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**Prohibition requires forbidding a practice, that’s distinct from a mere hindrance**

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

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

#### Violation---the aff is a presumption

Ahrens 2k (Deborah Ahrens-J.D., magna cum laude, New York University School of Law, 2000. NOTE:NOT IN FRONT OF THE CHILDREN: PROHIBITION ON CHILD CUSTODY AS CIVIL BRANDING FOR CRIMINAL ACTIVITY, 75 N.Y.U.L. Rev. 737, 764-765, June, 2000, Lexis, accessed via KU libraries, date accessed 12/22/21)

Statutes enacted in Arkansas, California, and Washington seem facially less troublesome; these statutes only affect the ability of persons convicted of sexual offenses against children to live in homes with children, and the Arkansas and Washington statutes only affect [\*765] convicted persons during the period of their probation. 128 Further, these statutes are presumptions against custody, in contrast with the Alabama statute's absolute prohibition (although the requirements to overcome these presumptions can be substantial). 129 Some aspects of these statutes, however, are actually tougher on released persons; in particular, none of these states makes exception for the person's own children. 130 California's statute, further, was amended in 1998 to create a presumption, not only against physical custody for persons convicted of sexual offenses, but against any legal custody, including visitation. 131

#### Vote Neg:

#### 1. Limits—there are infinite ways to tinker incrementally absent prohibition

#### 2. Ground—only forbidding a practice guarantees the neg link uniqueness for core DAs

#### Independently, they are extra T — they fiat the revival of the Penalty Office Authority in the plan text which is not directly a prohibition but rather the mechanism for the result of it — that’s a voter for fairness and education because they can fiat extra planks and claim advantages based on them — proven in this debate with them claiming an entire advantage off of the revival of the POA

### 1NC — CP

#### Text: The United States federal government should

Develop and implement a US plan for international action on disease including but not limited to the National Health Security Strategy, the National Security Strategy, and the National Biodefense Strategy

Assist with preparedness in low- and middle-income countries

Increase funding for disease NGOs, CDC, USAID, DOD, and DOS

increase the annual base funding for global health security-related activities

Ensure agencies have access to an emergency reserve fund

Maintain US support for global health programs

#### The United States federal government should substantially increase its funding for and promotion of international science and technology cooperation.

#### The United States federal government should establish a comprehensive technology policy that:

* Supports R and D in key tech, provides tax incentives for key building blocks, finances domestic production and scale-up, adopts a competitiveness screen for regulation and establishes reshoring financing

#### Further set of planks solves disease globally.

PATH ’17 [PATH is the leader in global health innovation. An international nonprofit organization, we save lives and improve health, especially among women and children. We accelerate innovation across five platforms—vaccines, drugs, diagnostics, devices, and system and service innovations—that harness our entrepreneurial insight, scientific and public health expertise, and passion for health equity. By mobilizing partners around the world, we take innovation to scale, working alongside countries primarily in Africa and Asia to tackle their greatest health needs. Together, we deliver measurable results that disrupt the cycle of poor health; October; *Healthier World, Safer America A US Government Roadmap for International Action to Prevent the Next Pandemic*; <https://www.path.org/resources/healthier-world-safer-america-a-us-government-roadmap-for-international-action-to-prevent-the-next-pandemic/>; accessed 11/29/18//MSCOTT]

RECOMMENDATIONS Pandemics can emerge quickly and rapidly, resulting in catastrophic loss of life, billions and even trillions in economic losses, and global instability which transcends sovereign borders. Too often we fall into the trap of addressing pandemic threats only after they become crises, repeating the cycle of global panic and emergency spending, followed by waning interest as the outbreak subsides, ultimately leading to inaction and complacency. The international efforts that have been launched with strong US leadership and financing in the wake of the Ebola crisis have begun to show results. Experts and leaders around the world have agreed that prioritizing strategic initiatives that sustainably bolster pandemic preparedness and global health security is needed to ensure that recent gains are not lost and that progress is maintained. To truly protect Americans and populations worldwide, the United States should continue to assert its global leadership and expertise to accelerate international progress on pandemic preparedness; build and implement a wholeof-government global health security strategy; invest in R&D for emerging disease threats; and provide dedicated and sustained funding for these efforts. Commitment to global health security mean will the next local outbreak will be stopped, before the headlines carry the news of another deadly, costly, and unnecessary pandemic. US global health leadership • Maintain consistent, high-level US political support for the next phase of implementation and expansion of the GHSA, taking concerted action in line with public declarations that strengthens global prevention, detection, and rapid response to emerging health threats abroad is a priority for the US government. • Leverage available diplomatic and multilateral financing channels to motivate partner countries, specifically at-risk countries, to achieve and sustain compliance with the IHRs; using the US voice and vote at the United Nations, WHO, World Bank Group, and other relevant international health, development, and security platforms. An international action plan • Develop and implement a US plan for international action in accordance with the structure set forth in the standing Executive Order Advancing the Global Health Security Agenda to Achieve a World Safe and Secure from Infectious Disease Threats. This action plan should prioritize and articulate the US government’s role in advancing preparedness in low- and middle-income countries and catalyze R&D for disease threats, supported with clear and measurable indicators for progress. • Designate senior-level oversight to achieve full implementation of the guidance outlined in the Executive Order and action plan, including ensuring coordinated support to US Chiefs of Mission and country teams to facilitate country preparedness for biological threats, and monitoring and evaluating progress toward global health security targets. • Prioritize global health security—especially the role of building low- and middle-income country capacity to contain pandemic threats—in all relevant future global and national health, R&D, and biodefense strategies, including the National Health Security Strategy, the National Security Strategy, and the National Biodefense Strategy. • Map the potential contributions of the nongovernmental sector to global health security and identify opportunities to catalyze multisectoral partnerships among the US government, private, and social sectors that will harness new allies, innovations, and investments to bolster pandemic preparedness. Research and development • Develop a new generation and robust pipeline of medical countermeasures—including appropriate drugs and technologies that are reflective of robust surveillance data—for infectious and emerging diseases with pandemic potential, allowing the US to quickly prevent an outbreak from becoming a pandemic. • Enable the development and deployment of incentives to proactively and sustainably engage the private sector in medical product development for infectious and emerging diseases with pandemic potential to capitalize on the resources, expertise, and other skills of industry. This includes expanding government driven incentive mechanisms like the BARDA to financially support R&D for an expanded set of infectious and emerging diseases to bring industry partners to the table. • Contribute US scientific and financial leadership to multilateral efforts to accelerate R&D on emerging pandemic threats, including through CEPI, the G20’s R&D Collaboration Hub for antimicrobial clinical research and product development, and regional regulatory harmonization initiatives in endemic disease regions. Dedicated, Sustained US Government financing • Ensure a whole-of-government approach to global health security financing including dedicated and sustained funding for CDC, USAID, DOD, and DOS programming and personnel. • Starting in FY2019, increase the annual base funding for global health security-related activities at CDC and USAID to ensure these agencies can continue their programming after the Ebola supplemental funding expires. To bridge the gap between the supplemental and core appropriations, USAID’s Emerging Pandemic Threats budget should increase from $72.5 million to $172.5 million, and CDC’s Division of Global Health Protection budget should increase from $58.2 million to $208.2 million. • Ensure agencies have access to an emergency reserve fund to initiate an early and rapid response to emerging pandemic threats, allowing USAID and CDC to each retain up to $70 million if and when needed. The reserve fund should be replenished once it is used to ensure funds are available for the next outbreak, and should not be interchangeable with annual appropriations or previously allocated emergency funding, nor borrowed from other global health or development programs, which would derail progress inother critical areas. • Maintain US support for global health programs that build core public health capabilities and bolster frontline preparedness—including PEPFAR, PMI, GPEI, and Child and Maternal Survival programs.

#### Next plank solves science diplomacy.

Holdren ’17 (John P; senior advisor to President Barack Obama on science and technology issues through his roles as Assistant to the President for Science and Technology, Director of the White House Office of Science and Technology Policy, and Co-Chair of the President’s Council of Advisors on Science and Technology, PhD from Stanford University; 4/27/17; “How International Cooperation in Research Advances Both Science and Diplomacy”; <https://blogs.scientificamerican.com/guest-blog/how-international-cooperation-in-research-advances-both-science-and-diplomacy/>; Scientific American; accessed 7/8/18; TV)

The partial budget blueprint released by the White House recently will put U.S. leadership in science and technology at serious risk if Congress goes along. In addition to the obvious damage that would result from the proposed $5.8 billion cut at NIH, the $2 billion cut in applied energy R&D, the $900 million cut in DOE’s Office of Science, the abolition of ARPA-E, and the research cuts at NOAA and EPA, a less immediately obvious potential casualty would be U.S. scientific cooperation with a wide variety of other countries on a wide variety of topics. These international collaborative activities are actually likely to be first on the chopping block for three reasons: the tendency of departments and agencies under budget stress to prioritize protection of purely domestic programs; the presumption among many members of Congress that international cooperation is a one-way street operating to the disadvantage of the United States; and the Trump Administration’s “America First” stance (which is, perhaps not surprisingly, the top line in the title of the March budget document). I have spent much of a long career in science and technology participating in and building international research collaborations with Australia, Brazil, Canada, China, the European Union, India, Japan, the Republic of Korea, Mexico, and Russia, among others. As President Obama’s Science Advisor and Director of the White House Office of Science and Technology for the past eight years, I had responsibility for overseeing U.S. participation in six of our most important bilateral science and technology cooperation agreements, including those with Russia and China, and for supporting the State Department in its lead role implementation bilateral S&T agreements with another forty nations. I know, therefore, how international S&T cooperation is structured, how it works, and how it benefits U.S. S&T capabilities in the national interest and also, as a huge bonus, how it serves this country’s diplomatic aims. I find the implications of the Administration’s budget proposal—and the President’s overall zero-sum stance on international interactions—to be deeply dismaying. There are several good reasons the U.S. government, under Republican and Democratic administrations alike, has long seen fit to encourage and support international S&T cooperation with a wide variety of partners: Science and technology are being pursued and advanced all across the globe. Working with other countries can provide access to valuable additional expertise, and it shares costs, allows pursuing complementary lines of effort, and helps avoid duplication of effort. The result is faster progress on common goals, at lower cost to U.S. funders. Accelerating joint progress through collaboration is even more valuable when the goals are global public goods—e.g., combating epidemic disease, curing cancer, reducing oil dependence, mitigating climate change, improving nuclear-reactor safety—in which progress anywhere provides benefits everywhere. Even when the benefits of S&T collaboration appear to be more one-sided, as when the United States collaborates with technically less advanced countries to help them build their scientific capacity and apply science and technology to development goals, this country reaps significant benefits: the resulting advances make the partner countries less likely to become sources of major refugee flows and regional political instability as well as more likely to advance economically to the point of becoming significant markets for U.S. products. Mutually beneficial S&T collaboration is also beneficial diplomatically, as the benefits provide a positive rationale for maintaining decent relations even in the face of disagreements on other issues. In addition to these generally well recognized benefits, international S&T collaboration foments personal relationships of mutual respect and trust across international boundaries that can bring unexpected dividends when the scientists and engineers involved end up in positions to play active roles in international diplomacy around issues with significant S&T content—e.g,, climate change, nuclear arms control, and intellectual property.

#### Last plank solves through a robust industrial strategy

Atkinson 20, founder and president of ITIF. Atkinson’s books include: Big Is Beautiful: Debunking the Myth of Small Business (MIT, 2018), Innovation Economics: The Race for Global Advantage (Yale, 2012), and The Past and Future of America’s Economy: Long Waves of Innovation That Power Cycles of Growth (Edward Elgar, 2005). Atkinson holds a Ph.D. in city and regional planning from the University of North Carolina, Chapel Hill, and a master’s degree in urban and regional planning from the University of Oregon. (Robert, “The Case for a National Industrial Strategy to Counter China’s Technological Rise,” *ITIF*, <https://itif.org/publications/2020/04/13/case-national-industrial-strategy-counter-chinas-technological-rise>)

KEY TAKEAWAYS

China has long posed a stark techno-economic challenge in the advanced industries that are most critical to America’s economic wellbeing and national security. To overcome that threat, policymakers must break free of conventional economic thinking. Trade and foreign policy measures are necessary, but not enough. America needs a robust domestic strategy, too—and it cannot be limited to generic policies to expand “factor inputs” like science, education, and infrastructure. America needs a national strategy that fortifies traded-sector tech industries that are “too critical to fail,” such as advanced machinery, aerospace, biopharma, electrical equipment, semiconductors and computing, software, transportation and more. To develop and implement a national industrial strategy, the federal government will need to significantly strengthen its institutional capabilities to conduct thorough sectoral analysis. Congress should act in four areas: support for R&D targeted to key technologies, tax incentives for key building blocks of advanced production, financing for domestic production scaleup, and adding a competitiveness screen for regulation. All these programs should be aligned with U.S. allies wherever possible. Without a robust industrial strategy to bolster its advanced industries, America will likely experience a steady erosion in its competitive position—akin to the UK’s path in the 1960s and 70s—and a concurrent rise in populist fervor. OVERVIEW Economic pundit Robert Reich once wrote that “industrial policy is one of those rare ideas that has moved swiftly from obscurity to meaninglessness without any intervening period of coherence.” But after 40 years of obscurity and meaninglessness, the concept is now gaining credence for one main reason: China. Elected officials and others from both sides of the political aisle have become increasingly concerned in recent years that China will overtake the United States as the world’s technology leader, with dire consequences for America’s prosperity and national security. And the COVID-19 pandemic, with its disruptions of supply chains, has put U.S. dependency on China in the news on an almost daily basis. Yet while efforts to push back against Chinese “innovation mercantilism” are needed, such steps, even if successful—which is increasingly doubtful—will not be enough. It is time for the federal government to put in place a national industrial strategy that focuses on supporting key industries critical to America’s economic vitality, public health, and national security: in other words, industries that are “too critical to fail.” Unfortunately, when it comes to industrial strategy, our institutional structures are holdovers from the Cold War era while our thinking remains stuck in the 1990s’ free-market, globalist-based Washington Consensus. It is time for a new way of thinking about national security, economic competitiveness, and advanced technology, coupled with new institutions that can effectively develop and implement a national industrial strategy in conjunction with our allies. As such, as Congress considers further stimulus in response to the COVID-19 crisis, it should focus on actions that will not only spur short-term growth and recovery, but also ensure long-term competitive and economic resilience. It is time for the U.S. government to put in place a proactive and targeted national industrial strategy, focused on supporting key industries critical to America’s economic and national security. This report provides the “why, what, and how” of a national industrial strategy—explaining why advanced industrial competitiveness is important, particularly vis-à-vis China; what is the nature of the U.S. advanced industry competitiveness challenge and why markets acting alone are not enough to address the challenge; what a strategy should look like, both institutionally and substantively, and how policymakers should approach developing one; and finally, why common objections to such a strategy are misguided. While trade and foreign policy responses need to play a key role in any overarching strategy to address the China challenge, this report focuses only on proactive, domestic measures the United States can take to have a better chance of retaining, expanding, and making advanced technology industries more resilient in the face of Chinese competition.1 These recommendations include:

