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# 1NC

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### Private Action CP---1NC

#### Text: The United States federal government should clarify that extraterritorial anticompetitive business practices by the private sector are subject to treble damages pursuant to a comity balancing test designed to balance global harmonization with cartel deterrence.

#### The plan causes extraterritorial application of both civil and criminal antitrust penalties. Civil alone solves.

Simmons 18, executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University. (Jay Kemper, “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” *Southern California Law Review*)

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.[153] For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”[154] Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and “criminally prosecutes traditional per se offenses of the law.”[155] In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.[156] These recognized remedial distinctions matter when assessing the FTAIA’s meaning. Along with the interpretive argument that the Sherman Act’s various provisions ought to be enforced in a way that is internally consistent, practical assessment of the varied remedies and parties that may pursue such remedies reinforces a narrow conception of the FTAIA’s language. The weighty power to seek imprisonment of offenders critically distinguishes criminal and civil remedies under the Sherman Act. The federal government alone retains such authority, predicated on principles of legality and sovereignty. For many reasons, it remains reasonable to permit civil redress—encompassing the full range of injunctive and damage relief—in extraterritorial proceedings under the Sherman Act. Aggrieved consumers and competitors targeted in American markets by foreign activities can sue for injunctive and treble damage relief under the Sherman Act’s civil provisions. Notably, the FTAIA permits as much by its own terms, at least where substantive elements under the Act are satisfied with respect to the requisite effect on domestic or direct import commerce. In this sense, American law maintains a strong deterrent to foreign actors through a robust system of civil, as opposed to criminal, redress. Extraterritorial competitive injuries are left to the civil sphere under the FTAIA. Such civil remedies are more than sufficient to advance the objectives of the American competition regime abroad—namely, to prevent through legal means artificial distortions on the price and output of goods and services. American courts play a major role in the adjudication of disputes spanning distinct sovereign jurisdictions; that role is best maintained through established civil remedies. But criminal remedies—being reserved to the sovereign alone—should not extend extraterritorially. The remedial distinctions under the Sherman Act reflect the aims of criminal and civil competition law—criminally, to vindicate public wrongs, and civilly, to remedy private injuries. Criminal antitrust remedies are logically limited in the context of foreign sovereign jurisdiction. By contrast, the Sherman Act’s civil remedies provide injunctive and damage relief that may compensate victims despite traditional notions of foreign sovereign authority. Far from one sovereign intervening in the backyard of another, a civil action enables individually aggrieved parties to receive compensation from an antitrust offender. This is an intuitive remedial extension of basic principles of legality and sovereignty. Thus, far from the government’s current position—that the FTAIA’s “claim” prong empowers prosecutors to independently seek criminal remedies for extraterritorial antitrust offenses—the overall remedy scheme for antitrust offenses reinforces a limited conception of criminal redress, particularly where the FTAIA provides the basis for government action. The preceding discussion substantiates a narrow interpretation of the FTAIA as cabining the extraterritorial criminal antitrust jurisdiction of federal courts. Based on the factors cited––along with substantial historical evaluation of the Sherman Act and FTAIA––this interpretation is consistent with the plain letter of the Act, engrained legal norms, and applicable canons of construction. The current state of U.S. antitrust law tacitly endorses potential executive overreach into criminal judgments of co-equal sovereigns, which is questionable even under consensual arrangements with such governments.[157] Such sovereigns’ domestic political and legal processes properly decide criminal judgments, absent American influence or legal process. In light of growing economic globalization, Part III briefly considers various implications of the prevailing construction of the FTAIA as independently supporting criminal prosecutions of foreign anticompetitive conduct.

