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#### **T: PER SE**

#### Interpretations:

#### 1---“business practices” are ongoing conduct defined by the behaviors of many market participants

MacIntosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University. (Kerry Lynn, “LIBERTY, TRADE, AND THE UNIFORM COMMERCIAL CODE: WHEN SHOULD DEFAULT RULES BE BASED ON BUSINESS PRACTICES?” *William and Mary Law Review*, vol. 38, no. 4, May 1997, p. 1465-1544. HeinOnline, Accessed: 8-27-2021)

These new and revised articles reflect a strong trend toward choosing default rules4 that codify existing business practices.5 [[BEGIN FOOTNOTE 5]] 5. In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2). [[END FOOTNOTE 5]] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

**Only per se illegality forbids a practice---rules of reason prohibit anticompetitive effects for individual acts, not the practices themselves.**

Stevens 90, Justice, Supreme Court of the United States (John Paul, “FTC v. Superior Court Trial Lawyers Ass'n,” 493 U.S. 411, Lexis)

LEdHN[3C] [3C]LEdHN[14] [14]Equally important is the second error implicit in respondents' claim to immunity from the per se rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. 15 The opinion further assumed that the per se rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U.S. App. D. C., at 295, 856 F. 2d, at 249.This statement contains two errors. HN10 [\*\*\*\*42] The per se [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the per se rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The per se rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

[\*\*\*\*43] LEdHN[15] [15]As we explained in Professional Engineers, HN11 the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U.S., at 692.

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 (1982).

[\*\*781] LEdHN[16] [16] [\*\*\*\*44] The per se rules in antitrust law serve purposes analogous to per se restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these per se rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

**2---“prohibition” means forbid.**

**Eaton** et al. **17**, Joseph Van Eaton, Gail Karish, Gerard Lavery Lederer, lawyers for Best Best & Krieger, Llp. Michael Watza, (3-8-2017, KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK, “BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C”, COMMENTS OF SMART COMMUNITIES SITING COALITION, https://tellusventure.com/downloads/policy/fcc\_row/smart\_communities\_siting\_coaltion\_comments\_mobilitie\_8mar2017.pdf)

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

#### The rule of reason is the opposite of a prohibition.

Loevinger 61, Assistant Attorney General in charge of the Antitrust Division. (Lee, “The Rule of Reason in Antitrust Law”, *Section of Antitrust Law* , Vol. 19, PROCEEDINGS AT THE ANNUAL MEETING, ST. LOUIS, MISSOURI, AUGUST 7 THROUGH 11, 1961, pp. 245-251, JSTOR, Accessed: 9-13-2021)

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

#### Violation: it’s impossible to determine whether practices preclude litigants from winning antitrust cases without effect-based analysis

#### Vote neg:

#### 1---GROUND---balancing tests devastate core links, because they allow the practice when it’s beneficial. AND, creates a moving target, because the disallowed behavior is context-dependent.

#### 2---LIMITS---they lead to a wave of novel legal standard plans.

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#### RACIAL CAPITALISM:

#### The plan strengthens free markets and saves capitalism.

Parakkal & Bartz-Marvez 13, \*Assistant Professor of International Relations, Philadelphia University, \*\*Visiting Assistant Professor, Department of Economics, University of Miami. (Raju, Sherry, Winter 2013, “Capitalism, democratic capitalism, and the pursuit of antitrust laws”, The Antitrust Bulletin, Vol. 58, No. 4, DOI: 10.1177/0003603X1305800409)

Antitrust laws have historically been associated with countries that possess a free-market capitalist economy, which is understood as an economic system in which competition and the market forces of demand and supply determine economic outcomes. This historical association between capitalism and antitrust laws is evident from the fact that the countries that first adopted national antitrust laws, such as Canada, the United States, and the countries of Western Europe, are countries that have long embraced a market economy. On the contrary, the statist economies of the erstwhile Soviet bloc and many developing countries, for the most part, did not institute antitrust laws of the type associated with free market economies. Notwithstanding these country examples, which indicate a positive association between a capitalist economic system and antitrust laws, there exist arguments that both support and oppose antitrust laws for a capitalist economy. Arguments in support of antitrust laws for a capitalist economy begin with the fundamental understanding that the most important ingredient of a capitalist system is market competition. The presence of a competitive market is vital to achieving the efficiency levels that a capitalist economy seeks. Therefore, competitive forces need to be protected to discipline the market players, especially the dominant ones. By preventing and punishing anticompetitive practices by market players, an antitrust law protects and promotes market competition. 1 In the United States, which is commonly understood to be the leading bastion of free-market capitalism and one of the first countries to enact an antitrust law, the role of antitrust legislation in preserving the capitalist character of its economic system is underscored by the near-constitutional status accorded to its antitrust statues by the U.S. Supreme Court. 2 The Court described these statutes as “the Magna Carta of free enterprise” and “as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”3 Such a sentiment is appropriate, given that the American antitrust law, the Sherman Act, was passed in 1890 to protect economic competition from rapidly-growing “trusts.”4 While the social and political zeitgeist has changed considerably since the passing of the Sherman Act, the fact remains that antitrust is perceived as key to “protecting consumers against anticompetitive conduct that raises prices, reduces output, and hinders innovation and economic growth.”5 Moreover, it is understood that “competition is a public good, and society cannot expect the victims of anticompetitive conduct to protect themselves.”6 The implication therefore is that government power, through the enforcement of antitrust statutes, is critical to reining in corporate power in order to protect economic competition and capitalism.

#### Racial capitalism subordinates billions and threatens extinction.

Gonzalez 20, Morris I. Leibman Professor of Law at Loyola University Chicago School of Law and Professor Emerita at Seattle University School of Law. (Carmen, 10-27-2020, "Climate Change and Racial Capitalism", *LPE Project*, <https://lpeproject.org/blog/climate-change-and-racial-capitalism/>)

Racialized communities have borne the brunt of the carbon-based capitalist world economy from its colonial origins through the contemporary climate crisis. They have been enslaved, exploited, dispossessed, and subjected to both the physical violence of invasion and occupation and the structural “slow violence” of polluting industry. From the Niger Delta to the Canadian tar sands, racially subordinated populations living in the shadows of oil drilling, coal mining, oil and gas pipelines, power plants, refineries, and petrochemical plants are poisoned by toxic chemicals and treated as surplus and disposable. In my article in the inaugural issue of JLPE, I break new ground by examining climate change and climate change-induced displacement through the framework of racial capitalism. Drawing upon the work of political theorist Cedric Robinson and sociologist Aníbal Quijano, I treat racism and capitalism as inextricably intertwined. Robinson argues that capitalism emerged from a feudal order thoroughly infused with racial (or proto-racial) hierarchies. Quijano identifies Europe’s violent conquest of the Americas as the pivotal event that globalized white supremacy and established the capitalist world economy. Both have analyzed how racism makes oppression socially acceptable by portraying large segments of humanity as inferior, unworthy, and expendable. In my article, I focus on how the global capitalist order has used racism to create the conditions for the massive unchecked resource extraction that has caused global climate change and for pushing the burden of its impacts onto those who are most vulnerable and least responsible. CLIMATE INJUSTICE Climate change is caused primarily by the world’s most affluent inhabitants but threatens the lives and livelihoods of those who contributed least to the problem. As climate change intensifies, those most susceptible to climate-related disasters and displacement are also overwhelmingly persons classified as non-white. They reside in vulnerable geographic locations (such as coastal zones, the Arctic, and the Pacific island states), and have been deprived of the resources to protect themselves from harm through centuries of predatory economic policies. Despite the disproportionate impact of climate change on vulnerable populations who have been largely ignored due to their racialization, legal scholarship on climate displacement has often adopted a doctrinal approach that fails to analyze the underlying systemic causes of the climate crisis and its relationship to race and racism. I focus on international law in particular. CLIMATE CHANGE AND INTERNATIONAL LAW International law has mounted an inadequate response to the climate crisis. The climate treaties have failed to curb global temperature increases, and have delivered insufficient adaptation assistance to climate-vulnerable states and peoples. Even though climate-related disasters and slow-onset events (such as sea level rise) threaten to displace millions of people, international law provides very limited protection to persons who flee their country of origin to escape the ravages of climate change. Neither the 1951 Refugee Convention nor the treaties governing climate change requires countries to admit climate-displaced persons. Part of the problem is that international law has been complicit in the project of racial capitalism. As Antony Anghie explains, international law originates in the colonial encounter and has justified successive Northern interventions in the Global South through a variety of doctrines – including terra nullius, the doctrine of discovery, the mandate system, trusteeship, modernization, and development. International law has depicted Southern peoples as so primitive, savage, uncivilized, backward, and under-developed that their lives, livelihoods, and cultures are unworthy of protection. It has also created the rules and institutions of the capitalist world system through which Northern states and transnational corporations maintain an iron grip on the states and people of the South, including trade law, foreign investment law, and international financial institutions such as the World Bank and the International Monetary Fund. EMERGING LEGAL AND POLICY RESPONSES TO CLIMATE DISPLACEMENT In the absence of a binding legal framework, three emerging legal and policy responses to climate displacement threaten to reinforce racialized hierarchies and to trap large segments of humanity in places that are becoming uninhabitable. First, the national security response constructs climate-displaced persons as barbarians crashing the gates of civilization, and has fostered the criminalization, detention, and expulsion of migrants. Second, the humanitarian response reinforces racial hierarchies by portraying climate-displaced persons as primitive, backward, and in need of charity rather than justice. Its voluntary initiatives to protect disaster-displaced persons obscure the Global North’s responsibility for climate change and have little chance of succeeding at a time of rising nationalism and xenophobia. Third, the migration management response encourages climate-displaced persons to finance climate resilience in their home countries through temporary labor migration. This approach shifts responsibility for climate change adaptation from affluent states to exploitable workers from the world’s poorest and most climate-vulnerable populations. The exodus of able-bodied workers may also exacerbate the vulnerability of “trapped populations” (darker-skinned, older, disabled) by producing a brain drain, labor shortages, and reliance on erratic remittance flows. A JUST SOLUTION TO CLIMATE DISPLACEMENT? Another way is possible. Climate-vulnerable states and peoples have called for an approach to climate displacement grounded in their collective right to self-determination and to legal continuity as self-governing communities on the territories of other states. This proposal deserves consideration. Successful implementation of it requires a responsibility-based framework that imposes obligations on affluent states to finance the mobility decisions of climate-displaced populations based on their contribution to the climate crisis. The self-determination approach is an example of the ways that Southern states and peoples are developing counter-hegemonic interpretations of international law that will permit them to shape their own history and transcend the colonially-imposed borders that impede mobility and increase climate vulnerability. An analysis of climate displacement grounded in racial capitalism must identify who benefits from policies that stoke racism and militarize borders. These beneficiaries include the corporations that provide surveillance, border walls, and detention facilities; the security apparatus of the state; the businesses that exploit undocumented or incarcerated migrants; and the authoritarian populists who demonize migrants in order to persuade working class whites to support policies that intensify economic inequality and hasten catastrophic climate change. Although greenhouse gases do not respect national borders, national elites deploy racialized systems of border control to perpetuate the illusion that persons classified as white can somehow escape the economic and ecological ravages of capitalism by erecting walls and fortresses. Racism enables states and corporations to pursue policies catastrophic to the planet and its inhabitants because the worst and most immediate consequences are inflicted on stigmatized populations in the sacrifice zones of the fossil fuel economy. While focusing on the problem of climate displacement, the article uses the framework of racial capitalism to highlight how the struggles for racial, economic, and climate justice are interconnected and interdependent. Racism creates divisions between people whose economic and ecological vulnerability should serve as the basis for solidarity and resistance. As economic inequality increases and the planet’s ecosystems are brought to the brink of collapse, all but the ultra-affluent will become frontline communities in an increasingly damaged and dangerous world. Deconstructing racial hierarchies is necessary in order to foster the collective action required to avert climate catastrophe. Climate change is not an isolated crisis, but a symptom of an economic (dis)order that jeopardizes the future of life on this planet. Through a race-conscious analysis of climate change grounded in political economy, this article seeks to engage scholars in a variety of disciplines in order to develop more robust critiques of the laws, institutions, and ideologies that maintain racial capitalism and pose an existential threat to humanity.

#### Vote neg to reject the aff and affirm place-based cooperatives.

Bledsoe et al. 19, \*Adam, assistant professor in the Department of Geography and African American Studies Program at Florida State University. \*\*Tyler McCreary, assistant professor in the Department of Geography at Florida State University, \*\*\*Willie Jamaal Wright, assistant professor of geography at Florida State University. (“Theorizing diverse economies in the context of racial capitalism”, *Geoforum*, <https://doi.org/10.1016/j.geoforum.2019.07.004>)

As acknowledged in the literature above, unorthodox value systems and modes of production are often present within Black-led cooperatives. Through collective community-building initiatives by groups like Cooperation Jackson and Cooperative Community of New West Jackson, Jackson has risen as a promising place for the incubation and application of economic, spatial, and political alternatives. Applying the analytic of marronage to discussions of commoning can contribute timely, place-based contributions to the study of cooperatives and the commons. Thinking of the commons, particularly of urban commons, through a lens of marronage may help residents and organizers in selecting and acquiring common property as well as in recreating modes of living beyond and before the (re)imposition of capital. Though communities are adept at determining their needs, as efforts such as D-Town Farms and the CCNWJ indicate, making academic resources, concepts, and methods available to collective and cooperative practices may lead to any number of fruitful and unforeseen outcomes. Finally, as residents and researchers are not immune to the trappings of spatial imaginaries based in logics of individual ownership (see Wright and Herman, 2018), an analytic of marronage has the potential to influence the spatial imaginaries of residents and researchers, alike, so that more of us come to view landscapes of marronage as more than blank slates for capitalist development but as the future of innumerable publics.

7. Conclusion

Analyses of racial capitalism are necessary in the drive to create alternatives to capitalism. If diverse economies hope to address phenomena like urban decay, gentrification, and environmental degradation, they must first recognize that notions of racial difference make such arrangements possible. Urban disinvestment, the repurposing of urban space, and the treatment of spaces as empty contribute directly to the reproduction of capitalist modes of production. In the context of North America, these mechanisms of accumulation occur precisely because the communities most affected by them remain subordinated to logics of conquest. The afterlives of settler colonialism and chattel slavery inform the realities of present-day capitalism, as the displacement and spatial fixing of Indigenous and Black populations—central to the initial rise of global capitalism—continue to be central characteristics of capital accumulation. Creating alternatives to capitalism thus means first recognizing how conquest continues to structure capitalist modes of production.

In the examples given above, Black and Indigenous communities provide clear analyses of the logics and concrete economic factors that oppress them. In recognizing how economic abandonment and intentional disinvestment from city spaces serve to reproduce capitalism and oppress their communities, Black communities in Detroit and Jackson and Indigenous communities in Winnipeg and Minneapolis offer a grounded theory of racial capitalism. These communal analyses explore particular manifestations of present-day capitalism, uncovering how capital accumulation takes place via the oppression of racialized populations. More importantly, these communities push beyond a diagnosis of oppressive dynamics and create place-specific alternatives to the expressions of capitalism they encounter. The establishment of public housing in Winnipeg and Minneapolis and the cultivation of commons through practices of marronage in Detroit and Jackson both entail alternatives to the forms of capitalism that displace the Indigenous and Black communities present in those cities. These communities, then, employ an analysis of racial capitalism to enact diverse economies.

Literature on diverse economies and actual, material creations of alternatives to capitalism can look to examples like those described above as they try to envision and implement economies that do not reproduce capitalist modes of production. Winnipeg, Minneapolis, Detroit, and Jackson are hardly the only locations in which capitalism has taken hold, and different locations will have to wage their own struggles against the specific forms of capitalism they face. Nonetheless, the movements described in this paper offer an important blueprint for how analysis and praxis can walk hand in hand. To create futures not dominated by capitalism requires both an honest assessment of the workings of racial capitalism and the ability to create alternatives to such arrangements. Looking to examples like those above are a starting point from which we can take both of these steps.

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#### NOTICE-AND-COMMENT CP:

#### The United States federal government ought to initiate notice-and-comment rulemaking to substantially increase its prohibitions on anticompetitive business practices by the private sector that preclude litigants from effectively vindicating their statutory causes of action in antitrust suits and implement the results pursuant to Administrative Procedure Act protocol.

#### The plan’s unannounced, unconditional mandate locks out public input and violates due process---turns solvency.

Chopra & Khan 20, \*Rohit, MBA, Commissioner, Federal Trade Commission; & \*\*Lina M., JD, current chair of the Federal Trade Commission, Counsel of the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary. (2020, "The Case for “Unfair Methods of Competition” Rulemaking," *University of Chicago Law Review*, Vol. 87 Iss. 2, Article 4, pg. 359-367, Accessible at: <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4>)

I. THE STATUS QUO: AMBIGUOUS, BURDENSOME, AND UNDEMOCRATIC?

Antitrust law today is developed exclusively through adjudication. In theory, this case-by-case approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the “rule of reason” standard. The “rule of reason” involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for “speculative, possibly labyrinthine, and unnecessary” analysis and appears to exceed the abilities of even the most capable institutional actors.1 Generalist judges struggle to identify anticompetitive behavior2 and to apply complex economic criteria in consistent ways.3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer.4 And if a standard isn’t administrable, it won’t yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms into their business decisions.5 Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.6

**[BEGIN FOOTNOTE 6]**

6. See FCC v Fox Television Stations, Inc, 567 US 239, 253 (2012). A lack of fair notice raises constitutional due process concerns. As the Supreme Court has explained, fair notice concerns arise when a law or regulation “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” Id (citations omitted)

**[END FOOTNOTE 6]**

Decades ago, former Commissioner Philip Elman observed that case-by-case adjudication “may simply be too slow and cumbersome to produce specific and clear standards adequate to the needs of businessmen, the private bar, and the government agencies.”7 Relying solely on case-by-case adjudication means that businesses and the public must attempt to extract legal rules from a patchwork of individual court opinions. Because antitrust plaintiffs bring cases in dozens of different courts with hundreds of different generalist judges and juries, simply understanding what the law is can involve piecing together disparate rulings founded on unique sets of facts. All too often, the resulting picture is unclear. This ambiguity is compounded when the Supreme Court assigns to lower courts the task of fleshing out how to structure and apply a standard, potentially delaying clarity and certainty for years or even decades.8

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business. Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms.14 Over the last decade, expenditures on expert costs by public enforcers have ballooned.15 In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.16

Another component of the burden is that antitrust trials are extremely slow and prolonged.17 The Supreme Court has criticized antitrust cases for involving “interminable litigation”18 and the “inevitably costly and protracted discovery phase,”19 yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”20 That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.21 The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.22

Lastly, the current approach deprives both the public and market participants of any real opportunity to participate in the creation of substantive antitrust rules.23 The exclusive reliance on case-by-case adjudication leaves broad swaths of market participants watching from the sidelines, lacking an opportunity to contribute their perspective, their analysis, or their expertise, except through one-off amicus briefs.24 Nascent firms and startups are especially likely to be left out—despite the vital role they play in the competition ecosystem—given that they do not comprise a significant portion of the parties represented in litigated matters, and they usually lack the resources to engage in amicus activity. Furthermore future entrants, whose interests should be carefully considered in all aspects of competition law and policy, have no voice.

Firms, entrepreneurs, workers, and consumers across our economy vary wildly in their experiences and perspectives on market conduct. Enforcement and regulation of business conduct can more successfully promote competition when it incorporates more voices and evidence from across the marketplace.

#### Fidelity to notice-and-comment [N&C] solves.

Chopra & Khan 20, \*Rohit, MBA, Commissioner, Federal Trade Commission; & \*\*Lina M., JD, current chair of the Federal Trade Commission, Counsel of the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary. (2020, "The Case for “Unfair Methods of Competition” Rulemaking," *University of Chicago Law Review*, Vol. 87 Iss. 2, Article 4, pg. 367-370, Accessible at: <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4>)

We see three major benefits to the FTC engaging in rulemaking under “unfair methods of competition,” even if the conduct could be condemned under other aspects of antitrust laws. As we describe above, the current approach generates ambiguity, is unduly burdensome, and suffers from a democratic participation deficit. Rulemaking can benefit the marketplace and the public on all of these fronts.

First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable.43 The APA requires agencies engaging in rulemaking to provide the public with adequate notice of a proposed rule. The notice must include the substance of the rule, the legal authority under which the agency has proposed the rule, and the date the rule will come into effect.44 An agency must publish the final rule in the Federal Register at least thirty days before the rule becomes effective.45

These procedural requirements promote clear rules and provide clear notice. As the Supreme Court has stated, a “fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”46 Clear rules also help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively and will allow market entrants and entrepreneurs to compete on more of a level playing field.

Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials. Identifying ex ante what types of conduct constitute “unfair method[s] of competition” would obviate the need to establish the same exclusively through ex post, case-by-case adjudication. Targeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted litigation, potentially saving significant resources on a present-value basis.47

Moreover, establishing a rule through APA rulemaking can be faster than litigating multiple cases on a similar subject matter. For taxpayers and market participants, the present value of net benefits through the promulgation of a clear rule that reduces the need for litigation is higher than pursuing multiple, protracted matters through litigation. At the same time, rulemaking is not so fast that it surprises market participants. Establishing a rule through participatory rulemaking can often be far more efficient. This is particularly important in the context of declining government enforcement relative to economic activity, as documented by the ABA.48

And third, rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.49 APA procedures require that an agency provide the public with meaningful opportunity to comment on the rule’s content through the submission of written “data, views, or arguments.”50 The agency must then consider and address all submitted comments before issuing the final rule. If an agency adopts a rule without observing these procedures, a court may strike down the rule.51

This process is far more participatory than adjudication. Unlike judges, who are confined to the trial record when developing precedent-setting rules and standards, the Commission can put forth rules after considering a comprehensive set of information and analysis.52 Notably, this would also allow the FTC to draw on its own informational advantage—namely, its ability to collect and aggregate information and to study market trends and industry practices over the long term and outside the context of litigation.53 Drawing on this expertise to develop rules will help antitrust enforcement and policymaking better reflect empirical realities and better keep pace with evolving business practices.

Given that the FTC has largely neglected this tool, some may question the Commission’s authority to issue competition rules and the legal status these rules would have.54 Indeed, a common misconception is that this authority is extremely limited because FTC rulemaking is subject to the extensive hurdles posed by the Magnuson-Moss Warranty–Federal Trade Commission Improvements Act55 (“Magnuson-Moss”). In reality, Magnuson-Moss governs only rulemakings interpreting “unfair or deceptive acts or practices.”56 For rules interpreting “unfair methods of competition,” the FTC has authority to engage in participatory rulemaking pursuant to the APA. Several antitrust scholars have affirmed this authority, and the Appendix lays out further background on and discussion of it.57

#### Democracy solves extinction.

Twining 21, PhD, president of the International Republican Institute, former director of the Asia Program at the German Marshall Fund. (Daniel, 10-10-2021, "America must double down on democracy", *The Hill*, <https://thehill.com/opinion/campaign/575693-america-must-double-down-on-democracy>) \*language edited

The hard truth is that a world that is less free is one that is less secure, stable and prosperous. The greatest dangers to the American way of life emanate from hostile autocracies. There are no quick fixes, but the best antidotes to the challenges of great-power conflict, terrorism and mass migration of desperate refugees lie in the building of inclusive democratic institutions — and working with allied democracies to sustain the free and open order that China, in particular, wishes to replace with a world that’s safe for autocracy. The conventional wisdom that authoritarianism has popular momentum is wrong. No one anywhere is taking to the street to demand more corrupt governance, the adoption of one-man rule, a stronger surveillance state, or greater intervention by malign foreign powers. Democratic freedoms are unquestionably under assault in many nations. Autocrats are aggressive precisely because of the growing demands for change in their more modern, connected societies — and the rising risk that middle classes in nations such as China and Russia will not be willing forever to forfeit political rights for prosperity. American retrenchment and isolationism compound the danger. It would be nice to live in a world where failed states and dictatorships were a problem for someone else to worry about. But rather than producing stability, Western retreat only emboldens autocrats in ways that amplify dangers to American national security. We know that violent extremism flourishes under state failure and dictatorship. Broken states become breeding grounds for extremist groups because they leave vacuums that terrorists are only too happy to fill. In nations without democratic accountability, citizens become drawn to the only forms of expression available to them, which are often violent and extreme. The good news is that we have billions of allies around the world: citizens on every continent chafing for greater freedom and dignity. They do not want U.S. military-led nation-building. They want peaceful support for their independent efforts to create democratic space in systems distorted by overweening government control, dangerous governance gaps and foreign malign influence. The free world cannot be neutral in the face of autocracy’s resurgence. Rather, it should play to its strengths. The appeal of democratic opportunity is a strategic asset for the United States — despite our own shortcomings — because people around the world similarly aspire to live in societies that guarantee justice, rights and dignity. America’s closest allies are democracies. Democracies don’t fight each other, export violent extremism, or produce the conflicts that drive mass migration. Democracies are better partners in fighting terrorism, human trafficking and poverty, as well as establishing reliable trading relationships. Open societies incubate the technologies that will help solve the world’s most pressing problems, including climate change. Citizens can hold leaders accountable when they fall short, and democratic institutions are stronger than any [individual] ~~man~~ — as America itself witnessed after the assault on the U.S. Capitol on Jan. 6.

### 1NC

#### REGULATION CP:

#### The United States federal government should establish regulations that prohibit anticompetitive business practices by the private sector that preclude litigants from effectively vindicating their statutory causes of action in antitrust suits.

#### Regulations solve

Mullenix 14, Chair in Advocacy, University of Texas School of Law (Linda, “ENDING CLASS ACTIONS AS WE KNOW THEM: RETHINKING THE AMERICAN CLASS ACTION,” *Emory Law Journal*, Lexis)

A third rationale in support of the class action rule posits that class action procedures enhance judicial efficiency and economy, which is largely a utilitarian justification for the rule.89 In this view, class litigation benefits not only the parties to a massive dispute but also serves the interests of the federal judiciary, which otherwise might be burdened with hundreds or thousands of repetitive, similar claims. Thus, it is argued, in situations where there are large numbers of claimants with similar injuries arising from common factual or legal questions, it is inefficient to insist that such claims be pursued on an individual basis. This is especially compelling in the instance of small consumer claims, where individuals might not be able effectively to vindicate their rights because of the asymmetrical risks and expenses entailed in individual litigation. The aggregation of claims, then, helps to relieve docket congestion that might otherwise exist by virtue of the filing of hundreds or thousands of repetitive claims. In addition, aggregating claims allows for economies of scale, leveling the playing field between litigants and lowering the cost and expense entailed in repeated individual litigation. Finally, it is contended that class action litigation, by aggregating claims, contributes to the speedy resolution of disputes because multiple claims may be resolved through one proceeding. An often recited justification in favor of class litigation, as opposed to individual proceedings, is that “justice delayed is justice denied.”90 Thus, class litigation arguably serves the three stated goals of Rule 1: securing the just, speedy, and efficient resolution of civil disputes.91 Similar to the other justifications for the class action rule, the problem with the efficiency rationale is that there is scant empirical proof supporting this rationale. For example, we simply do not know whether there is or would be massive docket congestion in the absence of a class action rule. With regard to small consumer claims, it is most likely that virtually no one would pursue these claims on an individual basis, thereby flooding the courts. Arguably, large numbers of potential small consumer claimants lack interest in the alleged injury, supporting the theory that these cases—on a classwide basis— “just ain’t worth it.” Moreover, it is difficult to assess whether the compensatory awards that eventually are made to such claimants are worth the bother. If the deterrence rationale is not compelling—meaning that corporate bad actors are not deterred by small-claims class actions—then it is difficult to understand the need for a class action rule to pursue small consumer claims, which might be better handled through robust regulatory oversight, penalties, or other similar non-adjudicative means.

### 1NC

#### POLITICS DA:

#### Climate-focused infrastructure funding will pass now---solves existential climate change

Collinson 10-29-2021, analyst @ CNN (Stephen, “Democrats fight one another in Washington as Americans struggle,” *CNN*, <https://www.cnn.com/2021/10/29/politics/congress-spending-bill-president-joe-biden-italy-g20-democrats/index.html>)

Changing millions of lives

There is no doubt that if it passes, the social spending package, which makes housing, education, health care and home care more affordable, has the potential to change millions of lives. The climate proposals could unleash a new green economy as well as help save the planet. And Biden will probably eventually get his Washington victory lap. His domestic policy chief Susan Rice told CNN's Anderson Cooper Thursday the White House was "very confident" a framework accepted by House progressives would be the basis of the spending bill that would now be able to pass both chambers. The two holdout moderate Democrats, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, are yet to publicly and unreservedly endorse the framework. The question now, after another missed deadline, is when the situation will change. In the last few days, the spectacle of Democrats ditching multi-billion dollar programs and hurriedly trying to come up with new ways to fund the bill has left an impression of chaos that hardly enhances the reputation of one of the biggest social spending bills in generations. The longer the impasse lingers, the greater the risk that moderate Senate Democrats will get cold feet. Or that progressives will sour on a framework for a deal that cuts out many of their favorite programs, including paid family leave and free community college. Biden's departure for the G20 summit in Italy and the UN climate conference in Scotland was set by Democratic leaders as the latest deadline to pass the infrastructure and spending bills. On Thursday, it also became the latest must-pass date to be missed, reflecting a growing habit for the White House to set deadlines that are not met and frazzle the President's credibility. As a result of the latest miss, Biden showed up in Rome looking like a President who cannot get his own house in order before he meets world leaders to reaffirm US leadership. Biden had particularly wanted climate programs in the spending bill sent to his desk before he left, to pressure other nations to make significant cuts to carbon emissions at the climate summit. Progressives believe that the social spending bill, which offers universal pre-school, home health care for the sick and the elderly and $500 billion in spending to combat climate change, is a once-in-a-generation chance to overhaul the economy to alleviate the burden on working Americans.

#### But, PC is key---no margin for error

Cadelgo 10-19-2021 (Chris, et al, “Biden bets his agenda on the inside game,” *Politico*, <https://www.politico.com/news/2021/10/19/biden-agenda-inside-game-516239>)

Before Joe Biden can fully pitch the public on his solutions to a lingering pandemic and economic rockiness, he’s got to finish the sale to his own party’s lawmakers. As Democrats on Capitol Hill brace in anticipation of a brutal midterm, Biden is spending an extraordinary amount of time and political capital behind the scenes to convince them to rally around a common framework for social and climate spending. His congressional huddles have accelerated, from phone calls on the White House veranda to one-on-one and group meetings — including two high-stakes Tuesday sit downs with moderates and progressives. He’s dialing up old friends to take their temperature about how his presidency is really fairing far beyond the Beltway. White House aides, in their own recent conversations with nervous allies, have repeatedly cited the flurry of presidential calls as a sign itself of Biden's commitment to getting the bills over the finish line, at times bristling at claims that he hasn't been involved enough. But Biden’s hours and hours of meetings don’t just reflect the precarious moment in which his presidency finds itself. They underscore the heavy reliance his White House has placed on an inside game, rather than the bully pulpit, to dislodge recalcitrant holdouts and move their agenda. "The president is a longtime policy guy and relationship guy. So he brings both kinds of skills to his work" to corral his party behind a trillion-dollar-plus package of progressive priorities, said Biden's former primary rival Sen. Elizabeth Warren (D-Mass.). Warren acknowledged, however, that Biden's level of influence over Sens. Joe Manchin (D-W.Va.) and Kyrsten Sinema (D-Ariz.) — both of whom met with Biden on Tuesday — remains to be seen: "We'll know the answer to that when we make it across the finish line and assess what we’ve got." Biden met Tuesday afternoon with Sens. Jon Tester (D-Mont.), Catherine Cortez Masto (D-Nev.) and Mark Warner (D-Va.), along with House progressives and moderates. "We just need to get to a number," Tester said after returning from the White House. "I think that he likes all the programs but I think everybody's negotiable at this point." Biden told progressives that tuition-free community college would likely be cut from the final package and the child tax credit may only be extended for a single year, according to a source familiar with the meeting. Rep. Pramila Jayapal, chair of the Congressional Progressive Caucus, said after the meeting that tuition-free college is "probably going to be out," and certain climate priorities were "challenging." "At this point we don't have a certainty on the final thing, but what we're hearing is good," Jayapal said. "We feel like the vast majority, if not all, of our priorities are in there, in some way, shape or form.” As Biden has worked on lawmakers in private — sometimes not putting a hard stop on his schedule so as not to stifle progress — he’s largely, though not entirely, resisted riskier public pressure campaigns that could backfire and are viewed as against his nature. Often, Biden has had just a single public event each day. Occasionally, there’s been no public interfacing at all. Eight times since Labor Day, the daily guidance issued by the White House has included only private meetings with Biden. A planned barnstorming of the country to sell the Build Back Better platform this summer was overshadowed by the chaotic U.S. withdrawal from Afghanistan. And congressional uncertainty amid infighting among Democrats on opposite poles of the party has overshadowed continuing trips by Cabinet officials and commandeered the media narrative in Washington. While Biden has held public events around the agenda, he has not done a formal press interview on it since Labor Day. On Wednesday, he will take a trip to his hometown of Scranton, Pa., to discuss the benefits of the legislative proposals, and on Thursday he will participate in a town hall broadcast on CNN. “The President won the most votes in history running on his Build Back Better agenda, unveiled the formal proposal in his first address to a joint session of Congress, and has made his case across the country ever since – along with his cabinet – which is deeply resonating with the American middle class," White House spokesman Andrew Bates said. Over the weekend, Biden called Sen. Bob Casey (D-Pa.) to discuss the upcoming trip, according to the senator, who is working on expanding care for older people and people with disabilities. “He wanted to get some suggestions about issues we should focus on, while we’re there,” Casey said. Still, inside the White House, the lower-key strategy has been seen as a necessity: Democrats have such slim congressional majorities that Biden, Senate Majority Leader Chuck Schumer and Speaker Nancy Pelosi have essentially no margin for error. That has put far more of the president’s focus on convincing a relatively small number of lawmakers to agree to details of the package, rather than using his time to sell policies that the general public supports. Chief among that small number of lawmakers are Manchin and Sinema, who remain resistant to the range of $1.9 trillion to $2.2 trillion that Biden and progressive lawmakers have discussed as a compromise top line for the social spending bill. "I'm told that they've given signs on the parking spaces for these two senators at the White House, that they're there so often,” Senate Majority Whip Dick Durbin (D-Ill.) said of Manchin and Sinema. “This president has been engaged from the start, in working with all the leaders, and particularly with those two senators." As he does that, Biden has labored to project a sense of optimism about his progress. White House officials say they’re encouraged by what they described as the accelerated pace of the talks, even as the Oct. 31 timetable appears exceedingly ambitious. Another explanation for the approach was baked in long ago. Biden is a 36-year veteran of the Senate with a heightened sense of his own negotiating instincts and abilities to move major legislation through the chamber. A self-admitted schmoozer, he has avoided doing much to shame Manchin and Sinema, preventing many details from their conversations and about his own preferences from spilling into public view. “There’s a lot of complaining about what the message has been on this package, but when you’re trying to fight for every vote, the coverage inevitably becomes about the process and numbers,” said John Podesta, a top aide to former Presidents Barack Obama and Bill Clinton and a major climate activist. “When you are inside talking one-on-one to members trying to convince people to stay with you or come on board it’s very hard to create a press environment which is different from what they’ve got.” Biden has resumed his in-person meetings with Congress’ return to Washington, including Tuesday sit-downs that involved Vice President Kamala Harris and Treasury Secretary Janet Yellen. There's a deepening acknowledgment that he has to hurry. “They really are now in a circumstance where they will take on more and more water unless they can close the framework,” Podesta added. “I think they’ll do it. But it’s not like they have forever. We’re talking about this week or next week.” In his meetings, Biden has spent a considerable amount of time on the party’s collective sense of urgency, aides and allies said, telling members of his party that they simply have to deliver. The conversations have at times been crisp, with Biden telling some Democratic skeptics that in order to be part of the negotiating process, they need to articulate policies that they are for and not just what they oppose — a message similar to the one Sen. Bernie Sanders (I-Vt.) has delivered to Manchin and Sinema. Biden’s goal has been to help establish broad areas of agreement before filling in the specifics. At the same time, Biden has repeatedly cautioned his senior aides and officials not to rely on generalizations, and to prepare recommendations based on data and input from the lawmakers about their states and districts. He has stolen bits of face time with lawmakers wherever he can, keeping members back after bill signings, for example, to sound them out, and gathering with them in their districts when he’s been on the road. Moving beyond sticking points has been a challenge, and Biden is known to implore lawmakers to step back and ignore a particular area and to temporarily focus on others where they might be able to make progress. “When you see him artfully and deftly manage these hard conversations with members and guide them into a productive place, it helps remind you there is room for optimism and there is a pathway here,” said Louisa Terrell, director of the White House Office of Legislative Affairs.

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

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

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

### 1NC

#### ADVANTAGE CP:

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

#### ---establish national health insurance.

#### ---pass the BBB infrastructure bill.

#### Solves healthcare.

Snapp 17, MS Business Logistics from Penn State, Managing Editor & Consultant at Brightwork Research & Analysis (Shaun, “The Inefficiency of the Pharmaceutical Industry”, 4/26/17, http://www.scmfocus.com/criticalthinking/2017/04/inefficiency-pharmaceutical-industry/)

NIH vs. Pharmaceutical Companies There are two research paths in the pharmaceutical industry. One is the NIH, which spends roughly $30 billion per year on basic research. The other is pharmaceutical companies which mostly perform and run clinical trials, but also perform research in assaying chemicals found by NIH supported university research. This comes to roughly $25 billion per year. Pharmaceutical revenues are roughly $325 billion per year (according to Reuters). Most the costs that the pharmaceutical companies incur are “marketing” related costs (over-paying doctors for clinical trials in order to get them to prescribe drugs, buying off top university research professors, patenting and re-patenting drugs, paying for pharmaceutical reps for distributing company propaganda, lobbying in congress, television advertising etc..). As can be seen, some of these marketing costs are not really marketing costs as much as bribes. The Current System Under a system where the NIH took over final drug development and clinical trials patents could be removed from the drug business altogether. The productivity of drug companies is atrocious. For the $325 billion in yearly expenditures (to which we must add the $30 billion of the NIH budget bringing it to $355 billion), US drug companies produce roughly 7 innovative drugs, and most of these are very narrow drugs which do not cure ailments but extend the life of late-stage terminal diseases. 78% of drugs are simply extending the life of old drugs which could come off of patent or copying another drug that already exists. This is according to (Marcia Angell as well as Dr. Jerry Avorn – two of the top experts in the field) Secondly the cost of clinical trials is greatly increased by the fact that a good portion of the payment to doctors is, in fact, a payoff to prescribe drugs (for those that are already approved), and in 78% of the cases, the drugs they are performing a trial on are not new chemical compounds. For this reason, we estimate that pharmaceutical companies only do actually $2.5 billion in research on new drugs. (and a number of these drug tests are falsified) However, they claim $325 billion in drug revenues. Even if all of their research was beneficial and non-corrupt (which we estimate less than $2.5 billion of it is) it still would not entitle the industry to $325 billion off of it. Handing it All Over to the NIH If the NIH took over clinical trials, it could do so at a cost of only $32.75 billion dollars (their current budget + the actual contribution of pharmaceutical company research). These unpatented discoveries could then be released to the generic manufacturers. This new system would mean no advertising, no pharmaceutical reps (doctors can read journals for their medical information, or if they don’t have time (and most of them don’t) they can go to Consumer Reports Health.com which provides a quick rundown of the benefits of drugs in an easy to read and digest format). This would allow the doctor to begin working for the patient rather than the pharmaceutical industry when prescribing drugs. It would also allow the doctor to be looking for other factors related to health problems rather than taking a narrow-minded drug approach because that is where their bread is buttered. Generic drug companies have low-profit margins and low costs of doing business. It cost less than ½ again as much to provide generic companies with a good profit for manufacturing and distributing the drugs because it is a very simple operation with high economies of scale. This would mean the total drug cost to Americans would not be more than $32.75 billion x 1.4 = $45 billion. This would reduce US health care costs by roughly $280 billion per year. In fact, there would be so much only left over that we could even increase the NIH budget by another $10 to $20 billion creating somewhat of a renaissance in medical research and providing more employment in the industry. This would require that most the old drugs, which should come off patent because they have been artificially extended through the abuse of patent law, need to fall into the public domain. It also means that the major pharmaceutical companies essentially go away and become small generic manufacturers with no ability to influence health care policy. For all the calculations see the image below. How Easy Would It Be? What is amazing is how easy this policy change would be (practically, not politically). The NIH can easily run clinical trials and do it far better than pharmaceutical companies. Pharmaceutical companies should not be running clinical trials, or even paying for clinical trials at all. Universities used to perform more clinical trials, but big pharma has increasingly begun to use private practice doctors or trial mills that they completely control. They then receive the studies, and compile them and then send only the ones the like to the FDA, where they have already positioned executives from their company into the top roles through political appointment. Better Quality Drugs Another issue that could be changed with an NIH takeover is better drugs could be developed. We could even decide as a society to give another 5 to 10 billion to the NIH, there would be so much excess created by removing the pharmaceutical companies, which could lead to even more useful drugs and more money for the actual workers, medical researchers. Because of greed and narrow self-interest, big pharma is pushing mostly the wrong drugs to clinical trials. Right now drugs that are not very socially beneficial are developed because they are the most profitable. The major category being lifestyle drugs. Pharmaceutical companies don’t develop drugs that support that overall objective of the health care system, but rather develop drugs that are very profitable. By having the NIH take over drug development, social goals in public health can begin to come to the forefront. Indirect Cost Benefits The indirect cost reductions would be enormous. Pharmaceuticals are a force that corrupts everything it touches. In addition to developing the wrong drugs, and re-patenting old drugs that are not improvements, they have a big place at the health care policy table that they do not deserve. They sit there for one reason, the corrupting influence of their money. Because this plan would essentially break the pharmaceutical monopoly, relegating them to nothing more than generic drug manufacturers, it would actually change how health care is practiced in the US. The indirect cost savings fall into the following categories: The major pharmaceutical companies would wither away as lobbyists in Washington and would lose their ability to corrupt medical schools and motivate the profession to look for pharmaceutical solutions to every problem. Over prescriptions, which is currently a huge problem would be greatly reduced because pharmaceuticals would tend to be prescribed only if they actually benefited the patient. The medical industry could begin to refocus on health and prevention. Many people currently employed in non-value added activities (pharmaceutical marketing and influence peddling activities) could be redirected to beneficial pursuits. Many clinical trials that are currently run need not be run. This would greatly reduce the load of pharmaceuticals on trial subjects, which they are, in the majority of cases, being misled into thinking that they are doing something beneficial for themselves and for society. (the very fact that clinical trial recipients are taking placebos when the exact drug was tested years ago is a loss for the system in terms of health efficiency.) The indirect benefits are difficult if not impossible to quantify. However, indirect benefits being ½ of the direct benefits could be easily justified. This would bring the benefits to $280 billion x 1.5 or $480 billion, or ½ trillion. Health care costs are growing in an unsustainable fashion, this could be critical change which in addition to reducing costs would more likely than not lead to better health for the country’s population.

