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#### Law Enforcement Tradeoff DA

#### Antitrust law enforcement has two areas of focus now: health care and big tech. Health care is under the radar.

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Lina Khan’s Federal Trade Commission has its eyes on health care. The agency known for efforts to rein in Big Tech companies like Facebook and Amazon is also enmeshed in high-stakes health care and health tech battles that extend well beyond Silicon Valley. Case in point: The FTC trial that kicked off yesterday examining monopoly concerns in the market for cancer screening technology. (More on that below.) That closely watched antitrust case — involving the giant Illumina and startup Grail — predates Khan’s confirmation as FTC chair. But it underscores how health issues are looming over the agenda, particularly heading into the pandemic's second year. The way health care companies and consumer health apps handle sensitive data “is an area that I'm sure [Khan’s] very, very interested in,” said Jessica Rich, former director of the FTC’s consumer protection bureau, adding that the Biden administration's FTC will also be closely scrutinizing hospital mergers. “I expect her and the commission to take a very bold approach to what constitutes harm for both,” Rich said. “I expect her to pay close attention to algorithms and potential discrimination in health care, both denials and pricing issues which the FTC's laws can address.” The FTC’s jurisdiction touches nearly the entire health economy. While its competition bureau looks at health care mergers like the Illumina-Grail deal, its consumer protection side is focused on health privacy and data security issues, as well as fighting bogus medical claims on everything from weight loss to Covid cures. When Congress passed the Covid-19 Consumer Protection Act last year, the agency was granted new authority to police Covid scams. Although Khan hasn't spoken publicly about her health care agenda, she's likely to take issue with health apps and companies whose business models maximize, incentivize and monetize data collection. Of particular concern is how firms disclose what they’re doing with consumers’ data — and whether it may still be deceptive or unfair.

#### The plan requires an unexpected, significant and drawn-out expenditure of finite law enforcement resources

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.

#### Resources are finite and are drawn from under-the-radar M and A priorities

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

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

#### Health consolidation collapses public health---specifically rural care

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Covid-19 has initiated yet another wave: A wave of hospital mergers and acquisitions that will have devastating consequences for public health if industry doesn’t soon execute an about-face. Whether because they’re on the brink of bankruptcy and have subscribed to the half-truth that size is protective, or because they think they can score some good deals and believe scale and success are synonymous, the financial fallout of Covid-19 has caused many hospital executives to make consolidation a core part of their future plans. With the intent of increasing care quality and decreasing consumer costs despite these challenging times, the merger between Shannon Medical Center and Community Hospital and partnership between Intermountain and Sanford Health are just two examples. There are multiple reasons why consumers absolutely cannot afford for industry to bulk up in an effort to weather this storm. The first is that the positive efforts executives claim consolidation will help them accomplish often prove to be futile. Research shows that wherever market concentration is high, there are also higher prices for both consumers and the employers who provide their healthcare coverage. In the absence of competition, costs increase and quality deteriorates. That’s the opposite of progress. Second, generally speaking, the union of two institutions with operational shortcomings only creates one larger institution with even more operational shortcomings! That’s not progress either. Third, Covid-induced consolidation will only make future progress many times more difficult. The larger an organization is, the more it will struggle to rapidly adapt to healthcare disruptions like we’re seeing today. Retail giants like Walmart, Walgreens, Amazon and CVS are pivoting to cater to healthcare consumer demands for affordability and accessibility. Right now, they’re still a blip on the radar relative to mainstream healthcare delivery, but they are looking to eventually corner the market and drive the industry forward. And as they continue down this path, consolidated healthcare systems will be left behind, potentially at the expense of the consumers in that area. The potential impact of continued consolidation on rural patients is especially concerning. Rural communities may have a limited number of the big-box retailers mentioned above. And the unfortunate fact of the matter is that when a larger hospital or health system purchases a smaller, rural hospital, it’s usually only a matter of time before the purchasing system realizes that unless they drastically pare down and reconfigure operations, the acquired hospital will never be profitable. Many eventually decide to close up shop, in some instances reducing or even eliminating rural patients’ options for care delivery. In the absolute worst-case scenario, this is exactly the reality all consumers could face if consolidation continues at its current pace. In theory and if left unchecked, all of the hospitals in the United States could be owned by only a handful of mammoth systems that then lack incentive to continually deliver quality services at lower total cost of care.

#### Rural care is key to US ag exports

Lichtenwald 16, CEO of Medsphere Systems Corporation (Irv, “Is CMS Efforts Enough to Transform Rural Healthcare?,” <http://hitconsultant.net/2016/02/22/32016/>)

The scenario is far from unrealistic. For the most part, non-urban healthcare organizations are not doing well. In fact, almost every rural hospital in the country is operating near the margin or in the red. According to iVantage Health Analytics Senior Vice President Michal Topchik, speaking to Health Data Management, 67 rural hospitals have closed since 2010, and 283 were vulnerable to closure last year. Already in 2016 iVantage has identified 673 vulnerable rural hospitals, with 210 at very high risk. While only about 15 percent of the American population, roughly 46 million people, live in rural areas, they do some of the nation’s most essential work. Mostly, they grow food, produce energy or provide services to the people that grow food and produce energy. Obviously, the rural healthcare situation matters in terms of food and energy security at home, but also in terms of economics—the United States is by far the largest global exporter of food, with roughly $40 billion separating America from number two, and is on the cusp of ending energy imports for the first time since 1950. In reality, rural healthcare is transitioning, not disappearing, mostly because doing nothing is just bad economics. People in rural areas need care. If they can’t get it locally, they have to be flown to the nearest facility, which ends up being more expensive over the long term than funding a local hospital. To their credit, the Centers for Medicare and Medicaid Services (CMS) are already aware of the situation in rural America and have been taking steps toward fixing it. Speaking recently to the National Rural Health Association, CMS Acting Administrator Andy Slavitt explained that the agency is “establishing a CMS Rural Health Council to work across the entire agency to oversee our work in three strategic priority areas– first, improving access to care to all Americans in rural settings; second, supporting the unique economics of providing health care in rural America; and third making sure the health care innovation agenda appropriately fits rural health care markets.” As Slavitt points out, rural Americans tend to be older, earn less money and they generally lack health insurance—more than 60 percent of citizens without health insurance live in rural areas in states that have not expanded Medicaid through the Affordable Care Act. Nearly 75 percent of government health insurance exchange users make less than 250 percent of the federal poverty level—currently a bit less than $12,000 a year for an individual and slightly more than $24,000 for a family of four. So, if the argument could be made that rural America is home to the greatest number of healthcare challenges, then it also represents the greatest opportunity. If we can make affordable healthcare work outside urban areas, we may have a template applicable to other scenarios. On Slavitt’s first two points—access and economics—CMS is working to sign rural Americans up for health insurance and adjusting requirements and payment models for rural care. Which brings us to the “innovation agenda,” Slavitt’s term for the digitization of healthcare and the all-in bet the federal government has made on the benefits of health IT. The goal here is to transform rural hospitals and clinics into efficient, wired, lean operations that can absorb the realities of rural care and still operate in the black. With 35 percent of rural hospitals losing money and almost two-thirds running a negative operating margin, there’s simply no way rural facilities can invest in health IT without help. From CMS, that help takes the form of several planned or in-process programs: – Medicaid State Innovation Model grants for technical support in smaller rural hospitals – Aggregation of services in rural communities creating benefits from population health – The Frontier Community Health Integration Project (summer 2016), developing and testing new models in isolated areas using telemedicine and integration approaches – The ACO investment model for hospitals that can’t invest in ACO infrastructure; the model now serves 350,000 rural beneficiaries through 1,100 rural providers – Incorporating telemedicine where appropriate; CMS is publishing a Medicaid final rule that for the first time allows for face-to-face encounters using telehealth It’s clear that CMS understands we can’t leave rural hospitals to fend for themselves. But it also seems clear that a lot of hospitals invested in electronic health records (EHRs) they could ill afford to qualify for Meaningful Use funds—dollars that seldom covered implementation costs for solutions that didn’t yield significant cost savings and required additional technical personnel. By and large, that MU money has been dispensed. The carrot has been eaten. What Medicare- and Medicaid-heavy hospitals can expect next is two sticks: more stringent reporting requirements necessitating EHR use and direct penalties (for now) related to Meaningful Use non-compliance. “The high capital and operating costs associated with health IT, specifically EHRs, have put some hospitals in a difficult position,” wrote Becker’s Hospital CFO in a prescient January 2014 article. “Do they absorb the financial hit now, even if they know they can’t afford it? Most organizations are doing so …” Yes, CMS is trying to help lessen the impact of that metaphorical beating, but these rural hospitals also have to make decisions to help themselves. Too many are paying for systems they can’t afford to maintain. Moreover, they are unable to invest in necessary security, leaving them increasingly open to data breaches. Many are also still handicapped by the costs of ICD-10 transition, for which there was no federal reimbursement. Rural hospitals need a comprehensive EHR platform that integrates with a revenue cycle system so they can properly capture charges and manage the billing process, and effectively collect on previously lost billing. These systems need to be available as a subscription service so that rural hospitals don’t have to come up with huge money down. And they can’t require the hiring of an additional 50 application specialists to make the new systems work. “The benefits of IT are still to come,” Standard and Poor’s Marin Arrick told Becker’s Hospital CFO more than two years ago. Still the economic crisis in rural care rages on, certainly lessening access to care for millions of Americans and arguably impacting the labor force that produces food, energy, etc.

#### US ag exports prevent hotspot escalation

Castellaw 17

Lieutenant General John Castellaw is the Founder and CEO of Farmspace Systems LLC, a provider of precision agricultural aerial services and equipment. He is a highly decorated 36-year veteran of the United States Marine Corp where he participated in and led several humanitarian operations in Africa, Asia and Europe. He is also the former President of the non-profit Crockett Policy Institute where he created the “SOLDIER 2 CIVILIAN” program to help veterans find jobs in precession agriculture. He graduated from the University of Tennessee, Martin (UTM) with a degree in Agriculture. He currently operates his family farm in Tennessee. “Opinion: Food Security Strategy Is Essential to Our National Security.” Agri-Pulse. May 1st, 2017. https://www.agri-pulse.com/articles/9203-opinion-food-security-strategy-is-essential-to-our-national-security

The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy. An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence. Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability. The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom. Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs. This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people. Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population. Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being. Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

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#### Two-track infrastructure will pass, PC is key, but there’s zero margin for error

Greve 9-7-2021, politics breaking news reporter for Guardian US, based in Washington (Joan, “Joe Biden to referee Democrats in brewing battle over $3.5tn budget bill,” *The Guardian*, <https://www.theguardian.com/us-news/2021/sep/07/biden-democrats-brewing-battle-budget-bill>)

Congress will return from its summer recess later this month, and some Democrats are already gearing up for a political fight – with each other. Democratic lawmakers are looking to pass their $3.5tn spending package, after the House and the Senate approved the blueprint for the budget bill last month. The ambitious legislation encompasses much of Joe Biden’s economic agenda, including proposals to expand access to affordable childcare, invest in climate-related initiatives and broaden Medicare coverage. But to get the bill passed, Democrats will first need to reach an agreement on the cost of the legislation. Centrist Democrats, including Senators Kyrsten Sinema and Joe Manchin, have expressed concern about the bill’s $3.5tn price tag, while progressives have indicated they will fiercely oppose any attempt to cut funding in the proposal. With his entire economic agenda hanging in the balance, Biden will need to convince the two fractious wings of his party to come together and pass a comprehensive spending package. And given Democrats’ extremely narrow majorities in both the House and the Senate, there is virtually no room for error. Despite warning signs of intra-party friction over the cost of the budget bill, congresswoman Suzan DelBene, who chairs the centrist New Democrat Coalition, said the House’s focus right now should still be on the content of the legislation. “I think discussion of a number is more distracting when the focus really needs to be on, what is the substance going to be of this legislation?” DelBene told the Guardian. “If we have strong legislation the people support, I think we can find the path forward.” Over in the Senate, majority leader Chuck Schumer is attempting to advance the bill using reconciliation, meaning Democrats do not need any Republican support to pass the legislation. But the 50-50 split in the upper chamber means that every single Democratic senator must be on board to get the bill approved. Schumer has been clear-eyed about the challenges ahead for the legislation. Shortly after the Senate approved the blueprint for the bill in a party-line vote last month, Schumer told reporters, “We’ve labored for months and months to reach this point, and we have no illusions – maybe the hardest work is yet to come.” Manchin proved Schumer’s point last Thursday, when he wrote a Wall Street Journal op-ed calling for a “strategic pause” in advancing the spending package. “While some have suggested this reconciliation legislation must be passed now, I believe that making budgetary decisions under artificial political deadlines never leads to good policy or sound decisions,” Manchin said in the op-ed. “I, for one, won’t support a $3.5tn bill, or anywhere near that level of additional spending, without greater clarity about why Congress chooses to ignore the serious effects inflation and debt have on existing government programs.” Bernie Sanders, the leftwing chairman of the Senate budget committee, responded to Manchin’s warning in kind, threatening to torpedo the bipartisan infrastructure bill if the spending package is not approved. “Rebuilding our crumbling physical infrastructure – roads, bridges, water systems – is important,” Sanders said on Twitter. “Rebuilding our crumbling human infrastructure – healthcare, education, climate change – is more important. No infrastructure bill without the $3.5tn reconciliation bill.” Progressive groups have echoed Sanders’s argument, insisting that every component of the $3.5tn legislation is vital. Sanders had initially called for spending $6tn on the budget bill, so progressives already view the current price tag as a concession. “We’re in a moment of crisis. Is this really the time for the Senate to press pause?” Ellen Sciales, the communications director of the climate group Sunrise Movement, said in a statement. She added: “If the Senate can’t pass an incredibly popular climate and jobs plan during a summer of unprecedented, fatal climate disasters, and an economy reeling from a global pandemic, we must abolish the Senate. $3.5tn was the compromise.” Natalia Salgado, the director of federal affairs for the Working Families Party, noted that some progressive economists have suggested the US needs to spend $10tn over 10 years to meet its obligations in the Paris Climate Agreement. “We’re going to come nowhere near that,” Salgado said. “So we can’t afford to lose a single cent in this $3.5tn. Every single penny will count.” Despite the war of words between moderates and progressives, the White House has continued to express confidence that Congress will ultimately reach an agreement on the legislation. “The president and his whole team are proud of and fighting for the substance of his Build Back Better agenda,” a White House official said in a statement. “These are complex processes, but as recent weeks have demonstrated, leaders in Congress and the President know how to move them forward.”

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

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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.

#### Passage solves climate change.

Roberts 8-7-2021, energy reporter, formerly of Vox (David, “Crunch time: this is America's last chance at serious climate policy for a decade,” *Vox*, <https://www.canarymedia.com/articles/climate-policy-crunch-time-we-need-congress-to-pass-a-clean-energy-standard-and-tax-credits/>)

Congress is working on what is likely to be its last big shot at climate change policy for a decade or more. If things go well, the legislation will include a clean energy standard (CES) and clean energy tax credits, which together would revolutionize the US electricity system. If things don’t go well, there will be no substantial climate legislation for many years to come. That’s the only question being decided: Will we get a CES and tax credits, or will we get nothing that will tackle fossil fuels this decade? That’s the binary. It’s time to focus. Looking around, it doesn’t seem like clean energy supporters, climate hawks, or the left more broadly really get that. So let’s talk about why this is such an important moment and what’s at stake. The reconciliation bill is likely the last chance for big federal climate legislation The Democratic approach for a while now has been to proceed along dual tracks. On one track, there’s the bipartisan infrastructure bill, hammered out by a group of just over 20 senators from both parties. On the other track, there’s the budget reconciliation bill, which is meant to contain … everything else in Biden’s agenda. The former needs 60 votes; the latter can pass with 50 Democratic votes. This has always been a fraught and delicate strategy. It could crash and burn in any number of ways. But so far, at least, it is hanging together. The bipartisan group unveiled its bill this week; it is slowly inching toward a vote, though Senate Minority Leader Mitch McConnell (R-Ky.) is doing everything he can to slow it down and gum it up. Twitter avatar for @jsfreed Josh Freed @jsfreed Okay, everyone, we’ve been crunching the BID numbers to see what’s in this deal and how it’ll impact clean energy and climate. Warning, this is a long 🧵 … 1/ seinfeld newman GIF July 29th 2021 176 Retweets497 Likes It contains decent chunks of money for things that will indirectly help clean energy — transmission, demonstration projects, R&D — but it lacks anything that will directly confront fossil fuels in the coming decade, the sine qua non of adequate climate policy. As Robinson Meyer argues in The Atlantic, it is not a climate bill, not really. There’s no guarantee the bipartisan bill will pass, and there’s no way to know how the Senate’s bipartisanship fetishists, Sens. Joe Manchin (D-W.V.) and Kyrsten Sinema (D-Ariz.), will react if it doesn’t. But whether it passes or not, when it comes to decent climate policy, it’s all about the reconciliation bill. There won’t be another bill this big while Democrats control Congress, and they won’t control Congress for long. What Democrats are able to get through in the reconciliation bill is likely to be the last big federal climate legislation for a decade at least. This is the key thing to understand, so I’m going to repeat it: What Democrats are able to get through in the reconciliation bill is likely to be the last big federal climate legislation for a decade at least. (You may be thinking: can’t Democrats do another reconciliation bill next year? Yes, they can, but the midterms will be in full swing, moderates will be feeling even more cowardly than usual, political appetite for big spending will have dried up in the face of a recovering economy, and focus will have turned, hopefully, to voting reform. This one is it.) Absent substantial federal voting reform — which is looking less and less likely, certainly nothing anyone should bet on — all signs point toward Republicans taking back the House in 2022. It’s unclear what will happen in the Senate, but regardless, if the GOP controls either house, no climate legislation will pass (and no voting reform). Republican presidential candidates can win despite larger and larger losses in the popular vote. And the chances of Democrats controlling both houses of Congress again are only getting dimmer. The structural advantages that favor the GOP in the US system are only tilting further in its favor, while the party is actively extending those advantages with a wave of voter-suppression laws at the state level and an accompanying wave of gerrymandering, which alone could win the GOP the House in 2022, even absent any Dem seats being lost. The GOP is protected in this endeavor by a hyper-conservative Supreme Court (which, by the way, could get even more conservative if the disastrously vain Stephen Breyer hangs on until there’s a Republican president again). The conservative movement in the US is attempting to engineer one-party control of US government (along the lines of their new hero, Hungarian autocrat Viktor Orban). There’s no way to know how successful the endeavor will ultimately be, but it’s a pretty good bet, given current trends, that Democrats won’t control the presidency and both houses of Congress at the same time again for a long while. Last time they lost full control (just before a wave of gerrymandering in 2010), it was a decade until they got it back. Twitter avatar for @sarahposner Sarah Posner @sarahposner New, from me, @TPM: That all begins in January 2023 — which makes this year’s reconciliation bill the Democrats’ last big shot at climate and clean energy policy. There are two key clean-energy policies on the table Climate folk are prone to endless policy arguments; everyone has their favorites. But most of those arguments are immaterial right now. Democrats have lined up behind a menu of clean energy policies in line with Biden’s climate plan. What’s on that menu is what might get in the bill. Might. If it’s not on that menu, it’s not going to get in. There’s no carbon tax. There’s no cap-and-dividend. There’s no prohibition on new fossil fuel infrastructure. You may support any and all of those policies, but they are not live options in the reconciliation bill. Right now, political pressure is best aligned behind options that actually are on the menu. Two in particular are immensely important — together, they would be transformative. The first is a Clean Energy Standard that would reduce electricity sector greenhouse gas emissions 80 percent by 2030. (Biden’s plan calls for 100 percent by 2035, but a reconciliation bill can only extend 10 years out.) It’s not actually going to be a standard, per se, because you can’t pass regulatory standards through reconciliation. Instead, it’s going to be a system of fines and payments that will incentivize utilities to increase their proportion of renewable energy to meet the targets. It’s called a clean electricity payment program (CEPP). A CEPP actually has some advantages over the traditional CES’s and renewable portfolio standard (RPSs) commonly seen in states. For one thing, it’s more progressive: the money to drive the transition comes from federal coffers (via taxes on corporations and the wealthy) rather than from electricity rates, which are regressive. If you’re interested in the details of how a reconciliation-friendly CEPP will be structured, see this piece from Ben Storrow and Scott Waldman of E&E, or this thread from Princeton professor Jesse Jenkins: Twitter avatar for @JesseJenkins JesseJenkins @JesseJenkins Broad contours of a Reconciliation-friendly Clean Electricity Standard (CES) are now coming into public view, as House & Senate Dems prepare a $3.5T Budget Resolution that will kick off a Reconciliation process, which permits passage of budget-related measures w/50+ Senate votes. July 15th 2021 1 Retweet16 Likes The end result will be the same as a conventional CES: the US electricity grid will reach 80 percent decarbonization by 2030, which is an achievable but still incredibly ambitious target. As I’ve said so many times, nothing is more important to deep decarbonization than cleaning up the electricity grid. It’s the core of the “electrify everything” strategy. The second is boosted and expanded clean energy tax credits. The investment tax credit (ITC) and production tax credit (PTC), for wind and solar respectively, would be renewed, but various forms of tax credits would also be extended to energy storage, hydrogen, carbon capture, and other key clean energy technologies. (The details are in flux; for a blueprint, see the Senate Finance Committee’s Clean Energy for America Act or the House Ways and Means’ GREEN Act.) Tax credits will provide the supply push; the CEPP will provide the demand pull. The result will be an enormous surge of clean energy projects and jobs. This is the core of good climate policy: pushing fossil fuels off the grid over the next decade and replacing them with zero-carbon energy. There are other good climate provisions on the Democrats’ menu for reconciliation as well. I would love to see a Civilian Climate Corps. I’d love to see more money for public transportation and an electrified postal service fleet. Lots of smaller climate provisions might make it through just by virtue of not drawing much notice, which would be great. But the CEPP and the tax credits are the one-two punch needed to make a real short-term difference in the energy system. And they are on the menu. Manchin is likely to be skeptical of the CEPP. Although carbon capture counts as clean energy under the program, every analyst understands that the practical effect is going to be to ramp up renewables and ramp down fossil fuels on the grid. Manchin doesn’t actually want that. I have no idea if public pressure will have any effect at all on Manchin, but it couldn’t hurt. Might as well try it. The perilous path ahead for reconciliation Everyone on the left is aware that the reconciliation bill is the last big legislative train leaving the station, and every interest group wants a seat on it. Climate policy will be competing with other Democratic priorities. Especially as Sinema and Manchin arbitrarily reduce the total size of the bill, as they surely will, the factions of the party will be fighting it out over a shrinking pie. It is far from a sure thing that the CEPP and tax credits will survive negotiations. It’s all being decided right now. Everyone who cares about US climate progress should put aside their personal projects and preferences for a few weeks and speak in a unified voice. Call your representatives. Push the groups you’re involved to make noise about it. It’s going to be the CEPP and tax credits or nothing big for climate. If both those policies are put in place, it could set the US power system on a new course and strengthen American credibility at the upcoming COP26 international climate meeting. If they slip through the cracks, climate will have to settle for scraps and the US will surrender all hope of meeting its climate targets or influencing others to do the same. For the next few months, this is all that matters. If you’ve ever considered getting involved, now is the time.

