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#### “The scope” requires removing an existing exemption

ABA 15 – (American Bar Association, Handbook on the Scope of Antitrust Law, ABA Section of Antitrust Law, Chicago: ABA Publishing, 2015, p. 9-12) ISBN: 978-1-63425-054-2

Next, the language of the federal antitrust laws imposes several scope limits. Each of the major antitrust statutes applies only to "trade or commerce,"39 and that phrase has been held to exclude gratuitous or charitable conduct and other conduct not involving the exchange of goods or services for consideration.40 The Sherman Act likewise applies only to "persons," and while that term is construed broadly under the Sherman Act, it has some exceptions, notably for the federal government and its instrumentalities.41 Stricter limits appear in the Clayton, Robinson-Patman, and Federal Trade Commission Acts (FTC Act), and these limits are quite complex. The Robinson-Patman Act and two of the Clayton Act's substantive provisions, the limit on tying and exclusive dealing arrangements in section 3 and the limit on interlockin§ directorates in section 8, apply only to persons "engaged in comrnerce.',4 The Federal Trade Commission Act is subject to a few special peculiar Scope limits of its own Finally, in several distinct ways the language of other federal statutes can limit the scope of the federal antitrust laws. First, approximately three dozen statutes explicitly limit antitrust as it would otherwise apply in particular contexts. Statutory exemptions tend to concern either ( 1) industries that are already regulated by some agency, like insurers excepted by the McCarran-Ferguson Act, by virtue of their being regulated by state insurance commissioners,44 or ocean shipping firms regulated by the Federal Maritime Com.mission,45 or (2) specific kinds of conduct that Congress has chosen from time to time to favor with special freedom to collaborate, like technological research and development, 46 the graduate medical resident program,47 or production joint ventures among competing newspapers.48

#### Those must be expressly Congressional

Krattenmaker 4, US Federal Trade Commissioner, (Antitrust Enforcement in Regulated Sectors Working Group , International Competition Network, https://centrocedec.files.wordpress.com/2015/07/limits-and-constraints-intervening-in-regulated-sectors-2004.pdf)

A. Congress’s will prevails. – The national antitrust laws and the national regulatory statutes are creatures of Congress. They mean whatever Congress wants them to mean and conflicts between them must be ironed out according to the will of Congress, as best as that intent can be ascertained. So, if Congress has spoken clearly to the issue, its resolution governs. For example, in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), the Supreme Court was confronted with an antitrust challenge to a bank merger. The banks argued that a recent statute, the Bank Merger Act of 1960 repealed by implication the application of antitrust law to block bank mergers. The Court found that Congress had not intended such a result. But what if Congress has not clearly spoken? Then other principles come into play. B. Full compliance is the norm. – Generally speaking, one must comply with both the dictates of the antitrust laws and the requirements of the regulatory regime. Thus, for example, mergers between telecommunications firms are subject to review under both federal antitrust law and the provisions of the Federal Communications Act. Telecommunications firms, then, may not merge unless they have cleared both antitrust and Federal Communications Commission review. Permission from one does not entail permission from the other. Denial by one is therefore sufficient, but legally does not constitute denial by the other. Of course, if there is a clear conflict – so that one federal statute commands an act that another one forbids and that conflict cannot be resolved by statutory interpretation – then the later expression of Congressional will governs. (See, for example, the case of Gordon v. New York Stock Exchange, discussed below, in which fear of conflict led the Court to imply an antitrust immunity.)

Exemptions from the antitrust laws are not lightly inferred. – Sometimes, compliance with antitrust may be possible, but difficult or arguably not consistent with the policies underlying the regulatory scheme. Firms may argue that the regulatory scheme should be understood to act as granting an implied exemption from antitrust. Federal courts rarely accept this argument. The general rule is that, to obtain an exemption from antitrust, one must get it directly and explicitly from the legislature, not from courts. The Philadelphia National Bank case, discussed above, is an example of the Court’s general refusal to find antitrust exemptions without express direction from Congress. Similarly, in an important case establishing the per se rule against price fixing, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), the Court gave short shrift to the defendants’ claim that their conduct was “consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act,” which was in place when the conduct began. This was because the conduct, illegal under the antitrust laws, “lack[ed] Congressional sanction.” Even though the Federal Energy Regulatory Commission has extensive powers over interconnection and interconnection prices, the Court refused to imply an antitrust immunity in a challenge to a refusal to interconnect and provide electricity in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). On very rare occasions, the Supreme Court will find an implied immunity. In Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) the plaintiffs challenged agreements by which New York Stock Exchange brokers fixed commission charges. These agreements were allowed under New York Stock Exchange rules, but the U.S. Securities and Exchange Commission had statutory authority to alter the rules and in fact exercised supervisory authority over them. On these facts, the Court found an immunity necessary to prevent conflicts between instructions from the Commission and from antitrust courts to the Exchange.44

**They violate — at most, they are an implied, judicial immunity**

#### Vote NEG---eliminating Congressionally enshrined exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC — CP

#### The United States federal government should

#### establish a health insurance mechanism, financing healthcare through a single public authority.

#### Diplomatically encourage Mexico to open up trade with Europe and Asia, subsidize and screen the hiring of new Mexican police force officers if Mexico limits executive authority.

#### Legalize marijuana and substantial invest in rehabilitation centers in the United States and Mexico.

#### Establish a binding executive policy to not divert national security concerns to cartel related border violence and communicate to allies.

#### Single payer solves every healthcare impact

Julie A. **Trager 17**, worked in the health care field for 15 years and is currently an independent insurance broker, 6-14-2017, "Universal health care turns out to be good for business," San Diego Union Tribune, http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-universal-healthcare-california-20170614-story.html

When cost savings are taken into account, $331 billion becomes the actual price tag for single-payer health care. Once we subtract the $225 billion we already receive in federal and public monies, that brings the need for additional funds to an affordable $106 billion needed to provide quality health care to every California resident that includes medical, dental, vision, mental health and prescription coverage. The $106 billion we do need would be paid for in two ways — through a personal sales tax of 2.3 percent on nonessential goods (which means necessities like housing, utilities and food at home are exempt) and a 2.3 percent gross receipts tax on businesses. Since insurance premiums, co-pays, deductibles and caps would go away, this means families and business would both save money. In full transparency, not everyone would save. Those families in the top tier of income earnings would now pay about 0.06 percent for their health care where now, through tax credits, they pay nothing. While families fare pretty well, businesses would win big. Small businesses with less than 9 employees would be exempt from taxation until they reach $2 million in gross receipts. Even with businesses above $2 million having to pay both a gross receipts and sales tax, the savings would be astonishing. Small businesses currently offering health care to their employees would see a net decline in health care costs of 22 percent, midsized companies 13.5 percent and large companies of up to 500 employees would save 5 percent on health care costs as a share of payroll. There are other ways businesses would see a positive impact. Better, cheaper health care means employees would take less sick days, feel better and be more productive at work. Small businesses that don’t offer health care would no longer lose employees to bigger companies solely because they offer benefits. Businesses that do offer health care could eliminate most of the administrative costs of doing so. Finally, it means business owners would get to focus on their product or service rather than the business of health care.

#### Planks and 3 solves Instability and removes cartel influence

Honan ‘20

(Jessica Honan is a third year Bachelor of Laws/Bachelor of Arts student at the Australian National University. She is the current President of the ANU International Relations Society and former intern with AIIA ACT. “What can be done about Mexico’s Drug War?” July 1, 2020. https://www.internationalaffairs.org.au/australianoutlook/what-can-be-done-about-mexicos-drug-war/)**A**

An effective strategy against cartels therefore must address (1) the high levels of impunity causing corruption in the military, police force, and government, and (2) the high levels of unemployment forcing people into the drug industry. The first step to ending impunity in Mexico would be enforcing a separation of powers. Currently, chief ministers have discretion over indictable crimes. This adds another layer of impunity to an already corrupt system and should be addressed to weaken cartels at a grassroots level. To end impunity, the legislature needs to limit the executive’s control over the judiciary and parliament. Secondly, the Mexican government needs to create more job opportunities, particularly in rural areas where there are few alternatives to cartel employment. Mexico has existing agricultural and manufactured goods sectors, but there is capacity to expand. Mexico trades almost exclusively with the USA, but there is potential to diversify – the EU and British markets should be tapped. Increasing production and exports would create many farming, factory, and finance jobs. The existence of safe and legal alternatives would render cartel employment less appealing, decreasing the membership and therefore the power of the organisations. Finally, to both decrease unemployment and end impunity, more police are needed. Introducing officers in the Mexican Federal Police dedicated to eradicating organised crime would increase the state’s strength and therefore weaken the hegemonic regional power of large cartels. A stronger police force would also help ensure cartel members are indicted for offences. To increase the number of police officers, the government needs to incentivise enlisting. Increasing officers’ wages will make the job more appealing and would also reduce bribes. As the world’s 15th largest economy, Mexico can financially support more public policing jobs with higher wages. Implementing these policies certainly has the potential to create grievances amongst cartel workers – particularly for those prospering from impunity. Some scholars argue the creation of “grievances” in the Mexican drug war would further fuel conflict, as it gives the cartels more reason to retaliate. However, given that the drug war can be defined as a conflict stemming from “greed” – that is, the cartels have not been fighting for ideological reasons – implementing these strategies is unlikely to incite further violence. Whilst the drug cartels are unlikely to respond positively to the above recommendations, peaceful strategies are a productive step in reducing extreme violence in the drug war.

### 1NC — DA

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

Abbott 21, JD, MA, Senior Research Fellow at the Mercatus Center focusing on antitrust, formerly served as the Federal Trade Commission’s General Counsel. (Alden, *et al*, 3-10-2021, “Aligning Intellectual Property, Antitrust, and National Security Policy”, *Regulatory Transparency Project of the Federalist Society*, pg. 2-5, <https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-SecurityPolicy.pdf>)

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

#### The plan’s precedent binds future courts and spills over

Huddleston 20, JD, Former Director of Technology and Innovation Policy at the American Action Forum. (Jennifer, 12-18-2020, "Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation", *AAF*, <https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>)

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would not remedy the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

#### Revisionist tech leadership causes nuclear war.

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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

#### 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.

#### Topical affs must 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 in a specific segment of the private sector.

#### 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

#### USICA will pass, it’s TOA, new priorities trade off. It key to tech leadership

Mattingly 1-28-2021, analyst @ CNN (Phil, “Biden builds toward a much-needed bipartisan Capitol Hill victory -- on China,” *CNN News*, https://www.cnn.com/2022/01/28/politics/china-us-semiconductor-chips-joe-biden/index.html)

After months of frustration, White House officials are suddenly looking at a rare opportunity on Capitol Hill -- the chance to pass something important with the support of both Democrats and Republicans. A sweeping, roughly $250 billion proposal to bolster US competitiveness with China has moved to the top of their legislative agenda, carrying policy and political benefits that tie directly to some of the most pressing issues President Joe Biden's administration faces. "We have momentum now, there's no doubt about it -- you can feel it," Commerce Secretary Gina Raimondo, one of the administration's point people on the bill, told CNN in an interview. "It's a sea change in momentum." The White House is leading the effort, with the support of Senate Majority Leader Chuck Schumer and Speaker Nancy Pelosi, and has been privately pressing Democrats to elevate the proposal as a priority, multiple people familiar with the effort said. White House officials view the proposal as an opportunity for a substantive bipartisan legislative victory that would address a series of clear domestic issues, ranging from bolstering manufacturing to easing pervasive price increases, ahead of a critical election year. It also serves as a critical element of Biden's efforts to directly respond to a rising China at a time when the relationship between the two countries has grown increasingly tense amid a series of actions, particularly related to Taiwan, that are viewed as intentionally aggressive by the administration. The bill comes at a time when Biden and his White House are looking for an opportunity to turn the page on a disappointing end to his first year in office. The potential bipartisan legislative win -- when combined with the promise to pick the nation's first Black female Supreme Court Justice to replace the retiring Stephen Breyer, strong economic growth statistics released Thursday and decreasing Covid-19 cases -- could signal a turnaround the President desperately needs ahead of November's midterm elections. On the policy side of things, it addresses a series of urgent issues, most notably the global shortage in semi-conductor chips, that Biden has consistently highlighted throughout his first year in office. On the political front, it neatly aligns with what Biden framed as the core of his economic policy -- an emphasis on domestic manufacturing and a clear and unmitigated effort to directly bolster US economic and technological advances to counter a rising China. The moment arrives as Biden's highest-profile legislative goals have run into a brick wall. Biden's cornerstone $1.75 trillion economic and climate package has been frozen in place due to the opposition of West Virginia Democratic Sen. Joe Manchin, with the centrist Democrat collapsing the arduous, months-long process to pass the bill in December. A few weeks later, Senate Republicans unanimously opposed Biden's voting reform push -- and Manchin joined with Sen. Kyrsten Sinema, an Arizona Democrat, to reject the Biden-backed effort to change the Senate filibuster rule to pass the measure with a simple majority. The twin defeats laid bare the reality of Biden's precarious political position, wrestling with the slimmest of congressional majorities and searching for a path forward at the very moment he entered a midterm election year with his lowest poll numbers of his time in office. The result drew no shortage of concern and complaints from Democrats both inside and outside of Washington. White House officials stress that they plan to take another run at a scaled back -- if still sweeping -- Build Back Better package. There's also cautious optimism that the bipartisan group of senators working to reform the Electoral Count Act could lead to an outcome Biden would support, even as officials have kept their distance from the effort and take pains to note it's not a substitute for their voting reform efforts. Yet neither of those is viewed inside the White House as imminent, with both likely weeks away from taking legislative center stage. A February 18 government funding deadline remains the most pressing issue on the calendar, but talks on a broader funding agreement, while progressing, have been plodding, indicating another short-term extension may prove necessary. 'The sweetest of political sweet spots' Therein lies the long-awaited opening for action. As Democrats sought to retrench amid the setbacks, they didn't have to look far for a proposal to move to the forefront -- one that had already passed the Senate with significant bipartisan support and that White House officials see as carrying significant policy and political benefits. At the core of the bill is $52 billion to turbocharge US semiconductor development and manufacturing, an area of palpable -- and growing -- economic and national security concern for administration officials. The effort would mark dramatic expansion of federal investment in manufacturing, new technologies and research and development, marking a dive into industrial policy designed to spur innovation and private sector follow-on that could dramatically reshape the US posture in what has become a strident technological rivalry with China. "Let's do it for the sake of our economic competitiveness and our national security," Biden said as he pressed lawmakers to act on the proposal last week at the White House. "Let's do it for the cities and towns all across America working to get their piece of the global economic package." "We need not have confrontation, but we have a stiff economic and technological competition," Biden added, speaking of China, which has served as a -- if not the -- animating element of Biden's foreign and domestic policy efforts. The pervasive shortage of chips, which are critical components in everything from cars and washing machines to phones and electrical grids, has been perhaps the most acutely painful of a myriad of pandemic-driven supply chain issues that have contributed to inflation that sits at a year-over-year 39-year high. Some manufacturers that rely on semiconductors are down to less than five days' worth of inventory, according to a report released Tuesday by the Commerce Department. "It's China, it's national security, it's inflation, it's manufacturing, it's bipartisan," one Democratic lawmaker who has pushed to move the bill for several months told CNN. "Beyond the policy necessity, it's the sweetest of political sweet spots." That a single bill could directly address some of the most significant issues facing the country is not lost on a White House -- or frontline House Democrats -- looking for a win. "There's not a member of Congress who is going into their district and not hearing about inflation, supply chain, chips," Raimondo said. A 'Sputnik moment' Yet for all of its political salience, supporters view the proposal as broadly transformational. Biden, when talking about the effort, has framed it through his oft-mentioned lens of the world facing an existential moment where democracies must confront the challenge of rising autocratic regimes. Sen. Todd Young, the Indiana Republican who has spearheaded the effort and successfully shepherded the measure through the Senate along with Schumer, the lead Democratic author, has compared the measure to a "Sputnik moment." In the place of the Soviet Union's technological advancements of last century, Young has pointed to China's vast investment in research and technology driving the USpublic and private sector response. White House officials view the measure as a vehicle not just for economic and technological advancement, but societal as well. One White House official outlined how design of the effort can re-attach the now disparate elements of local communities -- where things like regional technology hubs can serve as drivers for university researchers and corporations to align with workers and labor unions and philanthropic and community organizations. Taken together, they are lofty -- and, to a degree, hard to quantify -- ambitions for a single piece of legislation. But they also underscore sheer scale of what would mark the largest industrial policy effort in recent history. Despite suggestions by some lawmakers that the semiconductor piece be split off and moved separately, White House officials and key sponsors repeatedly rejected the idea, knowing separating the most urgent component would likely doom its other parts. The package, for it to have its full effect, needed to stay intact, they said. Yet for months the critical, if underappreciated, element of Biden's legislative checklist sat in limbo, stuck behind high-profile Democratic priorities, and weighed down by a handful of substantive policy disputes. "The biggest stumbling block to getting this done has just been distraction," Young said in an interview with Punchbowl News, citing the White House and congressional Democratic focus that, for months on end, centered on finding a path for Biden's Build Back Better Act. White House officials note Biden's focus on the core elements has been consistent throughout, with a bipartisan meeting to highlight the issue in February, followed by an executive order that laid the groundwork for the administration's focus on supply chain resilience -- with a clear focus on semiconductor chips. The Senate process was largely driven by lawmakers, with the White House providing technical advice and consultation, and those conversations have continued in the months that followed. Still, officials acknowledge that an almost all-consuming Democratic focus other agenda items played a role in a timeline that has remained ambiguous for months. A clear shift emerges But over the course of the last week, a series of intentional moves have underscored a clear shift. Biden highlighted the need for the legislation at a White House event, Pelosi listed the proposal in a memo to House Democrats as a top priority for House consideration and the Commerce Department released a report highlighting the severity of the current semiconductor shortage -- data Raimondo described as "truly alarming." In the most critical step, House Democrats released their long-awaited 3,000-page version of the bill. "We are hopeful about that process moving forward quickly, and the President would certainly like to sign it as soon as possible," White House press secretary Jen Psaki told reporters Wednesday. There remain significant hurdles, even as the White House throws its weight behind quick action. House Republicans have already made clear they largely plan to oppose the House Democratic proposal after their top committee members felt cut out as Democratic leaders moved to release the bill text. Administration officials, including Raimondo, have been pressing to line up the votes the last several days. The House bill diverges in several critical areas from its Senate counterpart, laying the groundwork for a complex conference process after House passage. Resolving those differences, particularly on differing trade provisions, between powerful House Democratic chairs and Senate authors who can point to a significant bipartisan vote in their favor is certain to create complications. The window for action, even though it's clearly open at the moment, may be fleeting as other priorities bubble in the background -- something underscored by the surprise addition of a looming Supreme Court confirmation battle to the Senate agenda Still, Biden's advisers have strategically mapped out ways to keep the issue on the front burner. Biden will highlight the bill, and the need to get it to his desk, once again when he travels to Pittsburgh on Friday. There will be an intensive focus on its necessity, not just for the near term, but also in laying the groundwork for a US. competitive advantage for years in the future. A sustained public and private focus is planned in the weeks ahead, officials said, as House Democrats move on their version of the legislation and then both chambers work to reconcile differences to get a final version to Biden's desk. The economic and national security risks, after all, aren't going away, even if it's taken longer than some lawmakers would have liked to finally lay out the path to the finish line. "Our challenge is to show leadership and not get tied up in any one particular red-line and miss the forest for the trees, which is: We have a semiconductor crisis," Raimondo said. "It's a national security crisis. It's an economic security crisis. And so, we just have to try to keep folks really focused on that."