* Congress should task the administration with creating a national advanced industry strategy, as Sens. Chris Coons (D-DE), Jeff Merkley (D-OR), Marco Rubio (R-FL), and Todd Young (R-IN) have proposed.
* Congress should establish a unit within the National Institute of Standards and Technology (NIST) to monitor and analyze U.S. domestic production capabilities in advanced industry sectors and their supply chains.
* Congress should significantly expand funding for research related to key technologies, including, among others, artificial intelligence, biopharmaceuticals, robotic and autonomous systems, and semiconductors, and target it to maximize commercialization of these technologies in the United States.
* Congress should establish a Competitiveness Tax Credit, providing a tax credit of 45 percent of all business investments made in the United States in R&D, skills training, and global standards setting, and a 25 percent credit for expenditures on new equipment and software, with expenditures in excess of 75 percent of base-period expenditures qualifying for the credit.
* Congress should support the establishment of an industrial investment bank to drive advanced production scale-up in America, as well as a reshoring incentive fund to encourage relocation from China to the United States of production in critical industries.
* These efforts should be coordinated with our allies, and as such, the federal government should work to establish a joint U.S.-EU-Japan Technology Alliance.

WHY ADVANCED INDUSTRY COMPETITIVENESS IS IMPORTANT The competitiveness of advanced, traded-sector establishments is a key component of healthy economies, and why dozens of nations have implemented strategies to bolster advanced industry competitiveness. There are at least five reasons why policymakers should focus on these sectors. First, advanced traded sectors are critical to America’s trade performance, accounting for 60 percent of U.S. exports.2 More competitive sectors mean a lower trade deficit and a higher value of the dollar relative to other currencies. The former is important because a lower trade deficit means less foreign debt owed by future generations. The latter matters because a stronger dollar means cheaper imports and a higher living standard now. Given the debate over the role of the value of the dollar in competitiveness, it is important to understand that the goal is not a weak dollar; the goal is globally competitive robust advanced traded sectors. If these sectors are competitive, and if the value of the dollar is determined by market forces rather than by foreign government policy, the dollar’s value will be high because sectors are competitive and the U.S. is exporting as much as—or more—than it imports. As such, U.S. currency policy should be focused not on keeping the dollar high or low, but rather on letting the price reflect market conditions (including by fighting foreign currency manipulation). However, U.S. economic policy should work to ensure these market conditions include having the most globally competitive advanced industries. Second, advanced traded sectors are a key source of high-wage jobs, including for non-college-educated workers. Workers in advanced industries earn 80 percent more than average, while workers without college degrees earn 57 percent more in high-tech industries.3 Third, a strong advanced technology sector is a source of growth and vitality for the macroeconomy. For example, 35 percent of U.S. economic growth came from 75 intellectual property (IP)-intensive industries.4 In this sense, having healthy and growing advanced technology traded sectors is akin to the Fed cutting interest rates: They provide a stimulus for continued growth. When advanced industries decline, they generate a headwind for economic growth, in part because spending by their workers and non-traded-sector suppliers falls. Fourth, these sectors give nations needed flexibility and resilience in the face of global challenges. Strength in a broad array of advanced technology sectors makes it easier to respond to external threats to supply chains, either from natural disasters like pandemics, or from actions by other nations to intentionally harm or exert leverage over the United States. Finally, advanced traded sectors and many of the technologies associated with them are critical to America’s ability to field a robust military force, particularly as China’s technological capabilities and efforts at “civil-military fusion” advance.5 As a recent Department of Defense (DOD) report on the defense industrial base stated, “To provide for our national security, America’s manufacturing and defense industrial base must be secure, robust, resilient, and ready.”6 And while much of the U.S. defense capability could once be provided principally by defense contractors, today, advancements in technology require “spin on” from the commercial sector. This is why Mike Griffin, undersecretary of defense for research and engineering, wrote, “Superiority in these [commercial] technologies…is the key to deterring or winning future conflicts.”7 And with the loss of advanced manufacturing capabilities to overseas locations over the last two decades, this makes it harder not just to produce needed technologies, but even to develop them. As Bonvillian, Van Atta, and Windham wrote in a report on the Defense Advanced Research Projects Agency (DARPA), “For the DARPA model agencies to be cut off from these innovation system capabilities, and unable to rely on a strong U.S. manufacturing base for rapid prototyping and innovative production, spells a major potential challenge to their ability to develop and implement hard technologies.”8 This is one reason DOD launched its Defense Innovation Unit to work with the private sector, and is supporting 8 of the 14 Manufacturing USA institutes.9 As such, the ability to defend the nation’s interests comes not only from traditional defense firms in sectors such as aerospace, shipbuilding, and munitions, it also comes from firms in dual-use sectors such as software, materials, machine tools, industrial automation systems, semiconductors, and technology hardware. Moreover, even other sectors, such as consumer electronics and autos, while not directly defense related, contribute to the overall technical capabilities and production resilience of the U.S. economy, in part by supporting science, technology, engineering, and mathematics (STEM) workers and technologically sophisticated suppliers.

### 1NC — T

#### Practice requires repeated and customary action as the usual mode—excludes outliers

Ohio Court of Appeals 59 (YOUNGER-judge. Opinion in City of Defiance v. Nagel, 108 Ohio App. 119 - Ohio: Court of Appeals 1959, Google scholar caselaw, date accessed 8/25/21)

As used here, the noun, "practice," means an actual performance habitually engaged in; often, repeated, or customary action; usage; habit; custom; or the usual mode or method of doing something. Therefore, in this instance, the practice of doing something cannot be proved by the proof of or the admission of one single act. Criminal statutes and ordinances are to be strictly construed.

#### The aff violates: those cases are uncommon

Petty 94 (Ross D. Petty - Roger A. Enrico Term Chair, Associate Professor, Babson College. “ADVERTISING LAW AND SOCIAL ISSUES: THE GLOBAL PERSPECTIVE” , 17 Suffolk Transnat'l L. Rev. 309, 17 Suffolk Transnat'l L. Rev. 309. Lexis accessed online via KU libraries, date accessed 1/30/22)

Like the United States, most countries authorize the injunction of a false advertisement. In Germany, preliminary injunctive relief is presumed appropriate, though rebuttable, in private advertising lawsuits. This burden of proof is much lower than the United States requires of private litigants under the Lanham Act, but is comparable to the burden required under the FTC. This rebuttable presumption is countered by liability for damages if the challenger does not prevail in the overall suit. 122 A few countries, such as Saudi Arabia and France, authorize the further relief of corrective advertising. 123 Australia also authorizes corrective advertising, but since the end of 1981 this remedy had not been used. 124

Damages are rarely awarded and often unavailable to consumers in other countries. To obtain damages, competitors must prove lost sales pursuant to the United States Lanham Act. Germany allows consumer groups to sue for damages, but any complainant seeking damages must prove intentional or negligent misconduct. 125 Other countries award fines or costs to the successful challenger. 126 Most European countries also provide for criminal prosecution for intentional misconduct, but, as in the United States, such cases are rare. 127

#### VOTE NEG: they lead to a flood of tiny single harm affs

### 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 — Innovation

### 1NC — AT: Disease

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

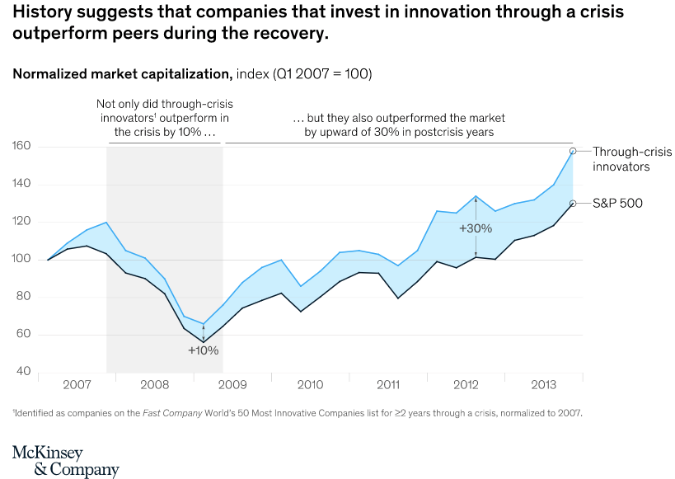
Jansen et al ’20 — Leigh Jansen (Associate Partner, McKinsey & Company); “Industry innovation: How has COVID-19 changed global healthcare?;” World Economic Forum; November 25th, 2020; <https://www.weforum.org/agenda/2020/11/healthcare-innovation-covid-coronavirus-pandemic-response-health>

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

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

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

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



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

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

#### 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

#### ABR is gradual, slow, and will be addressed---reject scary-sounding headlines

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.

### 1NC — AT: Heg

#### No leadership impact.

Fettweis 20, Associate Professor of Political Science at Tulane University. (Christopher J., 6-3-2020, "Delusions of Danger: Geopolitical Fear and Indispensability in U.S. Foreign Policy", *A Dangerous World? Threat Perception and U.S. National Security*, <https://www.cato.org/publications/publications/delusions-danger-geopolitical-fear-indispensability-us-foreign-policy>)

Like many believers, proponents of hegemonic stability theory base their view on faith alone.41 There is precious little evidence to suggest that the United States is responsible for the pacific trends that have swept across the system. In fact, the world remained equally peaceful, relatively speaking, while the United States cut its forces throughout the 1990s, as well as while it doubled its military spending in the first decade of the new century.42 Complex statistical methods should not be needed to demonstrate that levels of U.S. military spending have been essentially unrelated to global stability.

Hegemonic stability theory’s flaws go way beyond the absence of simple correlations to support them, however. The theory’s supporters have never been able to explain adequately how precisely 5 percent of the world’s population could force peace on the other 95 percent, unless, of course, the rest of the world was simply not intent on fighting. Most states are quite free to go to war without U.S. involvement but choose not to. The United States can be counted on, especially after Iraq, to steer well clear of most civil wars and ethnic conflicts. It took years, hundreds of thousands of casualties, and the use of chemical weapons to spur even limited interest in the events in Syria, for example; surely internal violence in, say, most of Africa would be unlikely to attract serious attention of the world’s policeman, much less intervention. The continent is, nevertheless, more peaceful today than at any other time in its history, something for which U.S. hegemony cannot take credit.43 Stability exists today in many such places to which U.S. hegemony simply does not extend.

Overall, proponents of the stabilizing power of U.S. hegemony should keep in mind one of the most basic observations from cognitive psychology: rarely are our actions as important to others’ calculations as we perceive them to be.44 The so‐​called egocentric bias, which is essentially ubiquitous in human interaction, suggests that although it may be natural for U.S. policymakers to interpret their role as crucial in the maintenance of world peace, they are almost certainly overestimating their own importance. Washington is probably not as central to the myriad decisions in foreign capitals that help maintain international stability as it thinks it is.

The indispensability fallacy owes its existence to a couple of factors. First, although all people like to bask in the reflected glory of their country’s (or culture’s) unique, nonpareil stature, Americans have long been exceptional in their exceptionalism.45 The short history of the United States, which can easily be read as an almost uninterrupted and certainly unlikely story of success, has led to a (perhaps natural) belief that it is morally, culturally, and politically superior to other, lesser countries. It is no coincidence that the exceptional state would be called on by fate to maintain peace and justice in the world.

Americans have always combined that feeling of divine providence with a sense of mission to spread their ideals around the world and battle evil wherever it lurks. It is that sense of destiny, of being the object of history’s call, that most obviously separates the United States from other countries. Only an American president would claim that by entering World War I, “America had the infinite privilege of fulfilling her destiny and saving the world.“46

Although many states are motivated by humanitarian causes, no other seems to consider promoting its values to be a national duty in quite the same way that Americans do. “I believe that God wants everybody to be free,” said George W. Bush in 2004. “That’s what I believe. And that’s one part of my foreign policy.“47 When Madeleine Albright called the United States the “indispensable nation,” she was reflecting a traditional, deeply held belief of the American people.48 Exceptional nations, like exceptional people, have an obligation to assist the merely average.

Many of the factors that contribute to geopolitical fear — Manichaeism, religiosity, various vested interests, and neoconservatism — also help explain American exceptionalism and the indispensability fallacy. And unipolarity makes hegemonic delusions possible. With the great power of the United States comes a sense of great responsibility: to serve and protect humanity, to drive history in positive directions. More than any other single factor, the people of the United States tend to believe that they are indispensable because they are powerful, and power tends to blind states to their limitations. “Wealth shapes our international behavior and our image,” observed Derek Leebaert. “It brings with it the freedom to make wide‐​ranging choices well beyond common sense.“49 It is quite likely that the world does not need the United States to enforce peace. In fact, if virtually any of the overlapping and mutually reinforcing explanations for the current stability are correct, the trends in international security may well prove difficult to reverse. None of the contributing factors that are commonly suggested (economic development, complex interdependence, nuclear weapons, international institutions, democracy, shifting global norms on war) seem poised to disappear any time soon.50 The world will probably continue its peaceful ways for the near future, at the very least, no matter what the United States chooses to do or not do. As Robert Jervis concluded while pondering the likely effects of U.S. restraint on decisions made in foreign capitals, “It is very unlikely that pulling off the American security blanket would lead to thoughts of war.“51 The United States will remain fundamentally safe no matter what it does — in other words, despite widespread beliefs in its inherent indispensability to the contrary.