#### Warming leads to extinction---it’s a conflict-multiplier and defense doesn’t assume non-linearity

Kareiva 18, Ph.D. in ecology and applied mathematics from Cornell University, director of the Institute of the Environment and Sustainability at UCLA, Pritzker Distinguished Professor in Environment & Sustainability at UCLA, et al. (Peter, “Existential risk due to ecosystem collapse: Nature strikes back,” *Futures*, 102)

In summary, six of the nine proposed planetary boundaries (phosphorous, nitrogen, biodiversity, land use, atmospheric aerosol loading, and chemical pollution) are unlikely to be associated with existential risks. They all correspond to a degraded environment, but in our assessment do not represent existential risks. However, the three remaining boundaries (climate change, global freshwater cycle, and ocean acidification) do pose existential risks. This is because of intrinsic positive feedback loops, substantial lag times between system change and experiencing the consequences of that change, and the fact these different boundaries interact with one another in ways that yield surprises. In addition, climate, freshwater, and ocean acidification are all directly connected to the provision of food and water, and shortages of food and water can create conflict and social unrest. Climate change has a long history of disrupting civilizations and sometimes precipitating the collapse of cultures or mass emigrations (McMichael, 2017). For example, the 12th century drought in the North American Southwest is held responsible for the collapse of the Anasazi pueblo culture. More recently, the infamous potato famine of 1846–1849 and the large migration of Irish to the U.S. can be traced to a combination of factors, one of which was climate. Specifically, 1846 was an unusually warm and moist year in Ireland, providing the climatic conditions favorable to the fungus that caused the potato blight. As is so often the case, poor government had a role as well—as the British government forbade the import of grains from outside Britain (imports that could have helped to redress the ravaged potato yields). Climate change intersects with freshwater resources because it is expected to exacerbate drought and water scarcity, as well as flooding. Climate change can even impair water quality because it is associated with heavy rains that overwhelm sewage treatment facilities, or because it results in higher concentrations of pollutants in groundwater as a result of enhanced evaporation and reduced groundwater recharge. Ample clean water is not a luxury—it is essential for human survival. Consequently, cities, regions and nations that lack clean freshwater are vulnerable to social disruption and disease. Finally, ocean acidification is linked to climate change because it is driven by CO2 emissions just as global warming is. With close to 20% of the world’s protein coming from oceans (FAO, 2016), the potential for severe impacts due to acidification is obvious. Less obvious, but perhaps more insidious, is the interaction between climate change and the loss of oyster and coral reefs due to acidification. Acidification is known to interfere with oyster reef building and coral reefs. Climate change also increases storm frequency and severity. Coral reefs and oyster reefs provide protection from storm surge because they reduce wave energy (Spalding et al., 2014). If these reefs are lost due to acidification at the same time as storms become more severe and sea level rises, coastal communities will be exposed to unprecedented storm surge—and may be ravaged by recurrent storms. A key feature of the risk associated with climate change is that mean annual temperature and mean annual rainfall are not the variables of interest. Rather it is extreme episodic events that place nations and entire regions of the world at risk. These extreme events are by definition “rare” (once every hundred years), and changes in their likelihood are challenging to detect because of their rarity, but are exactly the manifestations of climate change that we must get better at anticipating (Diffenbaugh et al., 2017). Society will have a hard time responding to shorter intervals between rare extreme events because in the lifespan of an individual human, a person might experience as few as two or three extreme events. How likely is it that you would notice a change in the interval between events that are separated by decades, especially given that the interval is not regular but varies stochastically? A concrete example of this dilemma can be found in the past and expected future changes in storm-related flooding of New York City. The highly disruptive flooding of New York City associated with Hurricane Sandy represented a flood height that occurred once every 500 years in the 18th century, and that occurs now once every 25 years, but is expected to occur once every 5 years by 2050 (Garner et al., 2017). This change in frequency of extreme floods has profound implications for the measures New York City should take to protect its infrastructure and its population, yet because of the stochastic nature of such events, this shift in flood frequency is an elevated risk that will go unnoticed by most people. 4. The combination of positive feedback loops and societal inertia is fertile ground for global environmental catastrophes Humans are remarkably ingenious, and have adapted to crises throughout their history. Our doom has been repeatedly predicted, only to be averted by innovation (Ridley, 2011). However, the many stories of human ingenuity successfully addressing existential risks such as global famine or extreme air pollution represent environmental challenges that are largely linear, have immediate consequences, and operate without positive feedbacks. For example, the fact that food is in short supply does not increase the rate at which humans consume food—thereby increasing the shortage. Similarly, massive air pollution episodes such as the London fog of 1952 that killed 12,000 people did not make future air pollution events more likely. In fact it was just the opposite—the London fog sent such a clear message that Britain quickly enacted pollution control measures (Stradling, 2016). Food shortages, air pollution, water pollution, etc. send immediate signals to society of harm, which then trigger a negative feedback of society seeking to reduce the harm. In contrast, today’s great environmental crisis of climate change may cause some harm but there are generally long time delays between rising CO2 concentrations and damage to humans. The consequence of these delays are an absence of urgency; thus although 70% of Americans believe global warming is happening, only 40% think it will harm them (http://climatecommunication.yale.edu/visualizations-data/ycom-us-2016/). Secondly, unlike past environmental challenges, the Earth’s climate system is rife with positive feedback loops. In particular, as CO2 increases and the climate warms, that very warming can cause more CO2 release which further increases global warming, and then more CO2, and so on. Table 2 summarizes the best documented positive feedback loops for the Earth’s climate system. These feedbacks can be neatly categorized into carbon cycle, biogeochemical, biogeophysical, cloud, ice-albedo, and water vapor feedbacks. As important as it is to understand these feedbacks individually, it is even more essential to study the interactive nature of these feedbacks. Modeling studies show that when interactions among feedback loops are included, uncertainty increases dramatically and there is a heightened potential for perturbations to be magnified (e.g., Cox, Betts, Jones, Spall, & Totterdell, 2000; Hajima, Tachiiri, Ito, & Kawamiya, 2014; Knutti & Rugenstein, 2015; Rosenfeld, Sherwood, Wood, & Donner, 2014). This produces a wide range of future scenarios. Positive feedbacks in the carbon cycle involves the enhancement of future carbon contributions to the atmosphere due to some initial increase in atmospheric CO2. This happens because as CO2 accumulates, it reduces the efficiency in which oceans and terrestrial ecosystems sequester carbon, which in return feeds back to exacerbate climate change (Friedlingstein et al., 2001). Warming can also increase the rate at which organic matter decays and carbon is released into the atmosphere, thereby causing more warming (Melillo et al., 2017). Increases in food shortages and lack of water is also of major concern when biogeophysical feedback mechanisms perpetuate drought conditions. The underlying mechanism here is that losses in vegetation increases the surface albedo, which suppresses rainfall, and thus enhances future vegetation loss and more suppression of rainfall—thereby initiating or prolonging a drought (Chamey, Stone, & Quirk, 1975). To top it off, overgrazing depletes the soil, leading to augmented vegetation loss (Anderies, Janssen, & Walker, 2002). Climate change often also increases the risk of forest fires, as a result of higher temperatures and persistent drought conditions. The expectation is that forest fires will become more frequent and severe with climate warming and drought (Scholze, Knorr, Arnell, & Prentice, 2006), a trend for which we have already seen evidence (Allen et al., 2010). Tragically, the increased severity and risk of Southern California wildfires recently predicted by climate scientists (Jin et al., 2015), was realized in December 2017, with the largest fire in the history of California (the “Thomas fire” that burned 282,000 acres, https://www.vox.com/2017/12/27/16822180/thomas-fire-california-largest-wildfire). This catastrophic fire embodies the sorts of positive feedbacks and interacting factors that could catch humanity off-guard and produce a true apocalyptic event. Record-breaking rains produced an extraordinary flush of new vegetation, that then dried out as record heat waves and dry conditions took hold, coupled with stronger than normal winds, and ignition. Of course the record-fire released CO2 into the atmosphere, thereby contributing to future warming. Out of all types of feedbacks, water vapor and the ice-albedo feedbacks are the most clearly understood mechanisms. Losses in reflective snow and ice cover drive up surface temperatures, leading to even more melting of snow and ice cover—this is known as the ice-albedo feedback (Curry, Schramm, & Ebert, 1995). As snow and ice continue to melt at a more rapid pace, millions of people may be displaced by flooding risks as a consequence of sea level rise near coastal communities (Biermann & Boas, 2010; Myers, 2002; Nicholls et al., 2011). The water vapor feedback operates when warmer atmospheric conditions strengthen the saturation vapor pressure, which creates a warming effect given water vapor’s strong greenhouse gas properties (Manabe & Wetherald, 1967). Global warming tends to increase cloud formation because warmer temperatures lead to more evaporation of water into the atmosphere, and warmer temperature also allows the atmosphere to hold more water. The key question is whether this increase in clouds associated with global warming will result in a positive feedback loop (more warming) or a negative feedback loop (less warming). For decades, scientists have sought to answer this question and understand the net role clouds play in future climate projections (Schneider et al., 2017). Clouds are complex because they both have a cooling (reflecting incoming solar radiation) and warming (absorbing incoming solar radiation) effect (Lashof, DeAngelo, Saleska, & Harte, 1997). The type of cloud, altitude, and optical properties combine to determine how these countervailing effects balance out. Although still under debate, it appears that in most circumstances the cloud feedback is likely positive (Boucher et al., 2013). For example, models and observations show that increasing greenhouse gas concentrations reduces the low-level cloud fraction in the Northeast Pacific at decadal time scales. This then has a positive feedback effect and enhances climate warming since less solar radiation is reflected by the atmosphere (Clement, Burgman, & Norris, 2009). The key lesson from the long list of potentially positive feedbacks and their interactions is that runaway climate change, and runaway perturbations have to be taken as a serious possibility. Table 2 is just a snapshot of the type of feedbacks that have been identified (see Supplementary material for a more thorough explanation of positive feedback loops). However, this list is not exhaustive and the possibility of undiscovered positive feedbacks portends even greater existential risks. The many environmental crises humankind has previously averted (famine, ozone depletion, London fog, water pollution, etc.) were averted because of political will based on solid scientific understanding. We cannot count on complete scientific understanding when it comes to positive feedback loops and climate change.

### OFF

#### The 50 United States and relevant subnational entities should enact and enforce substantial legislation prohibiting anticompetitive business practices in the delegation of generic Top-Level Domains by the private sector.

#### State antitrust is enforceable and solvent.

Lange et al. 21, \*Perry A., JD, antitrust lawyer, vice-chair of the ABA Antitrust Section’s Joint Conduct Committee. \*Brian K. Mahanna, JD, former chief of staff and deputy attorney general in the Office of the New York State Attorney General, \*Nicole Callan, JD, vice chair of the Civil Practice and Procedure Committee of the American Bar Association (ABA)'s Section of Antitrust Law, \*Álvaro Mateo Alonso, LLM, Law Degree, antitrust lawyer. (3-5-2021, "Developments in Antitrust Law: Keep an Eye on New York", *WilmerHale*, Full report accessible at: https://www.wilmerhale.com/en/insights/client-alerts/20210305-developments-in-antitrust-law-keep-an-eye-on-new-york)

Although much attention recently has been focused upon debates in Congress, potential legislative changes to U.S. antitrust law are not limited to proposals at the federal level. Many states are considering changes to their own antitrust laws, which usually can be enforced by state attorneys general and private plaintiffs. Importantly, New York legislators have introduced two bills that propose sweeping changes to the State’s antitrust law, the Donnelly Act, building on measures introduced in New York’s last legislative session.

These proposals, if enacted, would make New York’s single firm conduct statutory provisions the most aggressive in the United States and would give the New York Attorney General a more prominent role in reviewing transactions—including by creating a first-of-its-kind state merger notification requirement. These changes would allow New York’s antitrust law to reach a range of conduct not actionable under any existing federal or state antitrust law, and would introduce European-style antitrust standards to New York. Accordingly, this reform would create considerable new compliance challenges and risk for companies potentially subject to New York antitrust law, whether or not those companies are located in New York.

Other U.S. states and territories are considering antitrust law changes, but the New York proposals are the most significant. Although much of the conversation concerning developments in antitrust law has focused on “Big Tech” companies, these proposals would affect businesses across all sectors of the economy. This alert discusses these legislative proposals and key implications for businesses.

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#### The United States federal government should establish regulations that prohibits anticompetitive business practices in the delegation of generic Top-Level Domains by the private sector.

#### The counterplan solves and competes

Shelanski 18, Professor of Law @ Georgetown (Howard, “Antitrust and Deregulation,” Yale Law Journal)

A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incen- tives and discipline necessary to keep prices low, output high, and innovation moving forward.8 But sometimes market forces alone cannot ensure efficiency and economic welfare—for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, in- novation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which “antitrust may help maintain com- petition.”9 Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through “skill, foresight and industry.”10 Thus, competition authorities like the FTC and the DOJ’s Antitrust Division review mergers, inves- tigate single-firm conduct, and prosecute collusion.11 Private plaintiffs can pur- sue civil antitrust liability through suits in the federal courts.12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm’s activity is “substantially to lessen competition, or to tend to create a monopoly,”13 or to constitute a “contract, combination, . . . or conspir- acy” in restraint of trade,14 or to “monopolize, or attempt to monopolize” any line of business.15 Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure—and Congress has often done so. With such statutory authority, “[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles.”16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers.17 The 1992 Cable Act gave the FCC authority to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry’s market structure.18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecom- munications industry. More recently, the FCC issued,19 and then repealed, 20 “network neutrality” regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition.21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries.22 In contrast to the case-by-case approach of antitrust, regulation typically im- poses ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone com- panies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to custom- ers of competing networks.23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency’s enforcement decision is usually on the regulated party. Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures.24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act.25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has “willful[ly]” acquired or maintained other than “as a consequence of a su- perior product, business acumen, or historic accident.”26 Alternatively, with au- thority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies,27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots.28

#### It avoids resource tradeoffs

Lohr 20, NYT columnist, has covered technology, business and economics for The Times for more than 20 years. In 2013, he was part of the team awarded the Pulitzer Prize for Explanatory Reporting. He is the author of “Data-ism” and “Go To.” (Steve, “Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator Is Needed.,” *New York Times*, <https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html>)

For decades, America’s antitrust laws — originally designed to curb the power of 19th-century corporate giants in railroads, oil and steel — have been hailed as “the Magna Carta of free enterprise” and have proved remarkably durable and adaptable. But even as the Justice Department filed an antitrust suit against Google on Tuesday for unlawfully maintaining a monopoly in search and search advertising, a growing number of legal experts and economists have started questioning whether traditional antitrust is up to the task of addressing the competitive concerns raised by today’s digital behemoths. Further help, they said, is needed. Antitrust cases typically proceed at the stately pace of the courts, with trials and appeals that can drag on for years. Those delays, the legal experts and economists said, would give Google, Facebook, Amazon and Apple a free hand to become even more entrenched in the markets they dominate. A more rapid-response approach is required, they said. One solution: a specialist regulator that would focus on the major tech companies. It would establish and enforce a set of basic rules of conduct, which would include not allowing the companies to favor their own services, exclude competitors or acquire emerging rivals and require them to permit competitors access to their platforms and data on reasonable terms. The British government has already said it would create a digital markets unit, with calls for a Big Tech regulator to also be introduced in the European Union and in Australia. In the United States, recommendations for a digital markets regulator have also been made in expert reports and in congressional testimony. It could be a separate agency or perhaps a digital division inside the Federal Trade Commission. Significantly, the leading proponents of this path in the United States are mainstream antitrust experts and economists rather than break-’em-up firebrands. Jason Furman, a professor at Harvard University and chair of the Council of Economic Advisers in the Obama administration, led an advisory group to the British government that recommended the creation of a digital markets unit in 2019. “I’m a small ‘c’ conservative, and I’m not a fan of regulation generally,” said Jason Furman, a Harvard University professor. “But it’s needed in this space.”Credit...Zach Gibson/Getty Images Breaking up the big tech companies, Mr. Furman said, is a bad idea because that would risk losing some of the consumer benefits these digital utilities undeniably deliver. A regulator is necessary to police digital markets and the behavior of the tech giants, he said. “I’m a small ‘c’ conservative, and I’m not a fan of regulation generally,” Mr. Furman said. “But it’s needed in this space.” Regulators that focus on specific sectors of the economy are common in the United States. For financial markets, there is the Securities and Exchange Commission; for airlines, the Federal Aviation Administration; for pharmaceuticals, the Food and Drug Administration; for telecommunications, the Federal Communications Commission; and so on. There is also precedent for picking out a handful of big companies for special treatment. In banking, the biggest banks with the most customers and loans are classified as “systemically important financial institutions” and subject to more stringent scrutiny. Several supporters of a new tech regulator were officials in the Obama administration, which was known for being friendly to Silicon Valley. But the advocates said that experience — as well as the conservative, pro-big business drift of court rulings in recent years — left them frustrated with antitrust law as the only way to restrain the growing market power and conduct of the big tech companies. “The mechanism of antitrust is not working to protect competition,” said Fiona Scott Morton, an official in the Justice Department’s antitrust division in the Obama administration, who is an economist at the Yale University School of Management. “So let’s do something else — use a different tool.” Ms. Scott Morton led an expert panel on antitrust in a report last year on digital platforms by the Stigler Center at the University of Chicago’s Booth School of Business. The report recommended the creation of a regulatory authority. (Ms. Scott Morton has been a forceful critic of Google, but also a consultant to Apple and Amazon.) Such a regulatory approach carries the risk of government’s meddling in a fast-moving industry that could hobble innovation, some antitrust experts warned. While antitrust law reacts to alleged anticompetitive behavior and can thus be slow, that shortcoming is preferable to prescriptive government rules and regulations, they said. “I’m very uncomfortable with the regulatory path, especially if it means things like getting government approval for product changes,” said Herbert Hovenkamp, a professor at the University of Pennsylvania Law School. “The history of regulation shows that it is an innovation killer.” Editors’ Picks ‘Want to Join My Crossword Group Chat?’ She’s the Investor Guru for Online Creators The Shy Sisters Behind Austin’s Breakout Breakfast Tacos Continue reading the main story A. Douglas Melamed, a former general counsel of Intel and a former antitrust official in the Justice Department, shared that concern. But Mr. Melamed, a member of the expert panel for the Stigler Center report, said the tech giants did pose a competition problem. “I think regulation might make sense if it is narrowly focused, not running the industry,” said Mr. Melamed, who is a professor at Stanford Law School. The last major antitrust action against a big technology company was the landmark Microsoft case in the 1990s. The case began with a suit filed in 1994 by the Federal Trade Commission and a simultaneous consent decree. The Justice Department and several states later picked up the pursuit, investigated anew, filed suit and conducted an exhaustive trial. Microsoft was found to have repeatedly violated the nation’s antitrust laws, and the company then reached a settlement with the government, which a federal court approved in 2002. In the Microsoft case, the antitrust legal process worked, in its way. Yet its impact is still debated. Without the suit and years of scrutiny, some observers said, Microsoft could have throttled the rise of Google. Image The Justice Department and 20 states filed antitrust lawsuits against Microsoft in 1998. The Justice Department and 20 states filed antitrust lawsuits against Microsoft in 1998.Credit...Stephen Crowley/The New York Times But others said the technological shift toward the internet and away from the personal computer meant that Microsoft had lost the gatekeeper power it once held. Technology, not antitrust, they insisted, opened the door to competition. Triumph or not, the Microsoft case was two decades ago. Proponents of a new regulator said antitrust law was ill suited by itself to restraining today’s faster-moving digital giants. In the internet economy, they said, the forces that reinforce and expand the power of a market leader — called network effects — are stronger and more rapid than in the personal computer era. “Antitrust is not a fully adequate tool to deal with the companies that dominate these markets,” said Gene Kimmelman, who was on the Stigler Center panel and a co-author of a recent report by the Shorenstein Center at Harvard that called for the creation of a “digital platform agency” in America. Another argument for the regulatory option is that competition concerns now span four companies, not just one. Apple, Amazon, Facebook and Google are in different markets, including search, online advertising, e-commerce and social networks. Bringing separate antitrust cases against them would most likely be beyond the resources of the government. “When the competition issues are larger than a single firm, regulation might be the better tool to use,” said Andrew I. Gavil, a law professor at Howard University.

