has explored the history of antitrust enforcement in the health care industry, how it has evolved, and what steps health care companies can take to protect themselves from future enforcement actions. Antitrust Enforcement In The Health Care Industry While the DOJ has only recently fully deployed its criminal enforcement powers in the health care industry, it has historically been anything but hands-off in terms of civil enforcement of antitrust laws. In 2004, the DOJ and Federal Trade Commission (FTC) issued an in-depth report addressing the important role competition law and policy play in shaping the health care industry. Since then, the Division’s Healthcare and Consumer Products Section has brought over 25 civil merger and conduct cases in the industry and resolved several others without filing suit.

#### There are sufficient resources for the Antitrust Division to counter price-fixing now

Powers 21, Acting Assistant Attorney General (Richard, “Division Update,” <https://www.justice.gov/file/1379221/download>)

In the United States, we have multiple antitrust enforcers, including our colleagues at the FTC and the offices of the attorneys general of each state. We aim to cooperate with our partners whenever possible, and, should we disagree, we will work together to resolve our differences in a way that balances our respective interests and furthers our collective goal of promoting competition and maintaining a fair economy. We are also constantly in touch with our international partners at competition authorities across the globe, as we must be, given the worldwide scope of modern anticompetitive behavior. The coming months will undoubtedly be eventful ones, but I am confident that the Division will rise to any challenges that come our way. The Division’s criminal sections will continue investigating and prosecuting not only the price fixing of consumer and food products, but also per se illegal collusion that harms American workers. And we will continue the fight against collusion affecting government spending and taxpayer dollars— including the vast sums of money allocated to maintain economic stability and fight the pandemic. The Division’s civil sections will continue to protect and promote competition across the economy by investigating mergers and policing anticompetitive civil conduct. For the foreseeable future, Section 2 violations will continue to be a focus for civil investigations. And finally, our Appellate, Competition Policy and Advocacy, and International sections will continue to represent the interests of American consumers in appellate courts, with domestic stakeholders, and around the world. When the Division’s new leadership arrives, it will find that our talented career staff have continued to carry out the Division’s mission during this transition period, despite the ongoing pandemic and our limited resources. We look forward to welcoming our incoming leadership team and working alongside them

#### The DOJ can’t cut high profile mega-mergers, like Big Tech. So, they’ll cut under the radar initiatives

McCabe 18, covers technology policy from The Times' Washington bureau, formerly of Axios (David, “Mergers are spiking, but antitrust cop funding isn't,” Axios, https://www.axios.com/antitrust-doj-ftc-funding-2f69ed8c-b486-4a08-ab57-d3535ae43b52.html)

The number of corporate mergers has jumped in recent years, but funding has stagnated for the federal agencies that are supposed to make sure the deals won’t harm consumers. Why it matters: A wave of mega-mergers touching many facets of daily life, from T-Mobile’s merger with Sprint to CVS’s purchase of Aetna, will test the Justice Department's and Federal Trade Commission’s ability to examine smaller or more novel cases, antitrust experts say. What they’re saying: “You have finite resources in terms of people power, so if you are spending all of your time litigating big mergers … there might be some investigations where decisions might have to be made about which investigations you can pursue,” said Caroline Holland, who was a senior staffer in DOJ’s Antitrust Division under President Obama and is now a Mozilla fellow. What's happening: More mergers are underway now than at any point since the recession. The total number of transactions reported to the federal government in fiscal year 2017, and not including cases given expedited approval or where the agencies couldn't legally pursue an investigation, is 82% higher than the number reported in 2010 and 55% higher than the number reported in 2012. Funding for antitrust officials who weigh the deals hasn’t kept pace. The funding for the Department of Justice’s antitrust division has fallen 10% since 2010, when adjusted for inflation. That's in line with the broader picture: not adjusting for inflation, the Department's overall budget increased just slightly in 2016 and 2017. Funding for the FTC has fallen 5% since 2010 (adjusted for inflation). An FTC spokesperson declined to comment on funding levels and Antitrust Division officials didn't provide a comment. Driving the news: Merger and acquisition activity is up 36% in the United States compared to the same time last year, according to Thomson Reuters data from April. Several deals under government review have gotten national attention, including Sinclair’s purchase of Tribune's TV stations or T-Mobile’s deal with Sprint, which stands to reduce the number of national wireless providers from four to three. Meanwhile, the Justice Department is awaiting the ruling on its lengthy legal effort to block AT&T’s proposed $85 billion purchase of Time Warner. Yes, but: It’s not the attention-grabbing mega-mergers that advocates worry will get less of a close look thanks to a shortage of funds. Instead, some say budget limitations are likely to matter when officials are deciding which smaller or "borderline" deals to investigate further. “Sometimes there’s nothing there,” said Holland of the agency's early investigations. “Other times, it might be, ‘This is kind of a close call, and we’ve got three or four close calls and we need to pick one of them.’" "It could mean settlements get accepted that otherwise wouldn’t, or deals that should be challenged aren’t," said Michael Kades of the Washington Center for Equitable Growth, an antitrust-enforcement-friendly think tank that has done extensive research on the topic, in an email.