#### Heg is unsustainable---retrenchment is gradual now, but recommitting makes it violent and forced.

Kupchan 20, professor of international affairs at Georgetown University and senior fellow at the Council on Foreign Relations. (Charles A., 10-21-2020, "America’s Pullback Must Continue No Matter Who Is President", *Foreign Policy*, https://foreignpolicy.com/2020/10/21/election-2020-smart-retrenchment/)

As the Trump era potentially comes to an end, many foreign-policy voices in the United States and abroad relish the prospect of the country’s roaring return to the global stage. But attempting a full-on comeback would be a mistake. If anything, the strategic pullback that President Donald Trump has initiated needs to continue—albeit in a more coherent and judicious manner.

Much of the debate surrounding the next administration’s foreign policy has focused on boldly reasserting U.S. leadership in the world. And it’s true: Global interdependence and upheaval do require steady U.S. leadership and engagement. What’s been largely missing from this debate, however, are the challenges facing the next president when it comes to right-sizing U.S. engagement abroad—especially military involvement—and bringing the nation’s strategic commitments back into line with it means and purposes.

The American electorate has turned sharply inward in response to military overreach in the Middle East, the economic dislocations brought about by innovation and globalization, and the national calamity caused by COVID-19. The nation’s next president would be wise to take note—and craft a brand of global statecraft that is effective but also politically sustainable. Otherwise, the strategic pullback that needs to take place will occur by default rather than by design, risking that U.S. overreach could turn into even more dangerous underreach. Indeed, that’s what’s been happening during Trump’s presidency. He seems to have understood the need to retrench. But his troop withdrawals from Afghanistan, Iraq, Syria, and Germany have been haphazard, making a hash of the effort. Retrenchment cannot be done by tweet, in unpredictable fits and starts, and couched in an abrasive “America first” unilateralism that has alienated allies and set the world on edge.

Democratic candidate Joe Biden is far better suited to restore an equilibrium between the nation’s foreign policy and its political will. Throughout his career, he has been a pragmatic and prudent internationalist; looking forward, pragmatism and prudence will require a more selective and discriminating internationalism, not restoration of the status quo ante. Three-quarters of the American public want U.S. troops to leave Afghanistan and Iraq—it is time to downsize the U.S. footprint in the Middle East. U.S. foreign policy has become over-militarized—the next administration should reallocate priorities and resources, putting more emphasis on diplomacy, cybersecurity, global public health, and climate change. Washington should also return to being a team player if it is to lighten its load; retrenchment and multilateral engagement go hand in hand. Meeting the threat posed by China, managing international trade and finance, preventing nuclear proliferation, addressing pandemics—these and other urgent challenges all require broad international cooperation. And as the United States pulls back from its role as global policeman, it will want like-minded partners to help fill the gap. These partnerships become stronger through diplomacy and teamwork.

The top priorities of the next president will be at home: taming the pandemic, repairing the economy, and reviving democratic institutions and norms. Only if the country’s democratic lights come back on can it effectively deal with the rest of the world. In the meantime, the next administration needs to continue Trump’s effort to downsize the nation’s foreign entanglements—but in a smart and measured way. The United States needs to step back without stepping away. “Build back better” applies abroad just as much as it does at home.

## 1NC — FTC

### 1NC — Presumption

#### Their Lee evidence cites AMG Capital Management, LLC v. Federal Trade Commission as the cause of the FTC’s impending collapse — spoiler alert — that was decided in April on a 9-0 against the FTC — that should’ve triggered it as it has been 9 months but the FTC is doing just fine — means vote negative on presumption AND there is only uniqueness for the turn

### 1NC — Turn

#### FTC fraud prevention is funded now — BUT the aff trades off

1AC Bilirakis et al. 21 (Gus Michael Bilirakis is an American lawyer and politician serving as the U.S. Representative for Florida's 12th congressional district since 2013; Hon. Noah Joshua Phillips is a Commissioner at the Federal Trade Commission; Hon. Lina Khan is the Chair of the Federal Trade Commission, “Transforming the FTC: Legislation to Modernize Consumer Protection,” *Committee on Energy and Commerce*, 6/28/21, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer>)

Gus Bilirakis (3:12:44): Thank you. Our committee has worked extensively in a bipartisan manner to protect consumers from fraud and scams. Mr. Carter's Combating Pandemic Scams Act was enacted at the beginning of the year thanks to all of our leadership here. Representive Blunt Rochester's Fraud and Scam Reduction Act, as well as Representative Kelly's Protecting Seniors from Emergency Scams Act both cleared our chamber with bipartisan support this year. My bill, HR 2672, the FTC Reports Act, would require the FTC to report on fraud against our seniors. Commissioner Philips, how important is the work the FTC staff does to protect Americans from scams? Noah Josuha Phillips (3:13:33): Congressman, thank you for your question. The work we do to protect American consumers against frauds and scams, is our bread and butter as an agency. There is no work that makes me feel better as a commissioner, when we watch our ability to find bad guys, or taking money from American consumers, dipping into their life savings, and get that money back to them. So the work that you have done on the committee to provide funding, to provide tools for us to go after scam artists, is critical. And I think that needs to continue with the agency. Gus Bilirakis (3:14:05): Thank you, and Chair Khan, again, as you pursue other initiatives, when staff and resources be shifted away from the fraud program, which is so essential in preventing bad actors from harming our constituents? That's the question, please. Lina Khan (3:14:22): Sorry, could you repeat the question - when should services be shifted... Gus Bilirakis (3:14:26): Yes, of course. As you pursue other initiatives, when staff and resources be shifted away from your fraud program, which is so essential in preventing bad actors from harming our constituents? Lina Khan (3:14:40): Well, of course, we're always limited by the appropriations bills when it comes to thinking through how we're delegating resources across the agency. In certain instances, I think there are exigent needs that can arise in certain aspects. Gus Bilirakis (3:14:54): But you don't anticipate moving money from the fraud program, is that correct? Lina Khan (3:15:00): Not especially, but I mean, I think overall, we are trying to look through the prism of managerial efficiency and trying to understand how we can best use our resources, especially given some of the exigent circumstances and so we'll be continuing to make those determinations. Gus Bilirakis (3:15:15): I suggest that you not because this is such a very important program. Commissioner Wilson, can you elaborate on why the FTC Reports Act would also prove beneficial to increasing much needed transparency and the flow of information within the commission?

#### FTC has sufficient resources now particularly for scams and fraud

Soto et al. 21, American attorney and Democratic politician from Kissimmee, Florida, who is the U.S. Representative for Florida's 9th district; Lina Khan is Chair at the FTC; Noah Joshua Phillips is Commissioner at the FTC; Rohit Chopra is Commissioner at the FTC; Christine S. Wilson is Commissioner at the FTC, (Darren, “Transforming the FTC: Legislation to Modernize Consumer Protection,” Committee on Energy and Commerce, 6/28/21, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer>)

Noah Joshua Phillips (5:06:17): Thank you, Congressman, I'd just start with the fact that when I began, our budget was about 309 million, I think, something like that, and the latest congressional budget justification has us at 389. So there's been a substantial increase in the ask, including some funding from Congress. So I think it's important to track how those resources are used. But I do think we can do more with more. That's, that's certainly a true thing. But I think it's important to take care in how we spend what we have.

Darren Soto (5:06:46): Thank you. Commissioner Chopra.

Rohit Chopra (5:06:48): Sir, I think - I know every agency says that they need more resources. But just looking at the data, we are stretched completely to capacity and the rubber band is snapping. And if we need to effectively enforce the law, we need the resources. There are so many laws that Congress has recently passed, whether it's relates to opioids or so many other topics, that the FTC has not brought a single law enforcement action on. That's not just resources. That's also Commissioner accountability. But resources will certainly help.

Darren Soto (5:07:25): Commissioner Slaughter.

Christine Williams (5:07:30): Commissioner Slaughter had to leave, but Commissioner Wilson is here. And I would say that our hard working staff have been even harder working during the last 18 months. They are teleworking but they are working incredibly hard to stay on top of the increase in mergers as well as the increase in COVID scams. And I agree with Commissioner Phillips, it's important to understand how we are spending additional appropriations. But I also know that there are many different areas of the economy where Congress has expressed interest in our being very active and aggressive. And it is difficult to do that unless we have the appropriate resources to do that.

#### The FTC is dedicating substantial resources to fighting fraud now — status quo rulemaking is heightening penalties

FTC 12-16-2021 (“FTC Launches Rulemaking to Combat Sharp Spike in Impersonation Fraud,” <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-launches-rulemaking-combat-sharp-spike-impersonation-fraud>)

The Federal Trade Commission launched a rulemaking today aimed at combatting government and business impersonation fraud, a pernicious and prevalent problem that has grown worse during the pandemic. Impersonators use all methods of communication to trick their targets into trusting that they are the government or an established business and then trade on this trust to steal their identity or money. The COVID-19 pandemic has spurred a sharp spike in impersonation fraud, as scammers capitalize on confusion and concerns around shifts in the economy stemming from the pandemic. Incorporating new data from the Social Security Administration, reported costs have increased an alarming 85 percent year-over year, with $2 billion in total losses between October 2020 and September 2021. Notably, since the pandemic began, COVID-specific scam reports have included 12,491 complaints of government impersonation and 8,794 complaints of business impersonation. “It is reprehensible that scammers are preying on people during this pandemic by pretending to be someone they can trust,” said Samuel Levine, Director of the FTC’s Bureau of Consumer Protection. “The sharp spike in impersonation scams has cost our country billions and undermined response and relief efforts. The FTC is prepared to use every tool in our toolbox to deter government and business impersonation fraud, penalize wrongdoers, and return money to those harmed.” Government and business impersonators can take many forms, posing as, for example, a lottery official, a government official or employee, or a representative from a well-known business or charity. Impersonators may also use implicit representations, such as misleading domain names and URLs and “spoofed” contact information, to create an overall net impression of legitimacy. These scammers are fishing for information they can use to commit identity theft or seek monetary payment, often requesting funds via wire transfer, gift cards, or increasingly cryptocurrency. Government impersonators typically assert an air of authority to stage their scam. These impersonators sometimes threaten their target with severe consequences such as a discontinuation of benefits, enforcement of tax liability, and even arrest or prosecution. Government impersonators have also been known to deceive consumers into paying for services that would otherwise be free, or to lure them with promises of government grants, prizes, or loan forgiveness. Business impersonators typically get consumers’ attention with emails, telephone calls or text messages about suspicious activity on consumers’ accounts or computers or supposed good news about a refund or prize in hopes of gaining trust and receiving personal information. The harm is substantial, as people who lose money on the leading business impersonator scams report an individual median loss of $1,000. In the Advance Notice of Proposed Rulemaking (ANPR), the FTC is seeking comment from the public on a wide range of questions about these schemes. The ANPR outlines the extensive data the Commission has collected related to these types of impersonation scams, drawn largely from the FTC’s Consumer Sentinel Network database of fraud reports, and its law enforcement experience in this area. The FTC has brought numerous cases against government and business impersonation schemes through the years under its existing authorities, but the ANPR notes that the Commission’s authority to seek consumer redress or civil penalties in these cases is currently very limited. The provisions related to impersonation under the Telemarketing Sales Rule and Mortgage Assistance Relief Services Rule cover only specific sectors or methods of scams. This is the first rulemaking initiated under the Commission’s streamlined rulemaking procedures. A potential rule resulting from the ANPR could allow the FTC to seek strong relief for consumers across a broad array of government and business impersonation cases, which is especially important following the Supreme Court’s ruling in AMG Capital Management LLC v. FTC. If, after reviewing the public comments in response to the ANPR, the Commission decides to proceed with proposing such a trade regulation rule, its next step would be to issue a notice of proposed rulemaking.