#### Antitrust reform trades off with other legislative priorities

Carstensen 21, JD and MA @ Yale, Former Chair of U-W Law School, Senior Fellow of the American Antitrust Institute (Peter, “THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST,” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>)

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities. 15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate! 16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### USICA is key to disruptive innovations that solve climate change

Walker 21 Senior Vice President for Global Affairs and Chief Legal Officer at Google, Seizing the moment - A framework for American innovation, <https://blog.google/perspectives/kent-walker/seizing-moment-framework-american-innovation/>

Decades of government investment in R&D led to scientific breakthroughs that gave us the tools we use every day, and public-private partnerships have sparked innovations from the microchip to the internet. Government R&D investment has led to economic growth, jobs and new startups. As just one example, some of Google’s earliest work was made possible, in part, by the Digital Library Initiative, funded by the National Science Foundation. But if you fast forward to today, the U.S. government investment in tech has moved to the slow lane. Government-funded research in the U.S. has fallen by 60% as a percentage of GDP — from 1.9% of GDP in 1964 to just 0.7% today. Many countries around the world are investing significantly in research and development. For example, China has said that it will be increasing government R&D funding by 7% annually and recently announced a five-year plan to invest an additional $1.4 trillion in developing next-generation technologies. As a nation we now have a historic opportunity to put aside partisanship and come together on an issue that will determine our future competitiveness. The United States must seize the moment to cultivate science and technology by setting out a national innovation strategy, and we commit to doing our part. Senators Schumer and Young have introduced the bipartisan Endless Frontier Act — an important step in putting to work America’s strengths in science and technology to tackle some of the biggest issues of our time, from climate change to global health. Legislative proposals to increase funding for the National Science Foundation will accelerate innovation in the technologies of the future — including quantum computing, AI, biotech and genomics, advanced wireless networks, and robotics — and strengthen the U.S. innovation ecosystem through regional hubs spread throughout the country.

#### Climate change causes extinction

Alexander-Sears 21, PhD Candidate in Political Science at The University of Toronto, former Professor of International Relations at the Universidad de Las Américas (Nathan, “Great Powers, Polarity, and Existential Threats to Humanity: An Analysis of the Distribution of the Forces of Total Destruction in International Security,” Conference Paper: *International Studies Association, 2021 Annual Conference*, Research Gate)

Humanity faces existential risks from the large-scale destruction of Earth’s natural environment making the planet less hospitable for humankind (Wallace-Wells 2019). The decline of some of Earth’s natural systems may already exceed the “planetary boundaries” that represent a “safe operating space for humanity” (Rockstrom et al. 2009). Humanity has become one of the driving forces behind Earth’s climate system (Crutzen 2002). The major anthropogenic drivers of climate change are the burning of fossil fuels (e.g., coal, oil, and gas), combined with the degradation of Earth’s natural systems for absorbing carbon dioxide, such as deforestation for agriculture (e.g., livestock and monocultures) and resource extraction (e.g., mining and oil), and the warming of the oceans (Kump et al. 2003). While humanity has influenced Earth’s climate since at least the Industrial Revolution, the dramatic increase in greenhouse gas emissions since the mid-twentieth century—the “Great Acceleration” (Steffen et al. 2007; 2015; McNeill & Engelke 2016)— is responsible for contemporary climate change, which has reached approximately 1°C above preindustrial levels (IPCC 2018). Climate change could become an existential threat to humanity if the planet’s climate reaches a “Hothouse Earth” state (Ripple et al. 2020). What are the dangers? There are two mechanisms of climate change that threaten humankind. The direct threat is extreme heat. While human societies possesses some capacity for adaptation and resilience to climate change, the physiological response of humans to heat stress imposes physical limits—with a hard limit at roughly 35°C wet-bulb temperature (Sherwood et al. 2010). A rise in global average temperatures by 3–4°C would increase the risk of heat stress, while 7°C could render some regions uninhabitable, and 11–12°C would leave much of the planet too hot for human habitation (Sherwood et al. 2010). The indirect effects of climate change could include, inter alia, rising sea levels affecting coastal regions (e.g., Miami and Shanghai), or even swallowing entire countries (e.g., Bangladesh and the Maldives); extreme and unpredictable weather and natural disasters (e.g., hurricanes and forest fires); environmental pressures on water and food scarcity (e.g., droughts from less-dispersed rainfall, and lower wheat-yields at higher temperatures); the possible inception of new bacteria and viruses; and, of course, large-scale human migration (World Bank 2012; Wallace-Well 2019; Richards, Lupton & Allywood 2001). While it is difficult to determine the existential implications of extreme environmental conditions, there are historic precedents for the collapse of human societies under environmental pressures (Diamond 2005). Earth’s “big five” mass extinction events have been linked to dramatic shifts in Earth’s climate (Ward 2008; Payne & Clapham 2012; Kolbert 2014; Brannen 2017), and a Hothouse Earth climate would represent terra incognita for humanity. Thus, the assumption here is that a Hothouse Earth climate could pose an existential threat to the habitability of the planet for humanity (Steffen et al. 2018., 5). At what point could climate change cross the threshold of an existential threat to humankind? The complexity of Earth’s natural systems makes it extremely difficult to give a precise figure (Rockstrom et al. 2009; ). However, much of the concern about climate change is over the danger of crossing “tipping points,” whereby positive feedback loops in Earth’s climate system could lead to potentially irreversible and self-reinforcing “runaway” climate change. For example, the melting of Arctic “permafrost” could produce additional warming, as glacial retreat reduces the refractory effect of the ice and releases huge quantities of methane currently trapped beneath it. A recent study suggests that a “planetary threshold” could exist at global average temperature of 2°C above preindustrial levels (Steffen et al. 2018; also IPCC 2018). Therefore, the analysis here takes the 2°C rise in global average temperatures as representing the lower-boundary of an existential threat to humanity, with higher temperatures increasing the risk of runaway climate change leading to a Hothouse Earth. The Paris Agreement on Climate Change set the goal of limiting the increase in global average temperatures to “well below” 2°C and to pursue efforts to limit the increase to 1.5°C. If the Paris Agreement goals are met, then nations would likely keep climate change below the threshold of an existential threat to humanity. According to Climate Action Tracker (2020), however, current policies of states are expected to produce global average temperatures of 2.9°C above preindustrial levels by 2100 (range between +2.1 and +3.9°C), while if states succeed in meeting their pledges and targets, global average temperatures are still projected to increase by 2.6°C (range between +2.1 and +3.3°C). Thus, while the Paris Agreements sets a goal that would reduce the exis 6 - tential risk of climate change, the actual policies of states could easily cross the threshold that would constitute an existential threat to humanity (CAT 2020)

## 1NC — Access

### 1NC — SQ

#### Their own author proves the status quo is solving the impact now which makes our turns unique

#### Actavis already cracks down on pay for delay, spurring innovation – their ev, we read green

1AC Li et al. 21 (Xuelin Li is an Assistant Professor of Finance at the University of South Carolina's Darla Moore School of Business. His research focuses on innovation, venture capital, and information economics., Andrew Wen-Chuan Lo is the Charles E. and Susan T. Harris Professor of Finance at the MIT Sloan School of Management. Lo is the author of many academic articles in finance and financial economics. Richard T. Thakor is an Assistant Professor of Finance at University of Minnesota, Carlson School of Management. He is also a Research Affiliate at the MIT Laboratory for Financial Engineering (LFE). His research interests are in empirical and theoretical corporate finance, in the areas of managerial decision-making, R&D investments, healthcare finance, and the effects of financial frictions on firm project investments., June 2021, accessed on 7-16-2021, National Bureau of Economic Research, "Paying off the Competition: Market Power and Innovation Incentives", <https://www.nber.org/papers/w28964>)

\*“[Actavis]” added for clarity

How does a firm’s market power in existing products affect its incentives to innovate? We explore this fundamental question using granular project-level and firm-level data from the pharmaceutical industry, focusing on a particular mechanism through which incumbent firms maintain their market power: “reverse payment” or “pay-for-delay” agreements to delay the market entry of competitors. We first show that when firms are unfettered in their use of “pay-for-delay” agreements, they reduce their innovation activities in response to the potential entry of direct competitors. We then examine a legal ruling that subjected these agreements to antitrust litigation, thereby reducing the incentive to enter them. After the ruling [Actavis], incumbent firms increased their net innovation activities in response to competitive entry. These effects center on firms with products that are more directly affected by competition. However, at the product therapeutic area level, we find a reduction in innovation by new entrants after the ruling in response to increased competition. Overall, these results are consistent with firms having reduced incentives to innovate when they are able to maintain their market power, highlighting a specific channel through which this occurs.

1 Introduction

The effect of competition among firms on innovation is a critical issue for policymakers, given the importance of innovation as a driver of economic growth. However, the relationship between increased competition and innovation is not clear-cut in the literature (e.g. Aghion, Bloom, Blundell, Griffith, and Howitt (2005)). On the one hand, measures such as greater patent protection to reward firms for innovation by limiting competition may encourage further innovation in order to reap monopoly profits. On the other hand, an incumbent firm with an existing product under such protection may feel no need to innovate further if it can already rely on a guaranteed revenue stream from the product. Understanding the interaction between these forces is crucial for ascertaining the effect of policies aimed at increasing innovation by changing the degree of competition in a market, such as antitrust enforcement and patent policy.

In this paper, we explore this issue by providing evidence from a legal mechanism through which innovative firms may maintain their market power, and its ramifications for innovation. We do so in the setting of a particular sector known for developing innovative products through its research and development (R&D) activities—the pharmaceutical industry. In this industry, firms that are first to pass clinical trials and obtain Food and Drug Administration (FDA) approval for their drugs enjoy marketing exclusivity for a number of years, during which no other firm can directly compete against that drug. However, after marketing exclusivity expires, other firms may enter the market by launching generic versions of the specific drug through what is known as a Paragraph IV filing. In order to continue their monopoly over marketed drugs, incumbent pharmaceutical firms have regularly entered into “pay-for-delay“ agreements—also known as “reverse payments”—settlements with entering generic 2 manufacturers, whereby the generic firm agrees to delay product launch in exchange for a cash amount. These agreements effectively provide an endogenous tool through which incumbent firms can reduce the competition that they face.

Using detailed data on public pharmaceutical firms and their drug development portfolios from 2005 to 2016, we construct a firm-specific measure of the amount of competition that each incumbent faces through Paragraph IV generic drug entry filings. We show that unconditionally over our sample period, incumbent firms responded to potential entry from direct competitors by reducing their innovation activity and initiating a smaller number of new drug trials.1 The results suggest that firms appear to reduce their levels of innovation when faced with increased competition. We then explore the effect of a Supreme Court ruling in 2013, FTC v. Actavis, which increased the legal risk of engaging in pay-for-delay agreements. The ruling stated that under antitrust law, the Federal Trade Commission (FTC) could target such agreements, and granted the FTC broader bargaining power in these types of antitrust settlements.

Consistent with the increased legal risk, we document a sharp decline in the number of pay-for-delay agreements after the ruling, a stark reversal of the previous trend. Furthermore, we show that the ruling did not appear to change the incentives of generic entrants, which filed at the same rate both before and after the ruling.2 We therefore interpret the ruling as an unexpected regulatory change that reduced the ability of incumbent firms to enter into agreements to impede new competition.

Our initial result, that incumbent firms reduce their levels of innovation when faced

with increased competition, reverses itself following this ruling. Put differently, pharma firms after the ruling increase their number of new drug trial initiations and decrease their number of suspensions of existing projects in response to generic entry filings. This suggests that the initial negative relationship between generic competition and innovation is driven primarily by the ability of incumbent firms to protect their monopoly power through pay-for-delay agreements. Such agreements allow firms to resolve the uncertainty of product competition and reduce the need to maintain their competitive edge with novel drugs. However, after this channel becomes legally risky, firms need to rely on innovation activities to escape neck-and-neck competition (e.g. Aghion et al. (2005)).

While the above results are suggestive, they are subject to concerns about endogeneity and reverse causality, since generic entry and signing pay-for-delay agreements are contemporaneously endogenous decisions made by both incumbents and entrants. In order to address these concerns, we use the FTC v. Actavis ruling as a natural experiment, and conduct a differences-in-differences (diff-in-diff) analysis by exploiting firm heterogeneity in their exposure to the ruling. Specifically, incumbent firms with drugs slated to lose marketing exclusivity in the years immediately following the ruling had increased exposure to generic entry, and thus, to the court ruling. Furthermore, since the expiration date of marketing exclusivity for these drugs had been predetermined at the end of the drug approval process, which spans a number of years (e.g. DiMasi and Grabowski (2007)), the institutional framework alleviates concerns of self-selection into the treatment group. This diff-in-diff analysis shows that exposed firms had a relative increase in innovation through a higher number of new trial initiations, a lower number of suspensions. We additionally provide evidence that the economic value of new 4 innovations increases by relatively more for exposed firms, consistent with an increase in effort by developing firms that resulted in higher-quality innovation.