### CIL CP---OFF

#### The United States federal government ought to rule that increased prohibitions anticompetitive business practices in the delegation of generic Top-Level Domains by the private sector are mandated by customary international law.

#### The counterplan establishes CIL’s precedence over domestic law.

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To date, international antitrust cases have only been brought before domestic courts. Those courts, of course, have to apply domestic law. International law is applicable only to the extent that domestic law so provides. Also, when a domestic court has to decide an individual case, it need not determine whether a certain rule is part of domestic law or of international law as long as it is satisfied that the rule exists. Before a domestic court, proof of the existence of a rule of unwritten law is brought by citing as many domestic precedents as possible. Again, it seems to be immaterial whether those precedents reflect customary international law or only domestic rules of conflict of laws. Thus, there seem to be good reasons to subscribe to Lowenfeld's preference for some blend of public law, public international law and private international law.34 In international antitrust practice, however, there are cases where it does matter whether an assumed rule is one of international law or of conflict of laws. Domestic law may attribute a different rank to the two sets of rules. In Germany, for instance, rules of general international law prevail over any statutory law.35 Similarly, within European Community law, secondary legislation enacted by organs of the Communities is void if it violates general international law.36 And, on the level of relations between sovereign states, domestic rules of conflict of laws cannot, of course, be relied upon at all. The two legal systems interact in the process of forming new rules of unwritten law. Rules of conflict of laws may be part of state practice and thereby contribute to the formation of customary international law, and rules of customary internationalaw may be referred to when ascertaining or interpreting principles of conflict of laws. But, in contrast to reciprocal influences on the contents of new rules, their actual creation follows entirely different lines. First, the emphasis in the creation of conflict-of-laws rules is on judge-made law. Domestic courts are easily accessible and may give regular guidance on the development of the law, whereas international adjudication is the exception rather than the rule. Customary international law is mainly formed by theit is hoped, parallel, but usually divergent-practice of some 160 independent states, acting through their legislative, executive and/or judicial branches. Second, the role of legal publicists in the creation of new rules is different as well. In conflict of laws, theoretical approaches may be conceived specifically for adoption into judge-made law. The function of scholars of international law offers less opportunity for creative thinking: they may compile and analyze state practice, but they cannot replace it with their own concepts. Finally, the perspective for analysis is different, too. The- perspective of conflict of laws lies within a state. It is directed to domestic interests, both public and private. Foreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity. The perspective of international law stands above the sovereign states. It demands neutrality vis-a-vis the interests of particular states and it implies that, in general, the interests of the individual have to be articulated by sovereign states. These three differences should be kept in mind when state practice is surveyed and analyzed in the next two sections of this paper. They all derive from the same plain truth: domestic rules of conflict of laws make up part of one lawmaking system organized by one constitution and usually based on a broad consensus of values and interests. The decentralized making of international law does not enjoy any of those benefits and is therefore bound to offer a more modest yield of legal rules. But, as should also be remembered, modest answers of international law may often be supplemented by richer ones of conflict of laws.

#### CIL incorporation is key to US leadership in the international legal order---outweighs and turns every impact.

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Every generation gets the Constitution that it deserves. As the central preoccupations of an era make their way into the legal system, the Supreme Court eventually weighs in, and nine lawyers in robes become oracles of our national identity. The 1930s had the Great Depression and the Supreme Court’s “switch in time” from mandating a laissez-faire economy to allowing New Deal regulation. The 1950s had the rise of the civil rights movement and Brown v. Board of Education. The 1970s had the struggle for personal autonomy and Roe v. Wade. Over the last two centuries, the court’s decisions, ranging from the dreadful to the inspiring, have always reflected and shaped who “we the people” think we are. During the boom years of the 1990s, globalization emerged as the most significant development in our national life. With Nafta and the Internet and big-box stores selling cheap goods from China, the line between national and international began to blur. In the seven years since 9/11, the question of how we relate to the world beyond our borders — and how we should — has become inescapable. The Supreme Court, as ever, is beginning to offer its own answers. As the United States tries to balance the benefits of multilateral alliances with the demands of unilateral self-protection, the court has started to address the legal counterparts of such existential matters. It is becoming increasingly clear that the defining constitutional problem for the present generation will be the nature of the relationship of the United States to what is somewhat optimistically called the international order. This problem has many dimensions. It includes mundane practical questions, like what force the United States should give to the law of the sea. It includes more symbolic questions, like whether high-ranking American officials can be held accountable for crimes against international law. And it includes questions of momentous consequence, like whether international law should be treated as law in the United States; what rights, if any, noncitizens have to come before American courts or tribunals; whether the protections of the Geneva Conventions apply to people that the U.S. government accuses of being terrorists; and whether the U.S. Supreme Court should consider the decisions of foreign or international tribunals when it interprets the Constitution. In recent years, two prominent schools of thought have emerged to answer these questions. One view, closely associated with the Bush administration, begins with the observation that law, in the age of modern liberal democracy, derives its legitimacy from being enacted by elected representatives of the people. From this standpoint, the Constitution is seen as facing inward, toward the Americans who made it, toward their rights and their security. For the most part, that is, the rights the Constitution provides are for citizens and provided only within the borders of the country. By these lights, any interpretation of the Constitution that restricts the nation’s security or sovereignty — for example, by extending constitutional rights to noncitizens encountered on battlefields overseas — is misguided and even dangerous. In the words of the conservative legal scholars Eric Posner and Jack Goldsmith (who is himself a former member of the Bush administration), the Constitution “was designed to create a more perfect domestic order, and its foreign relations mechanisms were crafted to enhance U.S. welfare.” A competing view, championed mostly by liberals, defines the rule of law differently: law is conceived not as a quintessentially national phenomenon but rather as a global ideal. The liberal position readily concedes that the Constitution specifies the law for the United States but stresses that a fuller, more complete conception of law demands that American law be pictured alongside international law and other (legitimate) national constitutions. The U.S. Constitution, on this cosmopolitan view, faces outward. It is a paradigm of the rule of law: rights similar to those it confers on Americans should protect all people everywhere, so that no one falls outside the reach of some legitimate legal order. What is most important about our Constitution, liberals stress, is not that it provides rights for us but that its vision of freedom ought to apply universally. The Supreme Court, whose new term begins Oct. 6, has become a battleground for these two worldviews. In the last term, which ended in June, the justices gave expression to both visions. In two cases in particular — one high-profile, the other largely overlooked — the justices divided into roughly two blocs, representing the “inward” and “outward” looking conceptions of the Constitution, with Justice Anthony Kennedy voting with liberals in one case and conservatives in the other. The Supreme Court is on the verge of several retirements; how the justices will address critical issues of American foreign policy in the future hangs very much in the balance. This may seem like an odd way of thinking about international affairs. In the coming presidential election, every voter understands that there is a choice to be made between the foreign-policy visions of John McCain and Barack Obama. What is less obvious, but no less important, is that Supreme Court appointments have become a de facto part of American foreign policy. The court, like the State Department and the Pentagon, now makes decisions in cases that directly change and shape our relationship with the world. And as the justices decide these cases, they are doing as much as anyone to shape America’s fortunes in an age of global terror and economic turmoil. What Conservatives Understand About International Law The debate between inward-looking conservatives and outward-looking liberals has recently taken a turn toward the shrill. Liberal lawyers do not simply accuse their conservative counterparts of denigrating the rule of law; they accuse them of violating it themselves. Calling last spring for the firing of the tenured Berkeley professor John Yoo, an architect of the Bush administration’s legal strategy in the war on terror, Marjorie Cohn, the president of the National Lawyers’ Guild, declared that “Yoo’s complicity in establishing the policy that led to the torture of prisoners constitutes a war crime under the U.S. War Crimes Act.” The conservatives’ arguments are no less heated: not only, they contend, do liberals paint a naïvely romantic picture of the world — one in which the United Nations and its agencies and courts would make law for Americans — but liberals are also endangering American lives. Dissenting this past June from the Supreme Court decision giving those held at Guantánamo Bay a right to challenge their detention, Justice Antonin Scalia wrote that the majority’s ruling “will almost certainly cause more Americans to be killed.” These sorts of accusations are overstated and unhelpful. Neither the liberal nor the conservative view corresponds to the stereotype assigned to it by its opponents. Notwithstanding their limitations, both views express values that are deeply grounded in the American constitutional tradition and in the rule of law. Each is necessary to help us make sense of the Constitution’s role in an increasingly complex global world. Consider first the conservative vision, which is sometimes called “sovereigntist” because it emphasizes the power and prerogative of the United States to act as if it is responsible to no one but itself. The Bush administration, through its characteristic combination of boldness, historical ambition and operational incompetence, has given sovereignty a bad name, much as it has for unilateralism. But the constitutional principle here is actually one that most liberals also fully embrace: namely, the principle of democracy. International law, as even its staunchest defenders must acknowledge, often fails to accord with democratic principle. Such law is not passed by a democratically elected Congress and signed by a democratically elected president. It is true that the U.S. Constitution says that international treaties signed by the president and approved by the Senate shall be the supreme law of the land, thereby conferring some democratic legitimacy on treaties. But a great deal of international law derives not from treaties signed by consenting nations but rather from the vague category of international custom, which over time can harden into binding law. For hundreds of years, until more formal treaties were adopted, custom was the main way international law was created, giving rise to the laws of war, for instance, and condemning terrorism and torture. Even today, the existence of a treaty among only a select group of nations can be invoked in international forums as evidence of an established custom — and nonparticipating countries can come to be bound by treaties that they themselves never signed. To conservatives, such international “law” is anathema. Even in cases in which explicit treaties among nations do exist, conservatives worry. Such treaties, after all, are increasingly interpreted by nondemocratic institutions like tribunals of the World Trade Organization or the United Nations’ International Court of Justice. Two hundred years ago, treaties tended to be simple agreements between two parties, with each reserving the right to interpret (and, if necessary, enforce) the treaty’s terms for itself. Today, though, many of the most important treaties — those governing trade, the environment and other crucial matters — involve a large number of nations that agree as a condition of the treaty to be bound by the decisions of an international body. To sign on to such a treaty, conservatives point out, confers future lawmaking authority on some unelected and thus undemocratic body. According to the sovereigntists, the United States, faced with such undemocratic regimes, should feel free to reject any undesirable verdict of a body like the International Court of Justice and embrace a policy more in line with U.S. interests — much in the way that Israel responded to the I.C.J.’s condemnation of the path of its security barrier on the West Bank. In a world where Libya can lead an international human rights commission, no international institution is free from the distortions that arise when all countries are treated as equals. Even within the distinguished higher echelons of the United Nations or European Union, there is a risk that bureaucrats may pursue policies that reflect the values and priorities of their own technocratic classes. The worst-case scenario, from the perspective of the conservatives, is one in which enemies of the United States engage in “lawfare,” opportunistically charging the country with violations of international law to impede it from rightfully ensuring its safety. Another key sovereigntist principle is the right of the United States, when acting abroad, to protect itself, whether fighting wars or preventing terrorist attacks. Historically, the court has given the president, as commander in chief, great latitude to act abroad as he sees fit. In situations in which Congress has explicitly authorized the president’s action, the court has recognized the prerogative as almost absolute. For instance, when the United States acquired Puerto Rico, Guam and the Philippines in the Spanish-American War, the Supreme Court allowed Congress and the president to govern those territories without extending constitutional rights to the residents. Similarly, after World War II, when Germans held by the United States in occupied Germany pending war-crimes charges petitioned for judicial review, the Supreme Court turned them away. Conservatives argue, not implausibly, that these historic decisions did not undermine the rule of law: they embodied it. The Supreme Court’s judgments derived, after all, from the Constitution itself and its own democratic pedigree. One central reason that the people of the United States formed the Constitution was in order to provide for the common defense. The Constitution does protect rights, according to this view — but they are the rights of citizens, not the rights of mankind in general or of foreigners who have never even set foot in the United States. What Liberals Understand About International Law From the liberal perspective, the vision espoused by the conservatives is crabbed and parochial. Of course the Constitution demands democracy and gives rights to American citizens. But, say the progressives, that does not explain why over the last two centuries the Constitution has become the very model of what a system of government under law looks like. The key to the Constitution’s global appeal, according to the liberal view, is that the document stands for the universal principle that state power over individuals may only ever be exercised through law — no matter what government is acting, and no matter where on earth. This outward-looking, “internationalist” conception of the Constitution respects the sovereignty of the United States and that of other countries — provided they deliver a just legal order to their citizens. But liberals point out that even a constitutional state that guarantees rights for its own citizens will not protect people in many places and times, often when rights are most sorely needed. In wartime, for instance, almost no nation will have an interest in protecting the rights of foreign enemies that it encounters. On the open seas, no domestic law applies. And for reasons of sheer practicality, no country’s laws regulate all its potential relations with all other states. To cover situations like these, where domestic law runs out of rope, is the task of international law. Such law seeks to ensure rights for all, not by replacing the domestic law of independent nations but by holding it to standards of universal justice and by supplementing it where it is incomplete or inadequate. From this perspective, international law is necessary to ensure that the rule of law will actually obtain in situations where individual states do not provide it. This is why, for liberals, it is essential that the United States comply with its international obligations. The framers of the Constitution were certainly eager to demonstrate such compliance. When they made treaties the law of the land, they were saying — according to an interpretation of Chief Justice John Marshall’s that dates back to 1829 — that the moment the Senate ratifies a treaty, it automatically becomes the supreme law of the land, binding in every court in the nation. Deepening their historical argument, the liberals also point out that from the earliest days of the United States, the nation’s courts applied customary international law, regularly deciding who owned ships captured on the high seas according to immemorial practice that was not found in any treaty. What is more, the framers’ reliance on international law and custom went to the very heart of their constitutional endeavor: what, otherwise, did the framers mean when they spoke in the Constitution about the declaration of war, or about letters of marque and reprisal, or about judicial authority over ambassadors? In practice, the internationalist camp argues for the prudent use of international legal materials in constitutional decision-making — not only for purposes of rhetoric and persuasion but also to provide rules and principles to help actually decide cases. For example, liberals argue that if the United States adopts laws designed to comply with the Geneva Conventions, the government is obligated to follow the treaty to the letter should the government invoke the authority to detain prisoners that the treaty confers. Likewise, when the United States has undertaken to comply with the decisions of international tribunals, those tribunals’ rulings must be treated as law, just as the treaties themselves are. Liberals concede that the framers showed respect for international law, in part, because their country was new and revolutionary, and they sought legitimacy in the community of nations. But the liberal view stresses that the tradition of respect continued even once the nation was well established, and that it was kept alive by successive generations for different but always compelling reasons. The United States helped found the United Nations after World War II, for instance, at what was then the nation’s moment of greatest global power. Franklin Delano Roosevelt’s idea, shared by liberals then and now, was that the international rule of law was good not just in principle but also in practice. As a country governed by law, we were asserting the superiority of our system to others governed by dictatorship. Moreover, since the United States was a permanent member of the Security Council, any compromises to our national sovereignty were more than outweighed by the tremendous benefits of having a legitimate international legal order through which, as a superpower, it could assert its will. As liberals see it, being a leading exponent of the rule of law internationally strengthens America’s ability to pressure or bully other countries to respect the rights of their own citizens. In this way, oddly enough, the liberal view is consonant with certain aspirations of the Bush administration. In Afghanistan, Iraq and beyond, President Bush has tried to export liberal constitutionalism, including both elections and basic rights. His “freedom agenda” is, in fact, a direct descendant of liberal internationalism, a policy associated with Woodrow Wilson and his plans to make the world safe for democracy through the work of international institutions. The Bush administration, of course, distrusts international organizations that continue in the tradition of the League of Nations, which Wilson helped to found (though he could not persuade his own country to join it). But Bush’s notion that America’s democratic Constitution should be an inspiration for the world is identifiably Wilsonian — as is the zeal to spread the good word, voluntarily when possible but by force if necessary. If the greatest tragedy of the Bush presidency is the enormous human cost of America’s ham-handed efforts to accomplish this worthy goal, a second, related tragedy is that the spreading of constitutional democracy is rarely talked about anymore as a liberal goal at all. The Court’s Liberal Victory Each constitutional worldview — the one conservative and inward-looking, the other liberal and outward-focused — has found exponents on the current Supreme Court. This past spring, in two cases before the court, each side won an important victory. The larger battle, however, was widely overlooked. The liberal victory was widely publicized, but its full implications were not often noted. As for the conservative win, its very existence went almost entirely unnoticed. The liberal victory, in the case of Boumediene v. Bush, took place against the backdrop of the detentions of suspected terrorists at Guantánamo Bay, Cuba. The detainees were being held there because the Bush administration’s lawyers were confident that, under the Supreme Court’s precedent, the detainees would not enjoy constitutional rights. Like the Germans denied review after World War II, the detainees were noncitizens who were neither arrested nor held in the United States. Guantánamo was leased from Cuba under a 1903 treaty, so it was not in the United States, and yet there was no tradition of applying Cuban law there. In light of these circumstances, the Bush administration seemed to believe it could treat Guantánamo as a law-free zone. Unlike Iraq, which the administration conceded was a war zone in which the Geneva Conventions applied, Guantánamo was initially considered legally off the grid. It is often said by liberal critics that Bush’s anti-terror policies ignored the Constitution and international law. But this is a misleading oversimplification. What the choice of Guantánamo demonstrates, rather, is the profoundly legalistic way in which those policies were designed. Using the law itself, the lawyers in the Bush administration set out to make Guantánamo into a legal vacuum. The court’s decision in Boumediene repudiated that attempt. The majority, led by Justice Kennedy, announced that for constitutional purposes, Guantánamo Bay was part of the United States: the detainees there enjoyed the same rights as if they had been held in Washington. The Boumediene decision was chiefly the accomplishment of Justice John Paul Stevens, who has made overturning the Bush detention policies into the legacy-defining task of his distinguished career. In key opinions issued in 2004 and 2006, Stevens chipped away at the special status asserted for Guantánamo, each time referring the matter of judicial review for the detainees back to Congress. But Congress repeatedly approved the administration’s proposals to deny access to the courts. To win the fight even against Congress, Stevens needed Kennedy to provide the fifth vote and hold that denying the Guantánamo detainees their day in court actually violated the Constitution. The opinion that Kennedy wrote for the court’s majority in Boumediene announced squarely that the Constitution applied to the detainees being held in Guantánamo. Kennedy insisted that he was not overruling the precedent of the German detainees who were denied review. Unlike the situation with the Germans after World War II, he argued, the Guantánamo detainees had not received a hearing; the Guantánamo naval base was entirely under U.S. control; and granting hearings was not so impractical that it would fundamentally disrupt the operation of the prison. In effect, however, Kennedy’s opinion rejected what the Bush administration claimed to be the rule that noncitizens held outside the United States were not entitled to constitutional protection. Having refused to overturn Roe v. Wade in the 1990s and having championed gay rights in recent years, Kennedy may now be depicted as an unlikely liberal hero — the latest in a line of Republican appointees (one of whom is John Paul Stevens) who gradually evolved into staunch exponents of liberal rights. The key to Kennedy’s reasoning in the Guantánamo case was his expansive conception of the rule of law. In the central paragraph of the decision, Kennedy explained his underlying logic: if Congress and the president had the power to take control of a territory and then determine that U.S. law does not apply there, “it would be possible for the political branches to govern without legal constraint,” he wrote. Government without courts, Kennedy suggested, was not constitutional government at all. “Our basic charter,” he went on, “cannot be contracted away like this.” What seemed to most offend Kennedy about Guantánamo, then, was precisely the effort by the executive branch, with the approval of Congress, to make Guantánamo into a place beyond the reach of any law. By insisting on its own authority, the court was striking a blow for law itself. In this way, the court embraced the ideal of the outward-looking Constitution: a document that protects the rights not only of citizens within the United States but also of noncitizens outside its formal borders. This Constitution, by extension, stands for the ideal of legal justice being made available to all persons — no matter where they might be. Holding that the Constitution did indeed follow the flag to Guantánamo was an act with tremendous international resonance. It can even be read as an attempt to hold the Bush administration to its own rhetoric about democracy. The rule of law, after all, is not solely an American ideal but one that is broadly shared globally. To insist that some law covers all people wherever they may be found underscores the universality that law aims to create. The Court’s Conservative Victory From the conservative point of view, of course, Kennedy’s decision did not follow from the basic principle of the rule of law. According to the four conservative dissenting justices, whose views closely tracked those of the Bush administration, the Constitution unquestionably binds the government. But according to their view, the Constitution also allows the president and Congress, acting together, to lease or even acquire territory and govern it without allowing recourse to the courts. Indeed, this view was precisely the one adopted by the Supreme Court after the Spanish-American War, when the United States was a rising imperial power. The dissenters in Boumediene actually agree with the liberals that law does apply to Guantánamo; they just maintain that the courts are not part of it. The conservative cause may have lost in Boumediene. It prevailed, however, in a case decided last March that garnered little public attention— but that was, in its own way, just as important to defining our constitutional era. The case, Medellín v. Texas, grew from a conflict between the Supreme Court and the International Court of Justice over death-row inmates in the United States who were apparently never told they had the right to speak to the embassies of their home countries, a right guaranteed by a treaty called the Vienna Convention on Consular Relations. The international court declared that the violation tainted the inmates’ convictions and insisted that they have their day in court to try to get them overturned. The Supreme Court disagreed. In his initial trial and appeal, José Medellín, the man who brought the Supreme Court case, did not raise his right to speak to his embassy — presumably because, having never been informed of the right, he had no idea that it existed. Under the arcane rules for postconviction judicial review, a defendant ordinarily cannot ask the courts to consider legal arguments that were not raised when he was tried in the first place. And in its decision, the court upheld those rules: the violation of the treaty, it held, did not demand any special exception to the usual rules governing review. The fact that the United States had violated its international-treaty obligation was of no use on death row. Medellín was executed by the State of Texas on Aug. 5. What made this conflict between the Supreme Court and the International Court of Justice particularly stark was that the Bush administration had for once taken the side of international law. Before the Supreme Court issued its opinion, President Bush issued a memorandum advising state courts to follow the judgment of the International Court of Justice. With the ruling of the Supreme Court on one side, and that of the international court — endorsed by the president — on the other, just what did the Constitution require the state courts to do? The United States signed three separate treaties stating that it undertook to obey the judgments of the International Court of Justice. But the Supreme Court bridled at the thought that the international court’s decision might trump its own. This was not just instinctive turf-protection, though that concern no doubt played a part. Never before had an international body replaced the Supreme Court in telling lower courts in the United States that their own procedural rules were unacceptable. The natural order of things seemed to be turned on its head. The Supreme Court held that the treaties obligating us to listen to the International Court of Justice were not binding law. Chief Justice John Roberts wrote that a careful reading of the text of the treaties revealed no intention to subject the United States to the judgments of the international court — not, that is, unless Congress passed a separate statute demanding such obedience. This opinion upended the rules for applying treaties in the U.S. courts. In dissent, Justice Breyer painted a grim picture of the consequences. If treaties were not automatically binding law unless they said so, he wrote, the applicability of some 70 treaties involving economic cooperation, consular relations and navigation was now thrown into doubt. The rest of the world, he intimated, would be left wondering whether the United States intended to obey its treaty obligations or not — which is not a trivial concern when the world also suspects the United States of ignoring its obligations of humane treatment under the Geneva Conventions. To Breyer, the decision was a reversal of nearly 180 years of precedent and a message to the world that the United States was prepared to play fast and loose with its international commitments. When the justices rejected the death-row appeal, they were acting on the basis of familiar conservative concerns. The judges of the International Court of Justice were not appointed according to any constitutional procedure. To let the international body decide matters of law that would be binding for state courts seemed fundamentally undemocratic — an unjust usurpation of the judicial function. It would be absurd for the Constitution, as the core document of our democracy, to require such a result. The old precedent regarding treaties was thus, according to the conservatives, truly obsolete. It made no sense to apply it in a globalized world where treaties are not just straightforward agreements between sovereign states; now, they often create irresponsible international tribunals to adjudicate their meaning. If the judgments of an international court were to be obligatory, a democratically legitimate body should say so explicitly — either the Senate that approved the treaty promising compliance or the whole Congress in a separate legal enactment. By its own lights, the Supreme Court in the Medellín case was reading the Constitution to guarantee us control over our own destiny. That meant turning away from international law in a systematic and profound sense. The cost to the United States might be real, but the court considered it justified by the preservation of our democratic sovereignty. Which Side Is Right? The Boumediene decision saw the Constitution as facing outward, expanding and promoting the rule of law throughout the world. The Medellín decision, by contrast, saw the Constitution as a domestic blueprint designed to preserve and protect the United States from foreign encroachment, even at some cost to the international rule of law. Underscoring the tension between the two cases is the fact that nearly all the justices of the Supreme Court voted consistently across both of them. The four conservatives — Justices Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito — dissented from the extension of habeas corpus rights to Guantánamo Bay in Boumediene and joined the majority opinion in Medellín that made it harder for treaties to become law. Meanwhile the court’s liberals — Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer — joined the majority in the Guantánamo case, and all but Stevens dissented in Medellín. (Though Stevens voted with the majority in that case, he did so seemingly only for tactical reasons; he wrote a separate, concurring opinion that did not embrace the logic of Roberts’s majority opinion.) The key vote in both cases was that of Kennedy. In both cases, he acted to uphold the prerogatives of the Supreme Court — against the president and Congress in the Guantánamo case, and against the international court in the Medellín decision. And Kennedy does argue that such judicial supremacy is crucial to the rule of law. But the other justices did not see the cases in those terms. To them, the cases were not primarily about the perennial issue of the division of powers between the different branches of government. To these eight justices, the cases were about what sort of Constitution we have: either outward-facing or inward-looking. Who is right? It is tempting to conclude that the Constitution must look inward and outward simultaneously. But embracing contradiction is not the answer, either. Instead what we need to resolve the present difficulty is a subtle shift in perspective. There is an important way in which neither of the predominant approaches to the Constitution and the international order can provide a fully satisfactory answer to the problem. Although they differ deeply about what the Constitution teaches, the two sides share a common image of what the Constitution is. Both imagine it to be a blueprint offering a coherent worldview that will allow us to reach the best results most of the time. According to this shared assumption, the way to find the real or the true Constitution is to identify the core values that the document and the precedents stand for, and to use these as principles to interpret the Constitution correctly. There is nothing wrong with this picture of constitutional interpretation when it is applied to the vast majority of constitutional decisions, from the right to bear arms to the meaning of equal protection of the laws. Deciding what deep principles emerge from our history can help resolve even problems unimagined by the framers, like those presented by abortion or claims to gay rights. Most of the time, constitutional interpretation proceeds in precisely this way — and so it should. But when we are talking about the basic direction the country needs to face in order to achieve its goals in the modern world, deriving principles from history is often inadequate to dictate outcomes. The national and global situations in which we find ourselves are ever-changing. The ship of state must navigate in waters that correspond to no existing chart. The complexity of the world, coupled with the profound changes in the role the United States plays in it, is a very different thing from, say, our progressive recognition that African-Americans, women, gays and lesbians deserve the same equality and respect as everybody else. For this reason, when the world has changed drastically, the Constitution has always had the flexibility to change along with it. The industrial economy, for example, was so much bigger and more complex than the economy of 1787 that the old constitutional order no longer worked. The New Deal ushered in systematic regulation and administrative agencies that had no real place in the three-branch system — but that we now accept as constitutional today. The original federal system limiting the power of the central government relative to the states also had to be reconfigured when the economy became truly national. The changed nature of the president’s war powers offers yet another pragmatic example of flexibility and change. Modern wars demand rapid decision-making and overwhelming concentrations of force; in the light of these needs, we have largely abandoned the framers’ model for war powers, which gave Congress much more authority than it is able to exercise today. On each occasion that the Supreme Court has had to confront such drastically changed circumstances, it has adopted the approach of seeing constitutional government as an ongoing experiment. Justice Oliver Wendell Holmes Jr. wrote that our system of government is an experiment, “as all life is an experiment.” Justice Robert Jackson, confronting the separation of powers — about which the Constitution is cryptic at best — admitted frankly that nothing in the document, the case law or the scholars’ writings got him any closer to an answer. Then he tried to come up with his own rules, designed to reflect political reality and the changed nature of the presidency. Looking at today’s problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now? Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own. On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn’t the court defer to the decisions of the elected president and Congress? Aren’t judgments about the direction of our country the exclusive preserve of the political branches? Indeed, the Supreme Court does need to be limited to its proper role. But when it comes to our engagement with the world, that role involves taking a stand, not stepping aside. The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved. Even choosing to defer to the other branches of government amounts to a substantive stand on the question. That said, when the court exercises its own independent political judgment, it still does so in a distinctively legal way. For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law — which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. This, too, is an effective constraint on the way the court exercises its policy judgment. Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning. Why We Need More Law, More Than Ever So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. We need to build and rebuild alliances — and law has historically been one of our best tools for doing so. In our present precarious situation, it would be a terrible mistake to abandon our historic position of leadership in the global spread of the rule of law. Our leadership matters for reasons both universal and national. Seen from the perspective of the world, the fragmentation of power after the cold war creates new dangers of disorder that need to be mitigated by the sense of regularity and predictability that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all. From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies are obligated to help us by virtue of legal commitments they have made. The Bush administration’s lawyers often insisted that law was a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of “lawfare” as a threat to the United States is based on a misunderstanding of the very essence of how law operates. Law comes into being and is sustained not because the weak demand it but because it is a tool of the powerful — as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker people or states by promising them rules and a fair hearing than by threatening them constantly with force. After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over. On those occasions when the weak, using the machinery of courts, are able to vindicate their legal rights, the reason their demands are honored is generally that those who have the most influence in the system recognize it is in their own long-term interest to make the concession. Those who consider law a tool of the weak mistake these rare trade-offs for defeat, when — from the perspective of power — they are simply part of the cost of doing business. This is why, for example, the police and prosecutors embrace the Miranda warnings: they require that defendants be read their rights. But once the formality is satisfied, it is almost guaranteed that the defendants’ statements will be admissible into evidence. Applying the lesson that the world and the United States need law more than ever at this particular moment yields some specific conclusions. The executive branch certainly should be accorded considerable leeway in defending the nation from attacks by stateless groups like Al Qaeda. But it was an error of constitutional dimensions to choose Guantánamo as a global symbol of those efforts precisely because of the way it seemed to be outside the reach of our domestic Constitution, the law of any other country or international law itself. The Supreme Court therefore was right to reinsert Guantánamo in the legal grid — but not because this was definitively the best reading of the constitutional materials, which were contradictory and indeterminate. What justifies the decision is the practical necessity and importance of reassuring the citizens of the United States and the world at large that the United States had not given up the role it assumed after World War II as the chief proponent of the rule of law worldwide. Not every Supreme Court decision has this monumental symbolic effect — but the Boumediene case was guaranteed to be seen as either a victory or a defeat for the very idea of law itself. In an ideal world, the Supreme Court would not have had to send this message, and it could have avoided the substantial expansion of its own power to which it was driven by the foolishness of the Bush administration. The Medellín case is trickier. On one hand, globalization inevitably inserts us into an ever-widening array of treaty regimes, each with its own mechanism of adjudication. There is no turning back the clock to the simpler world of the framers. Joining the World Trade Organization, as we have, or the Kyoto Protocol, as we ultimately have not, does detract from the democratic legitimacy of the laws that govern us. This lesson can be easily learned from a glance at the European Union, where countries increasingly cede sovereign authority to the bureaucrats in Brussels. Under these circumstances, there is much to be said for requiring either the treaty ceding this authority to speak explicitly, or else for Congress to make this concession expressly, in full view of the public who elects it. On the other hand, there is the problem of timing. Had the United States not invaded Iraq under a claim of international law that many other countries rejected, or had the Guantánamo disaster been avoided by the exercise of wiser judgment, it would be relatively easy to conclude that the Supreme Court was right to pull us back from too rapid an entrance into an international order that undercuts our sovereignty. But the treaty decision came at just the moment when the United States was trying to reassert its commitment to the rule of law internationally. The conservatives who carried the day did not care. For them, upholding international judgments that differ from our own courts’ is inconsistent with our core constitutional values. The message sent, then, in the world and at home, is precisely the wrong one for this historical juncture, when the United States needs — at least for the moment — to convince the world that the project of international legality is one in which we believe. What the Election May Bring There are going to be many more opportunities in the coming years for the court to take a position on the Constitution and the international order. Should John McCain become president, there is good reason to believe he would be more committed than President Bush to the international rule of law. Influenced by his experience of being tortured in Vietnam, McCain has sponsored legislation requiring that U.S. government personnel comply with the Geneva requirement of humane treatment of prisoners. Yet McCain has also snubbed Justice Kennedy, promising to nominate justices like Roberts and Alito in their ideological orientation; justices of this persuasion are likely to see the Constitution in largely inward-looking terms. Meanwhile, Barack Obama, with his globalized upbringing and insistence on multilateralism, could be expected, as president, to nominate justices more sympathetic to an outward-looking Constitution. But if, as seems likely, the first retirees from the court are liberals, the best Obama could hope for would be to maintain the status quo — not to institutionalize a liberal majority for the future. Whichever candidate is elected, once the Bush administration is out of office, the war on terror will almost certainly be waged differently, and the constitutional issues that arise will not be exactly the same as before. Guantánamo Bay will probably be closed, and the legal team that planned it will be long gone. But most of its detainees will still have to be tried, and their appeals will reach the Supreme Court once again. Of course we will still want to catch terrorists — especially before they act — and we will have to figure out what to do with them when we do. No matter who is president, the United States will still find itself deeply enmeshed in the affairs of Afghanistan, even if in the next few years there are substantial troop withdrawals from Iraq. At the same time, the processes of globalization have not been turned back by the war on terror. The growing global financial crisis calls for more international regulation, not less. Conflicts between U.S. courts and international tribunals about the meaning of our international obligations are going to become more and more common, just as they have become for members of the European Union. Next time, the Supreme Court may not be able to avoid conflict by asserting that the courts are not obligated to listen to the international body. When that happens, new doctrines and solutions are going to have to be developed. In these all-important processes, as always in the history of the court, people are everything. Justices vary widely in temperament, ideology, intelligence and preparedness. The best justices can be really very impressive; the worst ones truly disastrous. Charged with interpreting the Constitution and therefore shaping its contemporary orientation, the Supreme Court needs to be extraordinarily sensitive to the demands of history. When the court gets it wrong, the consequences can be serious. The Constitution we get will still be the one we deserve, but our deserts need not be good ones. The Constitution, let us not forget, gave us slavery and segregation. It gave us dysfunctional limitations on progressive legislation that was desperately needed in the years before the Great Depression. We like to think the Constitution is always leading us toward a more perfect union. But this has not always been the case, and as with any experiment, there is no guarantee that it will be in the future.