#### This is also true for cyber prosecution — their Holland card and internal link is about funding and expanding their ability to prosecute data privacy — the FTC is doing that now

Hammer 12-3-2021, JD, represents employees in whistleblower, discrimination, and other employment-related litigation, including representing corporate whistleblowers in claims under the whistleblower protection provisions of the Sarbanes-Oxley Act and Dodd-Frank Act (Dallas, “FTC Whistleblower Act Would Reward and Protect Whistleblowing About Data Privacy Misconduct and Other Deceptive Practices,” National Law Review, <https://www.natlawreview.com/article/ftc-whistleblower-act-would-reward-and-protect-whistleblowing-about-data-privacy>)

In the meantime, the FTC recently has focused on a subset of its priorities. This includes addressing 1) privacy concerns that may be heightened by the pandemic, and 2) technologies or types of data that could exacerbate racial inequities. For example, during 2021, the FTC has addressed issues the pandemic has brought to the forefront, including increased use of health apps; accuracy of data used for housing, employment, and credit; and videoconferencing and education technology. Additionally, the Commission has collected research on racial equity issues, issued business guidance on artificial intelligence and algorithms, brought enforcement actions related to facial recognition and credit discrimination, and implemented the FTC’s Every Community Initiative. The Every Community Initiative examines consumer protection issues and the impact of unlawful privacy practices on distinct groups, including Black Americans, Latinos, Asian Americans, Native Americans, older adults, military service members and veterans, and other groups. Despite the legal and practical limitations, whistleblowers have reason to be optimistic that they can help the Commission fulfill its aggressive agenda. In addition to the foregoing issues, the FTC aims to: 1) better integrate its privacy and data security efforts with its mission to promote competition, 2) improve remedies for consumers, 3) focus on digital platforms, and 4) expand the Commission’s understanding of algorithms. One of the FTC’s priorities is to better integrate its privacy and data security efforts with its goal of promoting competition. Many companies have become players in digital markets by virtue of their access to and control over user data. The FTC aims to ensure that it views problems raising in digital markets through a dual lens that addresses both privacy and competition concerns. For example, market power may enable consumer protection violations that in turn decrease competition. Likewise, companies may gain market share through deceptive reassurances on privacy. In addition, the FTC wants to apply competition-based remedies in consumer protection cases. (See the Everalbum, Inc., enforcement action below as an example of how these principles may apply in action.) Another Commission priority is to improve consumer remedies. In pursuit of its goals to provide relief for consumers and deter unfair or deceptive privacy and security practices, the FTC is focused on expanding the following types of remedies: 1) providing notice to harmed consumers (see the Flo Health, Inc., enforcement action below); 2) recovering money for harmed consumers (see the Vivint Smart Home, Inc.; Equifax; and Facebook enforcement actions below); 3) obtaining non-monetary remedies for consumers (see the Vivint action); and 4) stopping companies from benefitting from illegally collected data (see the Everalbum action). Third, the Commission intends to increase its focus on the data practices of dominant digital platforms, so that the agency can leverage its limited resources to redress the most egregious practices and have a broader impact. The FTC sees an increased focus on order enforcement as integral to this goal. The Commission already has many large companies under order for privacy and/or data security violations, including Facebook, Google, Twitter, Microsoft, and Uber. The wants its orders to have credibility, disincentivize misconduct, and improve practices across the market. To accomplish that goal, the Commission plans to shift resources to order compliance and enforcement, especially against large companies. Finally, the FTC has a particular interest in better understanding algorithms and the consumer protection and competition risks associated with them. For example, the FTC Act’s prohibition on unfair or deceptive practices includes the sale or use of racially biased algorithms. If an algorithm’s developer promises that its product will provide unbiased results, but in fact it does not, that could be a deceptive practice. Similarly, if the use of a biased algorithm discriminates against consumers, causing them substantial injury that is not reasonably avoidable and not outweighed by countervailing benefits – the FTC could challenge that use as unfair. Perhaps the best way to understand these enforcement priorities is to look at how the Commission has applied them in practice. The following list highlights some of the FTC’s recent notable privacy and data security enforcement actions.

* In May 2021, the Commission settled its enforcement action against Everalbum, Inc., the developer of the photo storage and organization app, Ever. In the Matter of Everalbum, Inc., FTC File No. 1923172 (2021). The Commission alleged that the company violated the FTC Act by deceiving users about how it would apply facial recognition technology to the photos collected from users. The consent order resolving the allegations required the company to delete any facial recognition models or algorithms it developed with Ever users’ photos or videos. This remedy demonstrates the FTC’s emphasis on not only stopping illegal conduct, but also prohibiting violators from gaining a competitive advantage from unlawfully collected data.
* In June 2021, the FTC resolved its first privacy-related health app case against Flo Health, Inc. In the Matter of Flo Health, Inc., FTC File No. 1923133 (2021). The Commission alleged that, in violation of its promises to users, the company disclosed health data from millions of users of its Flo Period & Ovulation Tracker app to third parties such as Facebook and Google. In addition to other requirements, the settlement required Flo Health to notify affected users about the disclosure of their personal information. The FTC emphasized this remedy on the basis that it allowed those users to decide whether to still use or recommend Flo Health’s services in light of its actions. The Commission reasoned that this was a fundamental equity issue because those affected by a company’s unlawful conduct have a right to know about it, but many people will not hear about an FTC action against a company they deal with unless the company tells them.
* In April 2021, the FTC resolved a federal action against Vivint Smart Home, Inc., that alleged that in some instances consumers’ credit information was used by Vivint sales representatives without their knowledge or consent to qualify another individual for financing for Vivint’s products and services. S. v. Vivint Smart Home, Inc., Civil Action No. 2:21-cv-00267-TS (D. Utah 2021). According to the complaint, if customers qualified using these tactics later defaulted on their loans, Vivint referred the innocent third party to its debt buyer, potentially harming that consumer’s credit and subjecting them to debt collectors. Vivint agreed to pay $20 million to settle the charges, including a $5 million redress fund for consumers who did not sign up for Vivint’s services but were contacted by debt collectors or found Vivint accounts improperly listed on their credit reports. In addition, the settlement required Vivint to establish a customer service task force to verify that accounts belong to the right customer before referring any account to a debt collector, and to assist consumers who were improperly referred to debt collectors.
* In July 2019, the FTC settled allegations that Equifax, Inc., a credit reporting company, failed to take reasonable steps to secure its network resulting in a 2017 data breach that affected approximately 147 million people. In its complaint, the FTC alleged that Equifax’s failure exposed millions of names and dates of birth, Social Security numbers, physical addresses, and other personal information that could lead to identity theft and fraud. Equifax Inc. agreed to pay at least $575 million, and potentially up to $700 million. Notably, the Commission supplemented its authority by partnering with other agencies and states to get money back to consumers, and the FTC has stated that such partnerships will continue to be an especially important part of its enforcement efforts. This demonstrates that despite the AMG decision, the Commission still has tools to recover monetary relief for violations of the FTC Act.
* In April 2020, the U.S. District Court for the District of Columbia approved the 2019 settlement between Facebook, the FTC, and the U.S. Department of Justice. The complaint alleged that Facebook violated the Commission’s 2012 order against the company by 1) misrepresenting the control users had over their personal information, which tens of millions of users relied upon, and 2) failing to institute and maintain a reasonable program to ensure consumers’ privacy. The FTC also alleged that Facebook deceptively failed to disclose that it would use phone numbers provided by users for two-factor authentication for targeted advertisements to those users. The Commission’s order imposed a $5 billion penalty, as well as a host of modifications to the Commission’s original order designed to change Facebook’s overall approach to privacy. The $5 billion penalty against Facebook is the largest ever imposed on any company for violating consumers’ privacy.

As demonstrated by the foregoing enforcement actions, the FTC has leveraged its limited resources successfully to fulfill its enforcement priorities and redress the most egregious privacy and data security violations. Understanding the broad scope (and substantial limitations) of the Commission’s jurisdiction will help whistleblowers understand their rights and incentives under the new bill.

#### There are three link turns —

#### 1 — Expanded enforcement drains finite resources — false advertising is not on the docket

Dafny 21, Professor of Business Administration at the Harvard Business School and the John F. Kennedy School of Government, and former Deputy Director for Healthcare and Antitrust in the Bureau of Economics at the Federal Trade Commission. Professor Dafny’s research focuses on competition in health care markets, and the intersection of industry and public policy. (Leemore, “The Covid-19 Pandemic Should Not Delay Actions to Prevent Anticompetitive Consolidation in US Health Care Markets,” *Pro Market*, <https://promarket.org/2021/06/10/covid-pandemic-consolidation-pandemic-monopoly/>)

However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts. To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses. The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices. The substantial resources required to challenge transactions, paired with stagnating enforcement budgets, may explain why authorities have elected not to challenge some horizontal transactions they would likely have challenged in previous eras. Using data on a wide range of industries, antitrust scholar John Kwoka documents that enforcers rarely raise concerns about changes in market structure that used to draw scrutiny—that is, mergers that yield five or more market participants.

#### 2 — Big wins against big players cause FTC wing-clipping

Hyman 14, Workman Chair in Law and Professor of Medicine, University of Illinois, and former special Counsel at the Federal Trade Commission (David A., and William E. Kovacic, Hyman is H. Ross & Helen; Kovacic is Global Competition Professor of Law and Policy, The George Washington University Law School, “Can’t Anyone Here Play This Game - Judging the FTC’s Critics The FTC at 100: Centennial Commemorations and Proposals for Progress: Essays,” George Washington Law Review, 83.6)

The ABA Commission set out three basic guidelines for the FTC's future antitrust work:

(1) Forsake trivia in favor of economically significant matters;123

(2) Emphasize cases involving complex, unsettled questions of competition economics and law, and leave per se cases to the DOJ;124 and

(3) Replace voluntary commitments with binding, compulsory orders. 12 5

Each of these changes certainly sounds sensible, particularly when taken one at a time. After all, who could be against the forsaking of trivia? But, each change involved a shift from a safer law enforcement strategy to a riskier one. The pursuit of economically significant matters galvanizes tougher opposition in litigation and motivates firms to seek out legislative assistance in backing down the agency. Focusing on complex and unsettled areas of the law involves greater litigation risk (because the cases are on the edges of existing doctrine) and exposes the agency more broadly to claims that it is engaged in unprecedented enforcement or sheer adventurism. The pursuit of tougher remedies arouses a stronger defense by respondents and, again, increases efforts to enlist Congress to discipline the FTC. Although the ABA Commission noted the importance of political support and a vigorous chairman who would "resist pressures from Congress, the Executive Branch, or the business community," 1 26 it paid almost no attention to the predictable consequences of having the FTC occupy the risk-heavy end of the spectrum of all possible enforcement matters. The political science literature before 1969 had emphasized the political dangers inherent in the Commission's expansive norms-creation mandate and its broad information-gathering and reporting powers.1 27 For example, Pendleton Herring's study in the mid-1930s about the political hazards facing economic regulatory bod-ies said the agency's mandate placed it in "a precarious position" from the start: The parties coming within [the FTC's] jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of big business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."128 Had it read and absorbed the teaching of the available political science literature, the ABA panel would have had to confront deeper, harder questions about the causes of the FTC's performance. The panel missed (or underestimated) the big issue of politics. Like many blue ribbon studies of government performance, the ABA Report was long on demands for bold action and short on practical suggestions about how to cope with the crushing political backlash that boldness can breed.129 B. The Posner Dissent Posner argued that the FTC would not be able to deliver on the ABA Commission's ambitious agenda because the FTC's leaders and staff lacked the necessary incentives to do so. 130 In his view, FTC Commissioners deliberately avoided confrontation with powerful eco- nomic interests that could frustrate reappointment or deny the board member a suitable landing place in the private sector upon leaving the agency.131 Similarly, FTC staff saw little upside (and considerable downside) to being overly aggressive in enforcing the law.1a2 Posner's assessment was certainly plausible. Government service disproportionately attracts people who plan to stay, and keeping your head down is an excellent way of doing that. "Don't make waves" becomes the default strategy of the lifers, and those who are tempera-mentally unsuited to that approach either self-select out, or are ac- tively encouraged to depart. 33 But matters are not so simple. Regulators that create or adminis- ter a program that threatens major commercial interests can leave government and monetize their expertise by guiding firms through the regulatory shoals.1 34 The prosecution of big cases attracts media at- tention and raises the prominence of the officials who set them in mo- tion. This publicity often translates into attractive offers for post- government employment. Posner also overlooked the emergence of attractive career paths for aggressive enforcement officials outside the private sector. A reputation for toughness would prove to be an asset, not a barrier, for those aspiring to join university faculties, think tanks, or advocacy groups that wanted to add high visibility officials to their ranks. III. SOME LESSONS AND A FEW MODEST SUGGESTIONS People like morality tales. The conventional morality tale in- spired by the ABA Report goes like this: In 1969, the FTC had a long history of existence, but almost nothing else to recommend it.1" The ABA Report accurately diagnosed the problems and laid out a clear agenda for the FTC to redeem itself.136 The FTC followed the recom- mendations in the ABA Report, and the agency was saved. All hail the ABA Commission, and the wisdom of those who served onit.13 Of course, life is more complicated. Unambiguous morality tales are more common in children's books than in real life. 38 A close reading of the record indicates that the pre-1969 FTC was not as aw-ful, and the ABA Report was not as good, as the conventional wisdom would indicate.1 39 We consider the lessons that should be drawn and offer four "modest suggestions that may make a small difference" the next time we encounter a similar situation.140 A. Be Careful What You Demand (Or Wish For) The ABA Commission wanted the FTC to be a fierce and aggressive enforcer/regulator, and it generated a detailed list of all the things the agency had to do to justify its continued existence.141 The FTC responded aggressively to the challenge-but in so doing, it became significantly overextended. In other work, we consider a number of factors that appear to be associated with good agency performance.14 2 One of the most important factors is whether the agency has the capacity and capability to perform the tasks that it has been given (or for which it has assumed responsibility).143 An agency that is overextended will find itself engaged in a constant process of regulatory triage-meaning it is unlikely to do a good job on any of the tasks within its portfolio of responsibilities. It is one thing to launch a single bet-the-agency case and entirely another to launch a half-dozen of those cases and an equal number of significant rulemaking projects simultaneously-let alone staff each case and rulemaking project so as to maximize the likelihood of good outcomes across the entire portfolio.144 The ABA Commission set a high bar for the FTC to clear if it was to remain in business-and the FTC responded with the enforcement equivalent of building and launching an armada of 1,000 ships.145 Little thought was given by the ABA Commission (or by top FTC management) as to whether the agency was up to the task of waging the functional equivalent of multiple land wars in Asia. 146 In particular, the ABA Commission gave no attention to the time it would take the agency to build the highly skilled teams of professionals it would need to perform the ambitious agenda it had recommended. There should have been an express caution that building this capability would take time. Instead, the ABA Report's "one last chance" admonitionl47 led the FTC to take on a daunting agenda before it had the ability to deliver. This consequence arguably is one of the ABA Commission's most unfortunate legacies. The remarkable thing is that the FTC managed to do as well as it did-notwithstanding the Herculean list of labors handed to it by the ABA Commission. B. Leadership Incentives Matter Posner did not think the FTC leadership would ever be able to rouse itself from its stupor.14 8 He also could not envision a set of in- centives that would motivate the FTC to become an activist presence on the regulatory scene. 149 As detailed above, Posner's assessment on both of these issues was wrong.150 But, it does not follow that the FTC's leadership (or the leader- ship of any other agency) is subject to an optimal set of incentives. Agency leadership always faces a choice between consumption and investment-and the stakes are systematically skewed toward con- sumption (in the form of launching new high-profile cases) by the short duration of any given leader's tenure.'51 As one of us noted in another article, the case-centric approach to evaluating agency per- formance-which is what the ABA Commission effectively embraced and encouraged-has a critical vice: It accords no credit to long-term capital investments. It gives decisive weight to the initiation of new cases. This incentive system can warp the judgment of incumbent political appoin- tees who typically serve terms of only a few years. The per- ceived imperative to create new cases can create a serious mismatch between commitments and capabilities, as the si- rens of credit-claiming beckon today's manager to overlook the costs that improvident case selection might impose on the agency in the future, well after the incumbent manager has departed. It is a common aphorism in Washington that agency leaders should begin by picking the low-hanging fruit.... What is missing in the lexicon of Washington poli- cymaking is an exhortation to plant the trees that, in future years, yield the fruit.1 52 [FOOTNOTE 152 BEGINS] 152 Kovacic,supra note 144, at 922; see also Kovacic, supra note 151, at 189 ("[A] short-term perspective may incline the manager to launch headline-grabbing initiatives with inadequate regard for the matter's underlying merits or the ultimate cost to the agency, in resources and reputation, in litigating the case. If the case goes badly, the manager responsible for the take-off rarely is held to account for the crash landing. He can hope the passage of time will dim memories of his involvement, he can blame intervening agents for their poor execution of his good idea, or he can shrug his shoulders and say he was making the best of the fundamentally bad situation that policymakers encounter in the nation's capital."); Timothy J. Muris, Principlesf or a Successful Competition Agency, 72 U. CHi. L. REV. 165, 166 (2005) ("An agency head garners great attention by beginning 'bold' initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation. The departed agency heads, if anyone in the Washington establishment now cares about their views, can always blame failure on faulty implementation by their successors."). [FOOTNOTE 152 ENDS] Thus, if anything, the ABA Commission's "do something" recommendations encouraged (and hyper-charged) precisely the wrong incentives. C. Don't Forget About Politics Perhaps the largest failing of the ABA Commission was its failure to anticipate the political risks associated with its recommendations. Academics and do-gooders will enthusiastically lecture all and sundry about how the government exists to promote the general public interest-but decades of research on political economy make it clear that there is not much of a constituency for that mission.153 Indeed, an agency that seeks to promote the general public interest is an agency without any constituency.1 54 Thus, the ABA Commission wound up and sent into battle an agency without any real constituency or political backing, to wage war against a large and politically powerful collection of firms in every sector