#### The DOJ is focused on criminal antitrust litigation over price-fixing

Stargard 2-2-2021, JD, analyst @ ME(Andreas, “Why antitrust enforcement will matter to your practice in 2021 and beyond,” Medical Economics, <https://www.medicaleconomics.com/view/why-antitrust-enforcement-will-matter-to-your-practice-in-2021-and-beyond>)

Undertaking regular compliance check-ups is as advisable, of course, as a patient’s routine annual blood panel – but with healthcare likely topping President Biden’s antitrust enforcement agenda (perhaps only paralleled in importance by its focus on “big tech”), it will be of particular relevance this year. Let me briefly explain in 5 bullet points why I believe this to be the case. First, it is a given that the topic of “healthcare reform” sits atop the political and social-discourse agenda. One of the key tools the Biden administration has in its arsenal to achieve the desired changes – such as lowering costs, breaking up dominant players and preventing the further agglomeration of market power resulting from M&A deals, ensuring fairness in insurance and pharmaceutical pricing, and generally enhancing consumer access to healthcare across the country – will be its use of the antitrust laws (which are elsewhere more aptly named “competition laws”). Quite literally, the Sherman Act (and its little sibling, the Clayton Act) was made for achieving all of the examples given in the preceding sentence. Second, it strongly appears that Mr. Biden and Ms. Harris will generally take a keener interest in strictly objective antitrust enforcement than Mr. Trump, under whom the DOJ’s merger enforcement was frequently considered to be merely a tool for achieving ulterior objectives that were politically expedient (the DOJ’s objection to the AT&T/TimeWarner/CNN deal comes to mind). There is also the increased experience level of the incoming White House team: I once had the honor of being on the opposite side of VP Harris, acting in her role as California Attorney General, in a price-fixing cartel case. I can speak from experience that she is a determined litigator, seasoned in the often-complex specialty of law & antitrust economics. In addition, there is word in D.C. that the White House is considering the creation of a new “antitrust czar” advisory position within the executive. Taken together, it all points to increased action at the FTC and DOJ’s in-house competition “shops.” (I note that, while both agencies technically have jurisdiction over healthcare antitrust matters, based on a 2002 memorandum of understanding between the agencies, the FTC has historically focused on hospitals, professional services, medical equipment, and medical devices, whereas the DOJ investigated health insurance cases as well as all criminal antitrust proceedings, such as price-fixing cartels or competitors’ no-poach agreements).

#### Price-fixing generics will be a primary target

Lynch 20, partner in the Global Antitrust & Competition Practice at Latham & Watkins LLP. A former prosecutor and assistant chief in the San Francisco Field Office for the Antitrust Division of the US Department of Justice, Lynch has deep experience in cartel matters, representing companies and individuals defending criminal and civil price-fixing investigations and litigations in the US and abroad. (Niall, “Antitrust Enforcement In Health Care: A Risky And Evolving Landscape,” et al, https://www.lw.com/thoughtLeadership/antitrust-enforcement-health-care)

As recent criminal case filings reflect, the DOJ is now aggressively using its criminal enforcement authority to root out and prosecute so-called ‘hard-core’ antitrust violations in the health care industry. The first wave of the Division’s criminal enforcement efforts in health care markets started with several criminal actions involving price-fixing

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of generic pharmaceuticals. In December 2016, the DOJ charged two pharmaceutical executives with antitrust violations. They entered guilty pleas in January 2017. Then in May 2019, Heritage Pharmaceuticals Inc. entered into a deferred prosecution agreement (DPA) after being charged with fixing prices, rigging bids, and allocating customers for a medicine used to treat diabetes. In a separate civil action, Heritage agreed to pay $7.1m to resolve allegations under the False Claims Act related to the price-fixing conspiracy. Since then, the DOJ has charged several other pharmaceutical companies and four current and former executives as part of the same investigation of the generic drug market.