## ADV 1

### 1NC---Turn

#### LEADERSHIP TURN:

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Class action exposure undermine patents and innovation.

Kempf 20, \*Associate Professor of Finance University of Chicago, Booth School of Business, \*\*Chair of Financial Markets and Institutions University of Mannheim, Business School (Elisabeth and Oliver Spalt, “Attracting the Sharks: Corporate Innovation and Securities Class Action Lawsuits,” Finance Working Paper N° 614/2019

A vast body of academic work, from Adam Smith’s pin factory to Schumpeter’s creative destruction, emphasizes the importance of corporate innovation for economic growth. Consistent with this favorable view of innovation, fostering and promoting corporate innovation has become a core policy objective in governments around the world. If promoting innovative activity is a desirable societal goal, identifying potential obstacles to the creation and implementation of valuable new ideas is crucially important. This paper presents novel evidence suggesting that certain features of a central pillar of the U.S. litigation and corporate governance system, securities class action lawsuits, constitute such an obstacle. In particular, we show that the class action litigation system imposes disproportionate costs on firms with valuable innovation output, by making these successful innovators particularly vulnerable to low-quality class action litigation.1 We also show that class action litigation risk affects corporate innovation activity: firms patent less and the economic value of the innovations firms produce decreases after an exogenous increase in class action litigation risk.

#### Revisionist tech leadership causes nuclear war.

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

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

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

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

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

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

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

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

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

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

### 1NC---Growth High

#### Growth strong now. Predictive.

Winck 10-26-2021 (Ben, “3 signs the US economy roared in October and started to leave the Delta wave behind,” *Business Insider*, [https://www.businessinsider.com/economy-boomed-october-supply-chain-recovery-hiring-spending-ubs-forecast-2021-10](about:blank))

Several signs suggest the US recovery is accelerating again as the Delta wave fades, UBS economists said.

Americans' spending is rebounding, factories are solving backlogs, and businesses are hiring faster. The recovery through October is "far outpacing" the progress seen in September, UBS said. Temperatures are dropping across the US, but in one crucial way, it's feeling a lot more like summer. The US economy is booming once more after the Delta wave slowed the recovery through August and September. The comeback through October is "far outpacing" the progress seen the month before, UBS economists said in a Monday note. The degree of the rebound is also extraordinary. Such month-over-month improvements have only happened about 20% of the time historically, the team led by Ajit Agrawal said. The pickup comes from gains across the board. The Delta wave continued to fade, and daily case counts are now the lowest they've been since late July. The plunge in virus cases led to Americans spending more, with UBS forecasting that sales "picked up substantially" in October. Filings for unemployment benefits have steadily declined through the month. And while the country remains mired in a supply-chain mess, companies are working around the clock to solve massive backlogs. The signs all point to a stronger recovery heading into the end of the year. Here are the three trends revealing just how much the recovery picked up in October, according to UBS.

1. Spending is rebounding everywhere

Among the most encouraging signs is a healthy bounce in spending. Personal consumption expenditures — a popular measure of Americans' spending — likely improved "substantially" in October, UBS said. With consumer spending accounting for 70% of US economic activity, a pickup would broadly aid the recovery. Credit-card data suggests strong growth in sales of goods, particularly in the electronics, merchandise, and home renovation sectors. The bank expects retail sales to climb 0.2% in October. That would place sales just above record highs and mark a third straight monthly gain. The stronger spending isn't just on goods. Service spending, which is more affected by the virus, likely grew in September and probably grew even faster through October, the team said. Spending rebounded most at arts and entertainment, healthcare, and air travel businesses. While spending at restaurants and hotels was mixed, the bank still expects sales to shift further toward services as virus cases decline further.

2. Factories are sorting out their backlogs

Stronger spending is a good sign for the recovery. Yet Americans' massive spending has ran into global supply shortages in recent months. That mismatch helped keep inflation at decade-highs. October likely marked a turnaround for the problem, UBS said. Industrial production broadly bounced back in October after slowing the month prior, the team said. The largest improvements showed up in auto production, goods manufacturing, utilities, and gasoline production. Exports are also trending higher and could break from a months-long trend of flat output, the team added. The rosier outlook suggests the worst of the global supply-chain crisis could be behind the US. Port logjams, materials bottlenecks, and factory blackouts in China all slammed supply in the US through early fall. UBS's latest projections suggest the shortages will ease into the holiday season. The team isn't alone. Economists at Jefferies made a similar forecast earlier in October, saying in a note that "we may already be witnessing the worst" of the supply-chain mess.

3. The labor market is rebounding again

Job fair US hiring employers Employers manned booths with banners promoting their companies benefits, free logo branded swag and salary pay scales and in some cases recruitment bonuses in order to entice job applicants to approach their booths during the Lee County Area Job Fair in Tupelo, Miss., Tuesday, Oct. 12, 2021. Rogelio V. Solis/AP Photo The labor market remains far from healed, but October should mark a turning point for US hiring, UBS said. The pickups in consumer spending and industrial production should power much stronger job creation, according to the team. The bank estimates 631,000 payrolls were added in October, well above the consensus forecast of 390,000 added jobs. Such a reading would also mark a major improvement from the disappointing job creation seen over the last two months. The Delta wave limited August growth to 366,000 payrolls, more than halving the gain seen in July. September showed the recovery slipping further with an addition of just 194,000 jobs. The UBS forecast suggests the Delta wave's negative impact ended in October, and that the labor market's recovery will strengthen into 2022.

### 1NC---!D---Econ

#### No correlation between economic decline and war.

Walt 20, Robert and Renée Belfer professor of international relations at Harvard University. (Stephen M., 5/13/20, “Will a Global Depression Trigger Another World War?”, *Foreign Policy*, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/)

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”   
Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

### 1NC---!D---Biodiversity

#### Chemicals impact is biodiversity loss---that won’t cause extinction

Kareiva & Carranza 18, \*Director of the Institute of the Environment and Sustainability at UCLA, Pritzker Distinguished Professor in Environment & Sustainability and Chair, Doctorate, in the Environmental Science and Engineering program, \*\*PhD Student at University of California, Riverside. (Peter, Valerie, “Existential risk due to ecosystem collapse: Nature strikes back”, *Futures*, 102, pg. 39-50, doi: 10.1016/j.futures.2018.01.001)

While there are data that relate local reductions in species richness to altered ecosystem function, these results do not point to substantial existential risks. The data are small-scale experiments in which plant productivity, or nutrient retention is reduced as species number declines locally (Vellend, 2017), or are local observations of increased variability in fisheries yield when stock diversity is lost (Schindler et al., 2010). Those are not existential risks. To make the link even more tenuous, there is little evidence that biodiversity is even declining at local scales (Vellend et al 2017; Vellend et al., 2013). Total planetary biodiversity may be in decline, but local and regional biodiversity is often staying the same because species from elsewhere replace local losses, albeit homogenizing the world in the process. Although the majority of conservation scientists are likely to flinch at this conclusion, there is growing skepticism regarding the strength of evidence linking trends in biodiversity loss to an existential risk for humans (Maier, 2012; Vellend, 2014). Obviously if all biodiversity disappeared civilization would end—but no one is forecasting the loss of all species. It seems plausible that the loss of 90% of the world’s species could also be apocalyptic, but not one is predicting that degree of biodiversity loss either. Tragic, but plausible is the possibility our planet suffering a loss of as many as half of its species. If global biodiversity were halved, but at the same time locally the number of species stayed relatively stable, what would be the mechanism for an end-of-civilization or even end of human prosperity scenario? Extinctions and biodiversity loss are ethical and spiritual losses, but perhaps not an existential risk.

What about the remaining eight planetary boundaries? Stratospheric ozone depletion is one—but thanks to the Montreal Protocol ozone depletion is being reversed (Hand, 2016). Disruptions of the nitrogen cycle and of the phosphorous cycle have also been proposed as representing potential planetary boundaries (one boundary for nitrogen and one boundary for phosphorous). There are compelling data linking excesses in these nutrients to environmental damage. For example, over-application of fertilizer in Midwestern USA has led to dead zones in the Gulf of Mexico. Similarly, excessive nitrogen has polluted groundwater in California to such an extent that it is unsuitable for drinking and some rural communities are forced to drink bottled water. However, these impacts are local. At the same time that there is too much N loading in the US, there is a need for more N in Africa as a way of increasing agricultural yields (Mueller et al., 2012). While the disruption of nitrogen and phosphorous cycles clearly perturb local ecosystems, end-of-the-world scenarios seem a bit far-fetched.

Another hypothesized planetary boundary entails the conversion of natural habitats to agricultural land. The mechanism by which too much agricultural land could cause a crisis is unclear—unless it is because land conversion causes so much biodiversity loss that is species extinctions that are the proximate cause of an eco-catastrophe. Excessive chemical pollution and excessive atmospheric aerosol loading have each been suggested as planetary boundaries as well. In the case of these pollution boundaries, there are well-documented mechanisms by which surpassing some concentration of a pollutant inflicts severe human health hazards. There is abundant evidence linking chemical and aerosol pollution to higher mortality and lower reproductive success in humans, which in turn could cause a major die-off. It is perhaps appropriate then that when Hollywood envisions an unlivable world, it often invokes a story of humans poisoning themselves. That said, it is doubtful that we will poison ourselves towards extinction. Data show that as nations develop and increase their wealth, they tend to clean up their air and water and reduce environmental pollution (Flörke et al., 2013; Hao & Wang, 2005). In addition, as economies become more circular (see Mathews & Tan, 2016), environmental damage due to waste products is likely to decline. The key point is that the pollutants associated with the planetary boundaries are so widely recognized, and the consequences of local toxic events are so immediate, that it is reasonable to expect national governments to act before we suffer a planetary ecocatastrophe.

## ADV 2

### 1NC---Private Enforcement

#### Private enforcement is a worthless deterrent.

Crane 10, Professor of Law at the University of Michigan Law School. (Daniel A., Optimizing Private Antitrust Enforcement, 63 Vanderbilt Law Review 673, pg. 695, Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol63/iss3/2>)

It is unlikely, however, that the mere filing of a private antitrust suit brings about severe consequences for a defendant firm's managers. Unlike securities lawsuits, which may impair shareholder confidence in the integrity of insiders, antitrust lawsuits may instead communicate that company managers are acting aggressively to expand market share and increase profitability. This is especially true in the case of private antitrust lawsuits, which many shareholders may rightly regard as signaling that rival firms are merely disaffected by aggressive, but ultimately lawful, competition. While empirical work suggests that the filing of an antitrust action by the Department of Justice or Federal Trade Commission has an immediate and significant negative effect on a defendant firm's share price, the filing of a private antitrust lawsuit has only about a tenth of the effect of a public suit. Empirical studies have found that defendants lost, on average, 6 percent of their share value upon the filing of a government antitrust lawsuit,98 but only about 0.6 percent of their share value upon the filing of a private lawsuit.99 A half-percent drop in market capitalization is unlikely to engender ruinous consequences to most managers, particularly if the gains from the challenged behavior were large.

### 1NC---Forced Arbitration Thumper

#### Alt cause: intensified pleading standards.

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 851-853)

2. Intensified Pleading Standards

For those private plaintiffs seeking to enforce public law who are allowed to litigate rather than compelled to arbitrate, another recent procedural development poses a second obstacle: intensified federal court pleading standards.206 Around the same time as the Supreme Court began its move toward increasingly compelled arbitration, it also made a significant procedural move toward requiring more from plaintiffs’ initial pleadings to begin a lawsuit.

Since 1938, when the Federal Rules of Civil Procedure were enacted, Rule 8(a) had established a broad standard for complaints filed in federal court, referred to as “notice pleading.”207 As the Court described it in the 1957 case Conley v. Gibson, a plaintiff need only provide “a short and plain statement of the claim”208 showing that “the [plaintiff] is entitled to relief.” 209 This broad standard served the goal of the Federal Rules “to do substantial justice,” 210 the Court explained, and established that a complaint should be dismissed only when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”211

In two cases decided in 2007 and 2009, the U.S. Supreme Court upped the ante for what a plaintiff must include in a court pleading to survive a motion to dismiss, moving from a standard of “notice pleading” to a requirement of “plausible pleading.”212 In 2007, in antitrust case Bell Atlantic Corp. v. Twombly, 213 the Court majority reinterpreted Conley and all of its subsequent precedent, reasoning that the “no set of facts” language in Conley had been misapplied: it was not meant to create a “minimum standard of adequate pleading” but, instead to “describe[] the breadth” of possible proof for an “adequate complaint.”214 The Court established a new standard for Rule 8(a): a complaint pleaded with enough facts to “plausibly suggest[]” rather than be “merely consistent with” the plaintiff’s alleged claims.215 Applying this standard, the Court dismissed plaintiffs’ claims that telephone and internet service providers had conspired to set prices under the federal Sherman Act because their complaint failed to “nudge[] their claims across the line from conceivable to plausible.”216 As it did in the context of compelled arbitration,217 the Court’s dissent argued that this changed standard would limit private enforcement of public law. Writing for the dissent, Justice Stevens explained that Congress’s choice to allow for treble damages and attorneys’ fees in the Sherman Act showed “inten[t] to encourage . . . private enforcement of the law,”218 which made it especially important to “not add requirements to burden the private litigant beyond what is specifically set forth by Congress.”219

Two years later, in Ashcroft v. Iqbal, 220 the Court clarified that its holding in Twombly applied beyond antitrust matters to all federal pleadings when it dismissed the civil rights claims of a Pakistani detainee alleging abuse in federal custody for failing to meet the new “plausibility” standard.221 The Court elaborated on its Twombly test, describing it as a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense”222—a standard that has only contributed to further subjectivity and confusion for plaintiffs seeking to file federal lawsuits to enforce public law. Justice Souter, who had sided with the majority in Twombly, authored the Iqbal dissent, in which he criticized the majority for reading the pleadings so narrowly as to “den[y] [plaintiff] Iqbal a fair chance to be heard . . . .”223

### 1NC---Circumvention

#### Courts will find a way to nullify the case.

Newman 19, University of Miami School of Law professor and a former attorney with the U.S. Department of Justice Antitrust Division. (John, 4-5-2019, "What Democratic Contenders Are Missing in the Race to Revive Antitrust", *Atlantic*, <https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/>)

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions. But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well. No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area. Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades. But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up. Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it. If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench. Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power. Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing. And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017. Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench. Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system. There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

### 1NC---Healthcare Innovation High

#### Healthcare innovation high.

NAM 20, National Association of Manufacturers. Citing Robyn Boerstling NAM Vice President of Infrastructure, Innovation and Human Resources Policy (7-24-2020, "Report: U.S. Leads in Pharma Innovation, Thanks to Effective Policies", [https://www.nam.org/report-u-s-leads-in-pharma-innovation-thanks-to-effective-policies-9945/](about:blank))

The new report from the ITI Foundation offers strategies to maintain U.S. strength, spur greater innovation and increase domestic production.

U.S. policies spur success: “America still leads in innovation and drug development, in large part due to effective life-science policies, including significant federal investment in life-sciences basic research, robust intellectual property (IP) protections, effective technology transfer policies, investment incentives, and, importantly, drug pricing policies that enable companies to invest in high-risk drug development.”

Recommendations for policymakers: The paper suggests U.S. policymakers should focus on four key areas:

Maintaining U.S. strength in pricing, tech transfer and intellectual property—and avoiding oppressive drug price control schemes that damage competitiveness;

Boosting innovation through investment and additional tax incentives that promote research and development;

Increasing domestic production, including via tax credits and additional funding for key research institutions; and

Combating foreign mercantilism by making sure that America’s trading partners pay their “fair share” for new drugs, treatments and other medical products.

Innovation in the time of COVID-19: At a time when U.S. pharmaceutical companies are central to the fight against a global pandemic, the ability to innovate successfully is of paramount importance. The U.S. House Committee on Energy and Commerce held a hearing on Tuesday that discussed the issue, titled “Pathway to a Vaccine: Efforts to Develop a Safe, Effective and Accessible COVID-19 Vaccine.”

The NAM says: “The research ecosystem we have in the United States supports a global leadership position of biopharmaceutical innovation,” said NAM Vice President of Infrastructure, Innovation and Human Resources Policy Robyn Boerstling. “Manufacturers are committed to building upon that innovation—but it’s clear that government-led pricing restrictions and importing bad health care policies used by our competitors is not the way forward.”

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

### 1NC---!D---Bioterrorism

#### No bioterrorism---empirics and technical barriers.

Blum & Neumann 20, \*former Head of Laboratory at the Organisation for the Prohibition of Chemical Weapons. He holds a PhD in Biochemistry from the University of Frankfurt, \*\*Professor of Security Studies at King’s College London, and served as Director of its International Centre for the Study of Radicalisation from 2008-18.. (Marc-Michael & Peter, 6-22-2020, "Corona and Bioterrorism: How Serious Is the Threat?", *War on the Rocks*, https://warontherocks.com/2020/06/corona-and-bioterrorism-how-serious-is-the-threat/)

The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are teeming with talk about “biological warfare.” ISIL even called the virus “one of Allah’s soldiers” because of its devastating effect on Western countries. According to a recent memo by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks.

How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the technical challenges associated with weaponizing biological agents have proven insurmountable. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy.

A History of Failures

Biological warfare, which uses organisms and pathogens to cause disease, is nearly as old as war itself. The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat).

Among terrorists, however, the use of biological weapons has been rarer, although groups from nearly all ideological persuasions have contemplated it. Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. No one died in any of these instances.

The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to buy, steal, or develop biological agents. For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop.

Yet none of these efforts succeeded. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that none of the toxin had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose only fatality was the hamster on which it was tested. Of the tens of thousands of people that jihadists have murdered, not a single one has died from biological agents.

It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as Bruce Ivins, a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents.

Technical Challenges

Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a technical level, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be isolated and disseminated. But this is more difficult than it seems. As well as advanced training in biology or chemistry, isolating the agent requires significant experience. It also has to be done in a safe, contained environment, to stop it from spreading within the terrorist group. Contrary to what al-Qaeda said in one of its online magazines, you can’t just make a (biological) weapon “in the kitchen of your mom!”

In addition, there is the challenge of dissemination. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in perfect conditions. In the case of the bacterium anthrax, for example, only spores of a particular size are likely to be effective in certain kinds of weather. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is unlikely that terrorist groups possess the resources, stable environment, and patience to do likewise.

# 2NC

## CP---N&C

### 2NC---Solvency---Overview

#### Incorporating comments crafts optimal policy AND avoids capture.

Haw 11, JD, MPhil, Climenko Fellow and Lecturer on Law, Harvard Law School (Rebecca, May 2011, “Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal”, *Texas Law Review* 89, No. 6, pg. 1285-1287, https://heinonline.org/HOL/P?h=hein.journals/tlr89&i=1261)

Agencies could take policy making a step further using notice-and-comment rulemaking. Unlike in adjudication, regulation by rulemaking can be initiated without the formal requirements of a case or controversy and a proper appeal to the Supreme Court. Informal letters of complaint could spark an investigation. A rule-making agency could announce its intention to regulate publicly and provide a convenient venue for, or even solicit, expert opinions on the economic impact of the proposed rule. Not only would it have the benefit of these numerous perspectives, but it would also have the obligation to respond to them in a reasoned manner. Its rule would be subject to judicial review, affording an opportunity to catch mistakes 242 or invalidate rules that do nothing but deliver rents to special interests.