[marked]

of the economy. There is no question that the FTC was unlucky, in that many of its most enthusiastic supporters were being voted out of office at the same time the FTC was picking fights with everyone and their brother.155 But, luck aside, if you were trying to create a "coalition of the willing" determined to clip the wings of the FTC, you would be hard-pressed to pick a better strategy than the one selected by the ABA Commission.15 6

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## T — Presumption

#### Advocates explicitly propose presumptions *in lieu of* prohibitions.

Kroll 16 (Kyle R. Kroll-J.D. Candidate 2016, University of Minnesota Law School; B.S.B. 2013, Carlson School of Management, University of Minnesota. NoteAnticompetitive Until Proven Innocent: An Antitrust Proposal To Embargo Covert Patent Privateering Against Small Businesses, 100 Minn. L. Rev. 2167, 2212. May, 2016. Lexis accessed via KU Libraries, date accessed 12/22/21)

Lastly, a blanket prohibition against the use of PAEs in patent litigation would probably not curb patent privateering. 290 First, it would be difficult for courts to determine if a company truly is a PAE or not, given the secretiveness of privateering arrangements. A court could employ the same criteria as listed in the proposed presumption in Section A, but if it did so, it might as well simply employ the presumption anyway. Second, benign uses of PAEs for litigation by inventors, universities, and small firms would be unjustifiably enjoined. 291 A blanket prohibition on privateering would thus be overly broad. Third, prohibition would still not solve the evidentiary difficulty of discovering the existence of a privateering arrangement or the identity of a sponsor. 292 Fourth, such a prohibition may violate Noerr-Pennington immunity, established by the First Amendment. A presumption, on the other hand, succumbs to none of these difficulties.

#### That’s due to being lighter

Parrish 8 (Austen Parrish- Vice Dean for Academic Affairs and Professor of Law, Southwestern Law School. J.D., Columbia University School of Law, 1997; B.A., University of Washington, 1994. The author is the Director of Southwestern's Summer Law Program in Vancouver, B.C., Canada, where he teaches courses in international and comparative law at the University of British Columbia. ARTICLE: The Effects Test: Extraterritoriality's Fifth Business, 61 Vand. L. Rev. 1455, 1470-1471. October, 2008.Lexis accessed via KU libraries, date accessed 12/22/21)

As territoriality lost its hold over law, 82 the prohibition against extraterritoriality weakened to a mere presumption. 83 Congress had [\*1471] the power to enact extraterritorial laws, but it was presumed not to have used that power in most circumstances. The development of the effects test, however, marked the beginning of the end for meaningful territorial limits on legislative jurisdiction.

#### They’re contextually distinct

Manne et al 18 (Geoffrey A. Manne (President & Founder, International Center for Law & Economics). Julian Morris (Executive Director, International Center for Law & Economics). Kristian Stout (Associate Director, International Center for Law & Economics). Dirk Auer (Senior Fellow, International Center for Law & Economics). “Comments of the International Center for Law & Economics on the Consumer Welfare Standard (Hearing No. 5)” , FTC Hearings on Competition & Consumer Protection in the 21st Century FTC Docket No. FTC-2018-0091 , <https://laweconcenter.org/wp-content/uploads/2019/01/ICLE-FTC-Hearings-CWS-Comments-12-2018.pdf> , December 31, 2018, date accessed 9/20/21)

Just as the CWS evolves to develop more nuanced analysis for conduct that was previously poorly understood and, therefore, subject to sub-optimal prohibitions or presumptions, the doctrine is also capable of growing in order to recognize more expanded claims, or to modify existing doctrine in light of new business practices. Under the CWS

antitrust law can replace rules that require detailed factual assessment of individual cases with simpler, more categorical rules, such as the per se prohibition of price fixing; the modified per se rule applicable to most tying arrangements under Jefferson Parish; presumptions such as those used in horizontal merger analysis: and abbreviated rule of reason standards which do not require plaintiffs to prove harm to competition. While antitrust law moved away from such short-hands in recent years, there is nothing about the [consumer welfare] paradigm that would preclude a movement of the pendulum in the other direction, as evidenced by past episodes of antitrust expansion in monopolization doctrine and enforcement policy.33

Recently, the Supreme Court took up just such a potential modification in Apple v. Pepper. 34 Apple v. Pepper emerged from a claim that Apple’s pricing model for its App Store violates US antitrust laws. The central dispute of the case is whether the Illinois Brick indirect purchaser doctrine35 — which limits standing in price fixing cases only to those parties directly injured, and prevents private actions by subsequent purchasers — can be used to prevent App Store users from suing Apple for its alleged anticompetitive pricing imposed on app developers.36 Those in favor of applying Illinois Brick to prevent the standing of users assert that — following Campos v. Ticketmaster in the 8th Circuit37 — it is the app developers themselves who are injured by the restrictive pricing (while users receive only a pass-through injury).38 Therefore, so the argument goes, end users do not have standing under Illinois Brick to bring an antitrust suit.

#### As well as legally

Billings 99 (LUCY BILLINGS-judge. Opinion in ROXBOROUGH APT CORP v. Becker, 183 Misc. 2d 744 - NY: County Court, Civil Court 1999. Google scholar caselaw, date accessed 9/20/21)

While Real Property Law § 235-f allows a lease to limit roommates to one, the statute does not contain any prohibition or presumption against more than one. Therefore the standard lease provision at issue, which limits the number of roommates "in accordance with" Real Property Law § 235-f, permits more than one roommate.

#### At best they’re effects T

Taylor 2k (GREG TAYLOR- BA (Hons), LLB (Hons) (Adel), LLM (Marburg), GCLP (SA); Barrister and Solicitor of the Supreme Court of South Australia; Lecturer in Law, The University of Adelaide. ARTICLE: COMMONWEALTH v WESTERN AUSTRALIA AND THE OPERATION IN FEDERAL SYSTEMS OF THE PRESUMPTION THAT STATUTES DO NOT APPLY TO THE CROWN, 24 Melbourne U. L.R. 77, 113. April, 2000. Lexis accessed online via KU libraries, date accessed 12/22/21)

Thirdly, it is apparent that, on the facts of this case, the State was attempting to make use of too blunt an instrument to repel the attempted search. The State, as has been said, did not want to defeat the search to save itself from a present or prospective liability under s 10, for there was none; rather, it was concerned to safeguard its sources of information. If fishers thought that the information which they provided to the government might be used against them, they might not co-operate with the State, and this would hinder the research for which it needed the information. This extra-legal consideration (it is extra-legal because allowing a search warrant to be issued would not as a matter of law reduce in the least the legal obligation of fishers under the State Act to furnish information) was the real reason for the State's alarm at the issue of search warrants against it. But as the majority pointed out, 226 the State might be able to claim public interest immunity when seizure of confidential information is threatened. Applying the presumption would lead to a blanket prohibition of searching State premises even where confidential information is not involved, but public interest immunity, a much finer instrument, would exempt from use in criminal proceedings only such information as is confidential and could satisfy other tests (including the test of public interest) for the existence of the immunity. This is clearly a much better way of protecting information which is said to be confidential, because it does not involve a blanket prohibition which catches all information, whether confidential or not. Rather, there is a curial investigation which is specifically designed for the purpose of weighing the competing interests involved in keeping confidential information confidential. In this case the competing interests were the public benefit involved in the research conducted by the State government and the public interest in ensuring that people pay all the tax to which they are liable.

#### Their solvency advocate is specific to a legal “presumption” (KU GREEN)

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

One concern courts have raised with making false advertising the basis for an antitrust violation is that much of this behavior does not affect the market as a whole. Courts are right that even if one company engages in this conduct, and even if an individual rival is harmed as a result, that does not mean that competition in the market as a whole is affected. But there is a simple solution to this concern: focus on the defendant’s market power. Of all the actors employing false advertising, monopolists are the most likely to affect the market, with those attempting to monopolize making up the second-most-likely category. Targeting these two categories of actors recognizes that Section 2 of the Sherman Act provides the appropriate—and in fact only—framework for antitrust liability for unilateral conduct such as false advertising. Focusing attention on only monopolists and attempted monopolists dramatically narrows the universe of false advertising/antitrust claims. Such an emphasis also is consistent with the approach taken in the Areeda/Hovenkamp treatise, which recognizes that antitrust may be appropriate when “the practice makes a durable contribution to the defendant’s market power.”131 The treatise crafts a de minimis presumption because of the relative unlikelihood that any given false claim would “lead[] to or perpetuat[e] durable market power.”132 But the treatise also recognizes that “misrepresentations and organized deception by a dominant firm may have Section 2 implications when used against a nascent firm just as it is entering the market.”133 Once we understand that the treatise’s concerns about overapplication of false advertising law are addressed by requiring monopoly (or, as discussed below, attempted monopoly) status, the treatise would lend support to liability when the defendant’s monopoly power makes false advertising especially likely to affect the market as a whole and harm competition. Our focus on monopolists and attempted monopolists also is consistent with antitrust injury doctrine. As the Supreme Court famously explained in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., plaintiffs must prove “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”134 In other words, plaintiffs must challenge a harm that affects the market as a whole. Limiting our scrutiny to monopolists and attempted monopolists helps effectuate Brunswick’s objectives. We suggest a presumption that false advertising by monopolists constitutes monopolization. Crucially, the most fundamental critique against applying antitrust to false advertising—that “false advertising” does not require marketwide effects —are addressed by the defendant’s control over the market. To satisfy the first of the two elements of a monopolization case, a plaintiff must show that the defendant has monopoly power. As discussed above,135 a plaintiff can do so indirectly by showing a market share of at least 75 percent (and more likely 90 percent) along with barriers to entry that could entrench that market position. A plaintiff also can prove market power directly, such as by showing the defendant’s power to impose price increases or output reductions. Second, the plaintiff must show that the defendant engaged in false advertising. As a matter of underlying substantive law, liability for false advertising already requires findings that the defendant’s conduct was literally false or misleading, was material, actually deceived or was likely to deceive consumers, and caused or was likely to cause harm to the plaintiff.136 These elements are logically and practically linked to each other; they constitute the wrong of false advertising, just as an agreement to set prices constitutes the wrong of price fixing. In particular, deception is generally presumed from literal falsity, or is demonstrated by showing misleadingness—if consumers receive a false message from a facially ambiguous or even literally true claim, they have been deceived. Likewise, once both deception and materiality have been shown, courts generally find a likelihood of harm, as consumers have been misled about facts that are likely to affect their decisions. The false advertising foundation provides a unique advantage for antitrust law, one not available in other settings. The reason is simple. False advertising’s underlying requirements focus on the bad conduct, show its relevance, and demonstrate the harm. These elements offer on a silver platter what antitrust needs to prove monopolization. In addition, materially false advertising by a monopolist threatens multiple concerns: It makes it more difficult to compete on the merits, can easily be repurposed to harm any competitor, and is hard to credibly rebut without souring consumers on factual claims more generally. Because of these harms and the satisfaction of false advertising’s elements, a monopolist’s materially false advertising should be presumed to affect the market as a whole. A presumption that a monopolist using false advertising has engaged in illegal monopolization also is appropriate given the near certainty of anticompetitive effects. Unlike other lawbreaking by a monopolist such as tax fraud, false advertising by definition harms at least one competitor, in what is a relatively small field. That is, by definition a monopolist controls most of the market, so there will be fewer competitors to harm. False advertising may even directly harm all the other competitors if the false claim is one of general superiority, or, as in the AT&T example, is directed at keeping existing customers from switching products. And by poisoning the informational environment, false advertising inherently threatens the key mechanism by which rivals can compete: by explaining to consumers what they can offer in a way that might persuade them. False advertising is also a technique that can easily be extended to the next competitor, further justifying a presumption that its use by a monopolist caused harm to competition. Another way to frame the presumption of harm to competition centers on how we know that harm to actual entities has crossed into the legal category of “harm to competition.” When an entity that meets the standards for monopoly power engages in materially false advertising that causes damage, we know that it is a monopolist and that it harmed identified victims (such as consumers or competitors) in a way likely to push the market as a whole toward an untrusting and untrustworthy market for lemons. When a monopolist introduces a valuable innovation to the market, in contrast, that can harm competitors, but it also produces social benefit, meaning that the harm should be tolerated. So too when a monopolist truthfully and nonmisleadingly advertises a superior product. But when the ready-made template of false advertising law makes clear that a monopolist harms consumers’ ability to trust information in the market and causes consumers to pay prices or buy products they otherwise wouldn’t have chosen, at the very least the burden should be on the monopolist to show that it did no structural damage to the market.