### T Private Sector---1NC

#### Next off is T private sector

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

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

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

#### Violation: the aff applies exclusively to conduct overseas, which is a specific segment of the private sector.

#### Vote neg:

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

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

### Tradeoff DA---1NC

#### Law Enforcement Tradeoff DA:

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

Levine 8-25-2021, master’s degree from the Columbia University Graduate School of Journalism and a bachelor of arts in English from the University of Pennsylvania. She is also an alumna of the Fellowships at Auschwitz for the Study of Professional Ethics, a program in Germany and Poland that explores the ethics of reporting on politics, war and genocide (Alexandra, “How Biden's tech trustbuster could change health care,” *Politico*, <https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333>)

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

#### The plan overwhelms antitrust enforcement officers---China will block investigations at every turn

DOJ 6 (U.S. EXPERIENCE WITH INTERNATIONAL ANTITRUST ENFORCEMENT COOPERATION CHALLENGES TO ANTITRUST ENFORCEMENT IN TRANSNATIONAL MATTERS, <https://www.justice.gov/sites/default/files/atr/legacy/2006/06/01/1c.PDF>)

Enforcement of national laws in international matters is a process that can be both more complex and less predictable than domestic enforcement. Historically, concerns by nations over issues of sovereignty have led to some combination of legal, practical, and political impediments to such enforcement aims. Some nations introduced a variety of legal obstacles to stymie other nations in their efforts to prosecute international antitrust matters, and of course, affected parties often take their own evasive measures. The most common barriers to both U.S. antitrust authorities and private plaintiffs can impede efforts at accessing information and witnesses across borders. Sovereignty Concerns Sovereignty and consequent jurisdictional issues are among those that historically have elicited the most objections from other governments to U.S. antitrust enforcement efforts and, accordingly, led to the implementation of protective measures that bar efforts by U.S. litigants to obtain information for use in their domestic actions. Extraterritorial antitrust enforcement by U.S. antitrust enforcers has involved investigations into anticompetitive conduct of non-U.S. firms and individuals in violation of U.S.antitrust laws. Such conduct has included instances in which non-U.S. firms and individuals acting outside the United States have caused harm to competition within the United States and, on occasion, to U.S. firms doing business abroad. When engaging in this extraterritorial enforcement, U.S. antitrust authorities need to overcome sovereignty concerns that arise when they seek to obtain information and testimony from non-U.S. citizens located overseas; successfully meet jurisdictional requirements, including establishing personal jurisdiction and subject matter jurisdiction; and render valid service of process. Moreover, the successful prosecution of U.S. antitrust law under these circumstances requires U.S. antitrust authorities to overcome potential objections that extraterritorial enforcement violates principles of “traditional comity.” The term comity refers to the general principle that a country should take other countries’ important interests into account in its law enforcement in return for their doing the same. Traditional comity has been defined as “the recognition which one nation allows within its territory tothe legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.” The Advisory Committee, in 1 its deliberations, has considered these different dimensions. The application of comity with respect to application of the antitrust laws to conduct outside the United States remains an unsettled area of law after the most recent Supreme Court ruling in the area, Hartford Fire Insurance Co. v. California, and lower 2 federal U.S. courts have recently come to different interpretations of the holdings in this case. For much of the postwar period, extraterritorial application of U.S. antitrust laws had been a significant source of tension between the United States and its trading partners. In response to U.S. assertions of extraterritorial jurisdiction, some nations introduced laws that could impede U.S. investigatory efforts to compel production or gain access to information or witnesses located abroad. Today, while they are rarely exercised in contrast with even two decades ago, these statutes remain in effect. They encompass blocking statutes, to prevent the U.S. from collecting evidence and testimony on foreign soil, and clawback statues, to authorize the filing of local suits to recover multiple damages already paid in connection with a foreign judgement. Other mechanisms traditionally employed by foreign governments to resist or object to U.S. assertions of jurisdiction over foreign defendants are used occasionally today. These have taken the form of official protests to legal actions in the United States, including diplomatic notes of protest and the filing of amicus curiae briefs in connection with ongoing U.S. litigation; reservations against providing investigative or judicial assistance under bilateral or multilateraltreaties; and unwillingness to recognize and enforce acts of U.S. courts or extradition requests upon conclusion of antitrust litigation. Blocking statutes, no matter how sporadically invoked, stand as reminders to the hostility that may confront efforts by a U.S. antitrust authority to exercise and to enforce its compulsory power in the affected jurisdiction. Other obstacles include limitations on recognition and enforcement of foreign court orders, particularly those for multiple damages. Evidence Gathering One persistent impediment to U.S. evidence gathering efforts in international antitrustmatters is the government’s limited ability to exercise its compulsory powers in order to obtain information located abroad. As a result, in international matters the government is unable to engage in standard information gathering practices, forexample, searching the premises of a firm under investigation and seizing documents in the process. Compounding this situation is the fact that because evidence is located outside U.S. borders, there is a heightened possibility that essential information may be destroyed before U.S. antitrust authorities may have a chance to access it. Indeed, U.S. antitrust officials often emphasize that they are hindered in their efforts to aggressively pursue antitrust law violators because key documents and witnesses located abroad are often out of the reach of U.S. antitrust authorities.5