We validate these results through a number of robustness checks. First, we replicate the same exercise at the firm-therapeutic-category level and document that these effects also hold both across different categories within a single firm as well as across different firms within a single category.3 Second, our identification strategy requires that the loss of market exclusivity significantly increases innovation activities only after FTC v. Actavis. To show this, we perform a placebo test by counterfactually assuming the ruling occurred in 2009, and using firms with drug exclusivities expiring between 2009 and 2012 as the pseudo-treatment group. We obtain no significant results via this test for our outcome variables.

We also document a number of other results that are consistent with the diminished ability of firms to engage in pay-for-delay driving these effects. First, using data on drug sales, we find that these effects are centered on two groups: firms that have drugs with high sales whose exclusivity was set to expire after the Supreme Court ruling, and firms with a large number of drugs whose exclusivities were set to expire after the ruling. Both of these effects are consistent with the hypothesized responses of firms that are the most affected by the law. Second, we find that the affected firms are more likely to acquire projects from other firms, which is consistent with firms choosing to in-source existing projects from other firms as an alternative to in-house innovation. Third, we find that the affected firms increased their R&D expenditures and decreased their cash holdings following the ruling, which is consistent with firms spending to expand their net innovation activities. Finally, we use hand-collected data from 10-K filings and searches of news articles to find mentions of litigation faced by incumbent companies. We show that patent infringement settlements went down after the Supreme Court ruling. In contrast, the number of litigated court cases with rulings and the number of rulings where generic drugs were allowed to enter (i.e. cases that are not settled) went up. These effects are consistent with the hypothesized effects of the original FTC v. Actavis ruling.

#### The Actavis rule of reason test is solves for any harmful settlements and a ban gets no additional solvency

Orszag 13, SENIOR MANAGING DIRECTOR, COMPASS LEXECON, LLC, (Jonathan, HEARING before the SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS of the COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED THIRTEENTH CONGRESS FIRST SESSION, <https://www.govinfo.gov/content/pkg/CHRG-113shrg87818/html/CHRG-113shrg87818.htm>)

In conclusion, the Rule of Reason test adopted by the court in Actavis is surely the best available posture for guarding the public interest in settlements of pharmaceutical patent disputes involving reverse payments. Finding methods for answering the relevant questions raised under the Rule of Reason test is critical and courts will be well advised to take a careful and rigorous approach, especially in early cases where the precedents are likely to be set. Congressional action at this point to upset the process would likely be counterproductive and possibly have very damaging unintended consequences for innovation and competition in the pharmaceutical sector. A ban on settlements would not likely generate the consumer savings that the FTC alleges. If the FTC does its job under the Rule of Reason test, anti- consumer deals will be blocked in the courts and a ban would produce no incremental benefits for consumers.

#### Under Actavis the courts are using rule of reason to block settlements that block generics

Blumenfeld et al 21, Co-chair, Antitrust practice, Lowenstein Sandler. (Jeffrey, with Leiv Blad Jr Co-chair, Antitrust practice, Lowenstein Sandler, and Jonathan Lewis Partner, Lowenstein Sandler, Status of Reverse Payment Cases against Pharmaceutical Companies, https://globalcompetitionreview.com/review/us-courts-annual-review/2021/article/status-of-reverse-payment-cases-against-pharmaceutical-companies)

It is within this regulatory framework that patent litigants often settle in lieu of pursuing a final court determination in favor of either the brand or the generic manufacturer. Although settlement normally is a favored form of dispute resolution – providing litigants with outcome certainty and legal cost savings, and lessening the burden on the judiciary – a particular form of Hatch-Waxman settlement has drawn significant antitrust scrutiny in the past two decades. In some of these settlements, the agreements allegedly include a payment from the patent holder to the Paragraph IV applicant in return for an agreement by the Paragraph IV applicant to delay its entry into the market until a negotiated date up to the date of expiry of the patent. Settlement agreements allegedly containing such terms have been challenged by the Federal Trade Commission (FTC)[7] and private and class litigants as anticompetitive under certain circumstances, based on the theory that the patent holder is paying the generic firm to stay out of the market longer than the patents at issue would otherwise allow, and, thus, the patent holder may maintain its price above a competitive level.[8] On the other hand, patent holders are entitled to settle litigation involving their patents, and many settlements permit generic firms to enter the market earlier than expiry of the claimed patents.[9] Challenges to these patent litigation settlements by the FTC and private and class litigants are brought under sections 1 and 2 of the Sherman Act,[10] section 5 of the FTC Act,[11] and various state antitrust laws. In October 2019, California became the first state to enact a law specifically aimed at reverse payment settlements.[12] Generally, Sherman Act section 1 claims are based on allegations that brand-drug and generic-drug companies are competitors or potential competitors, and any settlement in which the generic company receives money in exchange for staying out of the market is an agreement to allocate the market. Section 2 claims typically are based on the theory that the brand-drug company, by inducing generic firms through payment to stay out of the market, is illegally extending its monopoly power in the relevant drug market. Agencies’ and courts’ original approach to reverse payments Early challenges of purported reverse payment settlements were met with inconsistent treatment by the federal courts.[13] Although some courts held that such agreements were presumptively legal, immune from antitrust scrutiny absent generic exclusion beyond the scope of the asserted patents,[14] other courts viewed the agreements as presumptively illegal or, at least, sufficiently anticompetitive as to justify a ‘quick look’ approach.[15] In 2013, the US Supreme Court resolved this circuit split in FTC v Actavis, Inc,[16] by holding that neither presumption applied. Instead, the Court ruled that reverse payment settlements are subject to the rule of reason. The facts underlying the Court’s decision in Actavis involved settlement agreements between the brand-drug company Solvay Pharmaceuticals and Paragraph IV applicants Actavis, Paddock, and Par, in resolution of Solvay’s infringement action against the generic-drug firms over Solvay’s testosterone-replacement drug AndroGel.[17] The FTC challenged the agreements under section 5 of the FTC Act,[18] asserting that the companies unlawfully agreed ‘to share in Solvay’s monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years.’[19] The US District Court for the Northern District of Georgia rejected the FTC’s claims,[20] and, on appeal, the US Court of Appeals for the Eleventh Circuit affirmed, ruling that ‘absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.’[21] The Supreme Court reversed the judgment of the Eleventh Circuit and remanded.[22] Although the Supreme Court accepted that the anticompetitive effects of the settlement agreements fell within the scope of the claimed patent, it rejected the argument that this fact alone immunized the agreements from antitrust scrutiny.[23] The Court reasoned that although the holder of a valid patent may be exempt from antitrust liability based on a legitimate patent right to exclude and collect monopoly profits, the issue in reverse payment cases is whether the patent holder has such a right.[24] Accordingly, if a generic-drug firm is successful in demonstrating that a claimed patent is invalid or not infringed, the patent holder would not enjoy the right to exclude the proposed generic product from the marketplace. The Court concluded, therefore, that the agreements at issue had the potential to have ‘significant adverse effects on competition,’ reasoning that ‘it would be incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well.’[25] The Court, however, also rejected the proposition that the settlement agreements’ potential for anticompetitive effects justified per se or quick-look treatment in light of the strong judicial policy favoring the settlement of disputes and ‘because the likelihood of reverse payment bringing about anticompetitive effects depends on its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.’[26] Accordingly, the Court ruled that reverse payment settlements are to be evaluated case by case under the rule of reason.[27] In doing so, the Court rejected the argument that such scrutiny would lead to ‘time-consuming, complex, and expensive litigation,’ as procompetitive justifications could be examined as part of the rule of reason assessment and evaluation of the underlying patent claim normally would not necessitate that the parties ‘litigate patent validity to answer the antitrust question.’[28] Instead, ‘the size of the reverse payment [could] serve as a proxy for the patent’s weakness without forcing a court to conduct a “detailed exploration of the validity of the patent itself.” ’[29] The Court also held that the size of the reverse payment could serve as a proxy for market power if larger than the patent holder’s anticipated litigation costs.[30] Applying the rule of reason to reverse payment cases, lower courts have looked to five ‘considerations’ outlined by the Actavis court: whether there was a ‘large and unjustified’ reverse payment so as to create a ‘potential for genuine adverse effects on competition’; whether the one who made such a payment is able to justify it, for example, as ‘avoid[ing] litigation costs or fair value services’; whether the reverse payment ‘threat[ens] to work unjustified anticompetitive harm’; whether an antitrust action was administratively feasible; and the parties’ reasons for ‘prefer[ring] settlements that include reverse payments.’ [31] Following Actavis, lower courts were left to grapple with whether and how to apply these considerations to challenged settlement agreements. One of the primary issues lower courts confronted following the Actavis decision was how to define ‘payment’ as contemplated by the Supreme Court, or more specifically, whether and what type of alleged non-monetary forms of consideration fall within the scope of the term, and whether such a payment was, in fact, ‘large and unjustified’ so as to create the potential for anticompetitive effects (or demonstrate market power). Although the district courts had diverged on whether ‘payments’ included non-cash consideration,[32] circuit courts that have considered the issue have ruled that a payment under Actavis is not just limited to cash, but, rather, includes other forms of consideration as well.[33] The US Court of Appeals for the Third Circuit, in King Drug Co v SmithKline Beecham Corp,[34] held that an agreement by the patent holder not to launch an authorized generic (AG) drug during a first filer’s 180-day exclusivity period,[35] known as a ‘no-AG’ clause,[36] was a ‘payment’ within the scope of Actavis.[37] The US Court of Appeals for the First Circuit and other federal courts have reached the same conclusion.[38] In In re Niaspan Antitrust Litigation,[39] the district court denied a motion to dismiss an action based on payments in the form of agreements on other drugs. The district court in In re Solodyn Antitrust Litigation[40] similarly held that a settlement and license agreement with upfront and milestone payments may constitute a payment. In contrast, the district court in In re Actos End Payor Antitrust Litigation[41] dismissed the plaintiffs’ antitrust claims on the basis that the plaintiffs failed to establish that the acceleration clauses in the brand-drug company’s settlements with the generic-drug companies constituted payments under Actavis. Courts have also accepted agreements separate from, but contemporaneous to, the settlement as ‘payments.’[42]

#### A per se ban on settlements is opposed by courts, the DOJ and the FTC because it is counterproductive

Blumenfeld et al 21, Co-chair, Antitrust practice, Lowenstein Sandler. (Jeffrey, with Leiv Blad Jr Co-chair, Antitrust practice, Lowenstein Sandler, and Jonathan Lewis Partner, Lowenstein Sandler, Status of Reverse Payment Cases against Pharmaceutical Companies, https://globalcompetitionreview.com/review/us-courts-annual-review/2021/article/status-of-reverse-payment-cases-against-pharmaceutical-companies)

The Supreme Court adopts a rather conservative approach Visa V Percy rules, which also extends to the application of the per se illegality rule in antitrust law cases. The per se illegality rule should not be adopted for administrative convenience, since it can be counterproductive and increase the total cost of the antitrust system, by prohibiting pro-competitive conduct that should be encouraged. Even though per se rules may decrease administrative costs, they met in parallel increase litigation costs by indirectly encouraging frivolous suits against legitimate practices. Despite an initial clash between the positions of the DOJ and the FTC until 2008, neither of them supported the application of the per se illegality rule to Hatch-Waxman patent settlements. The DOJ advocated in favor of the application of the rule of Reason, recognizing the efficiency enhancing objectives of settlements in conserving judicial resources and allowing parties to save litigation costs. Further, the likelihood of anti-competitive effects of patent settlements was not so great so as to render unnecessary a further examination of the challenge to conduct. The FTC did not support the application of the per se illegality for the totality of reverse payments either. Instead, the agency was in favor of a more extensive analysis of any pro-competitive effects of such a settlement, without however foreclosing the possibility of a more truncated approach and specific cases. The initial openness of the empty seat or the purse a illegality approach was criticized by courts and Academia and gradually evolved into a presumptive illegality approach that the agency supported in FTC versus Actavis. The following sections present the debate on the possible adverse effects that the application of a per se

#### Their own ev says the Creates Act Solved the internal links to their advantages — Green

1AC Collette 20 (Rhiannon Meyers Collette is a Communications Manager at Arnold Ventures, 1-9-2020, accessed on 7-28-2021, Arnold Foundation, "Study: Anticompetitive Tactics by Drug Maker Hindered Access to Lifesaving Medication for Opioid Use Disorder", <https://www.arnoldventures.org/stories/new-study-anticompetitive-tactics-by-opioid-addiction-treatment-manufacturer-hindered-access-to-lifesaving-medication/>)

A major drug maker engaged in anticompetitive behaviors that limited patients' access to the leading treatment for opioid use disorder, blocking generic competitors in order to maintain high prices and generate substantial profit, according to a perspective published Wednesday in the New England Journal of Medicine.

The revelation comes as the nation is struggling to stem the rate of opioid overdoses and save lives amid a ballooning public health crisis. By keeping the price of Suboxone® — a leading buprenorphine treatment used to manage opioid use disorder — artificially high due to a lack of competition, drug manufacturer Reckitt Benckiser (now Indivior) profited substantially and cost federal programs hundreds of millions of dollars, according to the researchers’ analyses.

“In the grips of the opioid crisis, which claims the lives of tens of thousands of people every year in overdoses — and affects millions more living with the addiction — a highly effective medication to treat opioid addiction has been out of reach for many due in part to its high price,” said Richard Frank, Professor of Health Economics at Harvard Medical School and a study author. “Our findings show that Suboxone’s manufacturer was able to maintain the drug’s expensive price tag by engaging in a number of different anticompetitive practices to maintain product exclusivity. These practices are widely used across the pharmaceutical industry and require regulatory reform.”

Frank co-authored the perspective, which was funded by Arnold Ventures, with Rebecca L. Haffajee, Policy Researcher at the RAND Corporation and Adjunct Assistant Professor at the University of Michigan.

In 2017, 47,600 Americans died from an opioid-related overdose. Medications used to treat opioid use disorder have been shown to significantly reduce the risk of overdose, yet only a small fraction of people receive evidence-based treatment. The high price tag limits the volume of drugs that can be purchased, especially for public payers like Medicaid, a leading purchaser of Suboxone.

Even after the patent on the drug’s key ingredient expired, the manufacturer exploited regulatory procedures and other patent policies to deter generic competition and maintain high prices, including so-called “product hops” — launching a reformulation of a brand name drug with additional or new benefits to insulate the brand from generic competition — filing questionable citizen petitions, abusing the Risk Evaluation and Mitigation System (REMs), and generating patent thickets.

The delays to generic entry resulted in at least $1 billion in extra profits to the manufacturer, the study found.

“These tactics to extend market exclusivity are alarming and are not limited to this one company, which underscores the necessity for reform,” said Haffajee. “Our findings show that when a single regulatory loophole is closed, pharmaceutical companies find other avenues to exploit, which is why comprehensive regulations like the recently passed CREATES Act are so necessary to end anti-competitive behaviors like this once and for all.”