### T-Per Se---OFF

#### T Prohibition

#### “Prohibition” requires a declaration of per se illegality

Loevinger 61 (Honorable Lee Loevinger- Assistant Attorney General in charge of the Antitrust Division. “THE RULE OF REASON IN ANTITRUST LAW” , *Section of Antitrust Law* , 1961, Vol. 19, PROCEEDINGS AT THE ANNUAL MEETING, ST. LOUIS, MISSOURI, AUGUST 7 THROUGH 11, 1961 (1961), pp. 245-251, JSTOR accessed online via KU libraries, date accessed 9/13/21)

Running through the history of antitrust law are two contrapuntal themes: A prohibition of restraint of trade and a principle lately called the "rule of reason" which limits the prohibition. The legal rule against restraint of trade began in the 15th century in cases holding that a contract by which a man agreed not to practice his trade or profession was illegal.1 However, in the course of development of the common law, it became established that agreements which were ancillary to the sale or transfer of a trade or business and which were limited so as to impose a restriction no greater than reasonably necessary to protect the purchaser's interest.2

Thus, when the Sherman Act incorporated the common-law principles on this subject into federal statutory law 3 by adopting the concept of restraint of trade, it presumably imported both the principle that restrictions on competition are illegal and also the principle that in some circumstances a showing of reasonableness will legalize restrictions on competition. Nevertheless, when the question was first presented to the United States Supreme Court under the Sherman Act, it was clearly held (despite later disavowals4 ) that the justification of reasonableness was not available as a defense to a combination which had the effect of restraining trade.' Indeed, it was intimated that the question of reasonableness was not open to the courts in these actions at common law.6 However, when the Court reviewed this matter in Standard Oil Co. v. United States,7 it said in fairly explicit terms both that the Sherman Act prohibited only contracts or acts which unreasonably restrained competition and that the standard of reasonableness had been applied to all restraints of trade at the common law. The Court's assertion is somewhat weakened by the fact that it construed the rule of reason not as applying a standard for judging the character or consequences of the challenged conduct, but as a technique involving the application of human intelligence, or reason, to the problem of making a judgment about whether the conduct does restrain trade.'

#### The aff violates—they create a new legal standard for courts to decide whether a practice is “unreasonable” based on weighing evidence—not a declaration of illegality without inquiry

#### VOTE NEG

#### Ground---balancing tests devastate core links, because the practice is allowed when it’s beneficial— creates a moving target that wrecks the neg AND devastates link uniqueness.

#### Limits— infinite possible affs that tweak antitrust judication procedure in any given advantage area.

#### Bidirectionality---rule of reason creates legally protected practices

Graglia 8 (Lino A. Graglia is the A. Dalton Cross Professor of Law at the University of Texas. “The Antitrust Revolution”, *Engage* Vol. 9, Issue 3, <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/HfSHUKp1jnxxov80FkGORMCD5eojoela0HkiRejm.pdf> , October 2008, date accessed 9/14/21)

Although Section 1 of the Sherman Act prohibits “every contract, combination…, or conspiracy, in restraint of trade,”7 it was early and necessarily—since the purpose of every contract is to restrain—decided that it prohibited only “unreasonable” restraints on trade.8 Under the resulting “Rule of Reason,” only business practices found to be net anticompetitive and without efficiency justification were (and are) illegal. Some practices, however, have been declared to be always or almost always anticompetitive and without justification—and therefore are said to be illegal per se. Because a challenged practice’s anticompetitive effects and lack of justification are typically very difficult to show—largely because they characterize few business practices—the Rule of Reason tends to become a rule of legal per se.9 The Rule of Reason means that antitrust plaintiff s will rarely win and, therefore, that few antitrust suits will be brought. Th e liberal justices of the Warren Court dealt with the “problem” by tending to declare nearly all challenged practices illegal per se.

## Advantage 1

### 1NC---!D---Cyber

#### No cyber impact.

Lewis 20, PhD, a senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies in Washington, D.C. (James Andrew, 8-17-2020, "Dismissing Cyber Catastrophe", *CSIS*, https://www.csis.org/analysis/dismissing-cyber-catastrophe)

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack.

To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With ~~man-made~~ actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge.

It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted.

More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are:

Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals.

There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.)

No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare.

State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war.

This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation.

The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability.

One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1

This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often?

#### Uncertainty alone checks.

Lewis 18, PhD, a senior vice president at the Center for Strategic and International Studies (CSIS). (James Andrew, 1-1-2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States”, pg. 29, <https://www.jstor.org/stable/resrep22408.8?seq=1#metadata_info_tab_contents>)

This upper bound on cyber attack is affected by the likelihood of attribution. If an attacker was confident that it could avoid having the attack attributed to it, the risk of retaliation would be reduced, making some attacks more attractive. Uncertainty about attribution capabilities, particularly American capabilities, combined with uncertainty about the effectiveness of cyber attack, creates caution. Public expressions of uncertainty about attribution are not shared by opponents, who know when they have been caught. Over the last decade, the United States has made a major effort to improve its attribution capabilities and has succeeded to the point where no opponent can be confident about anonymity and this, if linked to truly credible threats to impose consequences, may finally produce the cyber deterrence so long sought by the United States.

The implicit threshold governing cyber attack is the line between force and coercion. With very few exceptions, states have avoided cyber actions that could be judged as the use of force, based on international understandings on what actions qualify as the use of force or armed attack. Opponents have engaged in cyber actions below this implicit threshold with impunity, but they are reluctant to cross it for fear of creating a situation that they cannot control. In this, cyber incidents are more like border incursions or bandit raids than attacks.

Public sources suggest that at least seven countries have used cyber tools for coercive purposes. However, they have been careful to avoid anything that could be interpreted as the use of force, and they have avoided physical destruction or casualties. This suggests that countries prefer actions that advance their strategic goals without creating unmanageable risk of escalation into armed conflict. Opponents calculate the advantage they would gain from an attack against the potential cost. Miscalculation is possible, but if anything, opponents appear more likely to overestimate the risk of retaliation.

#### American democracy is resilient---institutional buffers ensure continuity.

Kroenig 20, Professor in the Department of Government and the Edmund A. Walsh School of Foreign Service at Georgetown University. (Matthew, *The Return of Great Power Rivalry: Democracy versus Autocracy from the Ancient World to the U.S. and China*, pg. 198-199, Oxford University Press)

American Democracy

The United States is the world’s oldest constitutional democracy. Fleeing persecution by European monarchs, the American founding fathers set up a system to check and balance the chief executive. The authors of the U.S. constitution were also very much inspired by the mixed system of government that proved so successful for the ancient Roman Republic. Individuals are selected for political positions through competitive elections. Freedom of the press, assembly, and many other liberties help to ensure that citizens have the opportunity for meaningful political participation. According to Polity, the United States has been rated as a democracy for over two centuries.3

Contemporary warnings of a possible decline in American democracy should be taken seriously, but, on inspection, they are often overblown. To be sure, American democracy is imperfect, but democracy does not require perfection. It requires free and fair elections and the broad range of civil and political rights that allow for meaningful political participation. There is no doubt that the United States meets this standard.