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

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

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

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

Numerof 20, PhD @ Bryn Mawr, internationally recognized consultant and author with over 25 years of experience in the field of strategy development and execution, business model design, and market analysis (Rita, “Covid-Induced Hospital Consolidation: What Are The Impacts On Consumers, And Potentially The President,” *Forbes*, <https://www.forbes.com/sites/ritanumerof/2020/11/11/covid-induced-hospital-consolidation-what-are-the-impacts-on-consumers-and-potentially-the-president/?sh=692d6fc94da0>)

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

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

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

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

#### US ag exports prevent hotspot escalation

Castellaw 17 Lieutenant General John Castellaw is the Founder and CEO of Farmspace Systems LLC, a provider of precision agricultural aerial services and equipment. He is a highly decorated 36-year veteran of the United States Marine Corp where he participated in and led several humanitarian operations in Africa, Asia and Europe. He is also the former President of the non-profit Crockett Policy Institute where he created the “SOLDIER 2 CIVILIAN” program to help veterans find jobs in precession agriculture. He graduated from the University of Tennessee, Martin (UTM) with a degree in Agriculture. He currently operates his family farm in Tennessee. “Opinion: Food Security Strategy Is Essential to Our National Security.” Agri-Pulse. May 1st, 2017. https://www.agri-pulse.com/articles/9203-opinion-food-security-strategy-is-essential-to-our-national-security

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

### Cap K---1NC

#### The 1AC’s based in free-market logics that upholds and saves capitalism

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

#### Extinction ⁠— try-or-die for transition

Foster 19, Sociology Professor @ Oregon (John Bellamy, February 1st, “Capitalism Has Failed—What Next?” *The Monthly Review*, Volume 70, Issue 9, <https://monthlyreview.org/2019/02/01/capitalism-has-failed-what-next/>, Accessed 06-30-2021)