#### That’s what they say is key to biosimilars (advantage 1) (KU GREEN)

Carrier and Tushnet 21, Michael A. Carrier Rutgers Law School Distinguished Professor, Rebecca Tushnet Harvard Law School Professor of Law (Iowa Law Review 2021 “An Antitrust Framework for False Advertising” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3593914)//ellie

An example illustrates our framework. The pharmaceutical industry is marked by high barriers to entry. It is expensive to enter the market, and there are significant hurdles such as receiving approval from the FDA. These barriers are even higher in the biologics setting. Compared to the “small molecule” drugs that have made up the pharmaceutical market for the past several decades, biologic products are more complex and less predictable. As a result, unlike the near-identical relationship between brand and generic drugs, the connection between biologics and “follow-on biosimilars” is not as direct.171 The relevant statute, the Biologics Price Competition and Innovation Act (“BPCIA”),172 requires a biosimilar to be “highly similar to” the biologic and have “no clinically meaningful differences” in relation to “safety, purity, and potency.”173 But the uncertainty surrounding the products has resulted in biologic manufacturers stating or implying that biosimilars are unsafe, sometimes by omitting relevant information about their functional equivalence with the reference biologics.174 In a setting in which even the most minute differences between products could be enough to dissuade patients from trying new medications, the assertions at least implied dissimilarities that could have significant safety effects. For example, Genentech noted on its “Examine Biosimilars” website that “FDA requires a biosimilar to be highly similar, but not identical to the [reference product].”175 More explicitly, Amgen tweeted: “Biologics or biosimilars? It’s not just apples to apples. While #biosimilars may be highly similar to their #biologic reference products, there’s still a chance that patients may react differently.”176 Given the context of life-saving medications, it’s easy to imply dire consequences. For example, Amgen created a YouTube video asserting that a switch “carries risks, given that no two biologic medicines are identical,” which suggests that they “can behave differently in the body.”177 Amgen also cautioned that “[s]witching drugs is not a good idea if your medicine is working for you” and that “an inadvertent substitution . . . is not appropriate care.”178 Finally, some biologic manufacturers have warned that patients could face “additional risks” by taking biosimilars or even “could end up in the emergency room.”179 These claims raise several concerns. Most significant, the statements at issue imply that biosimilars create serious risks, failing to disclose that the FDA approves a biosimilar only when “there are no clinically meaningful differences [from] the biologic product.”180 To the contrary, biologic and biosimilar products are required to have the same safety and effectiveness profile.181 Evidence from Europe, which has witnessed robust biosimilar entry, has confirmed that “over 700 million patient days of treatment” demonstrated “that clinical outcomes with biosimilars match the outcomes of the reference biologics.”182 This evidence also has revealed that “patient switching from the reference biologic to the biosimilar . . . is not of concern” since the more than 14,000 switches from biologic to biosimilar resulted in “[n]o change in clinical outcomes.”183 Given significant development costs, regulatory barriers, thickets of dozens of (or even more than 100) patents,184 and exclusive contractual arrangements,185 biologic manufacturers are likely to have monopoly power.186 Taking the absence of clinically meaningful differences in FDAapproved biosimilars as a given, plaintiffs challenging false statements are likely to satisfy our presumption if they can show that, under false advertising law, the statements (or omissions) are false and material, and therefore are likely to deceive consumers and cause harm. False advertising principles establish that biologic manufacturers will not be liable unless their statements are false or mislead substantial numbers of relevant consumers. But, if falsity or misleadingness are established, they are not likely to be able to rebut the presumption of anticompetitive conduct given the significance of health risk claims to consumers. Even for attempted monopolists, as long as a plaintiff establishes falsity or misleadingness, the factors would seem to favor liability. Given the lack of biosimilar entry to date, in many cases biosimilars will be seeking to enter the market. The statements, which focus directly on risk, pose significant barriers to entry, as doctors and consumers are not likely to take a chance on drugs that have even the possibility of safety concerns. It is hard to think of examples that would more concretely affect consumers than warnings that drug products are potentially unsafe. In fact, the FTC recently issued warning letters to a number of plaintiff-side law firms for advertising that linked FDAapproved drugs with serious side effects, potentially frightening patients away from useful medications.187 In addition, a biologic manufacturer’s disparagement of a biosimilar rival may be part of a broader range of anticompetitive conduct. For example, disparagement could entrench barriers to entry that convince insurance companies to favor biologics through potentially anticompetitive exclusive dealing, bundling, and rebates.188 In short, false advertising law provides useful tools for determining if substantial numbers of relevant consumers are being misled to their detriment. And our framework would likely find that a biologic manufacturer’s proven false advertising that raises safety concerns against a biosimilar constitutes monopolization.

#### AND the FTC (advantage 2) (KU GREEN)

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

Federal law presumes that false advertising harms competition. Federal law also presumes that false advertising is harmless or even helpful to competition. Contradiction is not unknown to the law, of course. This contradiction, though, is acute. For not only are both regimes at issue designed to protect competition, but they are both enforced by the same agency: the Federal Trade Commission, which targets "unfair competition" through antitrust and consumer protection enforcement.

Courts' treatment of false advertising in antitrust cases makes no sense. While courts have reasonably evidenced concern that not all false advertising violates antitrust law, the remedy is not to abandon the false advertising/antitrust interface. Instead, the solution is to focus on the actors most likely to harm the market: monopolists and attempted monopolists.

This Essay proposes an antitrust framework for false advertising claims. It introduces a presumption that monopolists engaging in false advertising violate antitrust law and a rebuttal if the false advertising is ineffective. The framework also applies to attempted monopolization by incorporating factors such as falsity, materiality, and harm inherent in false advertising law, along with competition-centered issues like targeting new market entrants.

Antitrust has dismissed false advertising that entrenches monopoly power for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets. Such an approach promises benefits for false advertising law, antitrust law, and consumers.

#### It’s at the heart of it

Tushnet and Carrier, 21 – Rebecca Tushnet is a Professor at Harvard Law School and former NDT Finalist. Michael Carrier is a Professor at Rutgers Law School. *An Antitrust Framework for False Advertising*, May, 106 Iowa L. Rev. 1841, p. Nexis – Iowa

[\*1844] False advertising law allows consumers to receive some redress for the money they paid for "unlimited" data that wasn't, 5 but there's no obvious remedy for the damage AT&T caused to the market as a whole. Antitrust law has been kneecapped by the courts and thus is powerless to act. In short, the law's neglect of the injuries caused by false advertising threatens structural harm to competitive markets.

In this Essay, we address these problems. We do so by focusing on the actors most likely to harm the market: monopolists and attempted monopolists. These actors are a numerically small percentage of businesses (and of false advertising defendants), but they can do great harm. Our emphasis on monopolists and attempted monopolists addresses courts' concerns of overbroad enforcement, preventing false advertising from morphing automatically into an antitrust violation. And it carves out a critical role for antitrust while embracing - rather than neglecting - antitrust's partner in fighting unfair competition, false advertising law.

We begin by introducing the laws of antitrust and false advertising, explaining the regimes' objectives and methods. We then survey the antitrust caselaw, critiquing three approaches courts considering false advertising claims have taken. Finally, we introduce our antitrust framework for false advertising claims. At the heart of the framework is a presumption that monopolists engaging in false advertising violate antitrust law, with that presumption rebuttable if the defendant can show that the false advertising was ineffective. The framework also applies to cases of attempted monopolization by incorporating factors (falsity, materiality, and harm) inherent in false advertising law, along with competition-centered issues on targeting new market entrants and entrenching barriers to entry. To illustrate how our framework should work, we apply it to an important area: advertising for biosimilars, which are pharmaceutical products with a substantial and growing role in treating numerous diseases.

False advertising that exacerbates monopoly power has been dismissed by antitrust law for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets.

#### Presumptions can make bidirectional changes that weaken existing antitrust

Butler 84 (HENRY N. BUTLER, \*Assistant Professor of Management, Texas A & M University. B.A., 1977, University of Richmond; M.A., 1979, Ph.D, 1982, Virginia Polytechnic Institute and State University; J.D., 1982, University of Miami. W. J. LANE, \*\*Assistant Professor of Economics, Texas A & M University. B.A., 1974, Point Loma College; Ph.D., 1978, University of California, San Diego. and OWEN R. PHILLIPS \*\*\*Assistant Professor of Economics, Texas A & M University. B.A., 1974, Ph.D., 1979, Stanford University. ARTICLE: The Futility of Antitrust Attacks on Tie-In Sales: An Economic and Legal Analysis., 36 Hastings L.J. 173, 212-213, NOVEMBER, 1984, Lexis, accessed online via KU libraries date accessed 12/22/21)

Per se illegality is only appropriate when an act is certain, or almost certain, to create social losses. Furthermore, prohibition of an action must result in avoiding those losses at a reasonable enforcement cost. The Supreme Court, in maintaining its per se prohibition of tying, has chosen to ignore economists' well-reasoned attacks on the view that tying arrangements create monopoly power. Even if the Court's analysis of tying arrangements were correct, however, our analysis indicates that the per se prohibition of tie-in sales would not result in a significant increase in consumer welfare. The losses that allegedly result from tying arrangements are not avoided by a strict prohibition because firms shift their activities to different methods that are not illegal. Nonlinear pricing strategies, which are legally available to firms that, according to the Court's view, could otherwise use tying arrangments to extend their monopoly power, may be as profitable as tying arrangements. Thus, the potential gains from an effective prohibition of tie-in sales are small. Considering that the resources devoted to the enforcement of the prohibition may well exceed the potential gains from such enforcement, the per se prohibition should be abandoned.

[\*213] We conclude that the appropriate legal approach to tying is a rule of reason analysis that includes a presumption of legality. This approach would rid the courts of many cases in which there is no hope of any social gain from enforcing the law and would restrict attention to the few cases in which enforcment might improve the performance of the market. The Court should only prohibit tying when there is substantial likelihood of eliminating significant losses through legal action.

#### That allows the aff to turn core DAs like innovation or biz con

Lemos 6 (Margaret H. Lemos- Furman Fellow, New York University School of Law; B.A. (Political Science) Brown University, 1997; J.D. NYU School of Law, 2001. Article: The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?, 84 Tex. L. Rev. 1203, 1218-1219.April, 2006. Lexis, accessed online via KU libraries, date accessed 12/22/21)

The mismatch between the two standards for judicial review is even more remarkable when one recognizes that an explicit statutory presumption [\*1219] is actually far better for the defendant than a categorical findings-based prohibition. A statutory presumption is rebuttable; it gives the defendant an opportunity to make an individualized showing that his own conduct had no effect on commerce. An explicit presumption also ensures that the jury will resolve any factual disputes about the presumption's accuracy as applied to the defendant.

A categorical prohibition is far more difficult to challenge, and it removes the jury from the picture altogether. Because a findings-based statute defines the prohibited conduct without reference to interstate commerce, the defendant has no opportunity to raise the issue of commercial effects with the jury. Although the defendant can challenge the statute on constitutional grounds, his argument will be addressed to the judge rather than the jury, and he will bear the burden of proving that his conduct had no effect on interstate commerce. Indeed, even if the defendant can prove his innocence, so to speak, he still may not prevail in a constitutional challenge. As noted above, the question for the court is whether there is a rational basis for Congress's judgment that the class of prohibited conduct has the requisite connection to interstate commerce, not whether that judgment is correct with respect to the individual defendant.

**Section 1 of the Sherman Act and Section 7 of the Clayton Act are core**

**Rabkin 8** (Michael A. Rabkin-partner with Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. “Tactical Interdependence and Institutionalized Trust: The Unrecognized Risks of Joint Ventures Among Competitors” , DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL , Vol. 7:63, 2008, <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1106&context=bclj> , date accessed 9/4/21)

a) Legal Standards Under the Sherman Act § 1 vs. the Clayton Act § 7

Although existing case law and frameworks for antitrust analysis of joint ventures do not currently recognize the risks posed by trust-facilitating devices, the broad language of the **core antitrust statutes** effectively encompasses these risks. As a technical matter, it may be difficult to determine whether a joint venture should be analyzed as a "combination" under Section 1 of the Sherman Act18 3 or as a sort of merger or "acquisition" under Section 7 of the Clayton Act. 8 4 This distinction, however, is inconsequential because the same substantive standards are applied under both statutes.185

**Here's evidence from the DoJ**

**DoJ 7** (“ANTITRUST DIVISION STATEMENT REGARDING THE RELEASE OF THE ANTITRUST MODERNIZATION COMMISSION REPORT”, Department of Justice Press Release, 4/3/2007, <https://www.justice.gov/archive/atr/public/press_releases/2007/222344.htm> , date accessed 9/4/21)

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

* Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.
* The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.
* New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are **general in nature and have been applied to many different industries** to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

We look forward to reading the report in depth and considering all of the Commission's recommendations. The Antitrust Division appreciates the service and commitment of the AMC Commissioners.