### 1NC — Turn

#### An all-out ban of settlements is the worst of all worlds —

#### 1 — a ban on settlements deters challenges and leads to protracted appeals that prevent new drugs from getting on the market

Kesselheim et 11, is a Professor of Medicine at Harvard Medical School and a faculty member in the Division of Pharmacoepidemiology and Pharmacoeconomics in the Department of Medicine at Brigham and Women’s Hospital. (Aaron with Lindsey Murtagh, J.D., M.P.H., and Michelle M. Mello, J.D., Ph.D., “Pay for Delay” Settlements of Disputes over Pharmaceutical Patents, N Engl J Med 2011; 365:1439-1445

Policy Considerations The controversy over pay-for-delay settlements raises three main policy issues: the availability of generic drugs, incentives for drug innovation, and the consequences of expensive drug litigation. Generic-Drug Availability The public health benefits of generic drugs are well known and include increased adherence to medication regimens 31 and reduced health care spending, 32 particularly for government insurance programs. The Paragraph IV challenge process was designed to prevent invalid or weak peripheral patents from blocking the approval of generic versions and to allow patent holders rights to be adjudicated before there is any economically damaging competition. 33 Indeed, a recent study showed that lower-quality and later-expiring patents that is, secondary patents not covering the underlying active ingredient have been the most common subjects of Paragraph IV challenges. 34 If a patent is invalid or not infringed by the generic-drug company, the brand name patent holder should not have the right to market exclusivity; society should benefit from market competition. Settlements allow market exclusivity rights in this situation to persist, threatening the effectiveness of the Paragraph IV process by offering generic manufacturers a lucrative alternative to market entry. 35 However, the prospect of pay-for-delay settlements can provide an incentive for generic manufacturers to bring Paragraph IV challenges. 36 Although patients and payers reap the benefits of generic-drug availability, the manufacturers of generic and brand-name drugs bear the burdens of Paragraph IV litigation, 37 and it is the generic drug company that must decide to initiate the process. In addition to incurring legal fees, the challenger risks a finding that its generic product infringes the patent. In the case of omeprazole, the court upheld one of the generic manufacturer s challenges but ruled that three other challenges involving generic pill-coating formulations were blocked by AstraZeneca s patents. The availability of settlements provides a countervailing incentive, and commentators have worried that restricting settlements may deter potential challengers from seeking to overturn weak or illegitimate secondary patents. 37 Effects on Innovation Patents can be effective in encouraging drug innovation only if patent holders can rely on the promise of protection. 38 In estimating the net return on investment in research, companies consider the chances that their patents will be challenged and invalidated. 39 Because courts can overturn patents, patent protection has always involved uncertainty, but the Paragraph IV process has increased it. The ability to enter into patent-suit settlements arguably promotes patent stability and therefore innovation by exerting a countervailing force. 40 However, the rush to settle can also threaten innovation. The Sherman Act was based on the premise that market competition drives companies to innovate. 41 Yet a settlement particularly one protecting a later-issued, peripheral patent removes the most immediate potential competitor from the market and indirectly blocks other generic manufacturers from entering. Minimizing Costs In pay-for-delay cases, most courts of appeals have emphasized the long-established judicial preference for settlements, which preserve scarce judicial resources and minimize litigation costs. 42 Patent-litigation costs, which can be extremely high, are passed to consumers in the price of drugs. Settlements can also have procompetitive effects if they encourage competing manufacturers to jointly bring a product to market more efficiently, rather than force litigation to an allor-nothing outcome. Allowing settlements to include compensation to the generic-drug company and an agreement to delay market entry can encourage the parties to settle the dispute. 43 A counterargument is that any savings to consumers resulting from lower litigation costs may be offset by the higher drug prices that persist when a settlement restricts competition from generic manufacturers. Patients and payers lose when companies that bring Paragraph IV challenges find that they have a greater financial return from a pay-for-delay settlement than from selling their product. Thus, settlements may result in lost opportunities to protect the market from elevated drug prices arising from later-issued patents that are weak or illegitimate. 1442 Resolving the Pay-for-Del ay Controversy Pay-for-delay settlements can have both beneficial and problematic economic and public health effects, making it difficult to identify an optimal resolution to the conflict they have generated. A blanket ban on pay-for-delay settlements in Paragraph IV cases would reduce incentives for frivolous challenges against legitimate patents, which do not serve the public interest and which raise costs for brand-name manufacturers. However, a ban would also decrease Paragraph IV challenges broadly against all but the highest selling products, as potential generic-drug challengers would weigh the risks and anticipated litigation costs against the value of the 180-day exclusivity period. This solution is therefore insensitive and subject to market changes that may change the value of the incentive, such as the introduction of authorized generic drugs or branded generic drugs sold or licensed by the brand-name company. 44,45 A settlement ban also wastes judicial resources by encouraging numerous appeals and delays to litigation that may not accelerate access to drugs. A more tailored alternative offered in recent legislation 46 and backed by the FTC is to ban settlements wherein the ANDA filer receives anything of value and agrees to limit or forgo research, development, manufacturing, marketing, or sales of the ANDA product for any period of time. This option seeks to limit the financial incentives for generic-drug manufacturers to drop a challenge or agree to socially undesirable terms. An FTC review of settlements should prevent the parties from disguising illegal payments through licensing agreements or other transfers of know-how, but only if the commission can successfully overturn objectionable settlement agreements in court. Notably, the legislation would grant the FTC rule-making authority to allow certain procompetitive agreements. With a Republican-controlled House dimming the prospects for such legislation, the FTC has suggested that it may proceed independently. In November 2010, a commissioner of the FTC reportedly proposed adoption of an FTC rule requiring that the parties to a settlement prove that the agreement is not anticompetitive. 47 An FTC rule lacks the strength of a statute, however, and would probably lead to judicial adjudication of disputes between companies and the FTC, which the commission would prefer to avoid because of its somewhat abysmal track record in the courts. 1 The FTC s proposed policy is preferable to a complete ban on pay-for-delay settlements, but both potential solutions sidestep the underlying problem: the bad patents that inspire many Paragraph IV challenges in the first place. There is no efficient mechanism outside the courtroom for challenging the numerous weak or invalid patents in the pharmaceutical market. Existing mechanisms of patent reexamination are rarely used because they are highly limiting for the parties, with restrictions on the admissibility of evidence and potentially damaging implications for subsequent appeals. Patent-reform legislation, now being considered in Congress, offers the framework for a partial solution to this problem. 48 This legislation seeks to establish a post-grant opposition proceeding in which third parties could challenge a patent s validity by submitting any additional information bearing on the patentability of the claimed invention to the USPTO. This process could identify bad pharmaceutical patents early, avoiding the cost of protracted litigation, and uphold the validity of other patents. Notably, in such a proceeding, a patent is not presumed to be valid, in contrast to judicial review, in which the patent is presumed to be legitimate and the challenger must prove its invalidity. However, the current legislation permits this administrative mechanism for only 9 months after issuance of the patent. Such a time frame would render this process essentially useless for pharmaceutical patents, most of which are granted years before the product is approved by the FDA. Another opportunity for administrative review could be provided after a pharmaceutical patent was first listed in the Orange Book in order to allow generic manufacturers or other interested parties to present at that time any evidence of a patent s invalidity. If effectively organized (and perhaps associated with a small award for a successful challenger), an administrative process could resolve patent issues before generic manufacturers would typically file Paragraph IV challenges. As a result, invalid patents that now serve as the basis for pay-for-delay settlements would be eliminated, and competition from generic manufacturers could begin immediately after expiration of the remaining legitimate patents, without the delays caused by unresolved litigation, 180-day generic exclusivity, or pay-for-delay settlements. Furthermore, this solution would reduce the pressure on judges to choose between the efficiency value of having parties amicably agree to resolve ongoing legal proceedings and the public health implications of pay-for-delay settlements. Because this process would affect only invalid patents, Paragraph IV challenges would still be necessary for cases of noninfringement, but the overall risk of anticompetitive settlements would be reduced.

#### 2 — the status quo turns the aff — a per se ban would stop the development of generics

Rubenfield & Dickey 12, Professor of Law and Professor of Economics Emeritus, University of California, Berkeley; Professor of Law, New York University (Daniel, with Bret Dickey MA and a PhD in Economics from Stanford University and a BA in Economics from the University of Pennsylvania, WOULD THE PER SE ILLEGAL TREATMENT OF REVERSE PAYMENT SETTLEMENTS INHIBIT GENERIC DRUG INVESTMENT?, Journal of Competition Law & Economics, 8(3), 615–625 doi:10.1093/joclec/nhs021 Advance Access publication 7 August 2012, <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Dickey-Rubinfeld-Would-the-Per-Se-Treatment-of-Reverse-Payment-Settlements-Inhibit-Generic-Drug-Investment-2012.pdf>)

The outcome of the patent litigation is highly unpredictable as well. While the branded drug may have substantial sales at the time of filing, a new therapeutic competitor or a follow-on product by the brand manufacturer may significantly limit the future sales for which the generic can compete. The ANDA and litigation processes can take years, and the competitive environment can change dramatically from the time of the initial entry decision. Having the option to settle the patent litigation helps to mitigate at least one aspect of this uncertainty. We highlight the uncertainty of generic investment with an example. Assume hypothetically that a small generic manufacturer begins development of a generic version of a low-volume branded drug with no patent listed in the Orange Book. Assume also that in the early stages of the process the branded manufacturer lists a new patent in the Orange Book. That listing implies that the generic manufacturer’s development is now potentially infringing. Finally, assume that there is a second generic manufacturer that files an ANDA shortly before the first. What originally started with a small manufacturer developing a generic version of a low-volume branded drug without any patent protection, could turn into a protracted and expensive patent litigation where the generic manufacturer did not even have the potential reward of exclusivity. In a world in which “reverse payment” settlements are per se illegal, the generic manufacturer may not have been able to settle this litigation. Without the ability to settle, such substantial uncertainties can dramatically chill the incentives of a generic manufacturer to develop generic drugs. Ensuring that generic manufacturers have a viable option to settle patent litigation reduces the uncertainty associated with investing in a new generic drug and, all else equal, increases generic manufacturers’ incentives to invest in new drugs. Increased competition from generic manufacturers leads to lower drug prices. Thus, to the extent that (procompetitive) reverse payment settlements are important to preserving this option, a policy that treats reverse payment settlements under a rule of reason approach can lead to increased generic competition, lower prices, and increased consumer benefits, relative to a policy that bans all reverse payment settlements.

### 1NC — AT: Cartels

#### Their portrayal of Mexico is nonsensical fear mongering—Mexico is stable and becoming more so

Cowen 10/19/21, Reporter for Bloomberg News, (Tyler, Could Mexico Be the Next Denmark? https://www.bloomberg.com/opinion/articles/2021-10-19/mexico-could-be-the-next-denmark-unspectacular-but-stable)

There, I said it. I realize that many people view Mexico as dangerous and corrupt, but the more basic facts are the more important ones, especially for investors and economists: Mexico has one of the higher per capita incomes of the emerging economies, it draws upon many vibrant cultures, and it is located right next to the U.S. If my enthusiasm isn’t enough to make you bullish on Mexico, listen to the many Central Americans who say Mexico is becoming too similar to the U.S., particularly in terms of excess commercialization. This criticism is itself evidence of progress. The debate about Mexico in the U.S. tends to focus on the differences between the two countries. A broader perspective is more insightful. Now, about that crime and corruption: By some estimates 20% of Mexican territory is controlled by drug gangs, and the country has a high murder rate. These issues won’t go away entirely, if only because they reflect demand for drugs in Mexico’s northern neighbor. But they are likely to become more manageable. As Mexico grows wealthier, the central and state governments will be able to establish greater control over their territory. And though the U.S. cannot usefully control many events in Mexico, its financial support of the Mexican government provides stability. Mexico’s government is also notoriously corrupt, and currently it has populist and especially irresponsible leaders. That too is likely to improve with greater state capacity. Mexico now has a middle class that votes, and it expects something in return for the taxes it pays. In the meantime, there are reasons to be bullish on Mexico right now. One is that economic globalization has been somewhat halted, and in some areas even reversed. To the extent Americans do not trust Chinese supply chains, the Mexican economy will pick up some of the slack. Mexico is also the natural lower-wage supplier to North American industry. (Its main problem in this regard is that its wages are no longer so low, but that too reflects its progress.) And if tourism in Asia and Europe remains difficult or inconvenient, Americans will visit Mexico more and grow accustomed to holidaying in locales other than Cancun. Some of those habits are likely to stick. Mexico, like much of Latin America, also has a burgeoning startup scene, especially in ecommerce and fintech. Mexico City might end up as the technology capital of Latin America. That would help with one of Mexico’s chronic economic problems, namely that small firms decide to stay small to escape regulations and taxes. Successful tech startups, in contrast, can scale more easily and face fewer regulations on average than manufacturing firms. Another reason to be bullish on Mexico: Recent data show that Latino immigrants to the U.S. assimilate remarkably well. Many of them have Mexican heritage, and may be a source of business capital and collaborations for Mexico proper. They also provide a steady reminder that prosperity is possible, and not just for Americans of Anglo heritage. I have been traveling to Mexico for almost 40 years, and each time I visit the country seems to be doing better. The prosperity seems broader-based, which lowers the degree of de facto racial and skin-color-based segregation in the country. And unlike much of the world, Mexico does not face national security issues from potentially invading or attacking rivals. That advantage may assume increasing importance, as competitors to Mexico have to deal with problems from China, Russia or other sources. Many investors and economists have been unduly pessimistic about Mexico because it has not grown at the pace of China. At this point, it’s best to concede that it probably never will. Yet many of the world’s more successful countries, such as Denmark, never had major growth spurts as China did. Instead, they managed a steady pace of growth with a few big dips. Mexico, with its strong connections to the U.S., is well-positioned to achieve that kind of growth stability over the coming decades. Unlike in the 1980s, the Mexican central bank is run by well-educated technocrats. Even during the pandemic, which hit the Mexican economy very hard, credit ratings remained acceptable.

## 1NC — Economy

### 1NC — AT: Economy

#### Recessions don’t uniquely cause wars

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

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

First, war can occur at any stage of expansion, crisis, recession, recovery, so it is unrealistic to assume that wars occur at any particular stage of the business cycle. On the one hand, although the domestic economic problems in the crisis/recession/depression period break out and become prominent in a short time, in fact, such challenge exists at all stages of the business cycle. When countries cannot manage to solve these problems through conventional approaches, including fiscal and monetary policies, they may resort to military expansion to achieve their goals, a theory known as Lateral Pressure. [13] Under such circumstances, even countries in the period of economic expansion are facing downward pressure on the economy and may try to solve the problem through expansion. On the other hand, although the resources required for foreign wars are huge for countries in economic depression, the decision to wage wars depends largely on the consideration of the gain and loss of wars. Even during depression, governments can raise funding for war by issuing bonds. Argentina, for example, was mired in economic stagflation before the war on the Malvinas islands (also known as the Falkland islands in the UK). In fact, many governments would dramatically increase their expenditure to stimulate the economy during the recession, and economically war is the same as these policies, so the claim that a depressed economy cannot support a war is unfounded. In addition, during the crisis period of the business cycle, which is the early stage of the economic downturn, despite the economic crisis and potential depression, the country still retains the ability to start wars based on its economic and military power. Based on the above understanding, war has the conditions and reasons for its outbreak in all stages of the business cycle.

Second, the economic origin for the outbreak of war is downward pressure on the economy rather than optimism or competition for monopoly capital, which may exist during economic recession or economic prosperity. This is due to a fact that during economic prosperity, people are also worried about a potential economic recession. Blainey pointed out that wars often occur in the economic upturn, which is caused by the optimism in people's mind [14], that is, the confidence to prevail. This interpretation linking optimism and war ignores the strength contrast between the warring parties. Not all wars are equally comprehensive, and there have always been wars of unequal strength. In such a war, one of the parties tends to have an absolute advantage, so the expectation of the outcome of the war is not directly related to the economic situation of the country. Optimism is not a major factor leading to war, but may somewhat serve as stimulation. In addition, Lenin attributed the war to competition between monopoly capital. This theory may seem plausible, but its scope of application is obviously too narrow. Lenin's theory of imperialism is only applicable to developed capitalist countries in the late stage of the development capitalism, but in reality, many wars take place among developing countries whose economies are still at their beginning stages. Therefore, the theory centered on competition among monopoly capital cannot explain most foreign wars. Moreover, even wars that occur during periods of economic expansion are likely to result from the potential expectation of economic recession, the "limits of growth" [15] faced during prosperity — a potential deficiency of market demand. So the downward pressure on the economy is the cause of war.