Worries about a U.S. president’s putative autocratic tendencies are not new; they are baked into the system. America’s founders were revolting against overbearing British monarchs and they wanted to be sure to prevent an overwhelming concentration of power in the executive branch. George Washington was criticized for his presumed monarchic ambitions. More recently, commentators criticized George W. Bush for supposedly consolidating power and creating an “imperial presidency.”4 What is truly most notable about the U.S. system, however, is not executive overreach, but the degree to which Congress and the courts, and the executive branch itself, continually step in to check the chief executive.5 This continues to remain true, even in the current era.

In sharp contrast to Russia, journalists do not have to worry that they will be shot in the back for criticizing the president. And, in distinction to China, the United States does not keep millions of Muslims locked up in re-education camps. It is perverse to draw a moral equivalence between democratic politicking in the United States and the gross evils perpetrated in Russia and China.

American democracy is strong enough to survive contemporary controversies and political scandals. There is little reason to believe that today’s headlines will be more damaging than the Teapot Dome Scandal, Watergate, Iran-Contra, or the Monica Lewinsky affair.

Indeed, contrary to the prevailing narrative, intense domestic political fights and polarization are not evidence that American democracy has failed; rather, they are proof that the system is working. Yes, democracy can be messy, but that is what makes the system great. These disagreements are not even permitted in autocratic states. Serious political conflicts of interest in autocracies often result in dead bodies. Our democratic political system gives us the ability to work out our differences through a mutually accepted and peaceful, institutionalized process. Legislative gridlock is not necessarily a problem. If half of the country strongly disagrees with a proposal, then it is not obviously a good idea, and probably should not become national law. The purpose of the U.S. government is not to enact legislation for its own sake but to ensure “life, liberty, and the pursuit of happiness.” By those measures the country is doing pretty well.

As Machiavelli argued five hundred years ago, discord within a republican system of government is not always pretty, but the results are more than worth it. Nations that desire expanded freedom at home and influence abroad should not rebuke domestic political struggles within a democracy, but celebrate them.

Indeed, the institutionalized tumult and discord in the United States will likely continue to be the primary engine for its continued international power and influence abroad.

#### The plan artificially props up the smallest and least secure 5G companies— turns cybersecurity

Tom Wheeler 19. Fellow in Governance Studies at The Brookings Institution, former Chairman of the FCC. 9/3/2019. “Why 5G requires new approaches to cybersecurity.” https://www.brookings.edu/research/why-5g-requires-new-approaches-to-cybersecurity/#cancel.

Proactive cyber investment today is the exception rather than the rule. For public companies, the Securities and Exchange Commission (SEC) and others are driving change from the corporate board-level on down through management. A favorite entrance point for cyberattacks, however, remains the smaller companies, many of which are outside of the scope of these efforts. Unfortunately, the SEC’s efforts [impact only the less than 10% of American companies that are publicly owned](https://www.privco.com/knowledge-bank/intro-to-private-companies/). At the very least, where companies have a role in critical infrastructure or provide a product or service that, if attacked, could imperil public safety, there must be the expectation that cybersecurity risks are being addressed proactively.[[2]](https://www.brookings.edu/research/why-5g-requires-new-approaches-to-cybersecurity/#footnote-2) Implementation of machine learning and artificial intelligence protection Cyberattacks on 5G will be software attacks; they must be countered with software protections. During a Brookings-convened discussion on 5G cybersecurity, one participant observed, “We’re fighting a software fight with people” whereas the attackers are machines. Such an approach was like “looking through soda straws at separate, discrete portions of the environment” at a time when a holistic approach and consistent visibility across the entire environment is needed. The speed and breadth of computer-driven cyberattacks requires the speed and breadth of computer-driven protections at all levels of the supply chain.

### 1NC---!D---LIO

#### No LIO impact---it’s a myth.

Staniland 18, Associate Professor of Political Science and Chair of the Committee on International Relations at the University of Chicago. (Paul, 7/29/18, “Misreading the “Liberal Order”: Why We Need New Thinking in American Foreign Policy”, *Lawfare*; https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy)

Pushing back against Trump’s foreign policy is an important goal. But moving forward requires a more serious analysis than claiming that the “liberal international order” was the centerpiece of past U.S. foreign-policy successes, and thus should be again. Both claims are flawed. We need to understand the limits of the liberal international order, where it previously failed to deliver benefits, and why it offers little guidance for many contemporary questions.

First, advocates of the order tend to skim past the policies pursued under the liberal order that have not worked. These mistakes need to be directly confronted to do better in the future.

Proponents of the order, however, often present a narrow and highly selective reading of history that ignores much of the coercion, violence, and instability that accompanied post-war history. Problematic outcomes are treated as either aberrant exceptions or as not truly characterizing the order. One recent defense of the liberal order by prominent liberal institutionalists Daniel Deudney and G. John Ikenberry, for instance, does not mention Iraq, Afghanistan, Vietnam, or Libya. Professors Stephen Chaudoin, Helen Milner, and Dustin Tingley herald the order’s “support for freedom, democracy, human rights, a free press.” Kori Schake writes that Western democracies’ wars are “about enlarging the perimeter of security and prosperity, expanding and consolidating the liberal order.” Historian Hal Brands argues that the order has advocated “political liberalism in the form of representative government and human rights; and other liberal concepts, such as nonaggression, self-determination, and the peaceful settlement of disputes.”

Other analysts have persuasively argued that these accounts create an “imagined” picture of post-World War II history. Patrick Porter outlines in detail how coercive, violent, and hypocritical U.S. foreign policy has often been. To the extent an international liberal order ever actually existed beyond a small cluster of countries, writes Nick Danforth, it was recent and short-lived. Thomas Meaney and Stephen Wertheim further argue that “critics exaggerate Mr. Trump’s abnormality,” situating him within a long history of the pursuit of American self-interest. Graham Allison—no bomb-throwing radical—has recently written that the order was a “myth” and that credit for the lack of great power war should instead go to nuclear deterrence. Coercion and disregard for both allies and political liberalism have been entirely compatible with the “liberal” order.

The last two decades have been a bumpy ride for U.S. foreign policy. Since 9/11, we have seen the disintegration of Syria, Yemen, and Libya, a war without end in Afghanistan, the collapse of the Arab Spring, the rise and resurgence of the Islamic State, and the distinctly mixed success of strategies aimed at managing China’s rise. At home, the growth of a national-security state has placed remarkable power in the hands of Donald Trump. Simply returning to the old order is no guarantee of good results. Grappling openly with failure and self-inflicted wounds—while also acknowledging clear benefits of the order—is essential for moving beyond self-congratulatory platitudes.

### 1NC---!D---Disease

#### Only existential impact in the internet card is disease---no extinction from disease.

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

1.1.3 Engineered pandemics

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

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

## Advantage 2

### Adv 2

#### Liberal tech norms fail.

Tisdall 20, foreign affairs commentator. He has been a foreign leader writer, foreign editor and US editor for the Guardian. (Simon, 12-13-2020, "Joe Biden’s bid to rally the ‘free world’ could spawn another axis of evil", *Guardian*, https://www.theguardian.com/commentisfree/2020/dec/13/joe-bidens-bid-to-rally-the-free-world-could-spawn-another-axis-of-evil)

Joe Biden’s big idea – a US-led global alliance of liberal democracies ranged against authoritarian regimes and “strongman” leaders – sits at the heart of his American restoration project. His proposed “united front” of the great and the good is primarily intended to counter China and Russia. Yet it could also antagonise valued western allies such as India, Turkey and Poland. For this and other reasons, it seems destined to fail. Biden pledged during this year’s election campaign to hold a “summit for democracy” in 2021 “to renew the spirit and shared purpose of the free world”. It would aim “to strengthen our democratic institutions, honestly confront nations that are backsliding, and forge a common agenda”, he said. It was needed because, partly due to Donald Trump, “the international system that the US so carefully constructed is coming apart at the seams”. It’s a laudable aspiration. Recent years have seen a marked growth in oppressive, mostly rightwing regimes that ignore international law and abuse UN-defined universal rights, including democratic rights. But how will Biden decide who qualifies for his alliance? Totalitarian North Korea and Syria’s criminal regime are plainly unwelcome. Yet illiberal Thailand, Venezuela and Iran all maintain supposedly democratic systems. Will they get a summit invite? Diplomats are already predicting Biden’s grand coalition will end up as a rehash of the G7 group of leading western economies – the US, Canada, Germany, France, Italy, the UK and Japan. One wheeze is to add India, Australia and South Korea – a notional “D-10”. But that simply creates another elite club from which many actual or aspiring democracies are excluded. Part of the difficulty is Biden himself. Terms such as the “free world”, recalling his formative years during the cold war, sound outdated. His blithe assertion of American moral superiority jars with recent experience. “We have to prove … that the US is prepared to lead again, not just with the example of our power but also with the power of our example,” he says. It’s an old refrain. Yet the songsheet has changed, and so have the singers. China does not threaten global security in the existential way the Soviet Union once did. The fundamental challenge it poses is subtler, amoral and multi-dimensional – technological, ideological, commercial, anti-democratic. The idea that a cowed world is counting on the US to ride to the rescue is old-think. The age of solo superpower is over; the unipolar moment was squandered. Power balances were already shifting before Trump destroyed trust. Weak, divided Europe may prove to be the exception in welcoming Biden’s initiative. “We need to step up our action to defend democracy,” says Josep Borrell, EU foreign affairs chief, amid alarm over recent trends highlighted in the V-Dem Institute’s Democracy Report 2020. It asserts that for the first time since 2001, autocracy is the world’s leading form of governance – in 92 countries in total, home to 54% of the global population. Britain’s international position is now so enfeebled that it will back almost anything Biden suggests. Germany will support his initiative too, as long as he does not endanger its lucrative China exports. Hungary and Poland are problematic. The Polish government’s disregard for judicial independence and abortion rights sits badly with a campaign promoting liberal values. According to V-Dem, Viktor Orbán’s Hungary is no longer a democracy at all but an “electoral authoritarian regime”. Looking further afield, Biden’s democracy drive could be like trying to herd cats, with much clawing and spitting. India is a case in point. It calls itself the world’s biggest democracy. Yet under prime minister Narendra Modi, it has become one of the biggest rights abusers, oppressing political opponents, independent media, NGOs such as Amnesty International, and millions of Muslims. Modi has nothing to say about democracy, except how to subvert it. Strictly speaking, Biden should add Taiwan, a model east-Asian democracy, to his guest list. To do so would utterly enrage China, so perhaps he won’t. Including Sudan and Afghanistan, both striving for democracy, might constitute wishful thinking. Conversely, snubbing Turkey, Peru, the Philippines, Uganda and a host of other flawed or pretend democracies would greatly offend otherwise friendly governments. The point here is that Biden, like all his predecessors, will in the end be obliged to deal with the world as it is, not as he would like it to be. As Barack Obama demonstrated in 2009, making a fine speech in Cairo about new beginnings in the Arab world feels good but ultimately signifies little. When the Arab spring faltered, the US backed the bad guys – in Egypt’s case, the dictator Abdel Fatah al-Sisi – because it suited its selfish geopolitical interests. China and Russia, and other undemocratic outcasts such as Saudi Arabia, will count on rediscovered realism to temper Biden’s plan in practice, even if he persists with old-school American rhetoric about values and rights. Only if he and his allies attempt something meaningful, such as actively defending Hong Kong’s shattered freedoms, will Beijing feel the need to push back. Unlike Eritrea or, say, Belarus, there is much China can do if Washington’s pro-democracy tub-thumping grows unbearable. On issues such as the pandemic and the climate crisis, Beijing’s involvement is indispensable, and Biden knows it. All manner of economic, diplomatic and political leverage could be used to deflect US pressure. Most provocative is the suggestion, recently recycled by Vladimir Putin, that Russia and China may forge an anti-western military alliance, potentially drawing in lesser powers such as North Korea. This probably won’t happen. But it’s just possible that Biden’s well-meant but polarising “alliance of democracies” will deepen divisions and unintentionally spawn a new “axis of evil”. Unlike the much-hyped original, this one would be truly formidable.

#### Food insecurity doesn’t cause war.

Vestby et al 18, \*Jonas, Doctoral Researcher at the Peace Research Institute Oslo, \*\*Ida Rudolfsen, doctoral researcher at the Department of Peace and Conflict Research at Uppsala University and PRIO, and \*\*\*Halvard Buhaug, Research Professor at the Peace Research Institute Oslo (PRIO); Professor of Political Science at the Norwegian University of Science and Technology (NTNU); and Associate Editor of the Journal of Peace Research and Political Geography. (5/18/18, “Does hunger cause conflict?”, *Climate & Conflict Blog*, <https://blogs.prio.org/ClimateAndConflict/2018/05/does-hunger-cause-conflict/>)

It is perhaps surprising, then, that there is little scholarly merit in the notion that a short-term reduction in access to food increases the probability that conflict will break out. This is because to start or participate in violent conflict requires people to have both the means and the will. Most people on the brink of starvation are not in the position to resort to violence, whether against the government or other social groups. In fact, the urban middle classes tend to be the most likely to protest against rises in food prices, since they often have the best opportunities, the most energy, and the best skills to coordinate and participate in protests.

Accordingly, there is a widespread misapprehension that social unrest in periods of high food prices relates primarily to food shortages. In reality, the sources of discontent are considerably more complex – linked to political structures, land ownership, corruption, the desire for democratic reforms and general economic problems – where the price of food is seen in the context of general increases in the cost of living. Research has shown that while the international media have a tendency to seek simple resource-related explanations – such as drought or famine – for conflicts in the Global South, debates in the local media are permeated by more complex political relationships.

#### China isn’t revisionist.

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

In the abstract, such claims are alarming—in context, and in balance, rather humdrum. In fact, the evidence of any Chinese intention to destroy, or even merely undermine and exploit, the current order is slight. China is certainly using its growing military power to defend its claims in the SCS and even—on occasion— to coerce its neighbors. It uses protectionist economic policies to boost the prospects of Chinese companies and reduce competition. It employs economic statecraft to serve its interests abroad. And it certainly is opposed to America’s policy of global democracy promotion. However, none of these positions fundamentally challenge the existing order, none of them radically depart from America’s own actions when it was a rising power in the nineteenth century, and none of them obviously surpass America’s own contemporary record of order subversion.

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

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

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

# 2NC

## CP—Regs

#### The counterplan is mutually exclusive

Shelanski 18, Professor of Law @ Georgetown (Howard, “Antitrust and Deregulation,” Yale Law Journal)

For decades, courts treated antitrust enforcement like a complement to regulation that could come into play when antitrust would not conflict with regula- tory objectives. The Supreme Court held in 1963 that unless antitrust and regu- lation are in direct conflict with each other, courts should try to “reconcile[] the operation of both.”77 Consistent with that principle, the Court subsequently held in Otter Tail Power v. United States that antitrust agencies could challenge conduct even if a regulatory agency already had authority to challenge that very same conduct.78 In a later case, Gordon v. New York Stock Exchange, the Court made clear that there must be actual or potential “plain repugnancy” between antitrust and the regulatory statute for a court to bar an antitrust claim.79 The doctrinal acceptance of complementary application of antitrust and regulation allowed the DOJ to bring one of the most significant antitrust cases ever against a regulated firm: the suit that broke up the decades old AT&T “Bell System” monopoly.80 Two cases in the last fifteen years have significantly weakened the “plain re- pugnancy” standard. In 2004, the Supreme Court ruled in Verizon Communica- tions, Inc. v. Law Offices of Curtis V. Trinko, LLP that a claim under Section 2 of the Sherman Act could not proceed against Verizon for violations that were more related to the Telecommunications Act of 1996 than to the antitrust laws.81 The Court phrased the question presented in Trinko as “whether a complaint alleging breach of the incumbent’s duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.”82 The Court found the allegation did not constitute a legitimate antitrust claim and reversed the Second Circuit.83 While that result is reasonable, the Court’s opinion goes well beyond answering the question presented and extends Trinko’s reach to claims that could be legitimate under antitrust law. The Trinko Court stated that one key factor in deciding whether to recognize an antitrust claim against a regulated firm “is the existence of a regulatory struc- ture designed to deter and remedy anticompetitive harm” because “[w]here such a structure exists, the additional benefit to competition provided by antitrust en- forcement will tend to be small.”84 That prudential consideration for precluding antitrust claims against a regulated firm has little to do with whether the plaintiff pleaded a valid antitrust claim or whether that claim could conflict with the reg- ulatory scheme. Indeed, it suggests that even when a plaintiff does plead a cog- nizable, nonconflicting antitrust claim, courts should still preclude the claim on grounds of enforcement efficiency if a regulatory structure could address the harm. This consideration marked a clear departure from Otter Tail and Gordon, which allowed antitrust intervention even where redundant to existing regulatory authority, absent “plain repugnancy” between the two. By introducing “small additional benefit” as grounds for precluding non-conflicting antitrust claims, the Court potentially undermined the long-standing doctrine favoring antitrust as a complement to regulation. The Court clearly took a skeptical view of such complementarity by finding little benefit from antitrust unless “[t]here is nothing built into the regulatory scheme which performs the antitrust func- tion.”85 The Court thereby suggests that it would displace antitrust if the regulation contains anything that addresses competition, even if it is addressed in only a limited way. Three years after Trinko, the Court decided Credit Suisse Securities (USA) LLC v. Billing. 86 The plaintiffs in Credit Suisse claimed that the defendants violated Section 1 of the Sherman Act, which prohibits “every contract, combination . . . , or conspiracy, in restraint of trade,”87 by setting securities prices through joint conduct that went beyond what securities laws allow.88 They also alleged that the defendants had violated antitrust and securities laws by impermissibly en- gaging in tying and similar activities.89 Importantly, the Court accepted as given that the securities law did, and “inevitably” would, render defendants’ conduct unlawful, so in principle there was no conflict between the antitrust claims and the regulatory statute.90 The Court nonetheless held that even where a correctly construed antitrust claim would not actually conflict with regulation, the anti- trust claim could still be barred on potential conflict grounds.91 The Court rea- soned that “only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immun- ity) from activity that the SEC must (and inevitably will) forbid.”92 Therefore, the Court expanded the notion of plain repugnancy to incorporate not just the genuine conflict that arises when antitrust could bar conduct that regulation might allow, but even conflict between antitrust and regulation that could arise only from judicial mistake or confusion. Credit Suisse thus went beyond prior implied immunity cases to establish a rule that blocks some claims even when they rely on legitimate antitrust principles, are consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme. Where the underlying conduct is similar enough to regulated conduct that a judge might confuse the two and create a conflict with regulatory authority, the Court chose to err on the side of barring antitrust claims. The effect of Trinko and Credit Suisse was to render antitrust and regulation more like substitutes and less like complements. The competitive practices, mar- ket structure, and market performance of regulated industries are thus more likely to develop without the constraints of antitrust, reflecting instead the po- tentially different requirements and prohibitions of a regulatory agency’s com- petition-related rules. With antitrust less able to act in parallel or as a comple- ment, the enforcement of competition in regulated industries will depend on the nature of the relevant rules, the agency’s commitment to enforcement, and the kinds of sanctions the agency can impose. As agencies repeal such rules or back off from actively administering them, the resulting competition enforcement gap could be greater because antitrust has been sidelined as an available supplement or complement. The doctrinal shift in the relationship between antitrust and regulation that resulted from Trinko and Credit Suisse therefore magnifies the competition enforcement consequences of strong deregulatory cycles.

#### The permutation causes antitrust suits to get dismissed. That still takes resources, but completely nullifies solvency.

Shelanski 11, Professor of Law @ Georgetown (Howard, “The Case for Rebalancing Antitrust and Regulation,” 109 MICH. L. REV. 683, Lexis)

One good way to measure the importance of a court decision is to ask how previous cases would have differed had the decision been in place earlier. By that measure, the Supreme Court's decisions in Verizon v. Trinko' and Credit Suisse v. Billing2 turn out to be unusually significant. By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history. 4 The preclusion of such cases has strong implications for the future of both antitrust enforcement and industrial regulation. Before 2004, the year the Supreme Court decided Trinko, public agencies and private plaintiffs had long enforced antitrust law in a variety of regulated settings. Several of those cases reached the Supreme Court and many more went through lower federal courts with no finding that they were inconsistent with the core objectives of antitrust or would interfere with regulatory objectives.- Yet many of those cases would have difficulty surviving a motion to dismiss today. Without specifically indentifying legal flaws or harmful consequences from previous antitrust actions in regulated markets, the Supreme Court has in the past decade reconfigured the relationship between antitrust law and regulation to make it much more difficult for antitrust law to play an important role in regulated markets-a limitation this Article will argue is potentially costly and unnecessarily strong.