## CP — Advantage

## Advantage 1

#### 2---alternative explanations for stability outweigh.

Fettweis 20, Associate Professor of Political Science at Tulane University.. (Christopher J., 6-3-2020, "Delusions of Danger: Geopolitical Fear and Indispensability in U.S. Foreign Policy", *A Dangerous World? Threat Perception and U.S. National Security*, https://www.cato.org/publications/publications/delusions-danger-geopolitical-fear-indispensability-us-foreign-policy)

Many of the factors that contribute to geopolitical fear — Manichaeism, religiosity, various vested interests, and neoconservatism — also help explain American exceptionalism and the indispensability fallacy. And unipolarity makes hegemonic delusions possible. With the great power of the United States comes a sense of great responsibility: to serve and protect humanity, to drive history in positive directions. More than any other single factor, the people of the United States tend to believe that they are indispensable because they are powerful, and power tends to blind states to their limitations. “Wealth shapes our international behavior and our image,” observed Derek Leebaert. “It brings with it the freedom to make wide‐​ranging choices well beyond common sense.“49 It is quite likely that the world does not need the United States to enforce peace. In fact, if virtually any of the overlapping and mutually reinforcing explanations for the current stability are correct, the trends in international security may well prove difficult to reverse. None of the contributing factors that are commonly suggested (economic development, complex interdependence, nuclear weapons, international institutions, democracy, shifting global norms on war) seem poised to disappear any time soon.50 The world will probably continue its peaceful ways for the near future, at the very least, no matter what the United States chooses to do or not do. As Robert Jervis concluded while pondering the likely effects of U.S. restraint on decisions made in foreign capitals, “It is very unlikely that pulling off the American security blanket would lead to thoughts of war.“51 The United States will remain fundamentally safe no matter what it does — in other words, despite widespread beliefs in its inherent indispensability to the contrary.

#### 3---err neg---proponents of hegemony are cognitively biased to overestimate its importance.

Fettweis 20, Associate Professor of Political Science at Tulane University. (Christopher J., 6-3-2020, "Delusions of Danger: Geopolitical Fear and Indispensability in U.S. Foreign Policy", *A Dangerous World? Threat Perception and U.S. National Security*, https://www.cato.org/publications/publications/delusions-danger-geopolitical-fear-indispensability-us-foreign-policy)

Overall, proponents of the stabilizing power of U.S. hegemony should keep in mind one of the most basic observations from cognitive psychology: rarely are our actions as important to others’ calculations as we perceive them to be.44 The so‐​called egocentric bias, which is essentially ubiquitous in human interaction, suggests that although it may be natural for U.S. policymakers to interpret their role as crucial in the maintenance of world peace, they are almost certainly overestimating their own importance. Washington is probably not as central to the myriad decisions in foreign capitals that help maintain international stability as it thinks it is.

The indispensability fallacy owes its existence to a couple of factors. First, although all people like to bask in the reflected glory of their country’s (or culture’s) unique, nonpareil stature, Americans have long been exceptional in their exceptionalism.45 The short history of the United States, which can easily be read as an almost uninterrupted and certainly unlikely story of success, has led to a (perhaps natural) belief that it is morally, culturally, and politically superior to other, lesser countries. It is no coincidence that the exceptional state would be called on by fate to maintain peace and justice in the world.

Americans have always combined that feeling of divine providence with a sense of mission to spread their ideals around the world and battle evil wherever it lurks. It is that sense of destiny, of being the object of history’s call, that most obviously separates the United States from other countries. Only an American president would claim that by entering World War I, “America had the infinite privilege of fulfilling her destiny and saving the world.“46

# 1NR

## Advantage 2

#### Squo FTC enforcement solves cyber [KU reads green]

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

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

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

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

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

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

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

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

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

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

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

#### **Enforcement against multiple companies magnifies the link.**

Sutner 20, News Director @ TechTarget. (Shaun, 12-15-2020, "Efforts to break up big tech expected to continue under Biden", *SearchCIO*, <https://searchcio.techtarget.com/news/252493702/Efforts-to-break-up-big-tech-expected-to-continue-under-Biden>)

Biden pushed on antitrust

Antitrust activists, though, are optimistic about the prospects of a Biden administration clamping down on big tech -- an outcome they argue is long overdue, with decades of light enforcement of antitrust laws. They are pushing Biden toward aggressive antitrust policy. Thirty-three antitrust, consumer and progressive groups in a letter on Nov. 30 urged Biden to reject the influence of big tech vendors and to exclude big tech executives, lobbyists, lawyers and consultants from his administration. Prominent among the signatories was Public Citizen, the liberal consumer advocacy group that has called for Biden to triple the FTC's annual funding, from $400 million to $1.2 billion. "At the front end we want these investigations to be pressed. There are supposed to be investigations of Amazon and Apple and we believe there are cases to be brought there," said Alex Harman, competition policy advocate at Public Citizen and former chief legal counsel to Sen. Mazie Hirono (D-Hawaii). "It's a lot to bring big antitrust cases against multiple companies, and that requires resources," Harman said. "As a lawyer, I don't want to say 'Biden does this,' but we want results that structurally change these companies. We don't want quick resolutions and quick settlements."

#### Antitrust lawsuits are resource-consuming---trades off with other priorities

**Mcgill, 19**, technology reporter for POLITICO Pro, (Margaret Harding , “Why breaking up Facebook won't be easy,” *POLITICO*, <https://www.politico.com/story/2019/05/27/breaking-up-facebook-antittrust-1446087>)

3) Antitrust cases take time and money The Justice Department’s antitrust lawsuit against AT&T, and its unsuccessful battle to break up Microsoft, were yearslong affairs that started under one presidential administration and ended in another. That means whoever wins the White House in 2020 could well be out of office before a potential case against Facebook is decided or settled. The AT&T case began in 1974 and ended in 1982, after which the government spent another two years implementing an agreement that split up the company into eight smaller entities. The government spent another decade in the 1990s and early 2000s waging an antitrust war against Microsoft for anti-competitive behavior, arguing that its operating system and internet browser should be separated. But by the time the court approved a settlement in 2002, requiring changes to the company's business practices but leaving Microsoft intact, the penalties did not have much impact, Verveer said. “Technology will change, business models will change, consumer preferences will change,” he said. “You could end up at the end of a long process with something that frankly doesn't make very much difference because the world has moved on.” That's one reason some Facebook critics, including former DOJ antitrust official Gene Kimmelman, argue that imposing restrictions on how social media companies use data could be a more effective strategy than breaking them up. A lengthy lawsuit against Facebook would also consume a lot of resources at the DOJ, which might have to hire outside attorneys and other experts as it did in the Microsoft case. The expense could even require additional appropriations from Congress, Schwartzman said. “It is a really daunting enterprise,” Schwartzman said. “The likelihood the Justice Department or Federal Trade Commission would be able to undertake such an activity is remote.”

#### The plan extends antitrust beyond its institutional capacity---sets the agency up to fail

Sokol 20, University of Florida Research Foundation Professor of Law, University of Florida (Daniel, “Antitrust's "Curse of Bigness" Problem ,” <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=2020&context=facultypub>)

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers.152 Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor) and exceeds its mandate of the past forty years. Rather, the better solution is to identify the underlying problem and solve it with more effective tools. If the problem is one of redistribution, tax is a better choice than antitrust.153 If the problem is one of privacy, strengthen privacy laws. 154 If the problem is one of financial institutions or sector regulators not doing what they need to do, correct structural problems with sector regulators. Antitrust has increasingly moved out of sector regulation 155 and toward advocacy. 156 The advocacy budget of the antitrust agencies is tiny, and to the extent that the problem is the rules of the game for particular industry sectors, Wu falls short by not suggesting greater competition advocacy. Wu’s concern with big tech companies because they are big (p. 126) is as misplaced now as it was earlier in antitrust history. Antitrust has gone through various moments in which it had reevaluated whether it has the proper tools to combat anticompetitive behavior in technology-related markets.157 It does have such tools and can bring important cases in these markets.158 It was just a decade ago that we were told that Walmart was taking over shopping, that eBay was the largest online marketplace, or that Facebook was the primary way in which users shared information. Today, Uber competes with Lyft, Amazon has eclipsed eBay, Facebook is a legacy service, and younger people use any other set of applications to share information— such as Pinterest, Twitter, or Snapchat. In a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics. To ask antitrust to go beyond its institutional capacity sets up antitrust to fail, because Wu’s deeper concern is with how society is structured. That structure can be changed through elections to the presidency and Congress and through changes as to the makeup of the Supreme Court. Antitrust history shows that it is the Supreme Court that changes antitrust law and policy the most because of antitrust’s common law–like nature. 159

#### The plan is viewed as populist antitrust by FTC insiders---that makes effective enforcement of all FTC goals impossible

Sokol and Wickelgrem 12-13-2021, \*D. Daniel Sokol is a Professor of Law at the USC Gould School of Law and an Affiliate Professor of Business at the Marshall School of Business. Additionally, in a part time capacity, he serves as Senior Advisor at White & Case LLP. Professor Sokol focuses his teaching and scholarship on complex business issues from early stage start-ups to large, multinational businesses and the issues that businesses face regarding competition: antitrust, data breaches, AI, corporate governance, compliance, innovation, IP, M&A, collusion, technological transformation, and global business regulation, \*\*Abraham L. Wickelgren is the Fred and Emily Wulff Chair in Law at the University of Texas at Austin. He is also a co-editor at the Journal of Law, Economics, and Organization, and a former co-editor of the American Law and Economics Review. His scholarship focuses on antitrust and economic analysis of law, and he occasionally consults on antitrust cases. (D Daniel, and Abraham, “Populism at the FTC Undermines Antitrust Enforcement,” *Pro Market*, <https://promarket.org/2021/12/13/ftc-populism-antitrust-enforcement-sokol-wickelgren/>)

The FTC plays an essential role in curbing illegal mergers and monopolies and increasing its enforcement is welcome. But to do so effectively, the FTC must stop ignoring the value of expertise, democratic accountability, and due process. Until relatively recently, antitrust had not been a high-profile area of law. In recent years, commentators (including at this center) made a number of critiques about the course of antitrust to push back against some of the most commonly-held antitrust assumptions. These assumptions include issues such as rulings that make class actions more difficult, insufficient merger enforcement, insufficient attention to monopsony, and the interface of IP licensing with antitrust, among other issues. Since that time, the pushback against traditional bipartisan antitrust grew. The Biden administration chose a set of antitrust critics for prominent leadership roles in the White House and at both antitrust agencies, which populists in the Republican party also embrace. A new bipartisan consensus of populists of left and right may not agree on issues such as mandatory Covid vaccines, immigration, or race but they find common cause in economic populism based on hostility to large corporations, especially large technology companies. While antitrust should always evolve as economic thinking and empirical work changes various assumptions, we believe that something different is afoot: The Biden administration is following the Trump Administration’s approach of prioritizing loyalty and ideology over expertise and experience among staff—at least at one federal agency: the Federal Trade Commission (FTC). By minimizing the importance of expertise, democratic accountability, and due process, however, the FTC is undermining its ability to effectively enforce our antitrust laws. This has manifested itself in a number of ways: Fewer judicial checks on bureaucratic power. Recently, the FTC has announced that companies that want to settle antitrust concerns about a current deal must agree to give the agency the power to block later ones that it considers similar, without having to go to court. By aiming to bring cases and make rules to stop what it deems “unfair methods of competition” rather than antitrust violations, the FTC narrows the scope and defers the time of judicial review. Rejection of expertise. The current FTC leadership criticizes reliance on economic analysis, caricaturing academic literature to justify dropping the agency’s guidance to companies about which vertical mergers may be challenged. As Professors Carl Shapiro and Herbert Hovenkamp have written for this blog regarding the basis of the vertical merger guidelines: “This statement is flatly incorrect as a matter of microeconomic theory. [Elimination of Double Marginalization] applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions. All of this has been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler.” This is a symptom of the larger process problem: The majority statement on the withdrawal cited the agency’s experience—yet the staff was likely not consulted. If they had been, they could have ensured the statement made the economically-defensible case for stricter merger review. Leaders of well-managed organizations listen to staff, but the FTC staff, Commissioner Christine S. Wilson recently said, has become increasingly marginalized in decision-making, noting “current leadership has sidelined and disdained our staff.” This leads the staff to invest less in the agency and the best employees to find other employment. What keeps talented staff making less money in the government is the knowledge that they make a difference. Without motivated and high-quality staff, the FTC cannot effectively maintain current work levels, let alone effectively expand enforcement. In her testimony, Wilson said that staff have been silenced externally—or as Commissioner Wilson states more directly, FTC leadership has been “muzzling staff internally and externally”—forbidden to speak publicly and present their scholarship. Ignoring and disrespecting staff undermines the agency’s capabilities and leads to enforcement errors and court losses. Internal decision-making. Studies across fields show the importance of diverse viewpoints in creating more effective outcomes. Yet the FTC, said Wilson, has erected walls between majority Democratic and minority Republican Commissioners—they no longer share drafts of decisions, which is unprecedented in modern antitrust history. Due process. The FTC hastily created public meetings without sufficient opportunity for stakeholders to respond with comments; for example, the public had only a week to respond to the plan to drop the vertical merger guidelines to offer comments to update the reality of the merger guidelines, after roughly a year since their introduction and with arguments for its withdrawal being challenged by the leading antitrust law and economics professors and the Department of Justice expressing reservations about the hasty withdrawal. Further, the FTC invites only one-minute commentary for stakeholders and only after it has voted (often along partisan lines—a change from prior administrations where agreement on harms created more legitimacy for enforcement). The increase in political polarization has now bled into antitrust, and the FTC has become political in a way that it had not been for more than a generation. This violates accepted norms of proper notice and comment and creates a sham version of input. Further, the FTC’s abandonment of the vertical merger guidelines while the Department of Justice Antitrust Division has kept them (at least for now, though it is possible that AAG for Antitrust Kanter may withdraw) means that when a deal is reviewed by one agency, the companies arbitrarily will be treated differently than they would by the other antitrust enforcer. Undermining accountability. Populists have criticized antitrust policy as insufficiently accountable to the democratic process, making it odd the FTC is assuming authority to make competition rules without explicit Congressional authorization. Odder still, the FTC claims that Section 5 of the FTC Act should be expanded to its 1914 original intent, but at the same time expands the pre-merger review law to include the notification of debt in merger filings—against the express original intent of that law. And when companies comply with the law and then complete their mergers, the FTC is issuing letters threatening to sue at some indefinite later time, defeating the purpose of pre-merger review and eliminating a critical bargaining chip that incentivizes companies to give the FTC sufficient time to conduct its review. A Way Forward First, Commissioners should embrace procedural fairness principles of due process, transparency, and genuine openness to input. Such an embrace creates better evidence to shape outcomes. Second, the FTC should create substantive legitimacy. Deliberation on the substance requires acknowledging both the benefits and costs. The best way to do this is to seek out non-partisan expertise, as well as input from stakeholders, rather than relying on ideological predispositions in which economic analysis takes a backseat to other amorphous factors. Economic analysis provides an empirical basis for action and tools to understand evidence and data. As economics changes, it allows antitrust to embrace new theoretical insights informed by facts. Durable change requires good process, dispassionate analysis and buy-in from multiple external stakeholders as well as from the courts. Legitimacy in substantive outcomes based on careful deliberation will make such outcomes less likely to be overturned by future administrations. This greatly reduces the risk of unintended or harmful consequences. Third, use the expertise and experience of the FTC staff. If the best antitrust lawyers and economists feel disrespected and ignored, they have no reason to stay in public service for much less money than they could make in the private sector. Without them, the FTC cannot perform its essential role of keeping our economy competitive.