Another advantage of rulemaking, an option for agencies but not for the Court, since it only operates through adjudication, is that rulemaking regulates behavior ex ante, while resolution of economic policy through cases is necessarily ex post. Antitrust courts worry obsessively about "chill"-—deterring procompetitive behavior with overly broad rules for liability.2 43 In fact, the overruling of Dr. Miles in Leegin implies that the entire twentieth century was a period of inefficient business practices and stunted innovation in distribution because of an early misunderstanding of RPM. Only after a long and expensive period of litigation was Leegin redeemed for breaking the law by effecting a change in the law, and only after Leegin was issued were similar firms, perhaps walking the Colgate line better than Leegin, redeemed for wanting some control over their product's ultimate retail price.24 4 The problem of ex post rulemaking is made worse by the treble damages afforded successful plaintiffs suing under the Sherman Act.2 4 5 To create a new form of liability, the Court has to punish a firm threefold for complying with standing antitrust norms. Thus Supreme Court lawmaking in antitrust is a kind of one-way ratchet.246

The result of the current ex post scheme is that "antitrust law leaves considerable gaps between what is permissible and what is optimal." 2 47 With judges making the rules one case at a time, this gap is justifiable. As discussed above, when judges are not economically sophisticated enough to know where "optimal" lies, 24 8 laissez-faire is a very inexpensive regulatory regime for courts to follow, and raising the level of regulation would effect a kind of taking of property from firms operating under the status quo. So if the Court is making antitrust policy, laissez-faire may be the only sensible approach. But that is not to say that it is the most sensible approach. An agency could provide firms with the necessary clarity—ex ante—that they need when conducting business in a world where competitive behavior so closely resembles anticompetitive conduct. The current state of affairs is that much more is illegal on the books than antitrust lawyers think is actually likely to be struck down in a court.24 9 Lawyers thrive in such a legally uncertain world, but firm efficiency suffers.

To inform its rulemaking and adjudicative decisions, an expert agency would have investigative abilities the Court lacks. It could gather data and conduct studies when good antitrust policy depends on hard facts, which, so the consensus holds, it usually does. 2 50 Data collection would be much easier for an agency than for the Court, since an agency can be endowed with broad investigatory powers and some, unlike the Supreme Court, can demand discovery and "require firms to supply annual and special reports." 25 1 An agency might employ hundreds of economists and statisticians well-qualified to design such a study and analyze its results. Defendants would no longer be able to advocate against liability by saying that the theoretically efficient rule is so unwieldy in the hands of inexpert judges that laissez-faire is the only workable option. To be sure, they could still argue that the theoretically efficient rule is too indeterminate even for economists to pinpoint, or too abstract to be clearly articulated to regulated firms. But if we think economists have at least a marginally higher tolerance for economic complexity than do lay judges, the economists must be better at fashioning and enforcing rules that regulate sensitive real-world economic systems.

#### Input and vetting make the outcome superior to the plan.

Hemphill 09, Associate Professor and Milton Handler Fellow, Columbia Law School. (C. Scott, May 2009, "An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition," *Columbia Law Review* 109, no. 4, pg. 679-680)

Rulemaking has significant, familiar advantages over the adjudicatory route. Rulemaking permits affected parties to test aggregate data in an open way, with ample opportunity for rebuttal. 209 The opportunity for input and testing tends to produce superior policy.2 10 The resulting rule thus has a superior claim to judicial deference, compared to judicial review of a single case: The rule has been thoroughly vetted under notice and comment, after a broad, deep review of the full terrain of behavior by regulated parties. It is this superior breadth and greater vetting, rather than the doctrinal force of Chevron itself,211 that presents the strongest reason to think that a rule might succeed where adjudication has failed.

### 2NC---Turns Solvency

#### AND the absence of the CP makes the plan unenforceable.

Souter 01, former Justice of the Supreme Court, delivering a Supreme Court Opinion. (David, 6-18-2001, "United States v. Mead Corporation, 533 U.S. 218", Published by the Climate Change and Public Health Law Blog @ LSU, <https://biotech.law.lsu.edu/cases/adlaw/mead.htm>)

The Federal Circuit, however, reversed the CIT and held that Customs classification rulings should not get Chevron deference, owing to differences from the regulations at issue in Haggar. Rulings are not preceded by notice and comment as under the Administrative Procedure Act (APA), 5 U. S. C. §553, they "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review." 185 F. 3d, at 1307. The appeals court thought classification rulings had a weaker Chevron claim even than Internal Revenue Service interpretive rulings, to which that court gives no deference; unlike rulings by the IRS, Customs rulings issue from many locations and need not be published. 185 F. 3d, at 1307-1308.

### 2NC---!---Overview

#### Decline triggers global war quickly

Diamond 19, PhD in Sociology, professor of Sociology and Political Science at Stanford University (Larry, “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition)

In such a near future, my fellow experts would no longer talk of “democratic erosion.” We would be spiraling downward into a time of democratic despair, recalling Daniel Patrick Moynihan’s grim observation from the 1970s that liberal democracy “is where the world was, not where it is going.” 5 The world pulled out of that downward spiral—but it took new, more purposeful American leadership. The planet was not so lucky in the 1930s, when the global implosion of democracy led to a catastrophic world war, between a rising axis of emboldened dictatorships and a shaken and economically depressed collection of self-doubting democracies. These are the stakes. Expanding democracy—with its liberal norms and constitutional commitments—is a crucial foundation for world peace and security. Knock that away, and our most basic hopes and assumptions will be imperiled. The problem is not just that the ground is slipping. It is that we are perched on a global precipice. That ledge has been gradually giving way for a decade. If the erosion continues, we may well reach a tipping point where democracy goes bankrupt suddenly—plunging the world into depths of oppression and aggression that we have not seen since the end of World War II. As a political scientist, I know that our theories and tools are not nearly good enough to tell us just how close we are getting to that point—until it happens.

### 2NC---Perm---AT Do Both

#### Perm can’t solve the net benefit.

#### 1---beginning N&C after already settling on a rule is fatal to the process

Yates 18, J.D. 2018, The George Washington University Law School. (James, September 2018, "Good Cause Is Cause for Concern," *George Washington Law Review* 86, No. 5, pg. 1452-1454)

B. Remedies to Address Good Cause Concerns

A failure to follow APA procedures presumptively warrants vacation of the rule. The executive and judiciary branches, however, have employed and analyzed several remedies that serve to justify invocations of good cause. These remedies include postpromulgation N&C, the harmless error doctrine, remand without vacatur, and a system of retrospective rulemaking.

Each of the purported remedies described in this Essay suffers from one common problem: they run the risk of triggering or promoting bias. Once an agency has promulgated a rule, with or without N&C, both the agency and the regulated parties will be discouraged from changing the rule. Whether it be agency bias or industry bias, there are significant risks to our democratic system where agencies are given a second shot at explaining away N&C or justifying an interim final rule postpromulgation. We may be willing to take this risk for rules with minimal societal impacts, but concern for bias is—or should be—enhanced when applied to major rules. Where rules have at least $100 million in consequences, agencies should not be free to skirt the democratizing procedures envisioned by the APA.

1. Postpromulgation N&C

The first of these remedies is postpromulgation N&C, where the agency provides an opportunity for public comment only after the rule is promulgated.9 1 Final rules justified on good cause grounds are often exempted from APA procedures. 92 Interim final rules, for example, are exempted from prepromulgation N&C but subjected to postpromulgation N&C. 93 Interim final rules have become popular for major rules, particularly during the Obama administration. 94

The major concern with interim final rules rests in bias. "Once an agency has publicly staked out a position and given effect to that position, . . . forces like regulatory inertia, status quo bias, confirmation bias, and commitment bias all make it less likely the agency will deviate from its position." 95 This proposition survives even in the face of postpromulgation comments that may call for change. Despite this concern, it is not clear whether postpromulgation N&C renders a good cause regulation unlawful.

Courts are divided on how to treat these rules.9 6 On the one hand, the APA's procedures were created to involve the public early in the rulemaking process, and failure to follow these procedures is fatal to the process.9 7 Treating postpromulgation N&C as a presumptive cure would "make the provisions of [section] 553 virtually unenforceable" because agencies could simply promulgate the rule and rely on postpromulgation procedures. 98 Scholars have also argued that regulated parties may not take postpromulgation N&C seriously if the rule is already in place. 99 Failure to include the public in early stages of the rulemaking process delegitimizes the rule itself. 00

#### 2---signaling. The plan shows there’s no cost to circumventing N&C, setting a precedent that ruins spillover

Hickman 16, \*Kristin E., Harlan Albert Rogers Professor of Law, University of Minnesota Law School. \*\*Mark Thomson, Law clerk to the Honorable Ed Carnes, United States Court of Appeals for the Eleventh Circuit. (“Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment”, 101 Cornell L. Rev. 261, pg. 286-287, Available at: <https://scholarship.law.cornell.edu/clr/vol101/iss2/1>)

The crux of the argument is twofold. First, giving effect to postpromulgation rulemaking would undoubtedly provide a powerful disincentive for agencies to comply with § 553’s prepromulgation notice and comment requirements when they seek to bind the actions of regulated parties.153 Notice-andcomment rulemaking takes time, ranging from months to years. While agencies may perceive value in obtaining outside input regarding their rulemaking initiatives, they may also sometimes see notice and comment procedures as an obstacle to getting things done and may be predisposed to interpret the exemptions from those requirements aggressively. To the extent agencies can rely on postpromulgation notice and comment to prop up procedurally invalid rules, they will be less inclined to follow the APA’s procedural requirements faithfully.154 By contrast, rigorous insistence on prepromulgation notice and comment—and nothing less—ensures scrupulous fidelity to the text of APA § 553.

#### Spillover relies on clear compliance.

Merrill 04, Charles Keller Beekman Professor of Law, Columbia University. (Thomas W., Dec. 2004, “Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation”, *COLUMBIA LAW REVIEW*, Vol. 104, pg. 2156)

But this insight does not get us very far in choosing among the various conceptions of the constitutional allocation of legislative power. If lax nondelegation serves an important function in supporting judicial review, would strict nondelegation do better, or would this be overkill? More intriguingly, would exclusive delegation provide an adequate substitute for lax nondelegation in creating the appropriate sense that there are important constitutional stakes at issue in judicial review of agency action? My sense is that it would. Courts would be constitutionally required to identify clear evidence that legislative power has been delegated, and that the agency is acting within the sphere of its delegated authority. This would lend a sense of gravity to the process of review, which would have spillover effects for the judicial attitude in reviewing the legality of the agency's compliance with rulemaking procedures and its fidelity to any statutory directions Congress has provided.

### 2NC---Perm---AT Do CP

#### a---certainty and immediacy.

#### The CP requires openness to revision.

Justia 18, legal information database. (Last reviewed: April 2018, "Notice and Comment Process for Agency Rulemaking", https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment/)

Response to Public Comments

Agencies must consider all “relevant matter presented” during the comment period, and they must respond in some form to all comments received. They are not, however, required to take any specific action with regard to the rule itself. The publication of the final rule must include analyses of any relevant data or other materials submitted by the public and a justification of the form of the final rule in light of the comments the agency received.

If opposition to the proposed rule is exceptionally large or strident, the agency may decide to make substantial modifications and start the process over by publishing a new notice and opening a new comment period. Otherwise, the agency will publish its final findings along with the rule, which is codified in the Code of Federal Regulations.

#### AND delay.

Wolfman 14, \*Brian, JD, Associate Professor of Law @ Georgetown. \*\*Bradley Girard, Public-interest lawyer @ Americans United for Separation of Church and State (12-3-2014, "Argument analysis: "Interpretive rules," notice-and-comment rule making, and the tougher issues waiting in the wings", *SCOTUSblog*, <https://www.scotusblog.com/2014/12/argument-analysis-interpretive-rules-notice-and-comment-rule-making-and-the-tougher-issues-waiting-in-the-wings/>)

Under the Administrative Procedure Act (APA), federal agency rules can be “legislative” or “interpretive.” A legislative rule, like a statute, is said to bind the public and have the “force of law.” Under the APA, a legislative rule generally cannot be issued without notice and comment, a lengthy process in which an agency publishes a proposed rule and gives the public a chance to comment on it. The agency must give serious consideration to the comments before the rule may be finalized. Public comments sometimes significantly affect the content of legislative rules. The APA provides that when an agency amends a legislative rule, the amendment must go through notice and comment, just like the original rule.

By contrast, an interpretive rule is said only to advise the public of an agency’s view of what a law or regulation means. Supposedly, an interpretive rule does not bind the public or have the force of law. Interpretive rules come in many forms, such as guidance documents, agency manuals, and interpretive bulletins. The APA expressly provides that an interpretive rule need not go through notice and comment. An amendment of an interpretive rule is exempt from the notice-and-comment requirement, just like an original interpretive rule—at least, it seems, according to the APA’s text.

But in a series of cases known collectively as the Paralyzed Veterans doctrine, the D.C. Circuit has held that when an agency issues an interpretive rule that significantly revises an existing interpretive rule, the agency must take the revision through notice-and-comment rulemaking before the revision can take effect. In the case before the Court, in 2006, the Department of Labor (DOL) issued, without notice and comment, an interpretive rule which stated that mortgage-loan officers are not entitled to overtime pay under the Fair Labor Standards Act. In 2010, the DOL changed course and said, again without notice and comment, that mortgage-loan officers are entitled to overtime pay. Applying the Paralyzed Veterans doctrine, the D.C. Circuit below held that the 2010 interpretive rule significantly revised the 2006 interpretive rule and so is invalid because it was issued without notice and comment. One point to keep in mind: The D.C. Circuit assumed that the 2010 DOL rule is an interpretive rule, not a legislative rule.

#### That competes:

#### 1---should.

Nieto 9, Judge Henry Nieto, Colorado Court of Appeals. (8-20-2009, People v. Munoz, 240 P.3d 311 Colo. Ct. App. 2009)

"Should" is "used … to express duty, obligation, propriety, or expediency." Webster's Third New International Dictionary 2104 (200(2) Courts [\*\*15] interpreting the word in various contexts have drawn conflicting conclusions, although the weight of authority appears to favor interpreting "should" in an imperative, obligatory sense. HN7A number of courts, confronted with the question of whether using the word "should" in jury instructions conforms with the Fifth and Sixth Amendment protections governing the reasonable doubt standard, have upheld instructions using the word. In the courts of other states in which a defendant has argued that the word "should" in the reasonable doubt instruction does not sufficiently inform the jury that it is bound to find the defendant not guilty if insufficient proof is submitted at trial, the courts have squarely rejected the argument. They reasoned that the word "conveys a sense of duty and obligation and could not be misunderstood by a jury." See State v. McCloud, 257 Kan. 1, 891 P.2d 324, 335 (Kan. 1995); see also Tyson v. State, 217 Ga. App. 428, 457 S.E.2d 690, 691-92 (Ga. Ct. App. 1995) (finding argument that "should" is directional but not instructional to be without merit); Commonwealth v. Hammond, 350 Pa. Super. 477, 504 A.2d 940, 941-42 (Pa. Super. Ct. 1986). Notably, courts interpreting the word "should" in other types of jury instructions [\*\*16] have also found that the word conveys to the jury a sense of duty or obligation and not discretion. In Little v. State, 261 Ark. 859, 554 S.W.2d 312, 324 (Ark. 1977), the Arkansas Supreme Court interpreted the word "should" in an instruction on circumstantial evidence as synonymous with the word "must" and rejected the defendant's argument that the jury may have been misled by the court's use of the word in the instruction. Similarly, the Missouri Supreme Court rejected a defendant's argument that the court erred by not using the word "should" in an instruction on witness credibility which used the word "must" because the two words have the same meaning. State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958). [\*318] In applying a child support statute, the Arizona Court of Appeals concluded that a legislature's or commission's use of the word "should" is meant to convey duty or obligation. McNutt v. McNutt, 203 Ariz. 28, 49 P.3d 300, 306 (Ariz. Ct. App. 2002) (finding a statute stating that child support expenditures "should" be allocated for the purpose of parents' federal tax exemption to be mandatory).

#### 2---substantial.

Words and Phrases 64 (40W&P 759)

The words" outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain: absolute: real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to inclusive.

#### 3---resolved.

Collins 14, Collins English Dictionary (Complete and Unabridged. 12th edition, HarperCollins Publishers 1991, 1994, 1998, 2000, 2003, 2014, http://www.thefreedictionary.com/resolved)

resolved [rɪˈzɒlvd] adj

fixed in purpose or intention; determined

#### b---adherence to N&C would likely produce a different, but better policy

Hickman 16, \*Kristin E., Harlan Albert Rogers Professor of Law, University of Minnesota Law School. \*\*Mark Thomson, Law clerk to the Honorable Ed Carnes, United States Court of Appeals for the Eleventh Circuit. (“Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment”, 101 Cornell L. Rev. 261, pg. 287-288, Available at: <https://scholarship.law.cornell.edu/clr/vol101/iss2/1>)

First, fairness militates in favor of placing the burden of proof on the agency because the consequences of forgoing prepromulgation notice and comment are often potentially severe. Relying solely on postpromulgation notice and comment in adopting a rule threatens to entirely freeze the public out of meaningful participation in the rulemaking process.254 Where an agency validly asserts an exception from APA notice-and-comment rulemaking requirements, the opportunity for comment postpromulgation is almost certainly preferable to the alternative, which is no chance for public participation at all.255 But, as several courts have recognized, in the absence of a valid exception, relying on postpromulgation procedures alone represents a complete failure on the part of the agency that disadvantages interested parties in a way that other, more technical procedural failures do not.256 Relying solely on postpromulgation procedures significantly increases the likelihood that helpful or valuable comments will be ignored, and thus that the rule in question will be different from what it would have been had procedures been followed.257 Moreover, because an agency has total control over whether it undertakes prepromulgation notice and comment, the agency alone is in a position to avoid the consequences of failing to comply with the APA. The potential consequences of ignoring notice and comment, combined with the agency’s ability to prevent such a defect in the first place, makes it fair to put the burden of proving harmlessness on the agency.

#### c---laws---regulations are distinct.

Yakima No Date, Yakima Regional Clean Air Agency. ("Law, Rule, Regulation and Policy", https://www.yakimacleanair.org/services/definitions.html)

Regulations are not laws themselves, but are legal directives written to explain how to implement statutes or laws. Local regulations must not be less stringent than the state regulations and state regulations must not be less stringent than the federal regulations.

#### Distinguishing between the two is key to education.

Carlson 17, nonprofit consulting. (Keith, 8-3-2017, "Laws vs. Regulations ... and Why the Difference Matters", *Indivisible Santa Barbara*, https://indivisiblesb.org/laws-vs-regulations-and-why-the-difference-matters/)

The term “laws” is commonly used to describe the overall system of rules enforced by society to govern behavior. When used in this sense, our laws include the rules made by Congress or other legislative bodies, e.g., state legislatures, by the executive branch through regulations, or by the courts through rulings that result in binding precedent. Although this all-encompassing, generic definition is useful in our everyday lives, having some knowledge of the finer points is helpful if we desire to impact public policy and its effects on our society.

Laws vs. Regulations

Congress passes national laws, often called Acts, such as the Affordable Care Act (ACA) and the Clean Air Act. The agencies, boards, and commissions empowered to enforce the Acts are authorized to adopt regulations that implement them; the federal regulations, therefore, follow from the Acts. These regulations have the force of law, fill gaps in the legislation, and help agencies carry out their duties and mission, as defined in the Acts. Federal regulations are published in The Code of Federal Regulations.