### AT Regs bad

#### Clear CP text solves (KU YELLOW)

Steven Semeraro 2, Associate Dean & Associate Professor of Law at the Thomas Jefferson School of Law, “Regulating Information Platforms: The Convergence to Antitrust”, Telecommunications & High Technology Law, Volume 1, p. 178-180

IV. INDUSTRY-SPECIFIC REGULATION

Industry-specific regulation is believed to be needed where cooperation among competitors is necessary in order to maximize consumer welfare and where the public interest demands consideration of goals other than short-run consumer welfare. Antitrust is generally thought to be incapable of achieving these results because it rarely imposes duties to cooperate.121 As explained in Section I, however, antitrust has proven quite adept at requiring cooperation when it is really essential.122 And Sections II and III explained how antitrust may incorporate long-run consumer welfare and free speech values. There is thus no inherent need for specifically tailored legislative pronouncements when the general body of antitrust law is seen as flexible enough to reach all threats to consumer welfare.

Nevertheless, industry-specific consumer-welfare regulation arguably could provide substantial benefits by clearly identifying ex ante the rights and obligations of the competitors in a way that the general antitrust laws cannot. But that theoretical benefit is unlikely to be realized. Congress has demonstrated a singular inability, or at least an unwillingness, to draft regulatory legislation that is clear enough to obtain this benefit. As Justice Scalia wrote in his opinion for the Court in Iowa Utilities:

It would be a gross understatement to say that the 1996 [Telecommunications] Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.123

In the absence of industry-specific regulation, litigation would often be necessary to resolve particular disputes. Given the inherent uncertainties in the antitrust laws, the notion that private parties could often settle differences in the shadow of those laws is unlikely.124 But industry specific regulation may be no better. The 1996 Telecommunications Act produced an explosion of litigation that remains unresolved five years later.125

Even when industry-specific regulation is interpreted in a way that provides clear rules to govern competitive behavior in information platform markets, the antitrust laws may remain a substantively better regulatory device. By their nature, industry- specific rules intended to enhance consumer welfare would necessarily require both (a) costly conduct to conform to the rules that in some situations would have no measurable consumer welfare benefit, and (b) permit some conduct that reduced consumer welfare but did not violate an ex ante rule.126 The problem would likely worsen over time as firms learned to walk the line along the rule, figuring out ways to comply with the letter of the law without providing the intended consumer welfare benefits. 127 For example, firms may learn the maximum permissible delays in the implementation of a rule-required behavior. All this is not to say that clear rules are never useful. But the resistance to using clear rules in antitrust doctrine generally should lead us to think twice before assuming that industry-specific legislation is a superior alternative to antitrust as a regulator of competition among information platforms.

### AT No enforcement

Solved by CP fiat and antitrust is worse:

#### Antitrust enforcement fails on all accounts

Shughart 8, PhD in Economics, Professor in Public Choice at Utah State University (William, “Regulation and Antitrust,” in *Readings in Public Choice and Constitutional Political Economy*, Ch 25)

The professed efficiency basis of competition policy has not gone unchallenged (Lande, 1982; DiLorenzo and High, 1988). What is more important, faith in the efficacy of the antitrust laws to deliver net social gains ignores the political pressures that impinge on the agencies created to enforce them, pressures marshaled by groups perceiving opportunities to exploit antitrust processes strategically, not to promote competition, but to subvert it (Baumol and Ordover, 1985). A law that declares mergers to be illegal where their effect ‘‘may be to substantially lessen competition or tend to create a monopoly’’ is also a law that affords the merger partners’ rivals the opportunity to block a transaction that promises to create a larger, more efficient competitor. A law that makes it illegal for a firm to charge different prices to different customers not justified by differences in the cost of serving them is also a law that affords rivals the opportunity to seek relief from prices that are ‘‘predatorily’’ low. The Robinson–Patman Act was in fact drafted and passed in response to the political influence mobilized by independent grocers, druggists and other small retailers, who complained loudly that, under the Clayton Act’s original language, the FTC was either unable or unwilling to prevent the emerging national chain stores from using their mass buying power to sell goods to consumers at prices below those charged by the independents (Ross, 1984). Observers of the antitrust enforcement process have long been critical of individual applications of it (for recent surveys of the case-study literature, see Armentano, 1990; Rubin, 1995). A typical antitrust case study finds that the evidence presented in behalf of the plaintiff was ‘‘weak and at times bordered on fiction’’ and that ‘‘neither the government nor the Courts seemed able to distinguish between competition and monopolizing’’ (Peterman, 1975, p. 143). Even when the law conceivably has struck at acts and practices that resulted in injury to consumers, the effectiveness of the penalties imposed on guilty defendants has been called into question (Elzinga, 1969; Rogowsky, 1986, 1987). Systematic empirical studies of the antitrust case-selection process have produced no support for the hypothesis that the process is guided by social-welfare criteria (Long et al., 1973; Asch, 1975; Siegfried, 1975) or that antitrust law enforcement has had measurable pro-competitive effects on the behavior of firms (Stigler, 1966; Asch and Seneca, 1976; Shaw and Simpson, 1986; Sproul, 1993).

#### Antitrust is one-off and targeted, which precludes economy-wide changes

Wheeler 21, Visiting Fellow - Governance Studies, Center for Technology Innovation (Tom, “A focused federal agency is necessary to oversee Big Tech,” Brookings, https://www.brookings.edu/research/a-focused-federal-agency-is-necessary-to-oversee-big-tech/)

Oversight of the dominant digital platforms’ broad effects on society is not possible within the existing federal regulatory structure. Agencies such as the Federal Trade Commission (FTC) and Department of Justice (DOJ) are filled with good and dedicated professionals, yet they are constrained in what they can do. Such limitations are perversely demonstrated by the recent headline-grabbing antitrust actions by both agencies. Antitrust enforcement, while important, is targeted against specific circumstances and cannot protect against general consumer abuses. Similarly, while the FTC also has authority over unfair and deceptive acts, many abuses in the digital marketplace are harmful but not considered deceptive and unfair. The FTC is further hampered by limited power to promulgate broad rules, thus constraining most of its activities to one-off proceedings against a singular company for a specific type of abuse rather than establishing broad behavioral rules across the consumer-facing digital economy.

## States CP

## Ad1

### 2NC---!D---Cyber

#### No cyber impact---that’s Lewis:

#### 1---deterrence---attacks would invite catastrophic retaliation---attribution is strong enough to deter escalation.

#### Uncertainty alone checks.

Lewis 18, PhD, a senior vice president at the Center for Strategic and International Studies (CSIS). (James Andrew, 1-1-2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States”, pg. 29, <https://www.jstor.org/stable/resrep22408.8?seq=1#metadata_info_tab_contents>)

This upper bound on cyber attack is affected by the likelihood of attribution. If an attacker was confident that it could avoid having the attack attributed to it, the risk of retaliation would be reduced, making some attacks more attractive. Uncertainty about attribution capabilities, particularly American capabilities, combined with uncertainty about the effectiveness of cyber attack, creates caution. Public expressions of uncertainty about attribution are not shared by opponents, who know when they have been caught. Over the last decade, the United States has made a major effort to improve its attribution capabilities and has succeeded to the point where no opponent can be confident about anonymity and this, if linked to truly credible threats to impose consequences, may finally produce the cyber deterrence so long sought by the United States.

The implicit threshold governing cyber attack is the line between force and coercion. With very few exceptions, states have avoided cyber actions that could be judged as the use of force, based on international understandings on what actions qualify as the use of force or armed attack. Opponents have engaged in cyber actions below this implicit threshold with impunity, but they are reluctant to cross it for fear of creating a situation that they cannot control. In this, cyber incidents are more like border incursions or bandit raids than attacks.

Public sources suggest that at least seven countries have used cyber tools for coercive purposes. However, they have been careful to avoid anything that could be interpreted as the use of force, and they have avoided physical destruction or casualties. This suggests that countries prefer actions that advance their strategic goals without creating unmanageable risk of escalation into armed conflict. Opponents calculate the advantage they would gain from an attack against the potential cost. Miscalculation is possible, but if anything, opponents appear more likely to overestimate the risk of retaliation.

#### 2---technical barriers---states lack the resources, skills, and expertise to attack dozens of sophisticated targets simultaneously. 25 years of unregulated cyber-attacks disprove capability.

#### 3---no motivation.

Lewis 18, PhD, a senior vice president at the Center for Strategic and International Studies (CSIS). (James Andrew, 1-1-2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States”, pg. 7-9, <https://www.jstor.org/stable/resrep22408.5?seq=1#metadata_info_tab_contents>) \*language edited---brackets

The most dangerous and damaging attacks required resources and engineering knowledge that are beyond the capabilities of nonstate actors, and those who possess such capabilities consider their use in the context of some larger strategy to achieve national goals. Precision and predictability—always desirable in offensive operations in order to provide assured effect and economy of force—suggest that the risk of collateral damage is smaller than we assume, and with this, so is the risk of indiscriminate or mass effect.

State Use of Cyber Attack Is Consistent with Larger Strategic Aims

Based on a review of state actions to date, cyber operations give countries a new way to implement existing policies rather than leading them to adopt new policy or strategies. State opponents use cyber techniques in ways consistent with their national strategies and objectives. But for now, cyber may be best explained as an addition to the existing portfolio of tools available to nations.

Cyber operations are ideal for achieving the strategic effect our opponents seek in this new environment. How nations use cyber techniques will be determined by their larger needs and interests, by their strategies, experience, and institutions, and by their tolerance for risk. Cyber operations provide unparalleled access to targets, and the only constraint on attackers is the risk of retaliation—a risk they manage by avoiding actions that would provoke a damaging response. This is done by staying below an implicit threshold on what can be considered the use of force in cyberspace.

The reality of cyber attack differs greatly from our fears. Analysts place a range of hypothetical threats, often accompanied by extreme consequences, before the public without considering the probability of occurrence or the likelihood that opponents will choose a course of action that does not advance their strategic aims and creates grave risk of damaging escalation. Our opponents’ goals are not to carry out a cyber 9/11. While there have been many opponent probes of critical infrastructure facilities in numerous countries, the number of malicious cyber actions that caused physical damage can be counted on one hand. While opponents have probed critical infrastructure networks, there is no indication that they are for the purposes of the kind of [devastating] crippling strategic attacks against critical infrastructure that dominated planning in the Second World War or the Cold War.

Similarly, the popular idea that opponents use cyber techniques to inflict cumulative economic harm is not supported by evidence. Economic warfare has always been part of conflict, but there are no examples of a country seeking to imperceptibly harm the economy of an opponent. The United States engaged in economic warfare during the Cold War, and still uses sanctions as a tool of foreign power, but few if any other nations do the same. The intent of cyber espionage is to gain market or technological advantage. Coercive actions against government agencies or companies are intended to intimidate. Terrorists do not seek to inflict economic damage. The difficulty of wreaking real harm on large, interconnected economies is usually ignored.

Economic warfare in cyberspace is ascribed to China, but China’s cyber doctrine has three elements: control of cyberspace to preserve party rule and political stability, espionage (both commercial and military), and preparation for disruptive acts to damage an opponent’s weapons, military information systems, and command and control. “Strategic” uses, such as striking civilian infrastructure in the opponent’s homeland, appear to be a lower priority and are an adjunct to nuclear strikes as part of China’s strategic deterrence. Chinese officials seem more concerned about accelerating China’s growth rather than some long-term effort to undermine the American economy.6 The 2015 agreement with the United States served Chinese interests by centralizing tasking authority in Beijing and ending People’s Liberation Army (PLA) “freelancing” against commercial targets.

The Russians specialize in coercion, financial crime, and creating harmful cognitive effect—the ability to manipulate emotions and decisionmaking. Under their 2010 military doctrine on disruptive information operations (part of what they call “New Generation Warfare”). Russians want confusion, not physical damage. Iran and North Korea use cyber actions against American banks or entertainment companies like Sony or the Sands Casino, but their goal is political coercion, not destruction.

None of these countries talk about death by 1000 cuts or attacking critical infrastructure to produce a cyber Pearl Harbor or any of the other scenarios that dominate the media. The few disruptive attacks on critical infrastructure have focused almost exclusively on the energy sector. Major financial institutions face a high degree of risk but in most cases, the attackers’ intent is to extract money. There have been cases of service disruption and data erasure, but these have been limited in scope. Denial-of-service attacks against banks impede services and may be costly to the targeted bank, but do not have a major effect on the national economy. In all of these actions, there is a line that countries have been unwilling to cross.

When our opponents decided to challenge American “hegemony,” they developed strategies to circumvent the risks of retaliation or escalation by ensuring that their actions stayed below the use-of-force threshold—an imprecise threshold, roughly defined by international law, but usually considered to involve actions that produce destruction or casualties. Almost all cyber attacks fall below this threshold, including, crime, espionage, and politically coercive acts. This explains why the decades-long quest to rebuild Cold War deterrence in cyberspace has been fruitless.

It also explains why we have not seen the dreaded cyber Pearl Harbor or other predicted catastrophes. Opponents are keenly aware that launching catastrophe brings with it immense risk of receiving catastrophe in return. States are the only actors who can carry out catastrophic cyber attacks and they are very unlikely to do so in a strategic environment that seeks to gain advantage without engaging in armed conflict. Decisions on targets and attack make sense only when embedded in their larger strategic calculations regarding how best to fight with the United States.

There have been thousands of incidents of cybercrime and cyber espionage, but only a handful of true attacks, where the intent was not to extract information or money, but to disrupt and, in a few cases, destroy. From these incidents, we can extract a more accurate picture of risk. The salient incidents are the cyber operations against Iran’s nuclear weapons facility (Stuxnet), Iran’s actions against Aramco and leading American banks, North Korean interference with Sony and with South Korean banks and television stations, and Russian actions against Estonia, Ukrainian power facilities, Canal 5 (television network in France), and the 2016 U.S. presidential elections. Cyber attacks are not random. All of these incidents have been part of larger geopolitical conflicts involving Iran, Korea, and the Ukraine, or Russia’s contest with the United States and NATO.

There are commonalities in each attack. All were undertaken by state actors or proxy forces to achieve the attacking state’s policy objectives. Only two caused tangible damage; the rest created coercive effect, intended to create confusion and psychological pressure through fear, uncertainty, and embarrassment. In no instance were there deaths or casualties. In two decades of cyber attacks, there has never been a single casualty. This alone should give pause to the doomsayers. Nor has there been widespread collateral damage.

### 2NC---!D---C2 Hacking

#### No nuclear hacking---US C2 is rigorously firewalled and isolated from other channels, making access impossible---two-person integrity and multi-layered safeguards prevent miscalc---that’s Caylor

#### Hacking impossible. Nukes aren’t online.

Fung 16, MSc, international relations. Reporter focusing on telecommunications, media, and competition. Citing Maj. General Jack Weinstein. (Brian, 5-26-2016, "The real reason America controls its nukes with ancient floppy disks", *Washington Post*, https://www.washingtonpost.com/news/the-switch/wp/2016/05/26/the-real-reason-america-controls-its-nukes-with-ancient-floppy-disks/)

As it happens, a similar logic underpins the U.S. military’s continued use of floppy disks. The fact that America’s nuclear forces are disconnected from digital networks actually acts as a buffer against hackers. As Maj. General Jack Weinstein told CBS’s “60 Minutes” in 2014: Jack Weinstein: I'll tell you, those older systems provide us some -- I will say huge safety when it comes to some cyber issues that we currently have in the world. Lesley Stahl: Now, explain that. Weinstein: A few years ago we did a complete analysis of our entire network. Cyber engineers found out that the system is extremely safe and extremely secure on the way it's developed. Stahl: Meaning that you're not up on the Internet kind of thing? Weinstein: We're not up on the Internet. Stahl: So did the cyber people recommend you keep it the way it is? Weinstein: For right now, yes. In other words, the rise of hackers and cyberwarfare is exactly why even technologically obsolete systems can still serve a valuable purpose.

#### Deterrence checks.

Lewis 18, PhD, a senior vice president at the Center for Strategic and International Studies (CSIS). (James Andrew, 1-1-2018, “Rethinking Cybersecurity: Strategy, Mass Effect, and States”, pg. 28-29, <https://www.jstor.org/stable/resrep22408.8?seq=1#metadata_info_tab_contents>) \*language edited---brackets

If it was possible to use a cyber attack to simultaneously [devastate] ~~cripple~~ strategic forces and launch a massive attack on critical infrastructure, an opponent might be tempted, but this would require a high degree of certainty that all strategic delivery systems could be taken offline by a cyber attack. This is unlikely, and it is more probable that a cyber attack will not be 100 percent effective. Some targeted weapons or systems will still operate. Saying that the United States can only shoot 50 missiles at your capital instead of 100 is not much of a comfort. In a larger armed conflict, this kind of reduction in enemy tactical capabilities can be valuable, but if the goal is to attack without fear of retaliation, it is insufficient.

### 2NC---!D---LIO

#### Liberal norms don’t shape international politics.

Staniland 18, Associate Professor of Political Science and Chair of the Committee on International Relations at the University of Chicago. (Paul, 7/29/18, “Misreading the “Liberal Order”: Why We Need New Thinking in American Foreign Policy”, *Lawfare*; https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy)

Second, the liberal order in its idealized form had very limited reach into what are now pivotal areas of U.S. security policy: Asia, the Middle East, and the “developing world” more broadly. The core of the liberal order remains transatlantic, but Asia is now growing dramatically in wealth and military power. What is the record of the order in the region? There was certainly some democracy promotion when authoritarian regimes began to totter, but there was also deep, sustained cooperation with dictators like Suharto and Ferdinand Marcos; while there are some regional institutions (such as ASEAN), they are comparatively weak; while there are some rules, they have been deeply contested. Close U.S. allies like Japan, Taiwan, and South Korea (the latter two experiencing long bouts of U.S.-allied autocracy) were not integrated into a broad alliance pact like NATO. India and Pakistan were never part of the core order, and China was only very partially integrated (primarily into the economic pillar of the order, and through ad hoc security cooperation from the 1970s). Southeast Asia has been a site of warfare and authoritarianism for much of its post-1945 history.

The United States has long considered the Middle East vital to its security, but the extent to which the United States should invest its own blood and treasure in protecting the area was always up for debate. It was only in the 1970s that the United States decided it was prepared to use force to defend the region; “dual containment” in the 1990s was always controversial, while the invasion of Iraq and its chaotic aftermath revealed deep fissures over how much presence was enough. Meanwhile, liberalism, democracy, human rights, and international institutions have not made much of a mark in the region. Jake Sullivan, in a rather odd defense of the order, suggests that “Middle Eastern instability has been a feature, not a bug, of the system.” This is not reassuring about the order’s ability to structure politics in the area. The same can be said about the order’s history in Africa, with deep Western involvement in civil wars, support for authoritarian regimes, and often-counterproductive demands for economic liberalization contributing to ongoing instability.

The legacy of the “liberal order” is both far more complex and shallower outside of the north Atlantic core than within it. Invocations of the order are seen with greater cynicism and suspicion in these areas than in Washington or Berlin. Yet they are precisely the regions that are increasingly the focus of U.S. security policy.

#### LIO’s too abstract and inconsistent to explain anything.

Staniland 18, Associate Professor of Political Science and Chair of the Committee on International Relations at the University of Chicago. (Paul, 7/29/18, “Misreading the “Liberal Order”: Why We Need New Thinking in American Foreign Policy”, *Lawfare*; https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy)

Finally, and as the preceding already suggests, the idea of “liberal order” is itself frequently too vague a concept, and was too incomplete a phenomenon, to offer guidance on a number of key contemporary questions. Allison goes so far as to call it “conceptual Jell-o.” The extremely abstract principles that experts use to define the order are confronted with a reality of extreme historical variation. This amorphousness undermines its usefulness as an actual guide to future foreign policy.

U.S. alliances in Western Europe since World War II looked dramatically different than those in East Asia. Both have achieved their basic goals, so which should be the model for the future? The United States often applied pressure to coerce its allies into adopting economic and security policies conducive to U.S. interests—going so far as to threaten abandonment of close European allies—even as it simultaneously built key elements of the liberal order. The core of the liberal order was a more tenuous and contested political space than we often remember.

This inconsistency applies to involvement in the domestic politics of other states. The United States has regularly embraced authoritarian leaders (and distanced itself from democratic regimes), while at other times it has helped to push these leaders out in the face of domestic mobilization. Advocates of the order tend to stress the latter and dismiss the former as aberrant, but both strategies contributed to the ultimate victory of the liberal order over the Soviet bloc.

The order’s history offers support for aggressively promoting democracy, accepting democratization when it emerges, and strongly supporting friendly dictators. This makes it unhelpful for grappling with the question of whether and how to promote democracy. The same is true of military interventions and covert operations abroad. U.S. leaders invested heavily in Cold War proxy wars and the overthrow of foreign regimes, while at other times and places they avoided such interventions.

This history carries important implications for addressing today’s policy challenges. Simply appealing to the order does not, for instance, tell us much about how to deal with a rising China: Since the liberal order included highly institutionalized alliances, loose “hub-and-spoke” arrangements, and coalitions of the willing, and was characterized by both preventive wars and containment, it is extremely unclear what the order suggests for America’s China strategy. While “rules-based” order is a term in vogue, it doesn’t tell us what the rules should actually be, or how they should be decided.

Nor does appealing to the liberal order help us understand whether the United States needs to be deeply involved or largely absent from the Middle East, or somewhere in between. Under the order, democracy promotion and assertive liberal intervention sometimes occurred, but so too did restraint and an acceptance of autocracy. There are no answers in the liberal international order for navigating the enormously difficult terrain of the contemporary Middle East.