Less than two decades into the twenty-first century, it is evident that capitalism has failed as a social system. The world is mired in economic stagnation, financialization, and the most extreme inequality in human history, accompanied by mass unemployment and underemployment, precariousness, poverty, hunger, wasted output and lives, and what at this point can only be called a planetary ecological “death spiral.”1 The digital revolution, the greatest technological advance of our time, has rapidly mutated from a promise of free communication and liberated production into new means of surveillance, control, and displacement of the working population. The institutions of liberal democracy are at the point of collapse, while fascism, the rear guard of the capitalist system, is again on the march, along with patriarchy, racism, imperialism, and war. To say that capitalism is a failed system is not, of course, to suggest that its breakdown and disintegration is imminent.2 It does, however, mean that it has passed from being a historically necessary and creative system at its inception to being a historically unnecessary and destructive one in the present century. Today, more than ever, the world is faced with the epochal choice between “the revolutionary reconstitution of society at large and the common ruin of the contending classes.”3 Indications of this failure of capitalism are everywhere. Stagnation of investment punctuated by bubbles of financial expansion, which then inevitably burst, now characterizes the so-called free market.4 Soaring inequality in income and wealth has its counterpart in the declining material circumstances of a majority of the population. Real wages for most workers in the United States have barely budged in forty years despite steadily rising productivity.5 Work intensity has increased, while work and safety protections on the job have been systematically jettisoned. Unemployment data has become more and more meaningless due to a new institutionalized underemployment in the form of contract labor in the gig economy.6 Unions have been reduced to mere shadows of their former glory as capitalism has asserted totalitarian control over workplaces. With the demise of Soviet-type societies, social democracy in Europe has perished in the new atmosphere of “liberated capitalism.”7 The capture of the surplus value produced by overexploited populations in the poorest regions of the world, via the global labor arbitrage instituted by multinational corporations, is leading to an unprecedented amassing of financial wealth at the center of the world economy and relative poverty in the periphery.8 Around $21 trillion of offshore funds are currently lodged in tax havens on islands mostly in the Caribbean, constituting “the fortified refuge of Big Finance.”9 Technologically driven monopolies resulting from the global-communications revolution, together with the rise to dominance of Wall Street-based financial capital geared to speculative asset creation, have further contributed to the riches of today’s “1 percent.” Forty-two billionaires now enjoy as much wealth as half the world’s population, while the three richest men in the United States—Jeff Bezos, Bill Gates, and Warren Buffett—have more wealth than half the U.S. population.10 In every region of the world, inequality has increased sharply in recent decades.11 The gap in per capita income and wealth between the richest and poorest nations, which has been the dominant trend for centuries, is rapidly widening once again.12 More than 60 percent of the world’s employed population, some two billion people, now work in the impoverished informal sector, forming a massive global proletariat. The global reserve army of labor is some 70 percent larger than the active labor army of formally employed workers.13 Adequate health care, housing, education, and clean water and air are increasingly out of reach for large sections of the population, even in wealthy countries in North America and Europe, while transportation is becoming more difficult in the United States and many other countries due to irrationally high levels of dependency on the automobile and disinvestment in public transportation. Urban structures are more and more characterized by gentrification and segregation, with cities becoming the playthings of the well-to-do while marginalized populations are shunted aside. About half a million people, most of them children, are homeless on any given night in the United States.14 New York City is experiencing a major rat infestation, attributed to warming temperatures, mirroring trends around the world.15 In the United States and other high-income countries, life expectancy is in decline, with a remarkable resurgence of Victorian illnesses related to poverty and exploitation. In Britain, gout, scarlet fever, whooping cough, and even scurvy are now resurgent, along with tuberculosis. With inadequate enforcement of work health and safety regulations, black lung disease has returned with a vengeance in U.S. coal country.16 Overuse of antibiotics, particularly by capitalist agribusiness, is leading to an antibiotic-resistance crisis, with the dangerous growth of superbugs generating increasing numbers of deaths, which by mid–century could surpass annual cancer deaths, prompting the World Health Organization to declare a “global health emergency.”17 These dire conditions, arising from the workings of the system, are consistent with what Frederick Engels, in the Condition of the Working Class in England, called “social murder.”18 At the instigation of giant corporations, philanthrocapitalist foundations, and neoliberal governments, public education has been restructured around corporate-designed testing based on the implementation of robotic common-core standards. This is generating massive databases on the student population, much of which are now being surreptitiously marketed and sold.19 The corporatization and privatization of education is feeding the progressive subordination of children’s needs to the cash nexus of the commodity market. We are thus seeing a dramatic return of Thomas Gradgrind’s and Mr. M’Choakumchild’s crass utilitarian philosophy dramatized in Charles Dickens’s Hard Times: “Facts are alone wanted in life” and “You are never to fancy.”20 Having been reduced to intellectual dungeons, many of the poorest, most racially segregated schools in the United States are mere pipelines for prisons or the military.21 More than two million people in the United States are behind bars, a higher rate of incarceration than any other country in the world, constituting a new Jim Crow. The total population in prison is nearly equal to the number of people in Houston, Texas, the fourth largest U.S. city. African Americans and Latinos make up 56 percent of those incarcerated, while constituting only about 32 percent of the U.S. population. Nearly 50 percent of American adults, and a much higher percentage among African Americans and Native Americans, have an immediate family member who has spent or is currently spending time behind bars. Both black men and Native American men in the United States are nearly three times, Hispanic men nearly two times, more likely to die of police shootings than white men.22 Racial divides are now widening across the entire planet. Violence against women and the expropriation of their unpaid labor, as well as the higher level of exploitation of their paid labor, are integral to the way in which power is organized in capitalist society—and how