#### Congressional support for FTC enforcement is high now

Edelman 6-19-2021, JD @ Yale Law School (Gilad, “The US Government Is Finally Moving at the Speed of Tech,” <https://webcache.googleusercontent.com/search?q=cache:ZPFV07F7X9MJ:https://www.wired.com/story/government-finally-moving-at-speed-of-tech/+&cd=1&hl=en&ct=clnk&gl=us>)

Now consider antitrust. Four years ago, Lina Khan was a month out of law school, where she had published a groundbreaking article arguing that the prevailing legal doctrine was allowing Amazon to get away with anticompetitive behavior. Antitrust law was not yet a high-profile issue, and Khan’s suggestion that it might apply to tech companies whose core consumer offerings were free or famously cheap was considered bizarre by much of the legal establishment. This week, Khan, at all of 32 years old, was appointed chair of the Federal Trade Commission, one of the two agencies with the most power to enforce competition law. Congress, meanwhile, has introduced a set of bills that represent the most ambitious bipartisan proposals to update antitrust law in decades, with the tech industry as their explicit target. Politics, in other words, may finally be moving at the speed of tech. In hindsight, what seems most remarkable about the Better Deal agenda is that it didn’t mention tech companies at all. Up to that point, the anti-monopoly movement in DC policy circles had been much more focused on traditional industries. Khan got her start writing about consolidation in businesses like meatpacking and Halloween candy. Silicon Valley still seemed politically untouchable. Taking on the likes of Facebook and Google, I wrote at the time, would “require angering some of the Democrats’ most important and deep-pocketed donors, something the party has not yet revealed an appetite for.” How did things change so quickly? There is no one smoking gun, but rather an accumulation of grievances that turned both Democrats and Republicans more and more against the tech companies. For Democrats, the key factor was the creeping sense that social media platforms, whatever the political leanings of their founders, had helped Donald Trump get elected. Facebook’s Cambridge Analytica scandal in 2018 supercharged those suspicions. Investigative reports, meanwhile, kept finding evidence that far-right and racist material was spreading on social media. At the same time—and in part as a reaction to social media platforms implementing more aggressive content moderation to mollify both advertisers and liberal critics—conservatives were growing ever more concerned that liberals in Silicon Valley were discriminating against them. And Republican politicians were picking up on the political potency of that talking point. The result is that we find ourselves living in a world that looks very different from the one we were living in just a few years ago. New antitrust cases against tech giants are popping up left and right, keeping the issue firmly in the public consciousness. The companies are devoting unprecedented sums toward lobbying, advocacy, and advertising to try to avert a crackdown. And in the sharpest break with the past, Congress and the White House are taking concrete steps to restructure markets that have been left to their own devices for two and a half decades. It’s all so much, so fast, that it’s hard to keep track of the various subplots. The introduction of the five House antitrust bills and the elevation of Khan to FTC chair, for example, look like two separate stories. But they’re really two parts of the same story: Khan was herself the key investigator behind the House antitrust subcommittee’s investigation of Apple, Amazon, Facebook, and Google, begun in 2019. The bills introduced last week are the fruits of that investigation. (While the time between the start of the investigation and the release of legislative proposals has felt like an eternity to those of us who follow this closely, it wouldn’t be bad for a Silicon Valley product launch. It took Amazon three years to bring the Kindle to market.)

#### Their evidence says congress and the public are key---only we have evidence that support is high now

1AC Lee, 21 [KU Yellow] – Bethany, J.D. Candidate, University of Pennsylvania Law School. “Reviving the Power of the FTC,” The Regulatory Review, May 17, <https://www.theregreview.org/2021/03/17/lee-reviving-power-of-ftc/> -- Iowa

The Federal Trade Commission (FTC) may face an existential threat to its ability to hold corporate lawbreakers accountable. A pending U.S. Supreme Court case threatens the FTC’s ability to seek monetary relief from wrongdoers, while mounting public concerns about the adequacy of the FTC’s enforcement have led to a crisis of confidence in the agency. The solution to this urgent crisis involves restoring a key FTC authority, according to a new paper by FTC Commissioner Rohit Chopra and his attorney advisor Samuel Levine. After tracing the history of the FTC’s enforcement tools and explaining their current inadequacy, Chopra and Levine argue that reviving the FTC’s Penalty Offense Authority will improve the FTC’s effectiveness and regain public confidence by increasing deterrence and ensuring fairness for honest firms. Established by the FTC Act, the FTC has a mission to “protect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices.” Chopra and Levine, however, highlight the FTC’s concerning track record in fulfilling this mission. In the 1980s, the FTC’s leadership viewed markets as self-correcting, and the agency shifted its focus from market-wide abuses to “small-scale criminal fraud.” Seeking to avoid the derisive label of a “national nanny,” the FTC began to disarm the administrative state by halving the agency’s staff, reversing rulemakings, and adopting policies restricting the agency’s own authority. The FTC’s ideology of the 1980s had lasting consequences, according to Chopra and Levine. In the 1990s, the agency failed to challenge tobacco advertising directed at children. In the 2000s, the FTC took minimal enforcement action to prevent the mortgage meltdown, remaining largely idle as subprime lenders sold loans structured to fail. Congress responded by stripping the FTC of major authorities over the financial sector, such as rulemaking on mortgages and debt collection. Chopra and Levine argue that the agency’s inaction over several decades has resulted in “massive harm for consumers, small businesses, and the economy.” They call for a shift toward “systematic efforts to combat widespread harms.” A key step, say Chopra and Levine, involves resurrecting the agency’s Penalty Offense Authority. Codified in Section 5 of the FTC Act, this provision allows the FTC to correct and deter harmful practices. Currently, the FTC largely relies on Section 13(b) of the FTC Act, which allows the agency to seek preliminary and permanent relief in federal court. But the use of Section 13(b) has been challenged in multiple cases, including in a pending U.S. Supreme Court case challenging the FTC’s authority to seek equitable monetary relief. Even if courts uphold the use of Section 13(b), argue Chopra and Levine, this enforcement tool remains inadequate in correcting and deterring widespread harms. To seek monetary relief under Section 13(b), the FTC must approximate harms or unjust gains—a potentially difficult and costly calculation. As a result, the FTC often resorts to no-money settlements that do not adequately deter wrongdoing. In addition, corporate wrongdoers tend to be undeterred by equitable relief sought under Section 13(b) since the worst consequence merely involves returning their earnings. Instead of overreliance on Section 13(b), Chopra and Levine advocate greater use of the Penalty Offense Authority under Section 5 of the FTC Act. Under this authority, the FTC can seek civil penalties if the agency issued a final cease-and-desist order determining that a practice is unfair or deceptive and if a party subsequently engaged in that practice, knowing that the practice was unfair or deceptive. Chopra and Levine note that the Penalty Offense Authority provides “strong due process protections for defendants.” For example, parties cannot be held liable unless shown to have actual knowledge of the FTC’s determination. Defendants can also challenge the FTC’s prior determination that the conduct was unlawful. Previously, the FTC deployed its Penalty Offense Authority to target whole industries, in a manner that one FTC commissioner described as “extremely effective and efficient.” Nevertheless, the agency’s use of this tool rapidly declined in the 1980s, and it was used only once in the last decade. Calling for renewed use of the Penalty Offense Authority, Chopra and Levine outline three key benefits of such a resurrection. First, compared to equitable relief, civil penalties would more effectively punish and deter wrongdoers. Second, the use of the Penalty Offense Authority would reduce litigation risk for the FTC. Current overreliance on Section 13(b) creates uncertainty as court cases challenge the program, and seeking monetary relief under Section 13(b) requires risky and expensive attempts to quantify harm. Finally, the Penalty Offense Authority provides market-wide impact. By providing notice to firms across an industry, the FTC can correct market-wide practices—increasing compliance and reducing the need to bring similar enforcement actions repeatedly. Chopra and Levine specifically advocate the use of the Penalty Offense Authority in areas where a harmful practice has been condemned by an FTC order but not forbidden by an agency rule. They identify five areas where the FTC could deploy the Penalty Offense Authority based on existing orders: for-profit college fraud, false earnings claims targeted at workers, online disinformation, deceptive data harvesting, and illegal targeted marketing. Ultimately, Chopra and Levine call on the FTC to shed its “self-inflicted paralysis” by drawing on a broader set of tools to protect the public.

#### The plan’s perceived as a fundamental critique of FTC’s legacy---that devastates morale

Kovacic 20, Global Competition Professor of Law and Policy, et al (William, with Allison Jones, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” *The Antitrust Bulletin*, 65.2)

(ii) Respecting and Learning from Past Achievements. In the United States, there is an unfortunate habit of making the case for major reforms by depicting the existing policy making institutions as utterly incompetent, slothful, or corrupt.61 Reform advocates sometimes appear to believe that any recognition that existing institutions sometimes have done good work undermines the case for fundamental reform. There is a perceived imperative to portray the responsible bodies and their leaders as hopelessly inadequate. Electoral campaigns can sharpen this tendency by leading the opposition party to claim that the incumbent administration’s program was an unrelieved failure. In a striking number of instances, this pattern has emerged in discussions of antitrust policy.62 In current discussions about the future of the U.S. antitrust regime, advocates of fundamental reform sometimes portray the federal antitrust enforcement agencies as decrepit -- perhaps to underscore the need for basic change.63 The implication is that, because the antitrust system has failed so miserably, there are few, if any, positive lessons to be derived from experience since the retrenchment of U.S. policy began in the late 1970s, and certainly none since 2000. This style of argument has several potential costs. One danger is that it overlooks genuine accomplishments and, in doing so, ignores experience that suggests how to build successful programs in the future. We offer three examples that deserve close study in building future cases that seek to expand the reach of the antitrust system. The first is the development of the FTC’s pharmaceutical and non-pharmaceutical health care program from the mid-1970s forward. The Commission identified health care as a major priority and devised a strategy that used the full range of the agency’s policy tools – cases, rules, reports, and advocacy – to change doctrine and alter business behavior.64 The affected business enterprises were (and are) economically powerful and politically influential, and they mounted powerful campaigns in the courts and in the Congress to blunt the Commission’s initiatives. The difficulty of the FTC’s program is perhaps most apparent in the case of health care services. The agency had to win cases before courts that displayed skepticism about whether competition had a useful role to play in the delivery of health care, or in any of what are known as the learned professions.65 The FTC also had to outmaneuver an industry that was bent on gaining legislative relief from antitrust scrutiny. Allied with other professional groups, the leading U.S. medical societies came within an inch in the late 1970s and early 1980s of persuading Congress to withdraw the FTC’s jurisdiction to apply the antitrust law to the professions.66 A second example is the FTC’s effort over the past two decades to restore the effectiveness of the “quick look” as an analytical tool in the wake of the Supreme Court’s decision in Federal Trade Commission v. California Dental Association (CDA).67 By 2001, it had become apparent to the FTC’s senior leadership team that CDA had raised doubts about the application of the quick look method of analysis to truncate the assessment of behavior that, while not previously condemned as illegal per se, strongly resembled conduct that antitrust jurisprudence had forbidden categorically.68 The agency responded with a strategy focused on the development of cases that would enable the Commission to use its administrative adjudication authority to persuade courts to reject the broader negative implications of CDA and restore the vitality of the quick look. This initiative ultimately generated court of appeals decisions that upheld the Commission’s effort to treat certain behavior as “inherently suspect” without proving that the defendant possessed market power and to require the defendant to offer cognizable, plausible justifications.69 A third example is the FTC’s successful litigation of three cases before the Supreme Court over the past decade.70 Not since the 1960s has the Commission litigated and won three consecutive antitrust cases before the Supreme Court. Each matter involved difficult issues and featured strong opposition from the defendants and amici. Had the FTC been a “timid” institution, one cannot imagine that it wouild have mounted or sustained these litigation challenges. The programs that accounted for these results were not accidental. Each program began with a careful examination of the existing framework of doctrine and policy to identify desired areas of extension. This stock-taking guided the identification of potential candidates for cases and the application of other policymaking tools.71 Each program built incrementally upon the bipartisan contributions of agency leadership and the sustained commitment of staff across several presidential administrations headed by Democrats and Republicans. If one assumes (as a number of reform proponents assert) that the FTC was a useless body in the modern era, there would be little purpose in studying these examples, or anything else it did, as there would be nothing useful to learn. The paint-it-black interpretation of modern antitrust history makes the costly error of tossing aside experience that might inform the successful implementation of new reforms. A second notable harm from the catastrophe narrative, most relevant to the discussion of human capital, is its demoralizing effect on the agency’s existing managers and staff. To see one’s previous work portrayed as substandard, or worse, tends not to inspire superior effort. It breeds cynicism and distrust where managers and staff understand that the critique badly distorts what they have done. Proponents of basic change must realize that the success of their program to expand antitrust intervention will require major contributions from existing staff and managers.