## 1NC — Innovation

### 1NC — AT: Disease

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

#### AND burnout means that even if they do exist, they cannot cause extinction

Owen Cotton-Barratt 17, et al, PhD in Pure Mathematics, Oxford, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute, 2/3/2017, Existential Risk: Diplomacy and Governance, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

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

# 2NC

## T — Exemptions

#### I’m inserting the list here.

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

Chapter II

The Domestic Scope of Antitrust, Unadulterated ........................ 13

A. The Scope of Federal Antitrust Unadulterated: The “Commerce” Requirement, the Meaning of “Persons,” and the Complicated Reach of the Clayton and FTC Acts ......................................................... 13

1. “Trade or Commerce” in General, Its Exclusion of Charity and Gratuity, and the Baseball Exemption ...................................................... 13

2. “Persons” ....................................................................... 17

3. The Reach of Clayton Act Section 7: Limitation on “Persons” Who Acquire “Assets” ............................ 21

4. The Jurisdiction of the Federal Trade Commission ................................................................... 23

5. Clayton Act Sections 3 and 8, and the RobinsonPatman Act .................................................................... 25

Chapter III

The International Scope of U.S. Antitrust ................................... 27

A. Political Compromises Underlying the International Scope of Antitrust ................................................................ 27

B. The Extraterritorial Reach of U.S. Antitrust Law, in General ............................................................................. 30

1. The Traditional “Effects Test” ...................................... 30

2. Codification of Extraterritorial Scope in FTAIA .......... 32

a. In General ............................................................... 32

b. Import Trade or Commerce .................................... 34

c. Foreign, Non-Import Commerce with “Direct, Substantial, and Reasonably Foreseeable” Domestic Effects ............................... 36

d. Plaintiff’s Claim Must Arise from a Domestic U.S. Harm ............................................... 38

C. Limitations Respecting Foreign Sovereignty and Foreign Relations Policy ...................................................... 40

1. Comity ........................................................................... 40

2. Sovereign Immunity ...................................................... 42

3. Act of State .................................................................... 43

4. Foreign Sovereign Compulsion ..................................... 46

D. Statutory Protection for U.S. Exports .................................. 47

1. Webb-Pomerene Act ..................................................... 47

2. The Export Trading Company Act of 1982 ................... 49

3. FTAIA’s Export Protection ........................................... 51

E. Exon-Florio: National Security Review of Certain International Acquisitions ....................................... 51

PART TWO

ANTITRUST AND THE CONSTITUTION

Chapter IV

Antitrust and the Constitution ....................................................... 57

A. Antitrust, Expression, and Free Association ........................ 58

1. Private Speech as a Component of Anticompetitive Conduct ............................................... 59

2. Political Activity and Public Speech .............................. 60

3. Association ..................................................................... 70

B. Antitrust and the Press .......................................................... 71

C. Antitrust and Religion ........................................................... 73

PART THREE

ANTITRUST AND POLITICS

Chapter V

The Noerr-Pennington Doctrine or “Petitioning” Immunity ..... 77

A. The Key Cases ..................................................................... 77

B. The Basis of the Noerr-Pennington Doctrine: Statutory Construction Versus the First Amendment ......................................................................... 80

C. What Is Petitioning? ............................................................ 84

1. In General ..................................................................... 84

2. Antitrust Violations Themselves Are Not “Petitioning” .................................................... 87

3. The “Sham” Exception ................................................. 88

4. The “Misrepresentation” or Corruption Exception ...................................................................... 91

5. The “Commercial” Exception ...................................... 94

6. Ministerial Government Acts ....................................... 94

D. Who May Be Petitioned ...................................................... 96

1. Quasi-Governmental Entities ....................................... 96

2. Petitioning of Foreign Governments ............................ 98

3. Foreign Parties Petitioning the U.S. Government .................................................................. 99

Chapter VI

The State Action Doctrine and Litigation Against State and Local Governments ........................................................................ 101

A. The State Action Doctrine ................................................... 101

1. Origins and Development ............................................. 103

2. Persons and Entities Entitled to Immunity ................... 106

a. The “Ipso Facto” Immunity of the State Qua State ............................................ 106

b. Cities, Counties, and Municipalities ....................... 107

c. Executive Departments, Agencies, and Special Authorities ........................................... 107

3. Issues in the Midcal Elements ....................................... 110

a. The Clear Articulation Requirement ....................... 110

b. The Active Supervision Requirement ..................... 114

4. Exceptions to State Action Immunity ............................ 117

a. Exceptions That Have Been Rejected: Conspiracy, Malicious Motives, and Corruption ................................................................ 117

b. The Uncertain Viability of the Market Participant Exception ............................................... 119

B. The Local Government Antitrust Act ................................... 120

1. In General ....................................................................... 121

2. Entities and Persons Entitled to Protection ..................... 122

C. Constitutional Aspects of Antitrust Litigation Against State and Local Government ................................... 125

1. Sovereign Immunity Issues: The Eleventh Amendment and the Rule of Ex Parte Young .............................................................................. 126

2. Antitrust and the Immunity for Public Officials .......................................................................... 129

3. Facial Challenge to Anticompetitive State Laws: Sherman Act “Preemption” and the “Hybrid Restraints” Concept .......................................... 132

PART FOUR

DOCTRINES OF IMPLICIT REPEAL

Chapter VII

The Doctrine of Implied Repeal and the Federal Instrumentality Rule ................................................................................................... 137

A. Implied Repeal and the Evolution of the Traditional Standard: Repeals by Implication Were Disfavored ............. 138

B. Credit Suisse .......................................................................... 144

C. Lower Court Developments Since Credit Suisse .................. 146

1. The “Generality” Gloss of Short Sale ............................. 146

2. Other Lower Court Developments .................................. 147

D. The Federal Instrumentality Rule .......................................... 150

Chapter VIII

The Keogh or “Filed-Rate” Doctrine .............................................. 153

A. The Filed-Rate Doctrine in General....................................... 154

B. Doctrinal Details .................................................................... 158

1. Scope of the Doctrine ...................................................... 158

2. The Filed-Rate Doctrine and Deregulation ..................... 164

3. Exceptions ....................................................................... 166

C. Future Prospects .................................................................... 170

Chapter IX

The Doctrine Of Primary Jurisdiction ........................................... 173

A. Origin and Contours of Primary Jurisdiction Doctrine ................................................................................. 174

B. Primary Jurisdiction in the Antitrust Context ........................ 178

C. Determining Whether Primary Jurisdiction Doctrine Applies .................................................................... 181

1. Identifying Appropriate Issues for Reference to Agency ........................................................................ 181

2. Determining Whether Agency Has Jurisdiction ...................................................................... 183

3. Determining Whether Referral Is Warranted ........................................................................ 184

D. Procedures Applicable to Primary Jurisdiction Referral .................................................................................. 187

E. Review of Decision to Invoke Primary Jurisdiction ............................................................................. 189

PART FIVE

ISSUES OF SECTOR-WIDE APPLICABILITY

Chapter X

Antitrust and Organized Labor ...................................................... 193

A. Historical Background ........................................................... 194

B. Current Law ........................................................................... 196

1. The “Statutory” Exemption ............................................. 196

2. The “Nonstatutory” Exemption ....................................... 200

Chapter XI

Antitrust and Agriculture ................................................................ 207

A. The Policy Problem and Evolution of the Statutory Framework ............................................................. 208

B. The Cooperatives Exemption: Antitrust Issues under Capper-Volstead and the Fishermen’s Collective Marketing Act ...................................................... 214

1. Applicability ................................................................... 214

2. Exempt and Non-Exempt Conduct ................................. 219

3. The Regulatory Roles of the Secretaries of Agriculture and Commerce ........................................ 222

C. The Agricultural Marketing Agreement Act ......................... 224

1. Orders and Antitrust Liability ......................................... 227

a. Filed Rates ................................................................ 228

b. Conduct Issues Associated with Orders ................... 228

2. The Hog-Cholera Serum Exemption ............................... 229

Chapter XII

Innovation and Entrepreneurship .................................................. 231

A. The National Cooperative Research and Production Act and the Standards Development Organization Advancement Act ............................................ 232

1. Applicability ................................................................... 235

2. Liability Standard, Awards of Costs and Fees, and Limited Damages ..................................................... 237

B. The Small Business Joint Venture Exemption ...................... 238

Chapter XIII

Antitrust and the Media .................................................................. 241

A. Newspaper Production Joint Ventures .................................. 243

1. Special Economic Problems in the Newspaper Industry ........................................................ 244

2. The Law of the NPA ....................................................... 246

a. Failing Newspaper Test ............................................ 247

b. “Effectuate the Policy and Purpose” of the Act ................................................................... 250

c. Challenges to Completed JOAs or Conduct by JOA Members ........................................ 250

3. Reform Efforts ................................................................. 251

B. FCC Merger Review and Broadcast Ownership Rules ...................................................................................... 252

1. Telecommunications Mergers ........................................ 252

2. Broadcast Ownership Rules ............................................ 254

C. Television Programming Collaboration ................................. 256

Chapter XIV

Antitrust and Sports ......................................................................... 259

A. Antitrust and Sports in General .............................................. 259

B. The Baseball Exemption and the Curt Flood Act .......................................................................................... 264

1. Historical Development of the Baseball Exemption ........................................................................ 264

2. The Curt Flood Act .......................................................... 265

3. The Scope of the Modern Baseball Exemption ........................................................................ 266

C. Statutory Exemptions for Sports ............................................ 267

1. The Sports Broadcasting Act of 1961 .............................. 268

2. The NFL-AFL Merger ..................................................... 270

3. The Olympic and Amateur Sports Act ............................ 271

D. The Labor Exemption In Sports ............................................. 272

PART SIX

REGULATED INDUSTRIES AND TARGETED EXEMPTIONS

Chapter XV

Statutory Exemptions for Regulated Industries ........................... 275

A. Insurance and the McCarran-Ferguson Act .......................... 276

1. Elements of the Exemption ............................................ 277

a. The Business of Insurance ....................................... 277

(1) Rate Setting ....................................................... 278

(2) Policy Standardization ...................................... 279

(3) Joint Underwriting Arrangements .................... 279

(4) Products Without Insurance Risk ...................... 280

(5) Non-Indemnity Health Insurance ...................... 281

(6) Relationships Between Insurers and Third-Party Vendors ......................................... 282

(7) Mergers & Acquisitions .................................... 283

(8) Marketing, Distribution, & Claims ................... 284

b. Regulated by State Law .......................................... 285

c. Boycott, Coercion, or Intimidation ......................... 288

2. Reforming the McCarran-Ferguson Exemption ...................................................................... 290

B. Banking and the Financial Sector ......................................... 291

1. Banking Law as a Competition Policy ........................... 292

2. The Current Applicability of Antitrust to Banking .......................................................................... 295

a. In General ................................................................ 295

b. The Robinson-Patman, Clayton, and FTC Acts .......................................................... 297

3. Bank Merger Review ..................................................... 298

a. In General ................................................................ 298

b. Resolution of Failing, Systemically Significant Firms ..................................................... 303

4. Alternative, Bank-Specific Competition Rules ............................................................................... 304

a. Objective Size and Concentration Limits ....................................................................... 305

b. Bank-Specific Conduct Rules .................................. 305

c. Affirmative Deconcentration: BHCA Divestiture Orders and the Kanjorski Amendment ............................................................ 306

5. Credit Unions ................................................................ 307

C. Air Transport Exemptions ................................................... 308

1. Regulation, Deregulation, and the Current Scope of Antitrust in General .......................... 308

2. The Exemptions That Remain ...................................... 310

a. Cooperative Agreements for International Markets ............................................. 311

(1) Alliance Agreements ....................................... 312

(2) Immunity for International Tariff Conferences ........................................... 314

3. Competition Regulation by the Department of Transportation ........................................................... 315

a. Unfair Competition ................................................. 316

b. Review of Joint Ventures ........................................ 317

D. Ocean Shipping .................................................................... 317

1. Legal Background ......................................................... 321

2. Antitrust Immunity ........................................................ 324

3. Ongoing Deregulatory Efforts ....................................... 326

E. Railroad Exemptions ............................................................ 328

1. Historical Background ................................................... 328

2. The Authority of the STB and the Applicability of Antitrust Laws in General ........................................................................... 330

3. Applicability of Antitrust Laws to Specific Practices ........................................................... 332

a. Rate-Related Antitrust Exemptions ......................... 332

b. Transactional Antitrust Exemptions ........................ 335

(1) Mergers & Acquisitions .................................... 335

(2) Pooling Agreements .......................................... 339

(3) Interlocking Directorates ................................... 339

(4) Rail Reorganization Meetings ........................... 339

(5) Other STB Powers with Competitive Consequences: Competitive Access, Market Entry, and Market Exit ................................................ 340

4. The Future of Railroad Antitrust Exemptions ............... 341

F. Collective Agreements among Motor Carriers ................... 342

1. Price Fixing .................................................................... 343

2. Interstate Bus Mergers ................................................... 344

Chapter XVI

Targeted Statutory Exemptions And Reversals Of Disfavored Judicial Decisions ............................................................................. 347

A. The Natural Gas Policy Act .................................................. 348

B. Soft Drink Interbrand Competition Act ................................ 349

C. Health Care Quality Improvement Act ................................. 353

D. Need-Based Educational Aid Act ......................................... 355

E. Charitable Gift Annuity Antitrust Relief Act ....................... 356

F. Graduate Medical Matching Program Exception .............................................................................. 358

PART SEVEN PROCEDURAL ISSUES

Chapter XVII

Certain Procedural Issues Common to Scope Matters ............... 363

A. Statutory Scope Limitations Are Presumed Not to Be Jurisdictional ......................................................... 363

1. The Significance of the Distinction ............................... 363

2. The Presumption Against Jurisdictional Limits ............................................................................. 364

B. Rulings on Exemptions, Immunities, and Other Scope Issues Are Ordinarily Not Subject to Interlocutory Review ............................................................ 365

#### There’s DA uniqueness

McGinnis 14 (Anne, “Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform,” University of Michigan Journal of Law Reform, 47.2)

Most of the statutory exemptions enacted over the last one hundred years are still in place today, despite widespread changes in economic theory, market structures, and antitrust law in general. When initially enacted, many statutory exemptions were seen as special-interest legislation harmful to competition, competitors, and society. While others were beneficial when first put into law, even many of those have grown irrelevant over time. Some have even become as harmful as those enacted with the intent of benefitting special interests.

**Exemptions are ONLY Congress**

**ARENA 11** --- AMEDEO ARENA, Associate Professor of European Union Law at the School of Law of the University of Naples, “Institute for International Law and Justice Emerging Scholars Papers”, IILJ Emerging Scholars Paper 19 (2011) (A Sub series of IILJ Working Papers) Finalized 01/18/2011, https://iilj.org/wp-content/uploads/2016/08/Arena-The-Relationship-Between-Antitrust-and-Regulation-in-the-US-and-in-the-EU-2011.pdf

According to a recent survey, approximately **20 percent** of the US economic activities are to some degree **exempted from antitrust law.**22 Federal statutory antitrust exemptions can be divided into **proper “exemptions**”, which entail immunity from antitrust rules, and “**pseudo-exemptions”,** which merely imply a differential application of antitrust law. The “exemptions” category’ can be split up into two sub-categories: “**full exemptions**”, which exempt a given activity from all antitrust rules, and “**partial exemptions**”, which grant exemption only from certain antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.2’ In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.24 In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparendy it has never engaged in any real regulatory oversight.23

Turning to the **nineteen partial exemptions currently in force**,26 the discrepancy between the scope of the exemption and that of regulator}\* oversight is even greater, possibly because those exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulator}- scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulator}- review at all.2 Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.28 Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard;29 in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.30

Unlike **full and partial exemptions**, the eight **pseudo-exemptions** in force **do not** bring economic activities **outside the scope of antitrust provisions** to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.3’ While pseudo-exemptions are generally not accompanied by regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory lato sensu.

ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

**Scope is when the law applies**

**Dernbach 21** --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute **applies**. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action **is not addressed in the statute, the statute is not applicable**. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

**Expanding requires a reversal of legislative intent**

**Garubo 84** --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by **including subject matter** which the **legislature expressly chose to exclude**.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will **expand the scope** of the statute **contrary to legislative intent**. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation **would constitute a defacto contradiction of legislative intent** by **altering the purview of the statute**.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 **By removing it, the court would affect a fundamental change in the** nature of the **statute**, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

#### Overlimiting is structurally impossible---the field of antitrust law is enormous

Spencer Weber Waller 20, John Paul Stevens Chair in Competition Law, Professor, and Director of Institute for Consumer Antitrust Studies at the Loyola University Chicago School of Law, and Jacob E. Morse, J.D. Candidate at the Loyola University Chicago School of Law, “The Political Face of Antitrust”, Brooklyn Journal of Corporate, Financial, and Commercial Law, Volume 15, July 2020, https://awards.concurrences.com/IMG/pdf/\_11\_weber\_waller\_v21\_formatted\_1\_.pdf?68864/b1fc17637de92baef13f2a93eb750f872a721091

IV. Antitrust in Civil Society

Competition issues are also part of the general civic discourse separate from the campaign rhetoric and legislative proposals offered by politicians. This is also a significant sign that antitrust has begun to be an important source of small “p” politics that engages substantial segments of the public at large.