it seeks to divide rather than unify the population. More than a third of women worldwide have experienced physical/sexual violence. Women’s bodies, in particular, are objectified, reified, and commodified as part of the normal workings of monopoly-capitalist marketing.23 The mass media-propaganda system, part of the larger corporate matrix, is now merging into a social media-based propaganda system that is more porous and seemingly anarchic, but more universal and more than ever favoring money and power. Utilizing modern marketing and surveillance techniques, which now dominate all digital interactions, vested interests are able to tailor their messages, largely unchecked, to individuals and their social networks, creating concerns about “fake news” on all sides.24 Numerous business entities promising technological manipulation of voters in countries across the world have now surfaced, auctioning off their services to the highest bidders.25 The elimination of net neutrality in the United States means further concentration, centralization, and control over the entire Internet by monopolistic service providers. Elections are increasingly prey to unregulated “dark money” emanating from the coffers of corporations and the billionaire class. Although presenting itself as the world’s leading democracy, the United States, as Paul Baran and Paul Sweezy stated in Monopoly Capital in 1966, “is democratic in form and plutocratic in content.”26 In the Trump administration, following a long-established tradition, 72 percent of those appointed to the cabinet have come from the higher corporate echelons, while others have been drawn from the military.27 War, engineered by the United States and other major powers at the apex of the system, has become perpetual in strategic oil regions such as the Middle East, and threatens to escalate into a global thermonuclear exchange. During the Obama administration, the United States was engaged in wars/bombings in seven different countries—Afghanistan, Iraq, Syria, Libya, Yemen, Somalia, and Pakistan.28 Torture and assassinations have been reinstituted by Washington as acceptable instruments of war against those now innumerable individuals, group networks, and whole societies that are branded as terrorist. A new Cold War and nuclear arms race is in the making between the United States and Russia, while Washington is seeking to place road blocks to the continued rise of China. The Trump administration has created a new space force as a separate branch of the military in an attempt to ensure U.S. dominance in the militarization of space. Sounding the alarm on the increasing dangers of a nuclear war and of climate destabilization, the distinguished Bulletin of Atomic Scientists moved its doomsday clock in 2018 to two minutes to midnight, the closest since 1953, when it marked the advent of thermonuclear weapons.29 Increasingly severe economic sanctions are being imposed by the United States on countries like Venezuela and Nicaragua, despite their democratic elections—or because of them. Trade and currency wars are being actively promoted by core states, while racist barriers against immigration continue to be erected in Europe and the United States as some 60 million refugees and internally displaced peoples flee devastated environments. Migrant populations worldwide have risen to 250 million, with those residing in high-income countries constituting more than 14 percent of the populations of those countries, up from less than 10 percent in 2000. Meanwhile, ruling circles and wealthy countries seek to wall off islands of power and privilege from the mass of humanity, who are to be left to their fate.30 More than three-quarters of a billion people, over 10 percent of the world population, are chronically malnourished.31 Food stress in the United States keeps climbing, leading to the rapid growth of cheap dollar stores selling poor quality and toxic food. Around forty million Americans, representing one out of eight households, including nearly thirteen million children, are food insecure.32 Subsistence farmers are being pushed off their lands by agribusiness, private capital, and sovereign wealth funds in a global depeasantization process that constitutes the greatest movement of people in history.33 Urban overcrowding and poverty across much of the globe is so severe that one can now reasonably refer to a “planet of slums.”34 Meanwhile, the world housing market is estimated to be worth up to $163 trillion (as compared to the value of gold mined over all recorded history, estimated at $7.5 trillion).35 The Anthropocene epoch, first ushered in by the Great Acceleration of the world economy immediately after the Second World War, has generated enormous rifts in planetary boundaries, extending from climate change to ocean acidification, to the sixth extinction, to disruption of the global nitrogen and phosphorus cycles, to the loss of freshwater, to the disappearance of forests, to widespread toxic-chemical and radioactive pollution.36 It is now estimated that 60 percent of the world’s wildlife vertebrate population (including mammals, reptiles, amphibians, birds, and fish) have been wiped out since 1970, while the worldwide abundance of invertebrates has declined by 45 percent in recent decades.37 What climatologist James Hansen calls the “species exterminations” resulting from accelerating climate change and rapidly shifting climate zones are only compounding this general process of biodiversity loss. Biologists expect that half of all species will be facing extinction by the end of the century.38 If present climate-change trends continue, the “global carbon budget” associated with a 2°C increase in average global temperature will be broken in sixteen years (while a 1.5°C increase in global average temperature—staying beneath which is the key to long-term stabilization of the climate—will be reached in a decade). Earth System scientists warn that the world is now perilously close to a Hothouse Earth, in which catastrophic climate change will be locked in and irreversible.39 The ecological, social, and economic costs to humanity of continuing to increase carbon emissions by 2.0 percent a year as in recent decades (rising in 2018 by 2.7 percent—3.4 percent in the United States), and failing to meet the minimal 3.0 percent annual reductions in emissions currently needed to avoid a catastrophic destabilization of the earth’s energy balance, are simply incalculable.40 Nevertheless, major energy corporations continue to lie about climate change, promoting and bankrolling climate denialism—while admitting the truth in their internal documents. These corporations are working to accelerate the extraction and production of fossil fuels, including the dirtiest, most greenhouse gas-generating varieties, reaping enormous profits in the process. The melting of the Arctic ice from global warming is seen by capital as a new El Dorado, opening up massive additional oil and gas reserves to be exploited without regard to the consequences for the earth’s climate. In response to scientific reports on climate change, Exxon Mobil declared that it intends to extract and sell all of the fossil-fuel reserves at its disposal.41 Energy corporations continue to intervene in climate negotiations to ensure that any agreements to limit carbon emissions are defanged. Capitalist countries across the board are putting the accumulation of wealth for a few above combatting climate destabilization, threatening the very future of humanity.