Federal regulations are created through a process known as rulemaking. If an agency wants to make, change, or delete a rule, the normal process is for the agency to publish the proposal in the Federal Register and seek public comments, which may include hearings in addition to written comments. After the agency considers the public’s comments and makes any revisions to the rule, it publishes the rule’s final version in the Federal Register, along with a description of the comments received, the agency’s response to those comments, and the date the rule goes into effect. The Administrative Procedure Act (APA) outlines required rulemaking procedures for Federal regulations.2

#### d---normal means.

Richman 20, Paul J. Kellner Professor, Columbia Law School. (Daniel C. “Defining Crime, Delegating Authority – How Different are Administrative Crimes?”, *Yale Journal on Regulation*, Forthcoming; Columbia Public Law Research Paper No. 14-680, pg. 49 Available at: https://scholarship.law.columbia.edu/faculty\_scholarship/2719

As Dan Kahan noted decades ago, agency rulemaking offers considerable advantage over what effectively has been a regime of judicial lawmaking empowered by common law or just plain vague statutory terms.331 Moreover, the risk of self-dealing highlighted by Gorsuch in Gundy and recognized by Kahan, is alleviated or even eliminated when agencies other than the Justice Department devise their own rules, according to proper rulemaking procedures, primarily for civil enforcement. Note how once can turn around the concern of Hessick and Hessick that agencies lack expertise when it comes to crime-definition.332 The story of congressional authorship in the federal criminal sphere, for nearly a half-century, has largely been one of reliance on Justice Department drafting -- whenever the Department could slip a “fix” into the omnibus bills that used to be a staple of criminal lawmaking333 or when it provided material for a Congress looking to make a “tough on crime” statement.334 Congress of course has the greatest “expertise” on retribution, but that fact is both tautological and troubling, and on even that score Congress’s habit of using criminal lawmaking more to loudly condemn than to actually apportion punishment diminishes any claim to actual expertise. Weighed against the risks of self-dealing or sloppiness created by the “normal” means of crime definition, administrative rulemaking that treats regulation as structuring primary behavior in a complex world -- drawing lines within spheres of socially productive activity between prohibited and allowed conduct -- rather than providing tools for the exercise of prosecutorial discretion sounds pretty appealing.

### 2NC---AT Courts Shield

#### Court rulings prevent N&C compliance by binding agencies to a predetermined outcome

Dieterle 17, governance policy fellow with the R Street Institute (C. Jarrett, April 2017, “Regulatory Reform in the 114th and 115th Congresses”, *R Street Policy Stud*y No. 91, pg. 5, <https://www.rstreet.org/wp-content/uploads/2018/04/91-1.pdf>)

The Sunshine for Regulations and Regulatory Decrees and Settlements Act32 tackled similar issues surrounding so-called “sue and settle” procedures. “Sue and settle” occurs when outside groups sue federal agencies—for example, for failing to meet a statutory deadline—and the agencies immediately enter into settlement negotiations with the litigants. Private organizations can use this tactic to steer and control agency policymaking, often with the agency’s encouragement. Agencies may do this in search of a court order that would bind the agency to a predetermined course of action in ways that circumvent the ordinary rulemaking process.

### 2NC---S---AT Courts Strike Down

#### The courts will be permissive IF the FTC complies with N&C

Hemphill 09, Associate Professor and Milton Handler Fellow, Columbia Law School. (C. Scott, May 2009, "An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition," *Columbia Law Review* 109, no. 4, pg. 680)

Rulemaking helps in another way. The FTC Act is broader than the Sherman Act, as noted above, but the degree of its additional breadth has been a subject of controversy. Some lower courts have regarded with skepticism the FTC's efforts to regulate behavior not already governed by the Sherman Act. 212 A powerful way for the FTC to overcome this skepticism would be to support its claim to authority with aggregation, buttressed by notice-and-comment rulemaking. In this manner, the FTC could combine, in a mutually reinforcing manner, the two ways in which its authority stands out relative to ordinary, judicial antitrust policymaking: in having a statute with broader reach than the Sherman Act, and in possessing the power to collect information beyond the reach of the judiciary.

#### Courts only invalidate antitrust efforts when they aren’t grounded in public notice

Ballou 21, Trial Attorney, Antitrust Division, U.S. Department of Justice (Brendan, 9-16-2021, “The 'No Collusion' Rule”, 32 *Stanford Law & Policy Review* 213, pg. 241, Available at SSRN: <https://ssrn.com/abstract=3793881>)

B. The Rule Is Unnecessary

A critic may reasonably argue that the FTC can already bring enforcement actions against companies for engaging in tacit collusion; why, then, is a rule necessary? Primarily because the federal judiciary has asked for such guidance. As described above, the FTC has indeed brought successful enforcement actions against companies for engaging in tacit collusion. Where the FTC has stumbled, however, it has often been because of its failure to articulate its “unfair methods of competition” authority. In E.I. du Pont, for instance, the Court set aside the FTC’s judgment, explaining that:

[T]he Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability. The Commission’s decision in the present case does not provide any guidelines . . . . Thus the FTC’s rulings and order appear to represent uncertain guesswork rather than workable rules of law.190

The No Collusion Rule would solve precisely the Commission’s concern about justiciable standards by providing a clear standard for what constitutes unacceptable tacit collusion: While companies can consider each other’s prices in setting their own, competitors’ prices cannot be the sole consideration in such decisions.191

#### Courts will give the FTC unlimited flexibility if rules are properly formulated

Walters 19, JD, Judicial Law Clerk in New York (Kurt, 7-31-2019, “FTC Rulemaking: Existing Authorities & Recommendations”, pg. 23, Available at SSRN: https://ssrn.com/abstract=3794346)

C. Judicial Review

After a few defeats in 1979 and 1980, courts have largely upheld FTC rules against challenges under the judicial review provisions of section 18 and the APA. The FTC’s declining rate of section 18 rulemaking has left the relevant case law somewhat dated. Still, the agency’s track record during the 1980s suggests that appropriately crafted rules do not face a materially greater legal risk than APA notice-and-comment rulemaking and that courts will afford the agency significant flexibility to take procedural steps for efficient proceedings.

#### Engaged rulemaking spills up.

Hemphill 09, Associate Professor and Milton Handler Fellow, Columbia Law School. (C. Scott, May 2009, "An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition," *Columbia Law Review* 109, no. 4, pg. 680-681)

Rulemaking has a further effect: It attracts congressional attention to an important policy issue where adjudication may not. The FTC's first controversial foray into rulemaking was the Cigarette Rule,213 a consumer protection rule promulgated in 1964 that governed the advertising and labeling of cigarettes. One powerful effect of the rule was to focus Congress on the question, in part because the industry argued that the FTC had usurped congressional prerogatives. The rule was withdrawn the following year, replaced by a watered-down statute.21 4

A modern antitrust rule might be expected to create a similar provocation. Whether that is an argument in favor of rulemaking is less certain. In the case of cigarette regulation, congressional action preempted the FTC's rule in key respects.2 15 However, the FTC stayed deeply engaged in congressional debates on the issue, and played an important role in promoting further statutory change. 2 16 Increased congressional attention might therefore be regarded as a modest positive overall, or at least not a negative.

### 2NC---NB---IL

#### AND, it confirms public perception of unaccountable leaders, shredding legitimacy---prior N&C key

Hickman 16, \*Kristin E., Harlan Albert Rogers Professor of Law, University of Minnesota Law School. \*\*Mark Thomson, Law clerk to the Honorable Ed Carnes, United States Court of Appeals for the Eleventh Circuit. (“Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment”, 101 Cornell L. Rev. 261, pg. 287-288, Available at: <https://scholarship.law.cornell.edu/clr/vol101/iss2/1>)

There are at least two other clear benefits of denying effect to postpromulgation notice and comment, both having to do with the way the public might perceive postpromulgation notice and comment. As some scholars have argued, citizens might not take seriously the opportunity to offer comments after a rule is in effect, believing that, because an agency has already committed to enforcing a particular rule, submitting comments would just be a waste of time.160 If a substantial portion of the public does not think it worthwhile to submit comments, that undermines the crowdsourcing rational of the notice and comment requirements. Thus, at least insomuch as the public is likely to treat the opportunity for prepromulgation comment more seriously than the opportunity for postpromulgation comment, postpromulgation notice and comment constitute an inadequate substitute for prepromulgation notice and comment.

Analogous reasoning can support an argument that postpromulgation notice and comment do not legitimize regulations to the same extent as prepromulgation notice and comment. To the extent the public is more likely to participate in prepromulgation comment periods—or just more likely to believe that prepromulgation notice and comment incorporate the full spectrum of public views on a rule—notice and comment procedures strengthen the perception that the resulting rules are the product of something resembling a democratic process. This, in turn, minimizes the degree to which the resulting rules are seen as democratically illegitimate.161 By contrast, if the public feels shut out of the regulatory process—as it might with postpromulgation notice and comment—the resulting rules will inevitably be perceived as less the product of a representative process and more the product of bureaucratic fiat.162 Refusing to give effect to postpromulgation notice and comment, then, might make sense from a legitimacy perspective.

### 2NC---NB---Spillover

#### The CP creates path-dependence for future administrative norms

Napolitano 14, Professor of Administrative Law, Law Department, University of Roma Tre. (Giulio, “Conflicts and strategies in administrative law”, *I CON*, Vol. 12 No. 2, doi:10.1093/icon/mou017)

4. Understanding change in administrative law: path dependence and interstitial adjustment Conflicts in administrative law are not a single-battle war. Every move of an actor responds to the moves made by others. That’s why administrative law is a repeated interactions game. Each move is incremental and path-dependent. Devices and mechanisms set up in the previous round cannot be easily and fully dismantled. Let’s take the example of independent authorities. Once they are established in order to insulate the implementation of specific policies from the influence of the government or from the pressure from local interests, it becomes difficult to abolish them: even when the rule-making power comes back into the hands of national legislators or executives. As a consequence, reactions must be fine-tuned and sophisticated. The preferred solutions will be, for instance, the transfer of a specific power from the regulatory agency to the executive, or the submission of some sensible prerogatives of the independent body to ex ante directives or ex post approval by a political actor.36 Further, procedural rights are difficult to withdraw: even more than organizational devices. Once they have been recognized, even if sometimes for purely instrumental reasons of fire-alarm signaling, they become sanctified as inalienable rights.37 That’s why adjustments and reactions must be interstitial: the right to be heard and other prerogatives of private actors cannot be nullified. Changing time limit for comments, enlarging or restricting addressees of participatory rights, shifting the burden of proof from the acting agency to private parties, and vice-versa, are among the most preferred solutions. Such a repeated-interactions game explains why the study of change in administrative law in complex legal orders and societies requires more and more a microanalysis approach: “Devil is in the details.”

#### Shifting agency norms influences the entire structure of administrative law

Yaver 16, PhD, Lecturer Yale University Department of Political Science (Miranda, “Inter-Agency Learning in United States Regulatory Policymaking”, pg. 1-4, Accessible at: <https://ssrn.com/abstract=2838457>)

Within Section 3012 of the Patient Protection and Affordable Care Act (2010), Congress called for the creation of an Interagency Working Group on Health Care Quality to facilitate the collaboration, consultation, and coordination on making progress toward national goals on health quality improvement, as well as to avoid inconsistency or duplicative work among agencies engaged in implementation in this domain. In addition to those agencies traditionally engaged in healthcare regulation (e.g., Department of Health and Human Services (working group chair), Centers for Medicare and Medicaid Services, Centers for Disease Control and Prevention), also included in this working group were the Department of Commerce, the Federal Trade Commission, the Department of Labor, the Federal Bureau of Prisons, and the Department of Education, to name just a few. The congressional provision of such institutions highlights the complexity of contemporary policymaking – drawing on multiple and diverse sources of expertise – and provides a wealth of opportunities for agencies to be influenced by one another in the development of rules and enforcement strategies in a complex and often conflictual political environment. The strategies underlying congressional delegation to administrative agencies has occupied the scholarly agendas of political scientists for decades. Such avenues of inquiry have produced valuable insights as to the utilization of procedural tools with which to manage agencies (e.g., McNollgast 1987, 1989; Bawn 1995; Epstein & O’Halloran 1999), the utilization of the more efficient model “fire alarm oversight” of agencies (McCubbins & Schwartz 1984), appropriations politics (Kiewiet & McCubbins 1991; McDonald 2010), the development of bureaucratic autonomy (Carpenter 2001), the specificity with which legislatures draft the legislation delegating to those whom they want to constrain (Huber & Shipan 2002), and the trade-offs between delegation to agencies versus mobilization of private litigants (Farhang 2010). However, an important limitation in all of this important scholarship is its restriction to models of Congress working to constrain an agency, when in practice, agencies rarely operate in isolation. Indeed, from joint rulemaking to interagency working groups, agency interactions seem to be frequent and ever-increasing. A number of legal and political science scholars have acknowledged the fragmented nature of the American administrative state, with James Q. Wilson referring to American policy implementation as a “barroom brawl” with “many participants” and “no referee” (1989: 297-301). Such a fragmented system of governance stands in contrast with a more centralized and hierarchical system governed by only a few key authoritative actors, as is more characteristic of European policy implementation, which Wilson characterizes as a centralization in executive affairs that “facilitated the process of controlling the administrative agencies and bending them to some central will” (1989: 377). The extensive division of responsibility among institutional actors in the United States, he argues “insures, if not causes, clumsy and adversarial regulation; there the unification of powers permits, if not causes, smooth and consensual regulation” (Id). Such a characterization of the structure of the American political system is apt. With over a dozen cabinet posts – not to mention numerous subdivisions within executive cabinets – as well as dozens of independent agencies and government-owned corporations, the eleven Courts of Appeals along with the Federal Circuit and the DC Circuit, district courts, and state-level agencies and courts, United States policy implementation is scattered both horizontally (federal-level) and vertically (federal, state, and local) across innumerable sources of institutional authority in the American regulatory state. And when these different institutions each holds some measure of autonomy but also acts in interaction with – or even relying on – other institutions, there is ample opportunity for efficiency-enhancing information transmission and productive competition, but also the potentially more detrimental competition over “turf” as well as coordination challenges in making policy. Despite the assumption of this complex implementation structure – with a number of administrative actors and agencies involved in a statute’s enforcement, and an increasing amount of overlapping jurisdiction, with multiple agencies tasked with the same enforcement responsibilities over the same policy provisions (e.g., joint rulemaking) – scholars have addressed its causes from normative more so than empirical perspectives (e.g., Gersen 2006; Freedman & Rossi 2012) and had not until recently formulated a measure of this administrative fragmentation. Such a measure is needed to answer such questions as the factors explaining fragmentation’s patterns and persistence over time as Congress continues to delegate authority to the executive branch to varying degrees and with the constraints of fragmented authority (Moe 1989; Farhang & Yaver 2016), statutory specificity (Huber & Shipan 2002), the mobilization of private litigants (Farhang 2010), and procedural constraints (McNollgast 1987, 1989; Epstein & O’Halloran 1999). Farhang & Yaver (2016) provide the first systematic measure of fragmentation – a composite 3 indicator incorporating the number of actors, agencies, and instances of overlapping jurisdiction over particular policy provisions – and find that divided government and electoral uncertainty are powerfully associated with congressional decisions to fragment authority across multiple actors and agencies and to create overlapping jurisdiction among those actors, with the goal of guarding policy against bureaucratic drift from the executive branch and against coalition drift from future congressional coalitions. They find that these fragmented policymaking designs have been particularly common since the late 1960s with the onset of prevalent divided government. Within this domain of significant regulatory legislation – defined as that which contains commands or proscriptions of domestic entities (e.g. no employer may discriminate) – they find that laws contain implementation from an average of approximately four administrative actors within approximately three separate agencies.1 But while this study provides new insights into the causes of such legal designs, we do not yet know the consequences of these congressional choices with respect to the policies we ultimately observe. Yet a range of consequences can emerge from the complexity of such institutional arrangements, from the difficulty of determining to which agency to defer in the midst of competing statutory interpretations, to evaluating the extent to which overlapping jurisdiction produces shirking or productive competition among agencies, to understanding the nature and extent of information spillovers among those interacting agencies. After all, by looking only at the “treatment” of funding rescission against a given agency that interacts frequently with other administrative actors who are risk averse and seek to avoid themselves facing funding rescission, there may be thus far unaccounted-for implications of congressional and judicial constraints on agencies’ regulatory latitude. That is precisely what this project takes up, evaluating the following core questions: To what extent, and under what conditions, will agencies be best equipped to learn from one another and adapt their implementation behavior accordingly? When will agencies invest in learning about other agencies’ policies and interactions with shared principals, and what statutory designs are most conducive to that learning taking place? And given agencies’ ability to observe these institutional interactions and thus the potential for spillover effects, what are the broader policy ramifications of bureaucratic punishment by Congress and courts? The answers to these questions have important implications for the scope of state capacity over time as Congress, courts, and agencies continue to interact and battle over the policy location. As congressional coalitions craft legislation that delegates implementation power to administrative agencies, it has a number of tools at its disposal to help it to manage drift, often by way of instituting procedures that constrain the range of actions available to the implementing agents and that allow for interest groups and others to raise “fire alarms” when violations are suspected (McCubbins & Schwartz 1984). When violations are detected, the DC Circuit and congressional coalitions are both able to intervene, whether by striking invalid the agency’s action or revising the statutory delegation, both instances of which Yaver (2016) finds with great frequency with respect to the Environmental Protection Agency. Such institutional interventions in agency policymaking can impose important constraints on that agency’s subsequent capacity to carry laws into effect. However, what we do not yet know, and what this project seeks to evaluate, is the broader effect of that bureaucratic punishment in shaping larger swaths of administrative action by multiple agencies who observe those signals from the shared political principals of Congress, courts, and interest groups. That is the subject of this paper’s inquiry. Defining Agency Learning By agency learning, I refer to the adaptation of regulatory strategy based on information gathered from observing other administrative agencies. I expect that litigation and legislative challenges against an agency will provide other agencies with valuable information about other institutions’ propensity to intervene in regulatory decisions. I expect also that agencies will prefer to operate without constraints and interference by Congress and courts, and thus will act to avoid such intervention when possible. Thus, it is rational for agencies to seek to take cues from the broader political environment in which they and other agencies operate, and to update their strategies when appropriate.

### 2NC---NB---N&C Key to Democracy

#### Meaningful N&C reinvigorates democracy

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Correspondingly, notice-and-comment rulemaking procedures “reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”229 “Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence.”230 Some degree of agency independence is inevitable—even desirable—especially because elected representatives typically lack the time and technical expertise required to address the complex regulatory problems modern society poses.231 But too much independence on the part of unelected agency representatives threatens the ideal of democratic representation.232 Providing for direct, meaningful public involvement through prepromulgation notice and comment procedures inserts an element of democracy into the rulemaking process and thereby legitimates resulting rules.233

### 2NC---!---DPT

#### Democratic spread puts a cap on conflict, and authoritarianism makes all of their impacts more likely

Diamond 19 – PhD in Sociology, professor of Sociology and Political Science at Stanford University (Larry, “Ill Winds: Saving Democracy from Russian Rage, Chinese Ambition and American Complacency,” Kindle Edition)

To make our republics more perfect, established democracies must not only adopt reforms to more fully include and empower their own citizens. They must also support people, groups, and institutions struggling to achieve democratic values elsewhere. The best way to counter Russian rage and Chinese ambition is to show that Moscow and Beijing are on the wrong side of history; that people everywhere yearn to be free; and that they can make freedom work to achieve a more just, sustainable, and prosperous society. In our networked age, both idealism and the harder imperatives of global power and security argue for more democracy, not less. For one thing, if we do not worry about the quality of governance in lower-income countries, we will face more and more troubled and failing states. Famine and genocide are the curse of authoritarian states, not democratic ones. Outright state collapse is the ultimate, bitter fruit of tyranny. When countries like Syria, Libya, and Afghanistan descend into civil war; when poor states in Africa cannot generate jobs and improve their citizens’ lives due to rule by corrupt and callous strongmen; when Central American societies are held hostage by brutal gangs and kleptocratic rulers, people flee—and wash up on the shores of the democracies. Europe and the United States cannot withstand the rising pressures of immigration unless they work to support better, more stable and accountable government in troubled countries. The world has simply grown too small, too flat, and too fast to wall off rotten states and pretend they are on some other planet. Hard security interests are at stake. As even the Trump administration’s 2017 National Security Strategy makes clear, the main threats to U.S. national security all stem from authoritarianism, whether in the form of tyrannies from Russia and China to Iran and North Korea or in the guise of antidemocratic terrorist movements such as ISIS. 1 By supporting the development of democracy around the world, we can deny these authoritarian adversaries the geopolitical running room they seek. Just as Russia, China, and Iran are trying to undermine democracies to bend other countries to their will, so too can we contain these autocrats’ ambitions by helping other countries build effective, resilient democracies that can withstand the dictators’ malevolence. Of course, democratically elected governments with open societies will not support the American line on every issue. But no free society wants to mortgage its future to another country. The American national interest would best be secured by a pluralistic world of free countries—one in which autocrats can no longer use corruption and coercion to gobble up resources, alliances, and territory. If you look back over our history to see who has posed a threat to the United States and our allies, it has always been authoritarian regimes and empires. As political scientists have long noted, no two democracies have ever gone to war with each other—ever. It is not the democracies of the world that are supporting international terrorism, proliferating weapons of mass destruction, or threatening the territory of their neighbors.