## Ad2

#### Tons of thumpers (KU YELLOW)

Dr. Nouriel 1AC Roubini 19, PhD in Economics from Harvard University, BA from Bocconi University, Former Professor of Economics at New York University's Stern School of Business, Chairman of Roubini Macro Associates, “The Global Consequences of a Sino-American Cold War”, Project Syndicate, 5/20/2019, https://www.project-syndicate.org/commentary/united-states-china-cold-war-deglobalization-by-nouriel-roubini-2019-05

Regardless of which side has the stronger argument, the escalation of economic, trade, technological, and geopolitical tensions may have been inevitable. What started as a trade war now threatens to escalate into a permanent state of mutual animosity. This is reflected in the Trump administration’s National Security Strategy, which deems China a strategic “competitor” that should be contained on all fronts.

Accordingly, the US is sharply restricting Chinese foreign direct investment in sensitive sectors, and pursuing other actions to ensure Western dominance in strategic industries such as artificial intelligence and 5G. It is pressuring partners and allies not to participate in the Belt and Road Initiative, China’s massive program to build infrastructure projects across the Eurasian landmass. And it is increasing US Navy patrols in the East and South China Seas, where China has grown more aggressive in asserting its dubious territorial claims.

The global consequences of a Sino-American cold war would be even more severe than those of the Cold War between the US and the Soviet Union. Whereas the Soviet Union was a declining power with a failing economic model, China will soon become the world’s largest economy, and will continue to grow from there. Moreover, the US and the Soviet Union traded very little with each other, whereas China is fully integrated in the global trading and investment system, and deeply intertwined with the US, in particular.1

A full-scale cold war thus could trigger a new stage of de-globalization, or at least a division of the global economy into two incompatible economic blocs. In either scenario, trade in goods, services, capital, labor, technology, and data would be severely restricted, and the digital realm would become a “splinternet,” wherein Western and Chinese nodes would not connect to one another. Now that the US has imposed sanctions on ZTE and Huawei, China will be scrambling to ensure that its tech giants can source essential inputs domestically, or at least from friendly trade partners that are not dependent on the US.

In this balkanized world, China and the US will both expect all other countries to pick a side, while most governments will try to thread the needle of maintaining good economic ties with both. After all, many US allies now do more business (in terms of trade and investment) with China than they do with America. Yet in a future economy where China and the US separately control access to crucial technologies such as AI and 5G, the middle ground will most likely become uninhabitable. Everyone will have to choose, and the world may well enter a long process of de-globalization.

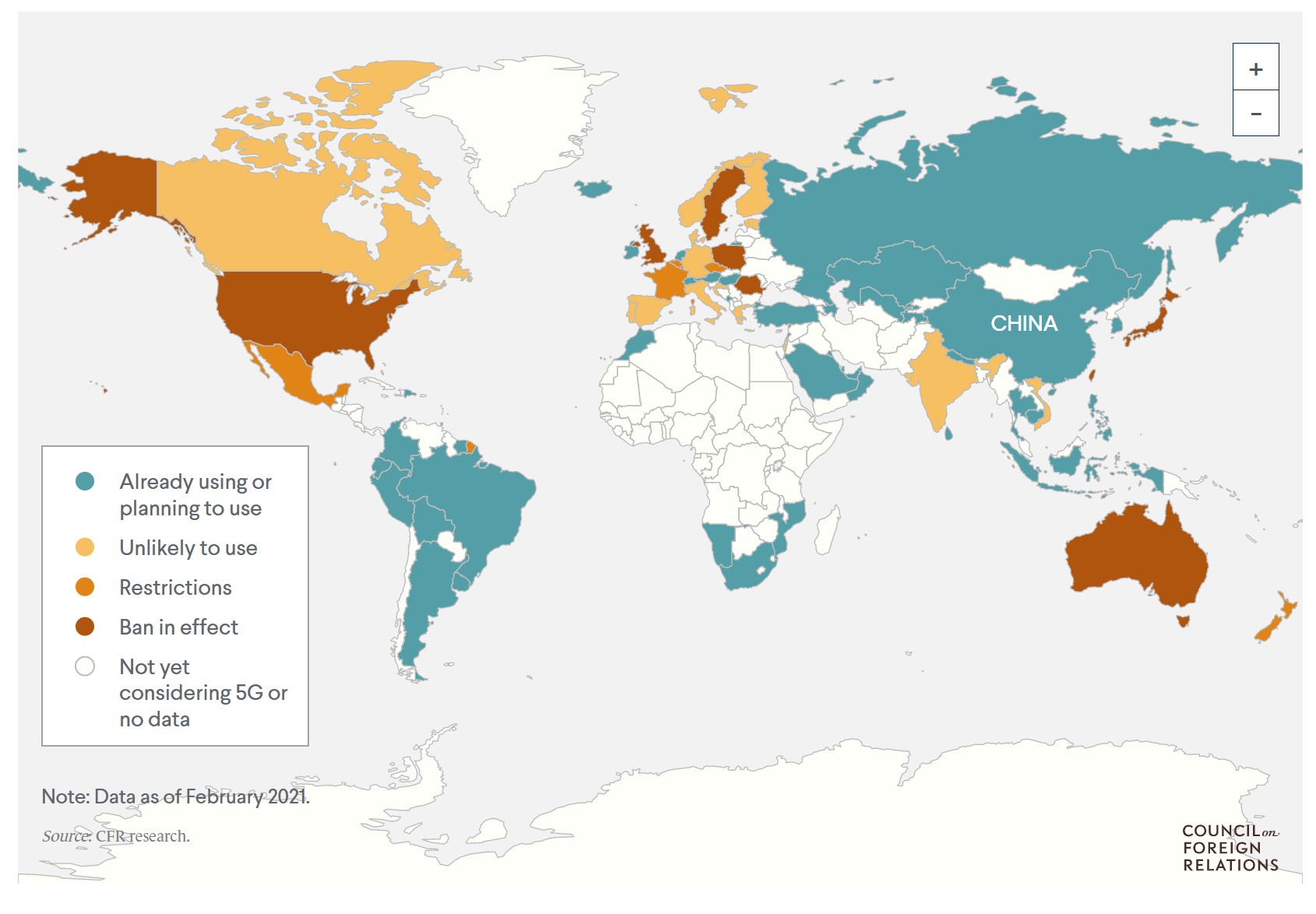
Whatever happens, the Sino-American relationship will be the key geopolitical issue of this century. Some degree of rivalry is inevitable. But, ideally, both sides would manage it constructively, allowing for cooperation on some issues and healthy competition on others. In effect, China and the US would create a new international order, based on the recognition that the (inevitably) rising new power should be granted a role in shaping global rules and institutions.

If the relationship is mismanaged – with the US trying to derail China’s development and contain its rise, and China aggressively projecting its power in Asia and around the world – a full-scale cold war will ensue, and a hot one (or a series of proxy wars) cannot be ruled out. In the twenty-first century, the Thucydides Trap would swallow not just the US and China, but the entire world**.**

### 2NC—Map

#### **Nonunique—inserting a map**

Sacks 3/29 (David Sacks, M.A. in International Relations and International Economics from Johns Hopkins 3-29-2021, "China's Huawei Is Winning the 5G Race. Here's What the United States Should Do To Respond," Council on Foreign Relations, <https://www.cfr.org/blog/china-huawei-5g>)



# 1NR

## Law Enforcement DA

### OV

#### Food shortages catalyze feedback loops of terrorism, refugee spread, and instability that spirals to existential nuclear war.

#### Turns governance impacts to advantage one and two---scarcity foments interntional hostility and divisions that zero cooperation and ensure backsliding.

Brinkman 11 – Henk-Jan Brinkman Chief of Policy, Planning and Application in the Peacebuilding Support Office of the United Nations and Cullen S. Hendrix, Assistant Professor at the The College of William & Mary and Fellow at the Robert S. Strauss Center for International Security and Law at the University of Texas at Austin, “Food Insecurity and Violent Conflict: Causes, Consequences, and Addressing the Challenges”, Occasional Paper n° 24, July, <http://ucanr.edu/blogs/food2025/blogfiles/14415.pdf>

Most of the types of political violence addressed here are more prevalent in societies with higher levels of chronic food insecurity. There is a correlation between food insecurity and political conflict in part because both are symptoms of low development (Collier et al., 2003). Nevertheless, a growing body of research makes both direct links and indirect links – as proxied by environmental scarcity or access to water resources – between food scarcity and various types of conflict. The causal arguments linking food insecurity to political violence lack microfoundational evidence – evidence based on actions of individuals – to explain how the mechanism works, but there are plenty of theories. The theories tend to rest either on the perspective of motivation, emphasizing the effect of food insecurity on economic and social grievances; or on the perspective of the opportunity cost, emphasizing the perceived costs and benefits of participating in violence relative to other means of securing income or food (Gurr, 1970; Tilly, 1978; Humphreys and Weinstein, 2008; Blattman and Miguel, 2010). These arguments are most valid with respect to participation in civil war and rebellion, where participation is better explained by a mixture of grievances – which provide motivation – and selective incentives – protection from violence and opportunities to engage in predation or to receive food, clothing, shelter and other material benefits – rather than grievances alone (Berman, 2009). A study of demobilized combatants in Sierra Leone found that poverty, lack of educational access and material rewards were associated with participation in the civil war (Humphreys and Weinstein, 2008). Interestingly, in Liberia, women were more likely than men to fight for material benefits (Hill et al., 2008). Thus, grievances are important, but so are motivations related to that individual’s economic and opportunistic considerations. Civil Conflict Civil conflict is the prevalent type of armed conflict in the world today (Harbom and Wallersteen, 2010). It is almost exclusively a phenomenon of countries with low levels of economic development and high levels of food insecurity. Sixty-five percent of the world’s food-insecure people live in seven countries: India, China, the Democratic Republic of Congo (DRC), Bangladesh, Indonesia, Pakistan and Ethiopia (FAO, 2010), of which all but China have experienced civil conflict in the past decade, with DRC, Ethiopia, India and Pakistan currently embroiled in civil conflicts. Pinstrup-Andersen and Shimokawa (2008) find that poor health and nutrition are associated with greater probability of civil conflict, though their findings are based on small sample sizes. Countries with lower per capita caloric intake are more prone to experience civil conflict, even accounting for their levels of economic development (Sobek and Boehmer, 2009). This relationship is stronger in those states where primary commodities make up a large proportion of their export profile. Some of the countries most plagued by conflict in the past 20 years are commodity-rich countries characterized by widespread hunger, such as Angola, DRC, Papua New Guinea and Sierra Leone. The mixture of hunger – which creates grievances – and the availability of valuable commodities – which can provide opportunities for rebel funding – is a volatile combination. World commodity prices can trigger conflict, as higher prices, especially for food, increase affected groups’ willingness to fight. Timothy Besley and Torsten Persson (2008) find that as a country’s import prices increase, thereby eroding real incomes, the risk of conflict increases. Oeindrila Dube and Juan F. Vargas (2008) arrive at similar conclusions when looking at Colombia, where higher export prices for coffee (which is labour intensive and a source of rural income) reduced violence in coffeeproducing areas while higher export prices for oil (which is capital intensive and a source of income for rebels and paramilitary groups) increased violence in regions with oil reserves and pipelines. Other research links transitory weather shocks to civil conflict. In these studies, weather shocks – like drought and excess rainfall – are thought to fuel conflict by causing crops to fail and reducing agricultural employment opportunities, thus increasing food insecurity both in terms of food availability and food access (ability to pay). The people most likely to participate in armed conflict – young men from rural areas with limited education and economic prospects – are likely to seek work in the agricultural sector. As that work dries up, fighting looks more attractive. However, the empirical link between transitory weather shocks and civil conflict is still ambiguous. Some studies find that civil conflict is more likely to begin following years of negative growth in rainfall (Miguel, Satyanath and Sergenti, 2004; Hendrix and Glaser, 2007), suggesting that drought and decreased agricultural productivity expand the pool of potential combatants and give rise to more broadly held grievances. However, approaches that look at levels of rainfall, rather than growth in rainfall from year to year, find tenuous, or in fact positive relationships, between rainfall abundance and the onset of conflict (Burke et al., 2009; Buhaug, 2010; Hendrix and Salehyan, 2010; Ciccone, forthcoming). Some case-based research, however, links drought to conflict – though mediated by the government’s response to the crisis. For example, during the Tuareg rebellion in northern Mali, drought – aggravated by the government’s embezzlement of drought relief supplies and food aid – was a significant source of grievance that motivated young men and women to take up arms (Benjaminsen, 2008). Recently, warmer temperatures have been linked to an increase in civil conflict, though this finding has been challenged (Burke et al., 2009; Buhaug, 2010). Civil war is also more likely in the aftermath of quick-onset natural disasters, such as earthquakes, major volcanic eruptions, floods, and cyclonic storms (Brancati, 2007; Nel and Righarts, 2008). The relationship between disaster and conflict is strongest in countries with high levels of inequality and slow economic growth; food insecurity and resource scarcity are among the more plausible explanations for this correlation. Interstate War The links between food insecurity and interstate war are less direct. While countries often go to war over territory, previous research has not focused directly on access to food or productive agricultural land as a major driver of conflict (Hensel, 2000). However, wars have been waged to reduce demographic pressures arising from the scarcity of arable land, the clearest examples being the move to acquire Lebensraum (“living space”) that motivated Nazi Germany’s aggression toward Poland and Eastern Europe (Hillgruber, 1981) and Japan’s invasion of China and Indochina (Natsios and Doley, 2009). Water, for drinking and for agriculture, is also a cause of conflict (Klare, 2002). Countries that share river basins are more likely to go to war than are other countries that border one another (Toset et al., 2000; Gleditsch et al., 2006). This relationship is strongest in countries with low levels of economic development. Institutions that manage conflicts over water and monitor and enforce agreements can significantly reduce the risk of war (Postel and Wolf, 2001). Jared Diamond (1997) has argued that for centuries military power was built on agricultural production. Zhang et al. (2007) show that long-term fluctuations in the prevalence of war followed cycles of temperature change over the period 1400–1900 CE, with more war during periods of relatively cooler temperatures and thus lower agricultural productivity and greater competition for resources. Similar findings linking cooler periods with more war have been established for Europe between 1000 and 1750 CE (Tol and Wagner, 2008). Democratic and Authoritarian Breakdowns Democratic breakdowns occur when leaders are deposed and replaced by officials who come to power without regard for elections, legal rules, and institutions. Not all breakdowns are violent – “bloodless” coups account for 67 percent of all coups and coup attempts – but many have been very bloody, and the autocratic regimes and instability that follow democratic breakdowns are more likely to lead to the abuse of human rights, in some cases leading to mass state killing (Poe and Tate, 1994; Harff, 2003). Food insecurity, proxied by low availability of calories for consumption per capita, makes democratic breakdown more likely, especially in higher-income countries, where people expect there to be larger social surpluses that could be invested to reduce food insecurity (Reenock, Bernhard and Sobek, 2007). Though statistical evidence is lacking, rising food prices have been implicated in the wave of demonstrations and transitions from authoritarian rule to fledgling democracy in some countries across North Africa and the Middle East in 2011. There are some historical precedents for this: a bad harvest in 1788 led to high food prices in France, which caused rioting and contributed to the French revolution in 1789; and the wave of political upheaval that swept Europe in 1848 was at least in part a response to food scarcity, coming after three below-average harvests across the continent (Berger and Spoerer 2001). Protest and Rioting Throughout history higher food prices have contributed to or triggered violent riots. Protests and rioting occurred in response to sharp increases in world food prices in the 1970s and 1980s (Walton and Seddon, 1994). Record-high world food prices triggered protest and violent rioting in 48 countries in 2007/08 (see Figure 1). The ratio of violent to non-violent protest was higher in low-income countries and in countries with lower government effectiveness (von Braun, 2008). Recent research links higher world food prices for the three main staple grains (wheat, rice and maize) to more numerous protests and riots in developing countries, though this relationship can be mitigated by policy interventions designed to shield consumers from higher prices (Arezki and Brückner, 2011; Bates, 2011). International market prices are not the only source of food-related protests. The lifting of government subsidies can lead to rioting as well. Until recently, the biggest demonstrations in modern Egyptian history were the three-day “bread riots” in 1977 that killed over 800 people, which were a response to the Egyptian government’s removal of state subsidies for basic foodstuffs, as mandated by the International Monetary Fund (IMF) (AFP, 2007). “IMF riots” can be traced to popular grievances over withdrawn food and energy subsidies (Walton and Seddon, 1994; Abouharb and Cingranelli, 2007). However, the relationship between “IMF riots” and food insecurity is more complicated. Generalized food and energy subsidies are regressive, meaning that wealthy and middle-class households generally capture more of the benefits. As such, it may be real income erosion, rather than acute food insecurity, that is driving participation in protest. Communal Violence Competition over scarce resources, particularly land and water, often causes or exacerbates communal conflict (Homer-Dixon, 1999; Kahl, 2006; Ban, 2007). Communal conflict involves groups with permanent or semi-permanent armed militias but does not involve the government. However, it can escalate to include government forces, as in the massacres in Darfur, Rwanda and Burundi. These conflicts have the potential to escalate to civil war when the government is perceived to be supporting, tacitly or otherwise, one communal group at the expense of the other (Kahl, 2006). While the conflict in Darfur began as a communal conflict over land and water, its impact escalated to devastating proportions following the government’s support for Janjaweed militias in their fight against the Sudan People's Liberation Army/Movement and Justice and Equality Movement rebels. Communal conflicts are common in the Sahel, the zone of transition between the Sahara desert and the savanna, particularly in years of extremely high and low rainfall (Hendrix and Salehyan, 2010). Recurrent, long-lasting droughts in the Sahel have undermined cooperative relationships between migratory herders and sedentary farmers, leading to food insecurity and increased competition for water and land between farmers and herders, but also within herding and farming groups. As a pastoralist in the Sudan noted: “When there is food, there is no cattle raiding.” (quoted in Schomerus and Allen, 2010). Once violence begins, conflict escalates and persists because of security dilemmas (fear of future attacks leads to preemptive attacks – see Posen, 1993) and lack of alternative dispute mechanisms between groups and effective policing within groups (Fearon and Laitin, 1996). These conflicts have been particularly lethal in Kenya, Nigeria, the Sudan and Uganda. Repeated clashes between Fulani herders and Tarok farmers in Nigeria’s Plateau State killed 843 people in 2004. Similar clashes between Rizeigat Abbala and Terjam herders in the Sudan killed 382 in 2007. Cattle raiding in the Karamoja Cluster, a cross-border region of Ethiopian, Kenyan and Ugandan territory, resulted in more than 600 deaths and the loss of 40,000 heads of livestock in 2004 alone (Meier, Bond and Bond, 2007). These conflicts tend to occur in politically marginalized territories far from the capital (Raleigh, 2010). Context Matters: Demographic, Social, Political, and Economic Mediators Food insecurity is a clear contributor to political instability and conflict. But neither hunger nor conflict exist in a vacuum: other aspects of the political, economic and social environment affect the degree to which food insecurity, and grievances more generally, are expressed violently (Tilly, 1978).

#### Turns cyber

Arntz 20, was Microsoft MVP in consumer security for 12 years running. (Pieter, 3-13-2020, "The effects of climate change on cybersecurity", *Malwarebytes Labs*, https://blog.malwarebytes.com/awareness/2020/03/the-effects-of-climate-change-on-cybersecurity/)

By 2030, climate change costs are projected to cost the global economy $700 billion annually, according to the Climate Vulnerability Monitor. And The International Organization for Migration estimates that 200 million people could be forced to leave their homes due to environmental changes by 2050.

Climate change and its implications will act as a destabilizing factor on society. When livelihoods are in danger, this will spark insecurity and drive resource competition. This does not only have implications for physical security, but in modern society, this also has an impact on cybersecurity and its associated threats.

From a big picture, worst-case-scenario perspective, climate change could trigger profound international conflicts, which go hand-in-hand with cyberwar. Beyond nation-state activity, individuals that have no other means of providing for their families could turn to cybercrime, which is often seen as a low-risk activity with a potentially high yield.

### AT: Normal Means Solves Link

#### Fiat does not solve---the plan only durably fiats prohibitions on anticompetitive conduct, not that those are funded.

#### The 2AC needed normal means evidence---this is just an assertion we need not answer until they have any.

### AT: Biden/FTC Thump

#### Their ev all says that Biden’s XO has instructed agencies to increase enforcement in a ton of sectors, but they have not read any evidence those cases are beginning. They’ve dropped 1NC ev---Khan is filing suits only against Big Tech and Healthcare now, but healthcare is under the radar and on the chopping block, and suits will get axed in the event of ovestreth.