One example is the increased number of non-technical books intended for a lay audience that deal with the role of antitrust in a healthy economy and democracy. Recent and forthcoming books dealing with these themes include Tim Wu’s “The Curse of Bigness,”109 Matt Stoller’s “Goliath,”110 Maurice Stucke and Ariel Ezrachi’s “Competition Overdose,”111 Zephyr Teachout’s “Break ‘em Up,”112 and David Dayan’s “Monopolized.”113 On the academic side, there are a plethora of government and NGO studies of competition policy on digital competition114 and new works are flourishing which explore the broader ramifications of antitrust and competition in society.115

Long form and more mass-market journalism have also taken up the mantle of exploring the role of antitrust and competition policy. Such diverse magazines as The Atlantic,116 Time,117 New Republic,118 American Prospect,119 Rolling Stone,120 New York Times magazine,121 Variety,122 National Review,123 Foreign Policy,124 and other policy and opinion magazines have all run recent stories or profiles of individuals involved in antitrust issues. Before the COVID-19 pandemic effectively monopolized press coverage in the United States, there were thirty-three antitrust related stories on the front page of the New York Times or the front page of its business section over a three-month period in late 2019.125 A majority of the stories focused on tech giants such as Apple, Microsoft, Google, Amazon, and Facebook.126 In addition, the New York Times also covered stories about mergers, merger policy, local issues such as the Chicago taxi market, and various smaller industries.127 This is separate from coverage during the same period of campaign issues and candidate statements relating to the field.

A similar increase in coverage during this same period can be observed anecdotally in more business-oriented publications like Forbes, Barron’s, Wired, and the Wall Street Journal; general newspapers like USA Today, Washington Post, and Huffington Post; more local newspapers; as well as radio and television.128 Web pages and social media accounts on these issues have similarly proliferated on all ideological perspectives.129

Lobbying and public policy groups are growing in number and influence. Beyond the traditional trade associations and general think tanks there are now a number of active groups with antitrust as a large part of their focus. These include the Open Markets Institute,130 American Antitrust Institute,131 Anti-Monopoly Fund,132 Institute for Self-Reliance,133 Public Citizen,134 Public Knowledge,135 Demos,136 and the International Center for Law and Economics.137

At the more technical legal end of the debate, antitrust is similarly flourishing as a field. One sees increased law school hiring in the field for the first time in decades. Academic institutes and centers abound with a wide variety of perspectives ranging from libertarian to enforcement oriented.138 Most major antitrust cases now feature multiple amicus briefs from legal and economic experts on both sides of an issue both in the Supreme Court or the Courts of Appeals.139

Conclusion

Antitrust has always been political in nature. Antitrust law provides broad legal commands dealing with how governments and private individuals can challenge different types of market behavior. In this way, antitrust has not changed.

Antitrust will never take the place of sports, the Dow Jones index, or the weather for conversation at the breakfast table, but it has become a meaningful part of the political and policy debate for candidates, the legislature, and important segments of civil society. What has changed, however, is the degree that antitrust has reentered the political arena. Once mostly the domain of technocrats, antitrust issues have been proposed and debated by Presidential candidates, political parties, legislators, pundits, journalists, lobby groups, and voters alike. There are also a flurry of serious proposals and investigations that would make significant changes to the current system if adopted.

## Advantage 2

#### Economic decline increases cooperation.

Christina L. **Davis &** Krzysztof J. **Pelc 17**, Christina L. Davis is a Professor of Politics and International Affairs at Princeton; Krzysztof J. Pelc is an Associate Professor of Political Science at McGill University, “Cooperation in Hard Times: Self-restraint of Trade Protection,” Journal of Conflict Resolution, 61(2): 398-429

Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

#### No impact to slow growth AND above answers apply

Posen 16 Adam S. Posen, Government and Economics PhD from Harvard, economic advisor to the Congressional Budget Office, faculty of the World Economic Forum, consultant for the International Monetary Fund and the United States government. [Why We Need A Reality Check, Reality Check for the Global Economy, Peterson Institute for International Economics Briefing 16-3]

Greater confidence in the world economy’s resilience and near-term prospects is justified. Market fears about the ability of policy to stabilize growth and promote inflation, if understandable, are exaggerated or in some cases unfounded. All the more reason then not to allow ourselves to be distracted by a financial market tail wagging the macroeconomic dog. At a fundamental level, most of the major economies, starting with China and the United States, are growing more sustainably now than a decade ago, at their slower rates. That growth is not built on rising private or public leverage, with the notable exception of China—and even in China some restructuring is under way with ample savings to cushion the process. Even where the situation is not so rosy, many in the markets seem to be confusing strains and suboptimal situations with acute instability, not just for Italian banks and for Brazilian budgets but also for Latin America more generally or for trends in global trade. A more normal muddling through with poor but stable conditions is a far better bet. And where some in the markets moving prices fear that normal economic laws have been reversed—that monetary policy is ineffective or that low oil prices are on net harmful—they are likely to be proven clearly wrong, as they were previously on inflation and commodity prices. Having some clarity to distinguish between the more solid underlying economic outlook and the shadows thrown by financial puppetry is critical to making the right policy decisions to avoid an unnecessary recession. A combination of public policies and decentralized private-sector responses to the crisis have increased our economic resilience, diminished the systemic spillovers between economies, and even created some room for additional stimulus if needed. Large parts of the global financial system are better capitalized, monitored, and frankly more risk averse than they were a decade ago, with less leverage. The riskier parts of today’s global economy are less directly linked to the center’s growth and fi nancing than when the troubles were within the United States and most of Europe in 2008. Trade imbalances of many key economies are smaller, though growing, and thus accumulations of foreign debt vulnerabilities are also smaller than a decade ago. Most central banks are now so committed to stabilization that they are attacked for being too loose or supportive of markets, making them at least unlikely to repeat some policy errors from 2007–10 of delaying loosening or even excessive tightening. Finally, corporate and household balance sheets are far more solid in the US and some other major economies than they were a decade ago (though not universally), and even in China the perceptions of balance sheet weakness exceed the reality in scope and scale.

## Advantage 3

#### No ABR Impact

Smith 16, PhD molecular biologist, former R&D director at MicroPhage and SomaLogic. (Drew, 6-14-16, “The Myth Of The Post-Antibiotic Era”, <https://www.forbes.com/sites/quora/2016/06/14/the-myth-of-the-post-antibiotic-era/#db027696fa83>)

Right now, drug resistant infections are mainly a threat to those that are already sick and/or in medical facilities. But, if we continue down this path, mundane infections in the otherwise healthy could someday morph into life-threatening ordeals, and simple medical procedures and surgeries may be skipped to avoid risk of infection. However, while this threat is real, it’s important to keep in mind that this is an ongoing, gradual challenge; it’s extremely unlikely that a single event will herald with complete certainty the abrupt end of modern medicine as we know it. In this context, those scary headlines are inappropriate, if not numbing and counterproductive. In May, Ars wrote about some alarmist and inaccurate news stories dealing with a newly identified type of drug resistance—one that makes bacteria resistant to a last-resort antibiotic called colistin and can spread between bacteria easily. The headlines blared that it was the “first” time such a dastardly microbe had seeped into the US—which is not true. And they suggested that it would certainly mark the end of antibiotics—also not true. This week, scientists provided updates on tracking that type of resistance, and of course some alarmist headlines followed. Yet, the new data actually suggests that a tempering of concerns about this particular resistance may be in order. It turns out that this “dreaded,” “scary,” “nightmare” of a drug-resistant microbe has been in the US for more than a year and elsewhere in the world since as far back as 2005—it’s just that nobody noticed it. And nobody noticed it because so far it hasn’t been the dreaded, scary nightmare some have feared. “It’s not a huge cause for concern,” Mariana Castanheira, lead author of one of this week’s resistance updates, told Ars. Castanheira is the director for Molecular and Microbiology at JMI Laboratories, a private company that monitors drug resistance microbes in hospitals and medical settings. They and others are finding this new type of resistance now simply because they’re looking for it, she said. Castanheira explains that people initially started digging for this new type of drug resistance—a gene called mcr-1—out of concern that it makes bacteria resistant to the antibiotic colistin, which is a relatively toxic drug used only when nearly all others have failed against a multi-drug resistant infection. Bacteria have shown up with colistin resistance before—in fact, many times in the US and elsewhere around the world. But in those cases, the genes were embedded in the bacteria’s chromosomes and generally passed down through generations. The mcr-1 resistance gene, on the other hand, seems to always sit on a plasmid, a small loop of DNA that bacteria can readily pass around to neighbors. If colistin-resistant bacteria shared their mcr-1 plasmid with others that are already resistant to lots of antibiotics, they could create a long-feared invincible germ—a “pan-resistant” bacteria. “Doesn’t scare me” So far that doesn’t seem to be happening, though, Castanheira said. In more than a decade of skulking around, mcr-1 has made its way into bacteria in animals, people, and soil all over the world. Yet, all of the mcr-1 carrying microbes examined have been susceptible to at least one antibiotic—and often several.

## Advantage 1

#### The most recent study agrees — low payment settlements occur now because of Actavis that speeds up generics making it into the market

Manganelli 21, Senior Researcher of the Centre for Research in Health and Economics (CRES) and Associate Professor of the Department of Economics and Business at University Pompeu Fabra. (Anton-Giulio, Reverse payments, patent strength, and asymmetric information, Health Econ . 2021 Jan;30(1):20-35. doi: 10.1002/hec.4174. Epub 2020 Oct 13., https://pubmed.ncbi.nlm.nih.gov/33051946/

The treatment of reverse payments has often fluctuated between a ban per se and a rule of reason. This study considers the parties incentives to invest and asymmetric information about the patent strength, which can represent both patent infringement and patent validity cases, and shows that the relationship between consumer surplus and reverse payment is highly non-monotonic. The main result is that reverse payments can increase consumer surplus in two ways. First, the asymmetric information about the patent strength makes litigation possible, which can trigger generic entry. Second, the higher generic investment may end up in a settlement with generic entry before patent expiry, when the reverse payment is small. These two effects counterbalance the entry delay effect of reverse payments. I also find that reversed payments do not necessarily delay the generic entry date. Reverse payments increased the incentive for the parties to reach a settlement. This reduces the probability of litigation and, for some distribution functions of the pet and strength, also reduces the generic entry date. In this case, reverse payments make entry occur earlier, at odds with the term "pay-for-delay." the optimal cap on reverse payments depends on the parameters of the model, such as the party's profits, investment costs and the avoided litigation costs, which is consistent with the decision of the Supreme Court versus Actavis (2013). Finally, the optimal reverse payment decreases with the destruction of Industry profits due to the generic entry and reverse payment typically increase consumer surplus in the asymmetry between the parties is low, the competitiveness in the market is soft, and their size is small. Results suggest that a rule of reason is more suitable than a ban per se.

#### They increase generics in the market

Manganelli 21, Senior Researcher of the Centre for Research in Health and Economics (CRES) and Associate Professor of the Department of Economics and Business at University Pompeu Fabra. (Anton-Giulio, Reverse payments, patent strength, and asymmetric information, Health Econ . 2021 Jan;30(1):20-35. doi: 10.1002/hec.4174. Epub 2020 Oct 13., https://pubmed.ncbi.nlm.nih.gov/33051946/

Reverse payments (pay-for-delay) are payments from an originator to a generic pharmaceutical producer to settle a potential litigation. In many jurisdictions, these payments are banned. This study shows that when the parties' investments are considered and the information about the patent strength is asymmetric, reverse payments increase both the possibility of generic entry and the litigation rate-both of which increase consumer surplus and do not necessarily delay generic entry. Reverse payments typically increase consumer surplus when the asymmetry between the parties is low, the competitiveness in the market is soft, and their size is small. Results suggest that a ban per se may be suboptimal.

#### Creates Act passed in 2019 and solves their impacts allowing generics to compete

Kades 21, is the director for markets and competition policy at the Washington Center for Equitable Growth. . (Michael 5/27/21, The CREATES Act shows legislation can stop anticompetitive pharmaceutical industry practices, https://equitablegrowth.org/the-creates-act-shows-legislation-can-stop-anticompetitive-pharmaceutical-industry-practices/

In December 2019, Congress passed the Creating and Restoring Equal Access to Equivalent Samples, or CREATES, Act, bipartisan legislation to stop anticompetitive strategies that delay competition in pharmaceutical markets and increase prescription drug costs. The act incorporates polices advocated by the Washington Center for Equitable Growth. The CREATES Act strengthens the 1984 Hatch-Waxman Act, which itself has saved American consumers and the U.S. healthcare system trillions of dollars (more than $1 trillion between 1999 and 2010 alone) by establishing a process for generic drug producers to bring their products to the marketplace. Even more money could have been saved, but some brand-name drug manufacturers, which enjoy monopoly or near-monopoly profits, have found ways of extending those profits by slowing or preventing competition from generic drugs. The CREATES Act addresses two of these dubious pharmaceutical company practices—which are estimated to have increased prescription drug costs by hundreds of millions to billions of dollars a year—with the goal of strengthening market competition and helping make more generic drugs accessible, thus reducing healthcare costs and saving lives. It does so through relatively minor and cost-free changes. Both a recent report from the Food and Drug Administration and anecdotal evidence from the generic industry, which are discussed below, provide strong evidence that the CREATES Act is working. Overview of the problem the CREATES Act addresses Under the Hatch-Waxman Act, generic companies do not need to prove their product is safe and effective. That would be costly, duplicative (because the brand-name company has already done that testing), and unethical (because such proof requires giving some patients placebos, which is unethical when the drug has already been proven effective). Instead, the generic manufacturer must show its product is a bioequivalent, or the same in all relevant respects, to the branded product. Although bioequivalency testing is much less expensive, it requires that the generic company test its product against the branded product. Moreover, some drugs that pose a health threat if used incorrectly require a safety protocol to ensure that they are used properly. These requirements, like most FDA requirements, exist to ensure that products are safe and effective, not to delay competition or provide branded companies with windfall monopoly profits. Nevertheless, if a branded company can find a way to prevent the bioequivalence test or prevent FDA approval of a safety protocol for the generic product, there is no competition, and the branded company protects its monopoly profits. The problem Congress sought to address in 2019 was simple: Prevent the branded companies from unfairly using two legal requirements to delay or prevent generic competition. Let’s consider each of these anticompetitive practices, so-called sample blockades and safety protocol filibusters, in turn. SAMPLE BLOCKADES As may be obvious, a generic company cannot prove bioequivalence if it cannot obtain samples of the branded drug with which it plans to compete. Before the CREATES Act, some companies used a variety of tactics to ensure that generic companies could not obtain those samples. By time the CREATES Act was enacted, there were 55 generic products for which companies could not obtain the needed branded samples, according to the Food and Drug Administration. The CREATES Act established a process that requires brand-name companies to provide generic companies with needed samples if the product is not generally available.

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It is designed to eliminate brand companies’ incentive to even try to deny the generic companies the samples they need. The process the act created is quick, the requirements are straightforward, and the bill imposes substantial penalties if a branded company acts in bad faith. At the same time, the law ensures that the generic companies receive what they need but no more. This was a concern of brand-name companies, alongside worries that generic companies’ testing procedures have FDA approval. While there are no detailed studies to confirm how this provision of the CREATES Act is working, I have talked to many representatives in the generic drug industry, who report that the longstanding problem of sample blockades has entirely or almost entirely disappeared. Interestingly, the formal process has been invoked few times, if at all; its mere existence as a threat has altered corporate behavior. SAFETY PROTOCOL FILIBUSTER The second tactic addressed by the CREATES Act is a little more complicated but just as effective. For drugs subject to safety protocols to ensure their safe use by consumers, originally a generic had to negotiate with the branded company to develop a shared protocol before the generic could receive FDA approval. But the branded company had a very big advantage. It already had its protocol accepted and its product on the market while the two companies negotiated a new shared protocol system. The process effectively gave patent-holding companies veto power over generic companies’ protocols, and thus the ability to filibuster negotiations endlessly without repercussion. And they did. Brand-name manufacturers would routinely nitpick, create impossible conditions, and “slow walk” the process, to the point where agreements were rare. It would take years of fruitless negotiating before a generic company could seek FDA permission to develop a different but equally safe protocol. Generic companies, for example, spent 3 unsuccessful years trying to negotiate a shared protocol system with Jazz Pharmaceuticals PLC for Xyrem, a then-billion-dollar treatment for narcolepsy, before the Food and Drug Administration was willing to approve separate protocols. Until the CREATES Act, only in one case was a generic able to successfully negotiate a shared system prior to receiving FDA approval. The CREATES Act has essentially eliminated this problem by flipping the presumption. Instead of requiring the generic drug company to try to reach an agreement with a branded competitor that has every reason to delay negotiations, generic companies can now propose their own safety protocols to the Food and Drug Administration from the start, although they are free to develop a joint one with a branded company as well. The provision’s effect has been immediate. Now that the negotiation process cannot delay competition, branded manufacturers are far more willing to reach shared protocols with generic competitors. According to the FDA’s Office of Generic Drugs’ 2020 annual report, within a year of the CREATES Act becoming law, the agency had approved shared protocols for two products, a stand-alone generic protocol for a third product, and a modification of protocols that enabled another pair of branded and generic companies with separate protocols to share the same protocol going forward.