#### DPT true

Hegre et al. ’18 (Havard; Professor Department of Peace and Conflict Research Uppsala University; Michael Bernhard; Miriam Ehrlich Chair in Political Science Department of Political Science University of Florida; Jan Teorell; Professor of Political Science Department of Political Science Lund University; *Reassessing the Democratic Peace: A Novel Test Based on the Varieties of Democracy Data*; <https://gupea.ub.gu.se/bitstream/2077/56045/1/gupea_2077_56045_1.pdf>; accessed 7/17/19)

4. Results

We estimated two sets of models for all pairs of states for every year over the 1900–2010 period with the democratic peace hypothesis represented as the democracy score(s) of the stronger country, that of the weaker country, the interaction of these two, and several control variables. In the first set of models, we entered the five indicators of constraint one by one along with our control variables. Figure 3 summarizes the results from these models. Complete estimation results in table form with all control variables are found in Appendix Table A-1.

The first model (called ‘Electoral accountability’) enters the three terms based on the electoral accountability index along with control variables. The estimates from this model are printed in green color at the top of the figure. The points represent the estimates and the whiskers their estimated 95% confidence interval. The two main terms are both positive, although that for the weaker country is not statistically significant. The interaction between the index values for the two countries in the dyad, on the other hand, is negative and highly significant – when both countries score highly in terms of electoral accountability, the risk of fatal dispute is much lower than if either have low scores. In line with expectations, we show in Appendix Table A-3 that the effect of electoral democracy is driven by the “Schumpeterian” core dimensions tapping into contestation – whereas suffrage does not play an independent role in promoting peace.

The second model enters the ‘Legislative constraints’ index terms. Again, the interaction term is negative and significant, whereas the main terms are positive and significant. Similar patterns are observed for the other three individual indicators.

Figure 4 shows that the net effect for each of these indicators is consistent with the democratic peace. In the left panels, the dashed line plots the estimated log odds of a MID when the weaker country j is at the mean of the index, as a function of the score for the stronger country (along the x-axis). The metric for the y-axis is log odds relative to the case where both countries have scores of 0 for the index. The dotted and solid lines show the same when the index is one standard deviation below or above the mean.19

The graph on the right plots the marginal effect of this relationship – it shows the change in the estimated probability of a fatal dispute when comparing a pair of countries where the weaker country has a value for the index one standard deviation below the mean and one standard 22 deviation above, respectively, as a function of the index for the stronger country. Both these graphs show a clear dyadic democratic peace in terms of all our indices of constraint – a more democratic weaker country means a clearly lower risk of fatal MID if the stronger country is relatively democratic.20

All of our individual indicators of constraint reflect the democratic peace when entered on their own. Given the high correlation between them, however, each of them may serve as a proxy for one of

## ADV 2

### 2NC---Private Enforcement Fails

#### Private suits don’t deter anyone.

Crane 10, Professor of Law at the University of Michigan Law School. (Daniel A., Optimizing Private Antitrust Enforcement, 63 Vanderbilt Law Review 673, pg. 691-694, Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol63/iss3/2>)

In order to evaluate this deterrence claim, one must ascertain who is being deterred. The primary class of relevant decisionmakers is corporate managers, although one must also consider the possibility that vigilant shareholders will rein in managers who fail to respond to antitrust incentives. With respect to these managers, the argument that private antitrust litigation provides effective deterrence is increasingly undermined. Two converging trends—the increasing length of antitrust proceedings and the increasing shortness of managerial tenure—make it likely that corporate managers severely discount the threat of future litigation damages. First, the time gap between the planning of antitrust violation (which is presumably the moment at which deterrence should take root) and antitrust judgment day is growing longer. While current statistics on the duration of antitrust litigation are not readily available, it is possible to make reasonable assumptions based on the available data. For the last decade, the average disposition time for all civil cases in the federal system has been steady at between eight and nine months. The average time from filing of the case to trial has steadily increased from around 18.5 months in 199681 to 24.6 months in 2007.82 This suggests that early disposition of cases, whether due to motions to dismiss or early settlement practice, has declined somewhat but that cases going all the way to trial take much longer than before because of the increasing complexity of modern litigation and the increasing burden of discovery.83 The Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.84 While this ratio has likely not remained constant—the average private antitrust lawsuit today takes over six years to disposition—the average antitrust suit almost certainly lasts several years. In 2007, there were 378 federal antitrust cases that had been pending for over three years, an immense number considering that there were only a thousand new antitrust filings and that many cases are quickly disposed of on motions to dismiss.85 The time from filing to trial tells only part of the story. The average interval from the filing of a notice of appeal to final disposition is now over a year for all federal cases. 86 The average interval for antitrust cases is likely even longer due to their monetary significance and complexity. Certiorari petitions to the Supreme Court typically add another year to the delay, during which the appellate court's mandate and the corresponding obligation to pay the judgment are stayed.87 Moreover, the misconduct at issue usually begins at least a year or two—and often many years—before the complaint is even filed. Hence, in the average private antitrust case, the time from the beginning of an anticompetitive scheme until judgment day is at least five years and may be closer to ten years or more. The relevant time intervals in two recent private antitrust cases, in which the plaintiffs won substantial damages awards at trial and had them affirmed on appeal, are instructive. In LePage's Inc. v. 3M, the allegedly anticompetitive bundled rebates were put in place in 1992; LePage's filed suit in 1997 but did not prevail until 2004, when the Supreme Court denied certiorari.88 In Conwood Co. v. U.S. Tobacco Co., the plan to eliminate Conwood was hatched in 1990, Conwood sued in 1998, and the Supreme Court denied certiorari in 2003.89 In both cases, the time between the decision to engage in the challenged conduct and the end of the legal process was well over a decade. This time lag should be paired with the fact that the managers who put into place anticompetitive schemes are increasingly unlikely to be around to internalize their effects at judgment day. During the 1980s, the turnover rate among senior managers in large corporations was just above ten percent. 90 By all accounts, the turnover rate increased significantly—perhaps even doubling—in the 1990s and 2000s as various capital market factors accentuated shareholder demand for short-term performance. 91 Today, the average CEO holds her job for about six years. 92 Mid-level executives, such as divisional managers, typically hold their jobs for an even shorter period, perhaps less than four years. 93 Thus, most of the executives responsible for an antitrust violation will no longer be with the firm by the time a damages award is entered against the company. High managerial turnover rates might not thwart the deterrence objective if managers were to internalize some of the detrimental effects of antitrust judgments rendered after they leave the defendant firm. In particular, managers might incur a reputational cost in lost future employment opportunities or take a prestige hit in the business community by virtue of their past roles in a later-adjudicated antitrust violation. 94 But there is scant evidence suggesting that individual managers' reputations are much affected by antitrust judgments against their former employers. Individual managers are not often named as co-defendants in private antitrust cases and usually do not appear in any public pronouncement of liability. Liability in complex antitrust cases seldom turns on the culpability of a single manager, but rather on a cluster of managerial decisions over time, making it difficult to pinpoint blame.95 Relatedly, judicial opinions in private antitrust cases often omit the names of individual managers, instead referring to the acts of an impersonal corporation or "the defendant." For example, in the much-publicized LePage's Inc. v. 3M case, neither the district court nor the Third Circuit opinion referred to a single 3M executive by name. 96 In most cases, an outsider to the litigation would find it difficult to impose a reputational sanction against any present or former firm manager. In light of these facts, it is difficult to see how the threat of a future damages judgment disciplines managerial decision-making. When managers plan conduct that brings immediate large profits but only potential liability at some future date, the extent to which the future liability deters them from choosing immediate profits is a function of their implicit discount rate for the potential damages award. The longer the perceived time until judgment day, the more likely it is that managers will discount the threat of damages. If managers believe that they are unlikely to be employed by the firm at the distant judgment day, they will tend to disregard the threat of future liability altogether.

#### They certainly don’t deter shareholders

Crane 10, Professor of Law at the University of Michigan Law School. (Daniel A., Optimizing Private Antitrust Enforcement, 63 Vanderbilt Law Review 673, pg. 696-697, Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol63/iss3/2>)

If managers cannot be expected to respond reliably to the threat of distant and unpredictable liability judgments against their firms, how about shareholders? Two related factors suggest that shareholders do not have strong incentives or capabilities either. First, the kind of industrial behavior that gives rise to antitrust claims creates the prospect of substantial long-run costs if an antitrust challenge is successful, but offers significant short-run profits in the meantime. From an outsider's perspective, it is very hard to evaluate the risk that firm behavior will produce eventual antitrust liability. Whether conduct of the kind adjudged under antitrust's rule of reason and monopolization law's amorphous standards is likely to result in antitrust liability is difficult for antitrust experts to predict, let alone the average institutional investor. 102 It is unlikely that many shareholders will try to curb behavior that increases a firm's market share and profits but that might eventually lead to antitrust liability. Even assuming that a large institutional investor with access to corporate insiders were aware that conduct was risky from an antitrust perspective, it still often would be a rational strategy to approve tacitly the risky conduct, hold the stock for a few years while its value increases, and then sell before an antitrust suit commences. The initial filing of the private lawsuit does relatively little damage to the issuer's share price, so savvy shareholders will have plenty of time to reap their profits and then exit.

### 2NC---Forced Arbitration Thumper

#### Stringent pleading standards shut down antitrust suits

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 853-854)

As with the trend toward compelled arbitration,224 the shift to plausible pleading has sparked analysis that goes well beyond the scope of this Article—both legal scholarship on its impact on plaintiffs’ complaints225 and empirical studies on its effect on case dismissal rates.226 Yet while the overall picture may be inconclusive, one data point is clear: private lawsuits in which there is information asymmetry between plaintiffs and defendants—such as an employee’s discrimination lawsuit against an employer or a consumer’s antitrust lawsuit against a corporation—are the most likely to be impeded by the intensified pleading standard.227 Thus, for public law statutes in which a private right of action is essential to enforcement, like Title VII or the Sherman Act, requiring more information at the outset of a case prior to discovery poses an additional challenge for those acting as private attorneys general.228

#### Limitations on class action suits thump, too.

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 854-857)

3. Narrowed Class Action Doctrine

Lastly, should private plaintiffs escape compelled arbitration and plead plausibly enough to survive a motion to dismiss, a third procedural trend may still preclude private enforcement: limitations on class action certification.229 While efforts to reign in class actions are not new, like arbitration and pleading standards, recent Supreme Court jurisprudence in this area has created additional hurdles.230

As Stephen Burbank and Sean Farhang document, it was not long after the increase in federal statutes establishing private enforcement in the 1960s that the executive branch shift to Republican control under President Reagan sparked a desire for deregulation and, with it, a project of “litigation reform.”231 The Reagan administration recognized that, as private enforcement of federal law grew, it posed “an obstacle to their regulatory reform agenda.”232 In particular, Burbank and Farhang explain, the administration set their sights on statutory fee-shifting provisions that they believed “forced business and government to pay the attorneys[ ] . . . of plaintiffs who launched invasive, disruptive, and costly lawsuits . . . .”233 Throughout the 1980s, the administration sought to pass legislation that would cap or do away with attorneys’ fees or punitive damages for enforcement of federal statutes but, with a few exceptions, were unsuccessful.234

The Reagan administration did, however, succeed in positioning deregulation supporters on the Federal Rules Committee and in the courts.235 As a result, the “litigation-friendly” Federal Rules that had been established in 1938 and amended to support private enforcement through fee shifting in class actions in 1966 were further amended in 1998 and 2003 to the opposite end.236 As amended, Rule 23 adopted more stringent notice and opt-out procedures and modified attorneys’ fees awards, reflecting the Committee’s belief that “large attorney fees in the absence of meaningful recoveries by class members . . . brings the civil justice system into disrepute.”237

Meanwhile, federal courts began to move in the same direction, with decisions on requirements and burdens for evidence that made it harder for plaintiffs’ to certify a class.238 This trend culminated in 2011, in the Supreme Court’s decision in WalMart Stores, Inc. v. Dukes, 239 in which, as Burbank and Farhang note, it came as “no surprise” that interpretation of requirements for class certification “ha[d] been stretched to the breaking point.”240 In Wal-Mart, a case in which private plaintiffs alleged employment discrimination in violation of federal law, the court adopted a new, more stringent interpretation of Rule 23 and reversed the appellate court decision granting class certification.241 To meet the “commonality” requirement for class certification under Rule 23, the Court held it was no longer enough to ask whether “there are questions of law or fact common to the class;”242 plaintiffs must show that class treatment would “generate common answers apt to drive the resolution of the litigation.”243 Then, to decide if plaintiffs met this new standard, the Court looked beyond certification issues to the underlying merits of the case and held they had not. According to the Court majority, the plaintiffs’ evidence lacked “some glue holding the alleged reasons for all those [discriminatory] decisions together” and failed to prove commonality under Rule 23(a)(2). 244 Justice Ginsburg, writing for the dissent, criticized the Court majority for merging Rules 23(a) and 23(b)(3) and going too far into the merits at the class certification stage, “disqualify[ing] the class at the starting gate” of its enforcement action.245

The Court also held, for the first time, that cases seeking more than “incidental” monetary damages accompanying injunctive relief must follow “opt-in” procedures for determining class members under Rule 23(b)(3), rather than “opt-out” procedures under Rule 23(b)(2),246 likely increasing the cost to plaintiffs’ attorneys to pursue class claims and limiting the size of the class for those that do.247

As with arbitration and pleading trends, the literature on class action reform is large and robust, a review of which is beyond the scope of this Article.248 But, given that class actions are an essential tool for private enforcers—especially when an individual plaintiff’s recovery is too small to warrant the cost and effort of litigation—the trend toward increasing the costs and procedural hurdles for class certification under Rule 23 also threatens statutory enforcement.249

### 2NC---Healthcare Innovation High

#### Biopharma innovation is strong and increasing.

CB 21 (CB Insights Research, 4-19-2021, "From Vaccines To Cancer Treatments, How Pharma Partnerships Are Driving The Next Wave Of Drug Innovation", https://web.archive.org/web/20210419185913/https://www.cbinsights.com/research/pharmaceutical-companies-business-relationships/)

As research and development costs continue to rise, biopharmaceutical companies are joining forces with startups to bring drugs to market. These relationships span use cases from vaccine development to AI for drug discovery, and are vital to the drug development ecosystem. In fact, more than 70% of new drugs are developed externally and later obtained by a pharmaceutical company. Biopharma startups can leverage partnerships and licensing deals with incumbents to decrease technological risk and increase access to funding and resources. In turn, large pharmaceutical companies can minimize commercial risk while maintaining the option to bring the technology or drug candidate in-house for further development or commercialization. Over the past couple years, startup-incumbent relationships have shifted towards a licensing model, with licensing representing nearly half of these business relationships to date in 2021. This shift supports the growth of the R&D outsourcing model, which has gained in popularity over the past few years as pharmaceutical companies look to create leaner operating models. Using CB Insights’ Business Relationships data, we look at how the world’s largest pharmaceutical companies are working with startups and what these collaborations indicate about their strategies moving forward. PARTNERSHIP TRENDS Covid-19 & vaccines Prior to the Covid-19 pandemic, the infectious disease market was growing at a slower rate than the overall prescription drug market, and many pharmaceutical companies had not built the internal capabilities needed to develop vaccines. This was particularly true for mRNA technology, which powered the first two Covid-19 vaccines authorized for emergency use by the FDA (Pfizer and Moderna). The past year has seen existing relationships expand in scope, and many new relationships created. One notable partnership, which saw Covid-19 vaccine approval in December, is between BioNTech and Pfizer. The partnership, which began by focusing on mRNA vaccines for influenza, launched in 2018, slightly over a year before BioNTech’s IPO. Pfizer paid $120M upfront for research funding and equity, with BioNTech entitled to an extra $305M based on development milestones. In early 2020, the companies leveraged mRNA technology and its resulting Covid-19 vaccine became the first one authorized by the FDA. Moderna Therapeutics, developer of the second FDA-authorized Covid-19 vaccine, was also partnering before the pandemic. In 2018, it received $125M in funding from Merck to develop mRNA-based cancer vaccines. It also landed one of the earliest deals in the mRNA space, receiving $240M from AstraZeneca in 2013. Moderna chose to independently develop and commercialize its Covid-19 vaccine. Post-approval, it is now working with partners like Uber to enable distribution and access. Covid-19 has also sparked partnerships between incumbents. For example, Sanofi and GlaxoSmithKline announced a vaccine development partnership in September 2020. More recently, Merck partnered with Johnson & Johnson to manufacture J&J’s one-shot Covid-19 vaccine. Cancer immunotherapy Cancer immunotherapy represents a $116B market opportunity, per CB Insights’ industry analyst consensus — so it’s no surprise that many large pharmaceutical companies have multiple pipeline candidates for various cancer types. To expedite drug discovery, many pharmaceutical companies are working with startups that own large clinical datasets to uncover novel biomarkers and cancer subtypes. Bristol Myers Squibb recently expanded its alliance with Tempus — a company creating a library of molecular and clinical data — to include RNA-based targets. This follows a similar partnership between Bristol Myers Squibb and Enterome to leverage microbiome-derived biomarkers for drug discovery. Other deals focus on applying a platform approach, such as cell and gene therapy technologies, to a particular disease. In 2020, Novartis paid $30M to use TScan Therapeutics’ technology to identify novel T-cell receptor (TCR) therapy antigens for kidney cancer. The deal gives Novartis rights to license and develop up to 3 novel targets that come out of the collaboration. Another common stage for licensing deals is immediately before clinical trials. Sanofi recently purchased exclusive rights to a solid tumor cancer immunotherapy candidate from Biond Biologics for an upfront payment of $125M. While the milestone payments could amount to as much as $1B, this early agreement — with the product still in animal trials — provides funding for Biond Biologics and access to a $425B market opportunity for Sanofi, per CB Insights’ industry analyst consensus. Biosimilars & biologics Historically, pharmaceutical companies have focused on small molecule drugs, which are not biologically derived. However, half of FDA-approved drugs in 2018 were biologics — drugs made from living organisms or containing components of living organisms — according to Pharmaceutical Commerce data. Biologics are used across a variety of products, including gene and cell therapies, therapeutic proteins, antibodies, and vaccines. To gain capabilities and access to biologics market opportunities, pharma companies are working with biologics startups. For example, Takeda Pharmaceutical entered a partnership with Crescendo Biologics in 2016, to apply Crescendo’s T-cell enhancing technology to multiple cancer targets for discovery and development. In late 2020, the partnership achieved its 6th technical milestone when Crescendo delivered novel targeted antibodies to Takeda. Because biologics are larger than small molecule drugs, partnerships can also be useful for biopharma companies that must rethink their manufacturing and drug delivery technology. For example, Bayer partnered with ReForm Biologics to apply ReForm’s viscosity-reducing excipients — molecules that carry active substances — to its biologics in order to enable injections. As the number of approved biologics grows, so will the number of biosimilars — follow-on products that are similar to patent-expired biologics in terms of safety, purity, and potency, but may have minor differences in their active components. In 2020, Teva Pharmaceutical Industries formed an exclusive strategic partnership with Alvotech to commercialize 5 biosimilar product candidates. The originator products — biologics that the biosimilars are modeled after — currently generate $35B in sales. The agreement leverages each company’s expertise, with Alvotech responsible for development and Teva responsible for commercialization. AI for drug discovery Large pharmaceutical companies are also partnering with AI startups to develop new drugs and therapeutics. Artificial intelligence can expedite the drug discovery process, finding new molecular compounds faster than traditional methods. AI may also improve predictions for the efficacy of drug candidates, boosting the likelihood of success in clinical trials and reducing total development costs. Atomwise uses neural networks to create 3D models of molecular compounds and simulate biochemical reactions to predict which compounds will bind to target proteins. The company, backed by Y Combinator and Khosla Ventures, has partnered with Eli Lilly, Merck, Bayer, Pfizer, and AbbVie. Recently, Atomwise launched its first joint venture — A2i Therapeutics — with its partner FutuRx. Exscentia, a UK-based AI drug discovery startup, recently received funding from the Bill and Melinda Gates Foundation to develop infectious disease treatments. In 2020, the company announced drug discovery partnerships with Huadong Medicine for oncology small molecule therapies and Bayer for cardiovascular and oncology targets. Another notable startup in this space is Insilico Medicine, which uses general adversarial networks (GANs) and synthetic data to generate targets and predict efficacy. Insilico has gained significant traction since the beginning of 2020, with 10 pharmaceutical partnerships. WHAT’S NEXT? The past two years have seen 700+ drug development-related partnerships by pharmaceutical companies, nearly half of which were related to Covid-19 or vaccine development. Rather than selling their own drug candidates, startups are sharing risk — and upside — with incumbents. Partnership and licensing agreements align payments with development and commercialization milestones. This partnership trend is likely to continue as biopharma companies leverage their commercialization power and work with startups to find novel drug candidates and biotechnology tools.