#### Reject the aff and critically interrogate neoliberal discourse

Giroux 20, McMaster University Professor for Scholarship in the Public Interest and The Paulo Freire Distinguished Scholar in Critical Pedagogy (Henry, June 9th, “Racist Violence Can’t Be Separated from the Violence of Neoliberal Capitalism,” *Truthout*, <https://truthout.org/articles/racist-violence-cant-be-separated-from-the-violence-of-neoliberal-capitalism/>, Accessed 08-24-2021)

Neoliberalism and its regressive notion of individualism and individual responsibility has undermined the belief that human beings both make the world and can change it. The pandemic has ushered in a crisis that undermines that belief and opens the door for rethinking what kind of society and notion of politics will be faithful to the creation of a socialist democracy that speaks to the core values of justice, equality and solidarity. Under such circumstances, private resistance must give way to collective resistance, and personal and political rights must include economic rights. If inequality is to be defeated, the social state must replace the corporate state and social rights must be guaranteed for all. There can be no adequate struggle for economic justice and social equality unless economic inequality on a global level is addressed along with a movement for climate justice, the elimination of systemic racism and a halt to the spiraling militarism that has resulted in endless wars. This can only take place if the anti-democratic ideology of neoliberalism, with its collapse of the public into the private and its institutional structures of domination, are fully addressed and discredited. Étienne Balibar is right in stating that the triumph of neoliberalism has resulted in the “death zones of humanity.” Following Balibar, what must be made clear is that neoliberal capitalism is itself a pandemic and a dangerous harbinger of an updated fascist politics.