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## DA — Innovation

#### Private sector tech leadership wards off revisionism and secures military dominance.

Thompson 20, PhD, MA, Chief Operating Officer of Lexington Institute. (Loren B., 10-8-2020, "Why U.S. National Security Requires A Robust, Innovative Technology Sector", *Lexington Institute*, PDF accessible at: <https://www.lexingtoninstitute.org/why-u-s-national-security-requires-a-robust-innovative-technology-sector/>)

Technology is thus a critical driver of national security, because it is the variable that determines the significance of all the other factors. In the past, the United States was able to sustain a culture of innovation that permitted it to lead the world in advanced technologies. Now that may be changing as other nations pursue investment initiatives aimed at dominating the global information revolution. For example, the Chinese economy today generates as much manufactured output as Germany, Japan and America combined, and that output increasingly consists of advanced information technology. This report is about the role that America’s own technology sector plays in bolstering national security. It is focused mainly on the defense dimensions of America’s strategic competition with China and other nations, illuminating how a robust and innovative domestic technology sector can contribute directly and indirectly to U.S. military dominance. The United States has faced major challenges to its military security in every generation since the 20th century began, and in each case new technology was a key factor defining the danger. The threat posed by imperialism at the century’s beginning was closely associated with 4 development of the dreadnaught. The threat posed by fascism a generation later was driven largely by the advent of air power. And the threat posed by communism in the century’s second half arose first and foremost from nuclear weapons. Unlike those earlier dangers, the technological content of today’s threat from other nations is grounded largely in commercial innovations— innovations readily adapted to new concepts of warfare. If the United States is to emerge from this latest contest with its leadership position intact, as it did in earlier rivalries, it will have to compete successfully in commercial markets through commercial enterprises. This is not an “arms race” in the traditional sense, but its implications for America’s place in the world are every bit as serious as the danger posed by dreadnaughts and bombers in earlier generations. What is the technology sector, and why will it be central to national security in the years ahead? The domestic technology sector is that part of the national economy devoted to developing and exploiting new information technologies. During the 1960s and 1970s, it was defined by information hardware such as mainframe computers and semiconductors. The definition later expanded to include enterprises focused on the generation of software. More recently, it has come to encompass companies whose business lines are enabled by the internet, such as Google and Facebook. It is not easy to define the boundaries of the technology sector, because every segment of the economy now relies on digital innovations and the internet to function. Hardware such as the smartphone is central to the emerging information economy, but many tech companies are engaged primarily in delivering services leveraged off of that hardware. For example, Amazon has transformed marketing and logistics using an internet-based business model, but it is mainly a provider of services rather than hardware. It is, nonetheless, a technology-driven change agent that is revolutionizing commerce. The military’s interest in the technology sector arises from the fungibility of information innovations across all facets of human activity. The same processors and memory chips that enable iPhones can be applied to smart weapons, battlefield communications, and military training devices. The same algorithms that facilitate machine learning in commercial products can be used to operate unmanned attack drones and autonomous fighting vehicles. And the “internet of things” that links disparate appliances is a model for the joint connectivity the military seeks in wartime. There is a broad consensus among military planners that the industrial model of warfare spawned by 20th century conflicts is giving way to an information-driven model enabled by new digital technologies. Collectively, these technologies allow warfighters to find, fix and defeat threats faster than adversaries can, while minimizing dangers arising from the fog of war such as fratricide. But the process of innovation is unfolding at a furious pace, and America’s military is hard-pressed to keep up. In August of 2020, the chief of staff of the Air Force released a strategy document aptly titled Accelerate Change Or Lose. The fear among military planners is that a near-peer adversary might use new technologies to leapfrog beyond the warfighting capabilities of America’s joint force, exploiting technologies that barely existed when the current force was conceived. In June of 2020, the Pentagon’s director of research and engineering issued a list of the highest-priority technologies in which the military needed to invest. The top technologies, in descending order of importance, were (1) microelectronics, (2) 5G communications, (3) hypersonics, (4) biotechnology, (5) artificial intelligence, (6) autonomy, and (7) cyber technologies. Only one of these technologies is predominantly military in character; all the others are mainly the products of commercial innovation. They are also all technologies that China and other nations have disclosed plans to invest in heavily as they strive to overtake the United States. So from a military perspective, the threat posed by new information technologies is twofold. On the one hand, the United States might be overtaken and surpassed in operationalizing the new technologies as tools for gaining military advantage in future conflicts. On the other hand, if America cannot keep up in the race to innovate, it might eventually lack the economic resources needed to sustain a global military posture. The U.S. government, and the Department of Defense in particular, invests extensively in such technologies. However, it is widely recognized that the private sector is where innovation in advanced technologies occurs more quickly and more imaginatively. Government can help industry to innovate with targeted funding, tax policy and other exertions, but it cannot create a culture of innovation within the public sector. That requires a structure of incentives that exists only in the marketplace.

#### Courts will shut antitrust down.

Goldsmith 10-7-2021, freelance writer based in Brooklyn. (Eloise, "Biden Wants to Break Up Big Companies. Will the Courts Stop Him?", *WhoWhatWhy*, https://whowhatwhy.org/politics/government-integrity/biden-wants-to-break-up-big-companies-will-the-courts-stop-him/)

When President Joe Biden nominated 32-year-old Lina Khan to head the Federal Trade Commission in June, both Republican and Democratic lawmakers heralded the appointment of the influential critic of monopoly power as the beginning of a new, tough-on-big-business era of antitrust enforcement. But less than two weeks later, an Obama-appointed judge delivered a setback, when he ruled that the FTC’s ongoing effort to break up social media giant Facebook had failed to prove the company was an illegal monopoly. The FTC filed a revised complaint in August, and experts expect the case to go to trial in what is just the beginning of a much larger fight between government and so-called corporate monopolies — especially those in Silicon Valley. But in this square-off between Big Tech and the state, the federal government’s regulatory power may be checked by the courts, which for the past 40 years have consistently come down in favor of firms in monopoly cases. If the FTC brings strong antitrust cases but loses in the courts, the onus will be on Congress to update century-old antitrust law to make it easier to police big business. Khan first made waves in 2017 when, as a law school student, she published a paper titled “Amazon’s Antitrust Paradox.” In a challenge to decades of established antitrust thinking, Khan argued against the “consumer welfare” approach, which accepts monopolies so long as they deliver low prices for consumers. In her analysis, low prices do not offset the harm monopolies can cause small businesses, workers, communities, and suppliers. Observers say the appointment of Khan and other advocates for breaking up Facebook signals the Biden administration’s tougher stance against the Big Tech companies that benefited from a laissez-faire approach to Silicon Valley during the Obama and Trump years. And for many, Monday’s hours-long Facebook outage, which disrupted the lives of the billions of people worldwide who rely on Facebook properties like Messenger and WhatsApp for basic communication, was yet another demonstration that the company is too big and wields too much power. There’s broad support for this new approach. Lawmakers in both parties and a majority of the American public believe that Big Tech companies have too much power, and breaking them up — in the way that past monopolies on oil and telephone services have been split — is wildly popular with voters of all stripes. Khan’s appointment to the FTC has generated buzz among people who work in the field of antitrust, said John Newman, a law professor at the University of Miami who focuses on competition and antitrust. But, “It’s early days,” he cautioned. Khan and her fellow appointees are bringing new ideas, which is a good thing, but it’s too soon to predict how successful they’ll be, he said. And they are still up against a decades-long winning streak for firms accused of monopoly behavior. Corporate Welfare In the 1970s, a group of conservative scholars, led by future Supreme Court nominee Robert Bork, popularized the consumer welfare approach to antitrust, which directs courts to leave monopolies unchecked as long as they keep prices low. Ever since, courts have been more “skeptical” of legal claims invoking antitrust law, said Randy Stutz, vice president of legal advocacy at the American Trust Institute, a nonprofit that researches and advocates for increased competition and antitrust enforcement. “There is a tremendous amount of caution about overreach baked into the case law,” Stutz said. “I would say excessive caution.” In practice, this has meant courts have given firms significant freedom to set prices and pursue mergers. And corporate defendants almost always win when antitrust cases are brought against them. Apple app store In September, a US District court judge issued a mixed ruling in Epic Games vs. Apple, in which the Fortnite-maker alleged that Apple’s operation of its app store violated antitrust law. The judge told Apple that app developers can use other payment methods in order to sidestep Apple’s 30 percent commission fee. But the judge upheld that Apple does not have a monopoly in the “digital mobile gaming transactions” market — ultimately, a win for Apple. Newman also points to the 2018 Supreme Court case Ohio v. American Express Co. as another recent example where courts sided with the large corporation. In that case, the federal government and 17 states accused American Express — one of the four largest American credit card companies — of “unreasonably restraining trade” with its “anti-steering provisions,” which prohibit merchants from encouraging customers to use competing credit cards with lower transaction fees. A lower court agreed, but on appeal, the Supreme Court’s conservative bloc, with Justice Anthony Kennedy as the swing vote, ruled 5-4 in AmEx’s favor.

#### Antitrust now is insignificant---it’ll be slow and rolled back.

Silverman 21, staff writer at The New Republic. (Jacob, 7-9-2021, "Biden Wants to Tame Big Tech With a Thousand Paper Cuts", *New Republic*, <https://newrepublic.com/article/162940/biden-executive-order-big-tech-monopoly>)

On Friday, the White House announced a potentially important, if modest, effort to further tamp down the power of the technology industry. This time the instrument is an executive order—the kind of wide-ranging declaration that often gets called “sweeping” or “major,” though its efficacy may take years to gauge—that covers everything from competition in the economy to drug prices to reforming a tech sector that is defined by a handful of seemingly unstoppable titans. Offering a mix of general recommendations, requests for action from other government agencies, and new administration policies, the Executive Order on Promoting Competition in the American Economy may be just what our overconsolidated economic system needs. But in tackling the power of a tech sector that has not only wrested control of the economy but remade it in its own data-hungry image, the Biden administration is still throwing pebbles at its enemy’s parapets. The tech industry has had 20 years to establish a stranglehold over our personal data, attention, and consumer choice. To tackle these problems, we need more, much more.

Despite promising to take on the power of Big Tech, President Joe Biden and his administration have so far taken a cautiously incrementalist approach. He’s appointed tough industry critics like Lina Khan to be commissioner of the Federal Trade Commission, but he has yet to name a head of the Justice Department’s antitrust division, a key role for any future enforcement action. In Congress, Democrats have introduced six smallish antitrust bills, but their path out of the House is murky, as ongoing disputes between Republicans and Democrats over how to fight this legislative battle mean that the final bills could look much different than they did in committee—if they make it to a floor vote at all. (It doesn’t help that some Silicon Valley-adjacent Democratic politicians, like Representative Ted Lieu and Representative Ro Khanna, have been less than supportive of the bills.)

As federal and congressional leadership lag, states have forged ahead, with dozens of attorneys general coming together in lawsuits like one, filed this week, accusing Google of anti-competitive practices. Other ongoing antitrust suits include one against Amazon over pricing issues; another lawsuit (this one with DOJ participation) against Google; and two others against Facebook that a judge recently threw out. In this proliferating legal war against Big Tech—premised on a lack of competition and companies’ abusing their monopoly status—any of these cases could yield billion-dollar fines for one of the tech giants. But fines are easily paid. Whether these suits can lead to meaningful reform, to breaking up companies and redirecting business practices away from the current dominant model of user surveillance and bulk data collection—that is far less clear. As with proposed legislation in the House, bipartisan legal efforts may be sundered on the altar of competing partisan priorities, with Republicans focusing on alleged censorship and Democrats more focused on economic competition and user rights.

With the stage set for legislative gridlock, drawn-out lawsuits, and bickering over the FTC’s legitimacy, a small opening has emerged for the Biden administration to take meaningful action on its own. And there are some measures in the executive order worth celebrating. One section aims to improve internet service by eliminating early termination fees and providing transparent pricing to help drive competition. Another proviso calls for gadget users—from farmers working on tractors to people tinkering with their own cell phones—to have what’s often referred to as “the right to repair,” a right that tech companies have suppressed by discouraging DIY or third-party work on broken items. (Forcing customers to take their doddering laptop to Apple’s Genius Bar helps the company maintain control over its products and ensures that repairs, and the money they generate, stay in-house.) Other relevant orders call for the restoration of net neutrality and applying more scrutiny to corporate mergers, which may prevent a tech giant from swallowing up the next WhatsApp or Slack, formerly insurgent chat/social media platforms that were absorbed by Facebook and Salesforce.

In the last year, tech companies have shifted their rhetoric, claiming that they are in favor of regulation—just on their terms. To that end, they’ve deployed armies of lobbyists to woo elected officials, making companies like Google and Facebook some of the most profligate spenders on K Street. With the potential for major legislative action still up in the air—a divided Senate doesn’t augur well, unless tech-critical Republicans like Senator Josh Hawley line up behind the Democratic legislative agenda, which seems unlikely—executive action may be the most promising way forward. Call it death by a thousand regulations. It’s also—as the executive order’s many prompts for action by the Federal Communications Commission, the FTC, and DOJ show—a plea for the government to do its damn job.

Even sympathetic observers may survey this latest initiative with some well-earned cynicism. Regulatory capture, in which regulatory agencies become beholden to the companies and industries they oversee, is a well-known feature of the land, and the families of leading politicians like Representative Nancy Pelosi periodically trade stocks based on what appears to be insider information. And as demonstrated by the measure to treat all internet traffic equally by restoring net neutrality (something that the Trump administration did away with), the Biden administration is still playing catchup, fighting many of yesterday’s battles. For instance, the order “calls on the leading antitrust agencies, [the DOJ and FTC], to enforce the antitrust laws vigorously and recognizes that the law allows them to challenge prior bad mergers that past Administrations did not previously challenge.”

While divesting WhatsApp and Instagram from Facebook are worthwhile efforts, there’s also a sense that would-be tech reformers are struggling to deal with the mistakes and oversights of a previous generation of politicians (i.e., pushing for the enforcement of existing laws is yet another call for the government to do its job). Even the order’s directive that the FTC “establish rules on surveillance and the accumulation of data” seems incredibly belated. We are 20-odd years into a surveillance economy, in which consumers have become the main source to be mined for value. The resulting inequities are vast, as the tech giants have had decades to strengthen their positions. It will take far more than an executive order to undo all this, much less to ensure a more equitable future. The question is: Does the Biden administration understand this grim state of play, or is this the best we’re going to get?