### 2NC---!D---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>)

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

#### Healthcare innovation high.

NAM 20, National Association of Manufacturers. Citing Robyn Boerstling NAM Vice President of Infrastructure, Innovation and Human Resources Policy (7-24-2020, "Report: U.S. Leads in Pharma Innovation, Thanks to Effective Policies", [https://www.nam.org/report-u-s-leads-in-pharma-innovation-thanks-to-effective-policies-9945/](about:blank))

The new report from the ITI Foundation offers strategies to maintain U.S. strength, spur greater innovation and increase domestic production.

U.S. policies spur success: “America still leads in innovation and drug development, in large part due to effective life-science policies, including significant federal investment in life-sciences basic research, robust intellectual property (IP) protections, effective technology transfer policies, investment incentives, and, importantly, drug pricing policies that enable companies to invest in high-risk drug development.”

Recommendations for policymakers: The paper suggests U.S. policymakers should focus on four key areas:

Maintaining U.S. strength in pricing, tech transfer and intellectual property—and avoiding oppressive drug price control schemes that damage competitiveness;

Boosting innovation through investment and additional tax incentives that promote research and development;

Increasing domestic production, including via tax credits and additional funding for key research institutions; and

Combating foreign mercantilism by making sure that America’s trading partners pay their “fair share” for new drugs, treatments and other medical products.

Innovation in the time of COVID-19: At a time when U.S. pharmaceutical companies are central to the fight against a global pandemic, the ability to innovate successfully is of paramount importance. The U.S. House Committee on Energy and Commerce held a hearing on Tuesday that discussed the issue, titled “Pathway to a Vaccine: Efforts to Develop a Safe, Effective and Accessible COVID-19 Vaccine.”

The NAM says: “The research ecosystem we have in the United States supports a global leadership position of biopharmaceutical innovation,” said NAM Vice President of Infrastructure, Innovation and Human Resources Policy Robyn Boerstling. “Manufacturers are committed to building upon that innovation—but it’s clear that government-led pricing restrictions and importing bad health care policies used by our competitors is not the way forward.”

### 2NC---!D---Bioterrorism

#### Terrorists are conservative, and technical complexities overwhelm.

Lentzos 17, Senior research fellow jointly appointed in the Departments of War Studies and of Global Health and Social Medicine at King’s College London. (Filippa, 07/3/17, "Ignore Bill Gates: Where bioweapons focus really belongs", *Bulletin of the Atomic Scientists*, https://thebulletin.org/2017/07/ignore-bill-gates-where-bioweapons-focus-really-belongs/)

I disagree. At a stretch, terrorists taking advantage of advances in biology might be able to create a viable pathogen. That does not mean they could create a sophisticated biological weapon, and certainly not a weapon that could kill 30 million people. Terrorists in any event tend to be conservative.

They use readily available weapons that have a proven track record—not unconventional weapons that are more difficult to develop and deploy. Available evidence shows that few terrorists have ever even contemplated using biological agents, and the extremely small number of bioterrorism incidents in the historical record shows that biological agents are difficult to use as weapons. The skills required to undertake even the most basic of bioterrorism attacks are more demanding than often assumed. These technical barriers are likely to persist in the near- and medium-term future.

# 1NR

## ADV 2

### 1NR---!D---Bioterrorism

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Lentzos 17, Senior research fellow jointly appointed in the Departments of War Studies and of Global Health and Social Medicine at King’s College London. (Filippa, 07/3/17, "Ignore Bill Gates: Where bioweapons focus really belongs", *Bulletin of the Atomic Scientists*, https://thebulletin.org/2017/07/ignore-bill-gates-where-bioweapons-focus-really-belongs/)

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## ADV 1

### !---Overview

#### Outweighs---Chinese tech parity is existential.

Suchodolski 20, \*Jeanne Suchodolski, attorney with the United States Navy Office of General Counsel where she currently serves as Patent and Intellectual Property Counsel for the Naval Undersea Warfare Center Division Keyport. \*\*Suzanne Harrison, Founder of Percipience, LLC, a board-level advisory firm focused on intellectual property strategy, management, and quantifying and mitigating intellectual property risk. \*\*\*Bowman Heiden is the co-director of the Center for Intellectual Property and visiting professor at University of California, Berkeley. (December 2020, “Innovation Warfare”, *North Carolina Journal of Law & Technology*, Volume 22, Issue 2, pg. 119, <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1416&context=ncjolt>)

Innovation Warfare does not just threaten American jobs and economic prosperity. By simultaneously co-opting and weakening the innovation capabilities of the United States, China seeks to advance its rise to world power. China’s prosecution of Innovation Warfare not only encompasses a rejection of a rules-based international order, but also poses an existential threat. A world where China dominates the technology landscape is not just about who earns the profits or prevails in an abstract geopolitical fight. According to the National Security Strategy of the United States of America (“National Security Strategy”), China pursues a world in which economies are less free, less fair, and less likely to respect human dignity and freedoms.8 China’s Innovation Warfare activities risk the type of economic and geopolitical aggressions that were a root cause of two World Wars.

### 2AC 1---AT: Growth Low

#### It’s perfect uniqueness for our turn. It only stays high if companies can capitalize on their predictions about re-opening

Van der Welle 21 (Peter; July 7; Strategist within the Global Macro team, M.A. in Economics from Tilburg University; Robeco, “How capex holds the key to a self-sustaining economic recovery,” [https://www.robeco.com/latam/en/insights/2021/07/how-capex-holds-the-key-to-a-self-sustaining-economic-recovery.html](about:blank))

Title: How capex holds the key to a self-sustaining economic recovery. Capital expenditure to fix supply shortages and meet burgeoning demand is seen figuring strongly in the post-Covid recovery. [Author and summary omitted]. Companies are expected to invest heavily in new equipment and capacity as they seek to meet the pent-up demand released from economic reopening. “The world is emerging from the pandemic, and much of the focus has been on the release of huge pent-up demand for goods and services that have been inaccessible for much of the past year,” says Peter Van der Welle, strategist with Robeco’s multi-asset team. “But there is a bigger issue regarding the ability of companies to supply these goods and services, due to the supply side constraints that have emerged through economic reopening. We believe this is powering a resurgence in capital expenditure by companies, and those which are investing in new equipment to meet greater demand will be the more sought after stocks.” Capex intentions Van der Welle says this trend can already be seen in the US Federal Reserve’s Capex Intentions Index, which shows that steep year-on-year increases in capital expenditures are planned. “So, that's promising for a near-term rebound in the capex cycle,” he says. “The market has already picked up on that theme because you can see a clear outperformance of capex-intensive stocks compared to the broader market year to date.” Fiscal dominance Van der Welle says five elements support the multi-asset team’s view that capex will rise from here onwards. “The first is the overarching macroeconomic picture in that we are increasingly moving towards an environment of fiscal dominance and away from one that has been monetary-led via quantitative easing,” he says. “Central banks have pursued very easy monetary policies, but they have hit the nominal lower bounds with regard to policy rates.” “This is a hard constraint because real rates are difficult for central banks to push even lower than they are nowadays, given the strong consensus among both central bankers and market participants that inflation is transitory.” Big spending plans For stimulus, fiscal policy is better suited to address the negative supply shock that Covid-19 has posed. Fiscal dominance can be seen in the huge infrastructure spending planned in the US, with the USD 1.9 trillion American Rescue Plan already in motion, and the USD 2 trillion American Jobs Plan going through Congress. In Europe, the disbursement of the EUR 750 billion EU Recovery Fund is due to start later in July. “An era of fiscal dominance is able to say goodbye to the secular stagnation thesis, which holds that the economy is suffering from under-investment,” says Van der Welle. “Under-investment due to insufficient demand, which was the biggest problem after the global financial crisis, has become less likely.” “We saw very subdued consumption growth both in the US and elsewhere between 2009 and 2019. That story is reversing in the US. Households’ income has been supported by fiscal policy during the Covid-19 recession, while burgeoning consumer demand in the reopening phase could prove to be more sticky as employment prospects continue to improve in the medium term.” Tobin’s Q looks good A third reason to expect higher capex is driven by ‘Tobin’s Q’ – the market value of a company divided by its assets' replacement cost. If this ratio is above one, then corporates have an incentive to invest directly in the underlying assets rather than buying another company at market value to acquire the same assets. The Tobin’s Q ratio is currently at 1.7 for the US. “So it's very expensive to do M&A, and it is wiser for corporates to invest in the underlying capital goods themselves,” Van der Welle says. “We should therefore expect a gradual move away from M&A activity towards companies making direct investments in capital goods.” Supply-side constraints The fourth element is the severe supply-side constraints seen in the global economy, as capacity shut down during the pandemic. “This is reflected in the ISM Prices Paid Index, which reached an all-time high in June in reflection of rampant shortages of raw materials and labor,” says Van der Welle. “Clearly the issue today following the pandemic is not demand related, but supply related. This will also trigger more awareness to push the productivity frontier and incentivize capital expenditure.” Less reliance on labor The fifth element is the partial substitution from labor to capital in the US against the backdrop of lingering labor shortages. “A decline in the labor force participation rate shows that people are not quickly returning to the labor force, as they have been disincentivized by the subsidies and pay checks they have gained from the stimulus plans, and/or structural changes in their work/life balance due to the pandemic,” says Van der Welle. “When the cost of labor becomes more expensive, substituting labor with capital becomes more attractive for employers. Typically, the inflection point for capex intentions becoming positive is when unit labor costs rise by more than 2% year on year, which is the case today.” Capex will lengthen the earnings cycle Regarding earnings, there is a significant relationship between capex intentions and productivity, though the lag from intending to invest to actually getting a realized productivity gain is quite long – up to several years. Higher capex that eventually brings higher productivity growth will sustain the earnings cycle, Van der Welle says. Higher productivity gives corporates more pricing power because they suppress unit labor costs, and that means profit margins can stay elevated for longer.

#### 2---Corporate optimism high

DiBlasi ’21 [Joseph; May 19; Associate Director of Corporate Communications at the Conference Board; the Conference Board, “CEO Confidence Hits All-Time High in Q2,” [https://www.conference-board.org/research/CEO-Confidence/](about:blank)]

The Conference Board Measure of CEO Confidence™ in collaboration with The Business Council improved further in the second quarter of 2021, following a sharp increase in Q1. The measure now stands at 82, up from 73. This marks the highest level of CEO confidence recorded since the measure began in 1976. (A reading above 50 points reflects more positive than negative responses.)

CEOs’ assessment of current economic conditions rose substantially, after slightly moderating last quarter. In Q2, 94 percent said conditions are better compared to six months ago, up from 67 percent in Q1. CEOs also expressed greater optimism about conditions in their own industries, with 89 percent reporting better conditions compared to six months ago, up from 68 percent in Q1. Historically high expectations in Q1 climbed even further in Q2: 88 percent of CEOs expect economic conditions to improve over the next six months, up from 82 percent.

“This quarter’s survey marks a remarkable turnaround from a year ago—when CEO confidence reached a nadir of 34 at the height of COVID-19’s first wave,” said Dana Peterson, Chief Economist of The Conference Board. “For CEOs, the challenge of navigating a once-in-a-century pandemic is receding, as the focus turns to hiring and investing to compete in an economy poised to see the fastest growth in decades over the months ahead.”

In the job market, the pace of hiring is expected to accelerate over the next 12 months, with 54 percent of CEOs expecting to expand their workforce, up from 47 percent in Q1. While the outlook for wages was virtually unchanged in Q2, more CEOs are reporting difficulty finding qualified workers—57 percent in Q2, up from 50 percent in Q1.

“Optimism is surging in C-suites and boardrooms across industries,” said Roger W. Ferguson, Jr., Vice Chairman of The Business Council and Trustee of The Conference Board. “For CEOs, the challenge is no longer staying afloat, but keeping pace—in particular, with a likely resurgence of the labor shortages experienced before the pandemic.”

Current Conditions

CEOs’ assessment of general economic conditions rose sharply in Q2:

* 94% of CEOs reported economic conditions were better compared to six months ago, up from 67% in Q1.
* Only 2% said conditions were worse, down from 10%.

CEOs were similarly optimistic about conditions in their own industries in Q2:

* 89% of CEOs reported that conditions in their industries were better compared to six months ago, up from 68%.
* Only 4% said conditions in their own industries were worse, down from 8%.

Future Conditions

Expectations about the short-term economic outlook improved further in Q2:

* 88% percent of CEOs said they expect economic conditions to improve over the next six months, up from 82% in Q1.
* Only 1% expect conditions to worsen, down from 7%.

CEOs’ expectations regarding short-term prospects in their own industries also improved in Q2:

* 81% of CEOs expect conditions in their own industry to improve over the next six months, up from 78%.
* Only 4% expected conditions to worsen, down from 7%.

Capital Spending, Employment, Recruiting, and Wages

The survey also gauged CEOs’ expectations about four key actions their companies plan on taking over the next 12 months.

* Capital Spending: 47% of CEOs expect to increase their capital budgets in the year ahead, up from 45% in Q1.
* Employment: 54% of CEOs expect to expand their workforce, up from 47% in Q1.
* Hiring Qualified People: 57% of CEOs report some problems attracting qualified workers, up from 50% in Q1. Notably, 28% report difficulties that cut across the organization, rather than concentrated in a few key areas—up from 18% in Q1.
* Wages: 37% of CEOs expect to increase wages by 3% or more over the next year, virtually unchanged from 36% in Q1.

#### 3---Cites chief economist that has positive economic outlook [KANSAS]

Cox 21 - Financial editor for CNBC. Author of Debt, Deficits, and the Demise of the American Economy. (Jeff, The rapid growth the U.S. economy has seen is about to hit a wall, [https://www.cnbc.com/2021/07/23/the-rapid-growth-the-us-economy-has-seen-is-about-to-hit-a-wall.html](about:blank), emuse)

The U.S. economy is expected to post another roaring growth spurt in the second quarter, before a slow and steady dose of reality starts to sink in. Gross domestic product is projected to accelerate 9.2% for the April-to-June period, according to a FactSet survey. The Commerce Department will release its first estimate for second-quarter GDP on Thursday. In a pre-pandemic world, that would have put annualized growth at its fastest level since the second quarter of 1983. However, the current circumstances and the [outsized policy response](about:blank) they generated make this merely the third straight quarter of GDP that sits well above the post-Great Recession trend. Things are about to change, however. The economy is creeping back toward normal, the open checkbook from Congress is about to get tighter, and millions of sidelined American workers will be returning to their jobs. That means a gradual reversion to the mean for an economy more used to growing closer to 2% than the much stronger levels it has turned in during the reopening. “Growth has peaked, the economy will slow a bit in the second half of this year, then much more noticeably in the first half of 2022 as fiscal support fades,” said Mark Zandi, chief economist at Moody’s Analytics. “The contours of growth are going to be shaped largely by fiscal policy over the next 18 months. The tailwind just blows less strongly, and may stop altogether by this time next year.” It’s been a long road getting here, but the economy has gotten very close to its pre-pandemic self. In fact, according to a running gauge that Jefferies keeps, overall output is at 98.6% of its “normal” level before Covid-19 turned everything upside down. The firm uses a slew of indicators to measure then versus now, and finds that while some areas such as employment and air travel are lagging, retail and housing have helped push overall activity to just below the 2019 level, at 98.6% as of July 19. “When I look holistically at household income dynamics and balance sheets, I see a very, very positive situation, very healthy fundamentals, and it’s hard to be pessimistic on the outlook,” said Aneta Markowska, chief financial economist at Jefferies. (The firm updated its tracker Monday, and said growth is now back to 100% of its pre-pandemic level for the first time.) Indeed, [household net worth totaled $136.9 trillion](about:blank) at the end of the first quarter, a 16% increase from its 2019 level, according to the Federal Reserve. At the same time, household debt payments compared with disposable personal income fell to 8.2%, a record low going back to 1980. But much of that net worth has been driven by increases in financial assets such as stocks, and personal income has swelled due to [government stimulus payments](about:blank) that are slowing and eventually will stop. Demographics holding back growth Keeping up such a rapid pace of growth will be difficult in an economy that has long been held back by an aging population and lackluster productivity. Those issues will be exacerbated by dwindling policy support as well as an ongoing battle against Covid-19 and its variants, though few economists expect widespread lockdowns and the plunge in activity that happened in early to mid-2020. “What we see is an economy growing robustly above trend albeit at a slower pace through 2023,” said Joseph Brusuelas, chief economist at consulting firm RSM. “Absent any productivity-enhancing policy support, we eventually will move back to trend because there’s not much we can do about the demographic headwinds, which will eventually drag growth back to the long-term trend.” But there also are shorter-term headwinds that should temper those gaudy growth numbers. An aggressive [spurt of inflation](about:blank) brought on by supply constraints and huge demand related to the economic reopening will hit output. While many economists, including those at the Federal Reserve, are willing to write off the inflation as temporary with soaring used auto and truck prices contributing a large component, officials including Treasury Secretary Janet Yellen warned that the [price increases are likely to continue](about:blank) for at least several months. Inflation combined with fading fiscal support also then will serve as a growth limit. “The economy is facing supply constraints with residential investment likely a drag and the change in inventories remaining negative,” Bank of America U.S. economist Alexander Lin said in a note. “Looking ahead, this is likely the peak, with growth cooling in the coming quarters.” Capital Economics forecasts a below-consensus 8% GDP figure for the second quarter, then a drop to 3.5% in the following period. “With surging prices squeezing real incomes we suspect the pace of monthly growth will remain lackluster, setting the stage for a sharp slowdown in consumption and GDP growth in the third quarter,” wrote Paul Ashworth, chief North American economist at Capital Economics. [The pandemic](about:blank) is another wild card. Cases of the delta variant are [spiking in a handful of states](about:blank), and health officials worry that the U.S. could face a surge like the one hitting some European and Asian countries. Few if any economists expect another wave of lockdowns or similar constraints in the U.S., but pressure from abroad could hit domestic growth. “Export platforms like Vietnam are being locked down now,” Brusuelas said. “Vietnam is becoming a more important cog in the global supply chain, so we are watching that closely. Brusuelas added that the negotiations over the debt ceiling also could shake up things in the U.S. Yellen said Friday that extraordinary measures the [U.S. may need to take](about:blank) to continue paying its debts could hit troubles as soon as October.

### 2AC 2---AT: No Link

#### Offense only goes our way---frivolous litigators will go after the most innovative firms

Kempf 20, \*Associate Professor of Finance University of Chicago, Booth School of Business, \*\*Chair of Financial Markets and Institutions University of Mannheim, Business School (Elisabeth and Oliver Spalt, “Attracting the Sharks: Corporate Innovation and Securities Class Action Lawsuits,” Finance Working Paper N° 614/2019

The purpose of this paper is to make progress by suggesting a new perspective on the link between innovation and litigation, which we label the “valuable innovation hypothesis.” The valuable innovation hypothesis holds that low-quality lawsuits specifically target successful innovators, i.e., firms that have recently received economically valuable patents and are about to embark on implementing their valuable ideas, because such successful firms are attractive targets for low-quality litigation. Several not mutually exclusive reasons can explain why successful innovators are attractive targets, including that managers who are busy growing their firms have high opportunity costs on time and other resources, that growing firms are particularly sensitive to bad publicity, and that successful innovators use more positive and forward-looking communication with investors, which is potentially easier for lawyers to attack. In this study, we provide both theoretical and empirical support for the valuable innovation hypothesis and show it fits the data better than, and overcomes some of the main shortcomings of, the risky innovation hypothesis. A core conceptual contribution of the valuable innovation hypothesis is to emphasize the distinction between innovation inputs, like R&D expenditures, and innovation outputs, which we measure as the economic value of granted patents in a given firm-year as described in detail below. This distinction allows us to reconcile the fact that practitioners and policy makers perceive innovation to be an important driver of low-quality litigation with the lack of strong evidence for an innovation-litigation link in the existing literature. We show that once we focus on innovation output, there is a strong empirical link between innovation and subsequent low-quality class action litigation. By contrast, if we follow prior work and focus on innovation input, we find no relation between innovation and low-quality litigation, consistent with Kim and Skinner (2012). The valuable innovation hypothesis thus helps us make progress on the first challenge to the risky innovation hypothesis we mentioned above. It also helps us make progress on the second challenge, because the valuable innovation hypothesis makes testable predictions about which firms have an elevated likelihood of being targeted by low-quality lawsuits conditional on a stock drop: firms with valuable innovation output. To measure a firm’s innovation output, we rely on an approach recently proposed by Kogan, Papanikolaou, Seru, and Stoffman (2017) (KPSS), who exploit stock-market reactions to new patent grants to determine the private economic value of innovations. The KPSS measure of valuable innovation output is ideal for our purpose because it is a strong predictor of subsequent growth in employment, capital, output, profits, and revenue-based total factor productivity. As shown by KPSS, this feature sets their measure apart from various other measures of innovation output and innovation input used in the prior literature. Hence, if innovation-induced firm growth makes innovative firms more attractive litigation targets, as predicted by the valuable innovation hypothesis, then the KPSS measure should allow us to pick up this relationship. We check other measures for robustness. We address potential endogeneity concerns using a range of different approaches. First, we show that the probability of a subsequent low-quality class action lawsuit increases in current innovation value also when controlling for a rich set of variables which have been shown by Kim and Skinner (2012) to predict shareholder litigation, including firm size, sales growth, stock returns, volatility, skewness, and turnover. In particular, we also control for innovation input using R&D expenditures and find that, while innovation output links strongly with subsequent lawsuits, innovation inputs do not. Second, we exploit information about how innovation affects not only low-quality lawsuits, but also high-quality lawsuits, and all lawsuits. While the valuable innovation hypothesis is consistent with the broader set of patterns, several alternative stories are not. For example, the hypothesis that innovative firms may simply have better lawyers is inconsistent with our finding that the probability of high-quality lawsuits does not decrease in innovation, and the finding that the overall probability of any lawsuit (i.e., both high and lowquality) increases. Third, we can include firm fixed effects in our regressions, which rule out that time-invariant characteristics of the firm, such as firm culture, are driving the documented relationship. Fourth, we show that the results are robust to using ex-ante proxies for lawsuit quality, as well as to alternative measures of innovation output. Fifth, we show that our results also obtain when we consider instruments for valuable innovation output. Finally, we estimate a dynamic version of our model, which shows that the timing of the effects supports a direct link between valuable innovation and subsequent low-quality litigation. On top of making a lawsuit more likely, we find that valuable innovation is associated with greater losses to shareholders conditional on a low-quality class action lawsuit being filed. A one-standard-deviation increase in valuable innovation is associated with an additional 1.4 percentage-point decrease in the targeted firm’s market capitalization in the seven days around a low-quality class action lawsuit filing. Combined, these findings imply that more valuable innovation output is associated with both, a greater probability of being subject to a low-quality class action lawsuit, and a greater loss conditional on receiving such a lawsuit. The expected costs of low-quality class action lawsuits are thus particularly high for firms with the highest innovation output. This finding is significant, because it implies that, ex post, low-quality litigation systematically drains resources from those firms with the most valuable ideas. With respect to potential drivers of these patters, we show that our findings cannot be explained by the risky innovation hypothesis, or by any other theory that focuses on innovationinduced stock price drops. Contrary to the predictions of these theories, firms with valuable innovation output in a given year are not associated with an increased likelihood of a stock drop next year, and their volatility decreases in the year following a valuable patent grant.