Overcoming Pandemic Pedagogy

The kind of societies that will emerge after the pandemic is up for grabs. In some cases, the crisis will give way to authoritarian regimes such as Chile, Hungary and Turkey, all of which have used the urgency of COVID-19 as an excuse to impose more state control and surveillance, squelch dissent, eliminate civil liberties and concentrate power in the hands of an authoritarian political class. As is well documented, history in a time of crisis also has the potential to change dominant ideologies, rethink the meaning of governance, and enlarge the sphere of justice and equality through a vision that fights for a more generous and inclusive politics. It is crucial to rethink the project of politics in order to imagine forms of resistance that are collective, inclusive and global, capable of producing new democratic arrangements for social life, more radical values and a “global economy which will no longer be at the mercy of market mechanisms.” This is a politics that must move beyond siloed identities and fractured political factions in order to build transnational solidarities in the service of an alternative radically democratic society. Making the pedagogical more political means challenging those forms of pandemic pedagogy that turn politics into theater, a favorite tactic of Trump. In this case, the performance works to suspend disbelief, hold power accountable and unravel one’s sense of critical agency. Pandemic pedagogy does more than undermine critical thinking and informed judgments, it dissolves the line between the truth and lies, fantasy and reality, and in doing so, destroys the foundation for understanding, engaging and promoting that social and economic justice. The endgame under the rubric of a pandemic pedagogy is not simply the destruction of the truth, but the elimination of democracy itself. Central to developing an alternative democratic vision is development of a language that refuses to look away and be commodified. Such a language should be able to break through the continuity and consensus of common sense and appeals to the natural order of things. At stake here is the need to reclaim both critical and redemptive elements of a radical democracy in order to address the full spectrum of violence that structures institutions and everyday life in the United States. This is a language connected to the acquisition of civic literacy, and it demands a different regime of desires and identifications to enable us to move from “shock and stunned silence toward a coherent visceral speech, one as strong as the force that is charging at us.” Of course, there is more at stake here than a struggle over meaning; there is also the struggle over power, over the need to create a formative culture that will produce informed critical agents who will fight for and contribute to a broad social movement that will translate meaning into a fierce struggle for economic, political and social justice. Agency in this sense must be connected to a notion of possibility and education in the service of radical change. Reimagining the future only becomes meaningful when it is rooted in a fierce struggle against the horrors and totalitarian practices of a pandemic pedagogy that falsely claims that it exists outside of history. Václav Havel, the late Czech political dissident-turned-politician, once argued that politics follows culture, by which he meant that changing consciousness is the first step toward building mass movements of resistance. What is crucial here in the age of multiple crises is a thorough grasp of the notion that critical and engaged forms of agency are a product of emancipatory education. Moreover, at the heart of any viable notion of politics is the recognition that politics begins with attempts to change the way people think, act and feel with respect to both how they view themselves and their relations to others. There is more to agency than the neoliberal emphasis on the “empire of the self,” with its unchecked belief in the virtues of a form of self-interest that despises the bonds of sociality, solidarity and community. The U.S. is in the midst of a political and pedagogical crisis. This is a crisis defined not only by a brutalizing racism and massive inequality, but also a constitutional crisis produced by a growing authoritarianism that has been in the making for some time. The recent attacks by the police on journalists, peaceful protesters and even elderly people marching for racial justice echoes the violence of the Brownshirts in the 1930s. Let’s stop the futile debate about whether or not the U.S. is in the midst of a fascist state and shift the register to the more serious question of how to resist it and restore a semblance of real democracy. Under such circumstances, education should be viewed as central to politics, and it plays a crucial role in producing informed judgments, actions, morality and social responsibility at the forefront not only of agency, but politics itself. In this scenario, truth and politics mutually inform each other to erupt in a pedagogical awakening at the moment when the rules are broken. Taking risks becomes a necessity, self-reflection narrates its capacity for critically engaged agency and thinking the impossible is not an option, but a necessity. Without an informed and educated citizenry, democracy can lead to tyranny, even fascism. Trump represents the malignant presence of a fascism that never dies and is ready to remerge at different times in different context in sometimes not-so-recognizable forms. The COVID-19 crisis and the pandemic of inequality and racism have revealed elements of a fascist politics that are more than abstractions. The struggle against a fascist politics is now visible in the rebellions taking place across the United States. While there are no political guarantees for a victory, there is a new sense that the future can be changed in the image of a just and sustainable society. There is a new energy for reform taking place in the aftermath of the killing of George Floyd. Massive protests for racial, economic and social justice are emerging all over the globe. As I have argued in The Terror of the Unforeseen, at stake here is the need for these protests to transition from a pedagogical moment and collective outburst of moral anger to a progressive international movement that is well organized and unified. Such a movement must build solidarity among different groups, imagine new forms of social life, make the impossible possible, and produce a revolutionary project in defense of equality, social justice and popular sovereignty. The racial, class, ecological and public health crisis facing the globe can only be understood as part of a comprehensive crisis of the totality. Immediate solutions such as defunding the police and improving community services are important, but they do not deal with the larger issue of eliminating a neoliberal system structured in massive racial and economic inequalities. David Harvey is right in arguing that the “immediate task is nothing more nor less than the self-conscious construction of a new political framework for approaching the question of inequality, through a deep and profound critique of our economic and social system.” This is a crisis in which different threads of oppression must be understood as part of the general crisis of capitalism. The various protests now evolving internationally at the popular level offer the promise of new global anti-fascist and anti-capitalist movements. In the current moment, democracy may be under a severe threat and appear frighteningly vulnerable, but with young people and others rising up across the globe — inspired, energized and marching in the streets — the future of a radical democracy is waiting to breathe again.