#### Health care enforcement is coming now---but it could be triaged in the case of overstretch

Galvin 9-10-2021 (Gaby, “Hospitals, Other Health Care Players Are Seeing ‘the Bar of Scrutiny’ Raised by Biden Regulators,” *Morning Consult*, <https://morningconsult.com/2021/09/10/health-care-antitrust-biden-administration/>)

When President Joe Biden tapped vocal critics of big tech companies for key antitrust roles, companies like Amazon.com Inc. went on high alert. But he’s pledged to crack down on anticompetitive behavior across sectors — including “unchecked mergers” in health care, and former officials and industry watchers say hospitals and other groups should tread carefully. Officials like Lina Khan, who was sworn in as chair of the Federal Trade Commission in June, and Tim Wu of the White House’s National Economic Council, haven’t gone public with how they plan to tackle health care consolidation. But early action from the administration points to hospital price transparency and heightened merger scrutiny as top priorities. “This administration is going to take a stronger approach to any antitrust enforcement than we’ve previously seen,” said Alexis Gilman, an antitrust lawyer at Crowell & Moring who worked in the FTC’s competition bureau, primarily during the Obama administration. “The bar of scrutiny does seem to have been raised.” Biden laid out his broad antitrust agenda in an executive order in July that singled out rural hospital closures and higher hospital prices in markets with little competition as reasons to support stronger FTC guidelines for health care mergers. Now, Gilman said the FTC appears to be taking more time to review details on proposed mergers that may have otherwise been cleared quickly or seen as “non-problematic.” The FTC’s public stances so far “reflect an agency that believes that prior enforcement has been a bit lax, and they’re going to tighten that up,” Gilman said. Health systems feeling the heat Industry watchers are taking cues from Sutter Health’s $575 million antitrust settlement, which received final approval from a federal judge in late August after a yearslong legal battle over allegations that the nonprofit health system in California engaged in price gouging. Notably, Health and Human Services Secretary Xavier Becerra sued Sutter Health in 2018 when he was California’s attorney general, and before joining the Biden administration, he said in March that he would continue to promote health care competition so patients “aren’t left holding the bag when big players dominate the market.” Given Becerra’s involvement, the case could offer a roadmap for health care competition policy in the Biden era at both the state and federal levels, said Elizabeth Mitchell, president and chief executive of the Purchaser Business Group on Health, which helped bring together employers and unions to file the lawsuit against Sutter Health. “I think it is very important that some of what we achieved in the Sutter case is applied more broadly,” Mitchell said. That includes efforts to promote hospital price transparency, a priority left over from the Trump administration. Meanwhile, Gilman points to the Sutter Health case and a federal settlement with North Carolina-based Atrium Health in 2018 as signs that health systems should “be a bit more cautious” when drawing up contracts that could be seen as anti-competitive, such as those that include measures that ban insurers from “steering” patients toward less expensive medical care or revealing pricing information. “I think there is — as a result of those two enforcement actions — increased risk, at the least for the largest systems that have meaningful shares in their local markets,” Gilman said. Provider groups are readying their defenses. In August, the American Hospital Association sent a letter to antitrust officials calling for more reviews of health insurance companies, saying payers have “largely escaped close scrutiny for conduct and practices that adversely impact both consumers and providers.” The group declined an interview request. David Maas, an antitrust lawyer at Davis Wright Tremaine LLP who works with health care providers, noted that ramped-up scrutiny on hospitals could hurt smaller physician groups or rural hospitals that are the only option for care in some communities. “We already have aggressive enforcement in that space, and it often is good and leads to more competitive marketplaces,” Maas said. “But just in the interest of being more aggressive, to push for even more enforcement in health care, I think could lead to some unfortunate outcomes, because a lot of health care providers are struggling.” Hospital mergers have slowed this year, with 27 deals completed in the first half of 2021 compared with 43 in the same time period last year, according to a Kaufman Hall analysis. While the number of deals has fallen, revenue is on par with previous years as health systems focus more on regional partnerships in new markets rather than acquiring smaller independent hospitals, the analysis said. Other health industries in regulatory crosshairs Hospitals aren’t the only health care groups getting a closer look in the Biden era. The FTC has also signaled interest in vertical mergers, when companies that don’t compete directly consolidate, and is looking to unwind life science company Illumina Inc.’s $7.1 billion acquisition of Grail Inc., which was finalized last month despite a lack of clearance from the FTC or European regulators. In Sept. 2 letters to GOP lawmakers who questioned the agency’s stance, Khan said the FTC is at a “crossroads” and has taken an “unduly permissive” approach in the past that’s allowed for massive companies to form across industries. Antitrust lawyers are closely watching the Illumina-Grail case, which will be “the first vertical merger case the FTC litigates in decades,” Gilman said. Another key deal to watch: Michigan-based Beaumont Health and Spectrum Health said last week they’re proceeding with a merger that would give the combined health system control of 22 hospitals, an outpatient business and a health plan covering 1 million people. If approved, the merger is expected to be finalized this fall. Collaborations between payers and providers — forming so-called “payviders” — have become increasingly common, with hospital systems launching their own health plans and health insurance giants such as UnitedHealth Group Inc. moving into health care delivery in recent years. “In the coming years, the for-profit insurers will start following United’s lead in acquiring, or effectively acquiring, more and more providers,” Maas said. Some analysts are skeptical of the Biden administration’s ability to meaningfully rein in such deals. “The idea that now Biden is going to direct the FTC to pay closer attention to health care mergers is a lot like closing the barn door after the horses have run out,” said Michael Abrams, co-founder and managing partner at health care consultancy Numerof & Associates. But “when you combine the payer and the provider, it’s the consumer who, more than ever, needs protection.” RELATED: Pharmacy Benefit Managers Are Feeling a Push From States to ‘Turn the Lights on’ to Their Business Practices Regulators picking their battles Going forward, Gilman said he expects agencies to “be less likely to either clear or settle vertical merger transactions” right away, which “could have some chilling effect.” But regulators will also have to “triage” top priority cases, given the FTC said it is being hit with a “tidal wave” of merger filings.

#### Law enforcement will be focused on health care now

Shryock 21, analyst @ Medical Economics (Todd, “Hospital consolidations in crosshairs of Biden administration,” *Medical Economics*, <https://www.medicaleconomics.com/view/hospital-consolidations-in-crosshairs-of-biden-administration>)

As part of a sweeping executive order, President Biden addressed hospital mergers and their sometimes negative effects on patients and the health care system. The order specifies that the Justice Department and Federal Trade Commission review and revise their merger guidelines to ensure patients are not harmed by the mergers. The administration points out that hospital consolidation has hit rural areas especially hard, leaving many patients without good options for convenient and affordable health care services. Since 2010, 139 rural hospitals have shuttered, including a high of 19 last year during the pandemic.

### AT: Covid Thumps Enforcement

#### CX exposed how hilarious this card is---FTC meetings having to be over zoom does not stop antitrust lawsuits, if anything, it speeds them up because now the FTC gets to meet virtually and doesn’t have to travel to do meetings!

### AT: Link Illogical

#### Enforcement of the aff saps law enforcement resources — individual cases created by the AFF take years to create, win appeals, and require extensive funding and staff hours — dafny establishes that resources are finite and create tradeoffs — Numerof is predictive and says those cuts will come from under the radar healthcare antitrust enforcement because big tech is on bidens agenda and khan and woo cant cut from the “attention grabbers” — empirics show they will choose to cut from health care

#### It’s not illogical---it’s a priority, but it’s on the chopping block which I did above. They won’t take more cases now but the plan forces that.

#### New enforcement priorities trigger a tradeoff from health care

Abbott 21, formerly served as general counsel of the Federal Trade Commission (Alden, “Lack of Resources and Lack of Authority Over Nonprofit Organizations Are the Biggest Hindrances to Antitrust Enforcement in Healthcare,” <https://www.mercatus.org/publications/antitrust-and-competition/lack-resources-and-lack-authority-over-nonprofit>)

Appropriate federal antitrust and consumer protection enforcement is good for the American economy. It promotes enhanced competition and consumer welfare. Regrettably, however, the effectiveness of federal enforcement in achieving these benefits is threatened by insufficient resources. As FTC Acting Chair Rebecca Kelly Slaughter explained in her April 20 testimony before the US Senate Committee on Commerce, Science, and Transportation, FTC employment has remained flat despite a growing workload, with merger filings doubling in recent years. Lauren Feiner reports on that testimony: “The absence of resources means that our enforcement decisions are harder,” [Slaughter] said. “If we think that we have a real case, a real law violation in front of us, but a settlement on the table that is maybe OK but doesn’t get the job done, we have to make difficult decisions about whether it’s worth spending a lot of taxpayer dollars to go sue the companies who are going to come in with many, many law firms worth of attorneys and expensive economic experts, versus taking that settlement.” I can attest to the accuracy of Slaughter’s observation, based on my experience as FTC general counsel in the Trump Administration. During my tenure, the FTC did indeed have to contend with resource limitations that adversely affected merger enforcement decision-making. The problem of resource constraints is particularly acute in the case of healthcare merger reviews, given the increasing consolidation of healthcare institutions. As one noted healthcare scholar stated in 2019, “The Affordable Care Act did not start the consolidation rapidly occurring with hospitals/health systems and medical groups, but it most definitely accelerated the movement to combine. In the last five years, the number and size of consolidations have been at an all-time high.”

#### Antitrust enforcers are drawing from other areas to challenge health care mergers now. The plan flips that strategy on its head.

Baer 20, Visiting Fellow, Governance Studies, The Brookings Institution (Bill, “Before the United States House Committee on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law,” <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-5.19.20-Submission-to-Subcommittee-on-Antitrust-Commercial-and-Administrative-Law-of-the-House-Judiciary-Committee.pdf>)

The dollars and resources need to be increased for a number of reasons. First, as I have discussed, the courts today place a high burden on the government to prove an antitrust violation. That means the enforcers need to devote significant resources to investigating and proving their cases, including extensive document reviews, witness interviews and depositions and expert opinion – industrial organization economists and others. It is time-consuming; it is expensive; and it is resource-intensive. As an example in 2016 the Antitrust Division challenged two proposed mergers that would have dramatically consolidated the health insurance industry: Anthem’s proposed acquisition of Cigna and Aetna’s effort to acquire Humana.13 We successfully persuaded the courts to enjoin both deals, but to get there required the commitment of 25 to 30% of the Division’s professional staff. My colleagues in the FTC’s Bureau of Competition were similarly constrained as they litigated in multiple forums during that same time. That inevitably meant other matters were understaffed. That is no way to ensure adequate enforcement.

#### The plan requires significant resources---that trades off with other areas

DOJ 15 (COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT : CHAPTER 9, originally published in 2008, updated in 2015, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-9)

The rapid changes and innovation typical of new-economy industries raise the question whether current antitrust enforcement mechanisms, which often involve lengthy investigation, followed by complex, time-consuming trials, are suitable for implementing effective remedies that adequately protect competition. Developing an equitable remedy in these markets has been likened to "trying to shoe a galloping horse."(116) One panelist observed that "the system seems broken in terms of speed, cost, and effectiveness of remedies."(117) Professor Hovenkamp explained the problem in the context of the Microsoft litigation: "[T]he legal wheels turn far too slowly. By the time each round of Microsoft litigation had produced a 'cure,' the victim was already dead."(118) Similar criticisms were directed to the long-running litigation against IBM. A panelist concluded that the IBM case highlights the "need for speed" and demonstrates "how the industry and the technology tend to change in a manner that by the time you are done, everything you thought when you started the case is irrelevant."(119) The time required for litigation may present particularly acute concerns in new-economy industries because in many instances, if anticompetitive conduct has eliminated potential competitors, the opportunity for robust competition may be difficult to recreate. As one panelist explained, in fast-moving, high-technology markets, "it's extremely difficult to resuscitate a competitor, after the competitor has been crushed. The convergence of factors that produced a competitive challenge before it was anticompetitively excluded[] may never re-appear, not in the same fashion, anyway."(120) To be sure, antitrust litigation ideally would be more rapid, reaching resolution and a remedy before the markets change significantly. In some cases, this issue can be addressed by consent decrees entered into before litigation; in others, it may suggest seeking preliminary injunctive relief. More generally, the effort to develop clear, objective standards for liability discussed in chapters 1-8 can help address this concern. The clearer and more objective the standard for liability, the more efficient and effective the antitrust enforcement. Violations are more likely to be deterred, litigation is likely to be faster and less expensive, and parties are more likely to reach prompt and effective settlements. Once an appropriate judgment has been issued, steps can be taken to ensure the efficacy of relief in dynamic industries. One possibility is to fashion remedies that go beyond the precise conduct at issue. For example, some panelists suggested that, before the Microsoft litigation ended, "the browser wars were over."(121) For that reason, the remedies at least partially focused on protecting competition that might arise through future middleware technologies. Of course, even when an industry's dynamic nature makes effective injunctive relief problematic, antitrust enforcement continues to play an important role. Thus, the Microsoft court recognized that, while the passage of time in fast-changing settings threatens enormous practical difficulties for courts considering the appropriate measure of relief . . . . [e]ven in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not."(122) The same potential for dynamic change between complaint and judgment that complicates crafting a remedy in the first place raises further complexity after a remedy is in place. Panelists warned that when technology is changing rapidly, a fixed remedy running years into the future may have damaging, unintended consequences.(123) Panelists' general admonitions that decrees should provide adequate flexibility(124) and should run no longer than necessary for re-establishing the opportunity for competition are therefore particularly applicable to cases in technologically dynamic settings.(125) V. Monetary Remedies The antitrust-remedial system in the United States is not limited to conduct and structural remedies. There are also a variety of monetary remedies available that can both deter future anticompetitive conduct and help restore injured parties to the position they would have been in without the unlawful conduct. Private plaintiffs in antitrust cases can seek monetary damages, which by law are trebled automatically.(126) Similarly, the federal government may seek treble damages in instances in which anticompetitive conduct harmed the United States itself,(127) and the states may recover damages they suffered themselves as well as on behalf of injured citizens in their parens patriae capacity.(128) In addition, certain monetary equitable remedies, such as disgorgement and restitution, may be available.(129) The antitrust enforcement agencies, however, do not have the authority to impose civil fines. Private Monetary Remedies--Treble Damages The U.S. antitrust laws permit private plaintiffs to recover three times the damages they prove they have suffered. Although treble damages can increase deterrence and overall enforcement, a number of observers argue that, in the section 2 context, treble damages also can chill procompetitive conduct and that the rationale for trebling is weaker here than in other contexts. As explained below, these concerns have led to questions about the appropriateness of treble damages in private section 2 cases. A successful plaintiff in a section 2 case is entitled to recover "threefold the damages by him sustained."(130) Plaintiffs also may recover attorneys' fees and, in limited circumstances, pre-judgment interest.(131) These private monetary remedies provide incentives for private enforcement and advance at least three important goals: deterrence, punishment of wrongdoers, and compensation of victims.(132) Trebling damages generally increases deterrence by compensating for the possibility that anticompetitive conduct will not be detected and prosecuted.(133) Likewise, the possibility of winning multiple damages enhances plaintiffs' incentives to seek out and detect anticompetitive conduct and to bear the time, expense, and uncertainty of bringing suit.(134) The Department believes that private actions and resulting monetary remedies play an important role in overall antitrust enforcement. The government has finite resources to prosecute antitrust violations; private enforcement supplements these efforts. Indeed, private plaintiffs, rather than the government, undertake a significant portion of antitrust enforcement, including section 2 enforcement.(135) Moreover, by deterring violations, private damages can reduce the need for government enforcement in the first instance.

### AT: Foreign Suits

#### Just pointing out they agreed this isn’t an arg in CX---foreign private lawsuits would obviously not matter for DOJ or FTC resources.

### AT: Agencies Wrecked

#### This was answered above.

#### Good lines are about dozens of regulatory agencies doing stuff, not FTC and DOJ. It encourages DOJ and FTC to challenge stuff, we’ve read ev that describes the way they are enforcing it

MFEM 8/19, Masuda, Funai, Eifert & Mitchell, Ltd., "The Implications of President Biden's ‘Executive Order on Promoting Competition in the American Economy’," Mondaq, 08/19/2021, https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1103288/the-implications-of-president-biden39s-executive-order-on-promoting-competition-in-the-american-economy.

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

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

Although the implications of the Order are not limited to the area of antitrust, the Order reflects the Biden Administration's emphasis on it. For example, the Order encourages the DOJ and other agencies responsible for banking to update guidelines on banking mergers to provide heightened scrutiny of mergers. The Order also encourages the DOJ and the FTC to challenge prior “bad mergers,” meaning that mergers that went unchallenged under previous administrations may be challenged in the future. Another specific area that the Order focuses on is the right to repair; it encourages the FTC to limit equipment manufacturers from limiting consumer's rights to repair.

Other affected areas of law include, but are not limited to, labor and employment (e.g. non-compete agreements) and consumer protection (e.g. financial data portability). Corporations with any significant activity in the United States should assess the impact that the Order would have on their businesses and prepare for the materialization of the specific initiatives included in the Order.

#### It’s hollow – the FTC is too busy, has resource shortages and enforcement efforts are having a reverse effect.

Lachapelle 8-26-21, Tara Lachapelle is a Bloomberg Opinion columnist covering the business of entertainment and telecommunications, as well as broader deals. She previously wrote an M&A column for Bloomberg News. (Tara, 8-26-2021, "Wall Street Is Ready To Put Lina Khan’s FTC To The Test", Washington Post, https://www.washingtonpost.com/business/wall-street-is-ready-to-put-lina-khans-ftc-to-the-test/2021/08/25/cb55d2c2-059c-11ec-b3c4-c462b1edcfc8\_story.html)

An overburdened U.S. Federal Trade Commission is warning acquirers that if they get impatient and close any deals without the agency’s permission, it just might slap them with a lawsuit. Dealmakers won’t hold their breath.

As President Joe Biden pushes for more aggressive antitrust enforcement — an effort spearheaded by legal scholar Lina Khan, his controversial pick to lead the FTC — the agency is running up against practical limitations. It’s working with very limited resources for a very large number of deals. How large? So far this year, nearly 10,000 U.S. companies agreed to be acquired for a combined deal value of $1.25 trillion, data compiled by Bloomberg show. That’s already surpassed last year’s sum and may even be on track for a record. Not all of those tie-ups will require regulatory approval but in July alone, 343 transactions filed premerger notifications and are awaiting review, compared with 112 in July 2020, according to the FTC.

Chart, bar chart

Description automatically generated

These filings start a 30-day clock for regulators to decide whether to further investigate a deal. If that waiting period expires without any action, a company would typically take that to mean that it’s free to complete the transaction. But now the FTC says it can’t get to its backlog fast enough and that inaction on its part doesn’t signal permission to proceed. In warning letters sent to filers this month, the agency said companies that go ahead anyway do so at their own risk because the FTC might later decide a deal violates antitrust laws and sue to undo it — and what a mess that would create for buyers and sellers. And yet, if the agency thought such an aggressive move might discourage mergers, it was wrong.

“To my mind, it is a completely hollow threat and makes the agency look weak,” Joel Mitnick, a partner in the antitrust and global litigation groups at law firm Cadwalader, Wickersham & Taft LLP, said in a phone interview. “They’re saying they’re going to ignore the statutory time limits on them whenever they feel like it and continue to investigate transactions until they’re satisfied. But it’s very difficult for the agency to sue to unwind the transaction once the eggs are scrambled.”

### AT: Plan = Small

#### Their convincing spin about how small the plan is does not matter---there are still tons of lawsuits that have to happen to enforce the AFF against every company taking too many domains, etc., which sucks up resources.

### AT: Covid X HC

#### Not about rural care---our internal link isn’t healcare, it’s just the existence of hospital mergers which prevent rural communities that are key to US ag.

#### FTC enforcement solves every warrant---prevents consolidation and increases access.

Gustafsson & Blumenthal 21, \*Lovisa Gustafsson is an assistant vice president at the Commonwealth Fund. She previously consulted for investor and industry clients on health policy and strategy issues. \*David Blumenthal, MD, is president of the Commonwealth Fund. He previously served as the National Coordinator for Health IT in the Obama Administration. (March 9th, 2021, “The Pandemic Will Fuel Consolidation in U.S. Health Care”, [https://hbr.org/2021/03/the-pandemic-will-fuel-consolidation-in-u-s-health-care#](https://hbr.org/2021/03/the-pandemic-will-fuel-consolidation-in-u-s-health-care))

Concentration in the U.S. health care sector has been on the rise over the past two decades. Starting with horizontal consolidation, it has spread to vertical mergers and acquisitions and megamergers of national players at multiple levels of the supply chain. Given the financial difficulty that many providers have suffered during the pandemic, this trend is likely to [continue](https://www.healthcarefinancenews.com/news/ma-activity-expected-surge-independent-health-systems-look-partners), reducing competition and increasing prices. In light of this danger, Congress and regulators should take steps now to [more fully assess the impact](https://www.urban.org/research/publication/addressing-health-care-market-consolidation-and-high-prices/view/full_report) and curb those combinations that adversely impact payers and patients.

Studies to date tend to rebut the argument that acquisitions improve efficiencies, reduce costs, and lead to better care coordination. Instead, they show that consolidation increases prices and fails to improve the quality of care. For example, hospitals’ acquisitions of physicians’ practices in California has been linked to higher prices for primary care and specialist services and to increases in insurance premiums.

There is some help on the way. In January, the Federal Trade Commission (FTC) [issued orders](https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers) to six large insurers (Aetna, Anthem, Florida Blue, Cigna, Health Care Service Corporation, and UnitedHealthcare) to provide commercial claims data for hospital inpatient and outpatient and physician services in 15 states from 2015 to 2020. These directives aim to provide more detailed evidence about how mergers of physician practice and hospitals’ acquisitions of physician practices affect competition. And this potentially opens the door for oversight at the state and federal level.

### AT: Food

#### Just going to point out the 1NC and 2AC both did not read food defense so it doesn’t matter.

#### 