#### Agency rulemaking will be reined in before it can chill confidence.

Owings 9-22-2021, \*Taylor, partner in Baker Botts' Antitrust and Competition Practice Group. \*\*Steve Maule is an Associate with Baker Botts. ("The FTC’s Repair Restriction Ambition May Face Friction", *IPWatchdog*, <https://www.ipwatchdog.com/2021/09/22/ftcs-repair-restriction-ambition-may-face-friction/id=137824/>)

The Federal Trade Commission (FTC) has pledged to use more of its enforcement resources to ensure that consumers are free from manufacturer-imposed restrictions on self-repair or third-party repair. Just last week, the Democrat Commissioners voted to give the new Chair, Lina Khan, blanket authority to issue compulsory process in any investigation of “unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices . . . related to any repair restrictions.” The breadth of that resolution suggests the FTC is poised to press this issue to the maximum extent allowed under the law. The unanswered question is: how far does the law allow the FTC to go? The answer is, quite possibly, not as far as the White House or Chair Khan would like. One problem for the FTC: doubts about the authority granted to the agency under the FTC Act. Another hurdle will be the legal protections granted to manufacturers—both as market participants responding to consumer demand and, in many cases, as the owners of intellectual property rights. This blog has already discussed some of the ways that the “right to repair” movement might conflict with copyright protections. Here, we focus on the limits of the FTC’s authority and antitrust doctrine, as well as conflicts with patent law. The FTC’s Authority May Be More Limited Than Its Right to Repair Ambitions President Biden’s Executive Order on Promoting Competition in the American Economy “encourages” Chair Khan “to exercise the FTC’s statutory rulemaking authority” to address “unfair anticompetitive restrictions on third-party repair or self-repair of items.” Anticompetitive restrictions are typically addressed through the FTC’s authority to prohibit “unfair methods of competition” under Section 5 of the Act. But there is significant doubt whether Congress has ever given the FTC statutory authority to make substantive rules articulating specific practices that violate the “unfair methods of competition” prong of the FTC Act. For example, our colleagues (former acting Chair of the FTC) Maureen Ohlhausen and (former Assistant Attorney General for Antitrust) Jim Rill explained in a white paper for the U.S. Chamber of Commerce that congressional silence is ~~deafening~~ when it comes to competition rulemaking. Congress explicitly authorized the FTC to use notice-and-comment rulemaking to articulate substantive principles in legislation like the Children’s Online Privacy Protection and Telemarketing and Consumer Fraud and Abuse Prevention Act. In contrast, the FTC Act grants the agency power only to issue cease-and-desist orders through adjudicative proceedings and “to make rules and regulations for the purpose of carrying out” that function. Nevertheless, the FTC under Chair Khan seems poised to try competition rulemaking. In her academic days, Chair Khan (along with still-current-Commissioner Chopra) made the case that such rulemaking should be allowed under the law. Last month, Chair Khan signaled that she may be moving forward with the plan: the FTC requested public comment (through the official channel of notice-and-comment rulemaking, Regulations.gov) on two petitions for competition rulemaking drafted and submitted by Khan’s former employer, the Open Markets Institute. What is more, Chair Khan and the Democrat Commissioners recently rescinded the bipartisan Statement of Enforcement Principles Regarding Unfair Methods of Competition, indicating that they are willing to challenge a significantly broader swath of conduct than can be challenged with the Clayton or Sherman Antitrust Acts. The dissenting Republican Commissioners argued that rescinding the definition leaves law-abiding companies without any guidance about what conduct is prohibited. In response, Chair Khan indicated that companies may be able to expect a rulemaking to clarify. Repair restrictions, especially those that have been upheld under traditional antitrust doctrine, may be one target. But the FTC will also face an uphill battle in expanding the reach of “unfair methods of competition,” if its past attempts at challenging unfair methods of competition in court are any indication. That is because courts have strong guidance on how to consider the equities that motivate competition law: substantial precedent protects manufacturers from being penalized for design choices and other business conduct that improves the consumer experience. Since the 1970s, courts have uniformly determined that the competition policy codified in the FTC Act does not require different balancing of the equities. Though Chair Khan may hope to find a healthy penumbra around the Sherman and Clayton Acts in the FTC Act, courts may rein her in when FTC actions would chill companies from innovating or responding to consumer demand.

#### US tech sector is dominant---only antitrust crushes it

Moore 8-6-2021, MA, economics, syndicated columnist. (Stephen, "Moore: US tech sector keeps besting the world", *Boston Herald*, <https://www.bostonherald.com/2021/08/06/moore-us-tech-sector-keeps-besting-the-world/>)

Take a bow, America. It’s official and irrefutable: The U.S. is blowing out the rest of the world in tech leadership. No other country in the world comes anywhere close in tech innovation and the dominance of our made-in-America 21st-century companies. The Nasdaq index of once-small technology companies reached 15,000 last week. Only a few years ago, that index stood at 5,000. Yes, these companies have tripled in their market cap value — and that doesn’t include the dividends that have been paid out to large and mom-and-pop shareholders in America and across the planet. We are told constantly that China is catching up and achieving remarkable digital-age leaps forward in biotechnology, artificial intelligence, green energy, robotics, 5G technologies and microchips. The value of America’s 12 most valuable companies today in terms of stock valuation is well over $10 trillion. Those red, white and blue companies from Silicon Valley to the “Silicon Slopes” of Utah to Boston to northwest Arkansas are worth roughly as much as all of the Chinese publicly traded companies combined. Firms such as Google — many of which didn’t even exist 30 years ago — have made millionaires off your next-door neighbor. Ordinary people are getting rich beyond anyone’s imagination 50 years ago, thanks to American innovation and inventiveness. Risk-taking, old-fashioned can-doism is a hallmark of this unrivaled success story that has never been matched anywhere at any time in world history. Almost all of this is a tribute to American financial markets that allocate capital in hyperefficient ways. Capitalists doing a spectacular job of allocating capital efficiently is our secret sauce to financial and technological success. I am always mystified when highly successful Wall Street investors can’t explain how it is they add value and sometimes concede that they are just unnecessary middlemen. Even Warren Buffett, one of the greatest of all time, expresses guilt about his billions, as if he and other great financiers are economic parasites. No. Steering financial resources to winners like Google, not losers like Solyndra, makes everyone in America richer. Meanwhile, few politicians have any clue of how capital markets create wealth and jobs and shared prosperity in America. If they did, they would appreciate that without capitalists and capital, there is no enterprise — no material progress. They would instantly understand the economic ~~lunacy~~ of increasing taxes on capital gains and dividends, wealth taxes, and, worst of all, death taxes that threaten the future survival of family-owned businesses. Cutting, not raising, the U.S. capital gains tax would be far wiser if we want America to maintain and widen our competitive lead and keep winning globally. The arrogant fools in the administration of President Biden believe that to keep America No. 1 technologically, we need to have a multibillion-dollar government-run slush fund with the politicians picking winners and losers with other people’s money. China does this, and so does Japan, and it has never worked. One of the most famous stories of government-as-investment banker was when the Tokyo government’s brain trust recommended that Honda not get in the business of making cars. Here in the U.S., the political class has made a $150 billion bet on wind and solar power since the late 1970s, and in return, that has produced only a small sliver of our energy needs. Even more inexplicable is the movement in America coming from senators such as Democrat Elizabeth Warren on the left and Josh Hawley of Missouri on the right to break up our tech companies. Why? Because, evidently, they are too good at what they do. They make too much money. They have too many customers and too many advertisers. Put aside for a moment the rancid political persuasions of some of these leftist Silicon Valley CEOs. Somehow, the left and right agree that building a superior product and even crafting entire new industries is a punishable offense. God forbid. The rest of the world — the Chinese, Indians, Japanese and especially the technologically inferior Europeans — would love to hobble American titans and tax away their profits. The role of the U.S. government should be to repel the foreign attacks. Crazily, the Biden administration has given the green light to foreigners pillaging American companies. This doesn’t put America first. So, can America’s tech dominance continue to blow away the foreign competition for decades to come? Bet on it. That is, unless we are foolish enough to decapitate our own industries through regulation, antitrust policies and raising tax rates on success. The challenge for U.S. supremacy is coming from Washington, D.C., not China.

#### American defense innovation is peerless.

Gholz 6-24-2021, Eugene, Associate Professor of Political Science at the University of Notre Dame. Harvey M. Sapolsky, Professor of Public Policy and Organization, Emeritus, at the Massachusetts Institute of Technology (MIT) and the former Director of the MIT Security Studies Program. ("The defense innovation machine: Why the U.S. will remain on the cutting edge", *Journal of Strategic Studies*, <https://doi.org/10.1080/01402390.2021.1917392>)

Here we examine these concerns that the American military advantage in the Post-Cold War era has dissipated in large part because the Defense Department lags behind in developing advanced technologies. Our judgment is that the American defense research and development system, as honed during the Cold War and expanded since, is fully capable of handling any military challenge. It is a gigantic technology-generating, innovation-producing, war-fighting machine. U.S. ‘hard’ innovation capabilities – ‘input and infrastructure factors’ like R&D facilities, human capital, access to foreign technology, and availability of funding – far outstrip those of its potential rivals, even though those factors are the ones often thought of as easier for catch-up countries to obtain.3 Despite warnings that the United States no longer spends enough on R&D and that Chinese R&D spending is surging, the reality is that the United States dramatically leads in military innovation investment. In functional terms, the United States dominates all other countries, including China, in ‘input factors,’ starting with resource allocations to defense research and development. More important, we believe that the American defense technology system is pushed toward innovation by specific contextual factors, the ‘soft’ categories of attributes and capabilities, that cannot readily transfer to likely rivals.4 First, the political culture of the United States values technology strongly: technology is assumed to be the solution to most problems, including military ones. American culture also has a strong casualty aversion driven by an economy traditionally burdened by labor scarcity and by responsive political institutions that encourage the substitution of capital for labor to keep its own people out of harm’s way.5 The All-Volunteer Force reflects this by making military service voluntary and thus making military service expensive for government and service personnel lives ever-more-valuable and in need of husbanding. Second, competition is deeply engrained in defense, as it is in most of American society, stimulating new ideas and providing a diversity of approaches to any problem, in case one technology trajectory does not work out as hoped. Competition extends among the various military services and agencies, which each seek to propose solutions to the nation’s strategic problems, and among firms with different design-team philosophies. Third, the United States also welcomes foreign ideas much more readily than other countries, given U.S. openness to immigration, especially among the highly skilled and technically expert. Finally, a Cold-War organizational innovation in the United States created special public-private hybrid organizations, Federally-Funded Research and Development Centers (FFRDCs) that offer unbiased technical advice and a mechanism for the accumulation of knowledge – a unique social, relational system for institutional memory and systems integration capability that generally works very well. Other nations, with different divisions between the public and the private and dramatically different governance institutions, cannot easily copy these capabilities. These soft innovation factors particularly emphasize American advantages in the functional category of institutional factors – norms of seeing technology as a solution, trying hard to minimise casualties, using innovation as a means of competition among organizations, and welcoming foreign ideas. The institutional factors draw from the particular American mix of organizations, notably independent military services with strong identities, competitive firms in the defense industry that readily form networks or teams of suppliers even as each maintains its own core competencies and technical habits, and FFRDCs that help keep systems integration efforts honest and less parochial and that help preserve knowledge of false-start technology trajectories and craft skills that enable high-tech systems to function well.6 Because of the robustness of America’s input factors and the difficulty of copying its unique institutional factors, we conclude that the American defense innovation system will remain at the cutting edge and will not be surpassed by a potential international rival. In the final section, we explain why American leaders are so nervous anyway.

#### Venture capital, investment, and tech firms are thriving.

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The United States is home to companies that make up substantially more than half of the market value of the top 100 global public companies. Technology makes up more than a third of America's contribution to that market value, at nearly $8 trillion. According to the World Bank, the innovation-based digital economy grew more than twice as fast as the overall GDP between 2004 and 2019. In the U.S., the digital economy has grown more than three times as fast as the overall U.S. economy since 2005. This torrid growth increases domestic employment and labor productivity. All of this redounds directly to U.S. national security—economic security is national security.

America's economic future depends not on big manufacturing, but on technology and innovation. Where steel plants and manufacturing plants once stood, we now see software development and chip design labs, cloud computing nodes and supply distribution centers. All this has happened specifically in the United States precisely because the government allowed resources to flow to their most productive uses and at times helped prime the pump with basic research funding.

The U.S., unlike some European nations, has avoided creating a vast web of bureaucracy and heavy-handed government regulation. While there are some pockets of innovation in Europe, the regulatory environments in France, Germany and Spain make them much less attractive to cutting-edge companies. Venture capital investment in the U.S. is more than three times larger than in the EU. For all of its foibles, America remains a good bet for innovative companies.

Our relatively laissez-faire economic policy has also created a robust startup community. It supports strong venture capital funding, like Andreessen Horowitz' investments in the burgeoning crypto industry and social media app Clubhouse. It also has helped the U.S. become the world leader in startup acquisitions.

Current U.S. economic policy has also created long-term growth opportunities in the public markets. American tech companies, for example, make up four of the five most valuable public companies based on market capitalization. Larger technology companies like Illumina may very well be able to fund smaller ones like Grail. They can identify opportunities to leverage economies of scale, make important innovations, such as new ways to screen for cancer, and bring new technology like multi-cancer early detection tests to market. This is a good thing.

#### Enforcement deters innovation in unrelated industries

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More to the point, does the short-term benefit come at a greater long-term cost? An enforcement action now could have a deterrent effect on future mergers, contracts, and innovations, including in unrelated industries. The consumer harm from these could well exceed the short-term benefits of a short-term improvement on market outcomes—assuming that regulators are consistently capable of such a feat.

#### Antitrust toward the pharmaceutical industry chills economy-wide innovation.

Carlton et al. 16, \*Dennis W., David McDaniel Keller Professor of Economics, Booth School of Business, University of Chicago; Research Associate, National Bureau of Economic Research; \*\*Fredrick A. Flyer, Consultant, Compass Lexecon; \*\*\*Yoad Shef, Consultant, Compass Lexecon; Adjunct Professor, Booth School of Business, University of Chicago. (“DOES THE FTC’S THEORY OF PRODUCT HOPPING PROMOTE COMPETITION?”, *Journal of Competition Law & Economics*, 12(3), pg. 495-496, doi:10.1093/joclec/nhw025)

I. INTRODUCTION

The FTC’s novel “product hopping” theory has recently appeared in court cases and has led to publically reported FTC investigations.1 Courts have disagreed on the merits of the theory.2 According to this theory, under certain circumstances explained in more detail below, a firm can violate the antitrust laws by introducing a new product that harms its rivals and consumers. Rivals are supposedly harmed because they lose sales to the new product. Consumers are supposedly harmed because they are assumed to gain no significant therapeutic benefits from the new product compared to the old one but must pay a higher price for the new product. Although the FTC so far has applied the theory only to pharmaceuticals, nothing in the theory limits its application to the drug industry. The theory is at best a misguided attempt to fix a regulatory problem in the pharmaceutical industry associated with the Hatch-Waxman Act3 and is premised on the proposition that competition does not work. Using antitrust law to fix such a regulatory problem, assuming one exists, would not only potentially cause consumer harm in pharmaceutical markets, but also create an undesirable antitrust precedent for other industries.

Assuming for sake of argument that there is a problem to be fixed in pharmaceutical markets, the appropriate remedy would be to alter the regulation, as opposed to applying the antitrust laws, which is designed to address harm to competition and not harm caused by ineffective regulations. The objective of the antitrust laws is to promote market competition, based on the underlying assumption that such competition benefits rather than harms consumers. The creation, introduction, and promotion of new products and the protection of investments by limiting “free-riding” off these investments by other competing firms is desirable competitive behavior. To use the antitrust laws to condemn such behavior would therefore misuse antitrust law. Creating disincentives for firms to introduce new branded products, under the guise of “fixing” problems that exists only when viewed by the FTC in the context of Hatch-Waxman’s regulatory objectives, contradicts the antitrust law’s ultimate goal of promoting competition. Even worse, the consequence of attempting to fix the problem, if one indeed exists, through antitrust enforcement will be to chill incentives for product innovation in an industry where the most important health advances come from product innovations. Furthermore, such an attempt could also chill product innovation in other industries, because antitrust law applies broadly to all industries, and not merely the pharmaceutical industry.

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## T — Exemptions

#### To defend against scope, a defendant invokes jurisdictional questions, arguing that they are categorically immune OR their conduct is categorically exempt. To defend against application, a defendant invokes antitrust defenses to justify conduct on the merits.

Keith Hylton & Fei Deng 6, Hylton is Professor of Law, Boston University; Deng is with NERA Economic Consulting, “Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects,” Antitrust Law Journal, December 2006, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1849&context=faculty\_scholarship

The Scope Index which we have presented measures the number of ways in which a firm could get into trouble under the nation’s competition law, or, informally, the size of the competition law net. However, the Scope Index score says nothing about the number of defenses that are available to a firm. In other words, the Scope Index measures the size of the net without saying anything about the number of holes in it.