#### 2---Spillover---Thee plan sets a precedent that chills innovation in every sector.

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

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

#### 3---Markets: class actions shock corporate valuations---triggers stock market over-reaction

Klock 15, Ph.D. in Economics, Boston College, 1983; J.D. (with honors), University of Maryland, 1988. Admitted to the Maryland Bar, 1988; admitted to the District of Columbia Bar, 1989. Member of the Executive Board, Center for Law, Economics, and Finance, The George Washington University School of Law; Professor of Finance, The George Washington University School of Business, Washington, D.C. The author has benefited from participants at the 2013 Canadian Law and Economics meeting and the 2013 Midwestern Law and Economics meeting. (Mark, “Do Class Action Filings Affect Stock Prices? The Stock Market Reaction to Securities Class Actions Post PSLRA,” Journal of Business & Securities Law, Lexis)

This study has endeavored to conduct and document a replicable event study on securities class action filings subsequent to the PSLRA using the largest available set of data. A large data set provides the most power in test statistics, meaning that we are less likely to accept a null hypothesis of no impact when in fact the event does have an impact on the value of the companies’ stocks. 152 We do find that, overall, all securities class action filings have a negative impact at the filing date, and there is a statistically significant decline in value before filing occurs. This suggests that the market partially anticipates the filing of securities class actions. We also find in the baseline case that the full drop in valuation because of the class action is completed one day after the filing, and the market does not over-react because there is no subsequent statistically significant bounce back towards prior valuation. Interestingly, the greatest decline in stock value occurs for firms that have a 10(b) claim against them. Other types of claims that are not coupled with a 10(b) claim do not result in as large of drops. Also noteworthy is the fact that frivolous suits, defined as those that are subsequently dismissed on motion, also cause a statistically significant drop in value, but not as large as merit-based suits. This might suggest that the market has some ability to distinguish between frivolous and non-frivolous suits, but even frivolous suits are costly to corporate value. We also note that the circuit filed where the complaint is filed is correlates with the valuation change. Filings in the Ninth Circuit have a valuation drop that is much larger than those in the Second Circuit, and suffer some persistence in a continued valuation drop weeks after the filing. The economic sector also makes a difference to the magnitude of the valuation drop. Non-service firms lose more value than service firms. Within service firms, financial firms lose most. Excluding financial service firms, transportation and communications service firms lose more value than other types of service firms. Securities class action lawsuits provide benefits in the form of deterring fraud, redressing fraud, and promoting investor confidence in the market. 153 They also come with costs associated with attracting nuisance suits, which damage value either through resource expenditures or damage to corporate reputation.154 An optimal level of class action filings would result in marginal costs that equal the marginal savings.155

#### 4---Economic Closure: Expanded class action prevents economic opening---that is a structural cap on post-COVID growth

Bruggeman 20, graduate student at the University of Cambridge (Jacob, “Opinion: Frivolous lawsuits jeopardize our economic recovery,” <https://www.cincinnati.com/story/opinion/2020/06/15/opinion-frivolous-lawsuits-jeopardize-our-economic-recovery/5335326002/>)

While America slowly reopens in the wake of the COVID-19 pandemic, the public stands in a legal no man’s land of liability. Businesses are understandably worried about a deluge of lawsuits from consumers who could contract the virus while dining, drinking or simply browsing wares. Employees are concerned over workplace safety. The family of an Illinois Walmart worker, for example, who reportedly told supervisors about symptoms, has filed a wrongful death lawsuit. And McDonald’s employees in Chicago and Hooters employees in Tampa have filed class-action lawsuits. Consumers, too, have launched a litany of class-action lawsuits against companies like Ticketmaster and even private colleges. Senate Majority Leader Mitch McConnell insists on building liability protections into the next round of COVID-19 relief attempts to curb the possible economic problems posed by such lawsuits and class-action cases in particular. McConnell’s most recent effort to limit liability, this legislative priority has been derided by opponents as a "ruse" and "devious" attempt to hand fat cats "corporate immunity" and rush the rest of Americans back to work. But protection from class-action lawsuits is precisely what businesses of all sizes need if they’re to safely and expeditiously reopen. After all, a new report, authored by law firm Jones Day, confirms the worst: These suits seldom help anyone but attorneys. Drawing from 110 class-action cases between 2010 and 2018 in which federal courts approved settlements, the report’s interrelated findings are damning. In the end, it reads, "only a small fraction of [class-action lawsuit] members receive any monetary benefit at all from the settlements." When America’s courts do award cash settlements, lawyers rake in the cash while claimants are left with no more than a nickel. To quote the paper directly: "In eight injunctive relief cases, class counsel received an average amount of $491,717, while class members received no monetary relief." The courts themselves have critiqued the sorry state of affairs, noting that this type of relief is "utterly worthless" and does "not benefit the class in any meaningful way." Further still, the paper finds eight cases in which class members received only vouchers, or non-cash relief – while attorneys received "an average amount of $1,028,909." In fact, across 44 different settlements, the paper found that an average of more than 60% of the cash goes to attorneys or non-class members. Enriching lawyers at the expense of clients – are these lawsuits or scams? These findings confirm McConnell’s calls for class-action reform. And this is to say nothing of other serious criticisms of these lawsuits: raised costs for consumers, disseminated bad science, and a whole lot of economic damage. These are just a few reasons why lawmakers might consider keeping these reforms in post-pandemic society. That’s not to say no class-action lawsuits have a legitimate place in America’s legal landscape, but when plaintiffs’ attorneys are paid millions and their clients leave the courtroom empty handed, it’s clear that something is seriously wrong. Obviously, these frivolous lawsuits pose a serious threat to the country’s post-COVID-19 economic recovery. Larry Kudlow, Trump’s chief economic adviser, worries that wrongheaded lawsuits will jeopardize the country’s recovery, saying "businesses should not have to deal with any 'trial lawyers putting on false lawsuits.'" Fortunately, the Insurance Journal reports, that only a few such lawsuits have been filed so far, partly because of "the difficulty of proving where someone was infected." That doesn’t mean businesses are out of the woods. If the Jones Day paper demonstrates anything, it’s that lawyers have both the financial incentive and legal know-how to turn bogus claims into big-time payouts. And when nothing is standing in their way to do so, why wouldn’t they? As the battle over the extent of COVID-19 liability restrictions continues in Congress, lawmakers should consider solutions like capping settlements, or at least the percentage paid out to attorneys. Only then will businesses feel secure about the possibility of opening, in a time when security is the number-one thing they need.

### 2AC 5---AT Antitrust Now

#### Courts will shut antitrust down.

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

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

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

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

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

attention, and consumer choice. To tackle these problems, we need more, much more.

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

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

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

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

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

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

### 2AC 6---AT: No Link

#### Frivolous litigation magnifies the risk

Kempf 20, \*Associate Professor of Finance University of Chicago, Booth School of Business, \*\*Chair of Financial Markets and Institutions University of Mannheim, Business School (Elisabeth and Oliver Spalt, “Attracting the Sharks: Corporate Innovation and Securities Class Action Lawsuits,” Finance Working Paper N° 614/2019

Securities class action lawsuits can be socially beneficial if they deter wrongdoing, curb managerial rent extraction, and compensate injured shareholders. However, class actions have a well-known dark side which stands against these benefits: lawyers can have an incentive to bring low-quality (also referred to as “meritless”, or “frivolous” in the literature) suits in the hope of securing a large settlement despite no actual managerial wrongdoing (e.g., Bebchuk (1988), Romano (1991), Bondi (2010)). Faced with the prospect of entering a long and resource-intensive legal dispute, and faced with the dangers of an imperfect judicial process, many firms are willing to settle cases even though the allegations have little to no legal merit. In Section 4 we present a model built around the intuition that, from the perspective of the plaintiff and the plaintiff’s lawyers, filing a meritless lawsuit is a long-shot bet on imperfections of the judicial system. Cases without legal merit are almost surely socially wasteful: they do not sanction any wrongdoing, they hurt corporate shareholders, they may distract managers from running their companies, and they are a burden on the judicial system. While, all else equal, minimizing the amount of meritless class action litigation appears desirable, designing optimal policy to discourage meritless suits is difficult. A case in point is the Private Securities Litigation Reform Act of 1995, which did not prevent a large number of lowquality class actions being filed after its passage. A more recent illustration is the Lawsuit Abuse Reduction Act (LARA), which aims at curbing meritless litigation by holding plaintiff lawyers accountable for the cases they bring.7

### 2AC 7---AT: Competition Low

#### The tech industry is vigorously competitive now.

CR 21, Catalyst Research, research organization led by Dr. Mark Drapeau (August 2021, “Nightmare on Main Street: The Effects of ‘Populist Antitrust’ on America’s Small Businesses”, pg. 11-12, *Data Catalyst Institute*, https://datacatalyst.org/reports/nightmare-on-main-street-the-effects-of-populist-antitrust-on-americas-small-businesses/)

And while certainly one can quantify that “big tech” companies have grown bigger of late, that is not the same as demonstrating that this bigness has snuffed out competition, or even proving that there is too much concentration in the industry. To the contrary, one could argue that the situation is the exact opposite:

Digital companies including Zoom, BigCommerce, Monday.com, SquareSpace, ZipRecruiter, DoorDash, ZoomInfo, and Snowflake all had initial public offerings (IPOs) during the last two years - and many of their offerings compete with GAFA’s offerings.

There are currently 712 “unicorn” tech startups (private companies with valuations of $1 billion or higher) with a cumulative valuation of $2.337 trillion. Over 300 of them became unicorns just in 2020 and 2021; about two-thirds of these new unicorns are U.S.-based companies.

Global venture capital (VC) funding of tech startups hit an all time high in Q1 2021 at $125 billion. VC funding also remained strong throughout the pandemic, with about $60-90 billion invested per quarter.

These statistics hardly paint a picture of the disappearance of competition and innovation; unlike Vanderbilt’s railroads, GAFA has plenty of well-funded competition. As noted tech commentator Benedict Evans recently wrote in an article about the proposed antitrust legislation, “People in tech agree on very little, but everyone would agree we're in the hottest market for tech startup creation in history - any relevant data would tell you that tech startup creation has actually risen by three to four times in the last decade.”

# 2NR

## CP---N&C

### 2NR---AT Say No

#### FTC will do the plan despite the risk of nullification

Zakrzewski 21, reporter, citing William E. Kovacic, a former FTC chair. (Cat, 8-19-2021, "Lina Khan’s first big test as FTC chief: Defining Facebook as a monopoly", *Washington Post*, <https://www.washingtonpost.com/technology/2021/08/19/ftc-facebook-lawsuit-lina-khan-deadline/>)

So far, Khan has taken a series of steps to signal a shake-up has arrived at the FTC. She’s started hosting open meetings to open the agency’s business to the public, and she’s warned that greater scrutiny of mergers is on its way. But the challenge will be for the agency to remain focused on the most important cases, including Facebook, Kovacic said. “She has a downpour of demands from both ends of the avenue,” he said. And none of her other efforts will matter if she can’t show that she can win against companies, including Facebook, in court. “The real measure to business decision-makers of your effectiveness and seriousness is your ability to prosecute and win cases,” Kovacic said.

#### FTC is willing to take on losing cases

Nicolás Rivero 21. NU Graduate. "Biden’s antitrust crusaders can’t crusade without Congress". Quartz. 3-11-2021. https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/amp/

US president Joe Biden is poised to promote two of the country’s most prominent anti-monopoly crusaders to top jobs in his administration. The moves signal that Biden is serious about cracking down on dominant companies that include Facebook, Google, Amazon, and Apple. But for the president’s trustbusting champions to make a real impact, they’ll need support from Congress.

Biden appointed Columbia law professor Tim Wu to the National Economic Council (NEC) as his top advisor on technology and competition on March 5. Politico reports that Biden will soon follow up by nominating Lina Khan, also a Columbia law professor, to the Federal Trade Commission (FTC). (Before she can take her seat as one of the antitrust agency’s five commissioners, Khan must be confirmed by the Senate.)

Khan and Wu are two of the leading voices in a new movement of legal thought that argues the US should fundamentally overhaul the way it approaches antitrust. The crux of their argument is that courts should broaden the values they consider when deciding whether to block a merger or break up a dominant company. Rather than focus narrowly on the impact a company has on consumer prices, they argue that judges should also think about a company’s impact on small businesses, labor rights, and the health of democracy.

Khan and Wu have already secured a win for their cause just by being appointed—essentially a White House stamp of approval on their viewpoints. But despite much handwringing from industry groups, neither appointee will be able to single-handedly remake American antitrust in their image.

How the FTC can tackle antitrust

To be sure, Wu can advocate loudly for his preferred policies from his perch at the NEC, which advises the president on economic policy. And if Khan makes it to the FTC, which is the top US antitrust enforcement agency, she’ll have direct influence over which investigations the agency prioritizes, which lawsuits it brings, and whether its prosecutors will ask judges to impose fines, break up dominant firms, or require them to change their business practices.

But there are clear limits to their power. The most the FTC can do is bring more antitrust cases that ask courts for more aggressive remedies, like breakups. That would allow the agency to make a point about what it considers acceptable business behavior. But many of those lawsuits would be bound to lose in front of judges who have grown far more skeptical of antitrust cases over the past four decades and far more conservative over the past four years.

### 2NR---AT No Spill-Over

#### Fixing democracy at home outweighs international threats

Berman 19, professor of political science at Barnard College, Columbia University, and the author of “Democracy and Dictatorship in Europe: From the Ancien Régime to the Present Day.” (Sheri, “The main threat to liberal democracy comes from within, not from authoritarians,” *Washington Post*, Proquest)

At the end of the 20th century, the collapse of communism led to celebrations of the triumph of liberal democracy. Today those celebrations are gone, replaced by fears, as Robert Kagan recently argued in The Post, that strongmen are striking back. But just as the earlier optimism masked important underlying realities, so, too, does today’s pessimism warp the understanding of what is going on. Globally, the condition of democracy remains strong. Democracy does face threats, but the “gravest one” comes not, as Kagan asserts, from without — from “resurgent authoritarianism” — but from within, from the failures of Western elites and governments. Let’s start with arguments about “resurgent authoritarianism.” Empirically, the evidence for this is thin. The number of democracies today remains close to its all-time high: There were 11 in 1900, 20 in 1920, nine in 1940, 32 in 1970, 77 in 2000 and 116 in 2018. Moreover, the undertow following the democratic wave that began in the late 20th century has been weak: It left many more democracies in its wake than previous waves of democratization in 1848, 1918 or 1945. Today’s authoritarian regimes are also less authoritarian than their predecessors, according to a new study by Anna Lührmann and Staffan I. Lindberg in the journal Democratization. During much of the 20th century, closed, repressive dictatorships were the most common form of authoritarian regime. Today, the dominant form is “electoral autocracies” that allow (flawed) elections, and some space for civil society, courts and so on. (Viktor Orban’s Hungary and Recep Tayyip Erdogan’s Turkey fall into this category.) Assessments of democracy’s current condition also require historical perspective. In Europe, for example, the struggle for democracy began in 1789 with the French Revolution. During the next 150 years, many transitions to democracy occurred in France and other European countries; most failed. It was only after 1945 that liberal democracy became the norm in Western Europe and only during the late 20th century in Southern Europe. In the United States, an entire section of the country — the South — remained illiberal and undemocratic up through the Civil War. It took another hundred years after that before political and legal rights were accessible to all citizens, including African Americans. The path to liberal democracy has always been long and difficult. That countries with almost no previous experience with liberalism or democracy, such as Russia, Hungary and Poland, have had trouble constructing well-functioning democracies today should sadden but not surprise us. What should surprise us are the problems facing liberal democracy in the West, where it has long been taken for granted. Yet these problems are not caused primarily by “resurgent authoritarianism.” Kagan argued that authoritarianism represents a grave threat because such regimes “are more powerful today than they have been” in the past; “revolutions in communications technologies” have enabled them to better control their societies and destabilize democracies; and they have a “powerful anti-liberal" ideology to offer. It is hard to see by what criteria contemporary authoritarian states are more powerful than their predecessors: Is Putin’s Russia really stronger or a greater threat than the Soviet Union? And it is unclear that Putin or other contemporary authoritarians are actively trying to roll democracy back, as Kagan asserted. Instead, they seem primarily interested in securing “friendly” regimes, particularly in their regions, regardless of political persuasion — as the United States was during much of the Cold War and seems to be again today under President Trump. Similarly, the idea that new communications technologies provide authoritarian regimes with unprecedented control over their own societies lacks historical perspective: Does Xi Jinping’s manipulation of Internet access give him more control over China than Mao was able to achieve with the Red Guards? And as Facebook-inspired uprisings across the globe have made clear, communications technologies can destabilize democracies and dictatorships. As for authoritarian regimes’ “powerful anti-liberal" ideology, while it is true, as Kagan noted, that 19th-century authoritarians peddled an anti-liberal ideology that called for a return to traditional societies where “natural hierarchies and divine authorities … determined every aspect of people’s existence,” and 20th-century fascists and communists promoted potent worldviews as well, today’s authoritarians have nothing remotely similar to offer. Xi, Putin, Orban and their ilk do not justify their hold on power with promises to create a better world. Their primary justification for power is pragmatic: They promise better performance than the alternative. And that alternative is liberal democracy. And herein lies the real cause of democracy’s contemporary problems. Liberal democracy is precious and precarious, yet decades of relative stability tempted too many to neglect it. During the late 20th century, anti-liberalism began gaining adherents, as Kagan noted, within parts of the Western left and, even more perniciously and pervasively, the right, weakening democracy and providing troublemakers such as Putin with divisions and allies they could exploit for their own ends. Yet those most culpable in the destabilization of democracy are probably politicians and other elites who seem to have forgotten what’s necessary to make it work. In the United States over the past decades, politics has become corrupted by gerrymandering, voting restrictions and the influence of big business and the wealthy. Education, health care and other public services have deteriorated. Society has become increasingly riven by economic, racial and geographical divisions. And the U.S. economy has developed to disproportionately benefit the already advantaged. Such trends have weakened U.S. democracy from within. During the post-World War II decades, successful Western democracies acted as beacons to citizens suffering under authoritarianism across the globe. Today the light from those beacons has dimmed, and contemporary authoritarians have skillfully exploited democracies’ weaknesses to justify their own rule and taken advantage of the fading ability and willingness of the United States in particular to champion democracy worldwide. Yet despite this, the global condition of democracy remains strong. If we want to secure and even strengthen it, the best strategy the best strategy would be to revitalize it from within rather than focusing on threats from without.