### Horsetrading DA---1NC

#### Antitrust only passes after it’s horse-traded with Republicans for censorship prohibitions

Perera 3-12-2021, veteran cybersecurity reporter, Data security & privacy reporter for MLex (Dave, “US antitrust legislation faces uphill battle despite unified Democratic government,” <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government>)

Renewed interest among US lawmakers in antitrust legislation is unlikely to produce radical policy shifts, notwithstanding the Democratic Party’s unified control of the federal government. Democrats promised a “big, bold agenda” after they captured the Senate by a hairsbreadth in January. Democratic lawmakers may very well stick to those ambitions and announce audacious legislative proposals. But the fate of those bills is at the mercy of a political dynamic ensuring that the more liberal the policy prescriptions, the less likely they are to become law. The most likely outcome over the next two years is more funding for enforcers at the Department of Justice and Federal Trade Commission, whether directly through appropriated funds, steeper merger notification filing fees, or both. It’s also possible Congress could incrementally tinker along the edges of antitrust. It might lower the threshold for challenging mergers, or mandate data portability requirements for social media companies. Those expecting — or fearing — more ambitious outcomes likely won’t see them enacted. So until America’s November 2022 election, scratch from the list of high probabilities reforms such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company. Put another way, unless a bill can attract significant Republican support, not even two years of unified Democratic government can guarantee reforms. — American exceptionalism — Single party control of both congressional chambers and the presidency is relatively rare in American politics. It has occurred in fewer than a third of legislative sessions since 1980. When it strikes, it doesn’t last long — typically just the two years between one congressional election and another. Historically, unified control is a fertile period for new regulations. President George W. Bush overhauled Medicare. President Barack Obama ushered in financial sector reforms and the Affordable Care Act. Indications are that President Joe Biden is emboldened by his party’s last-minute capture of the Senate. History, of course, isn’t a blueprint. Even a brief look at past episodes of unified control reveals that not even single-party capture of the executive and legislative branches of the US government can assure the enactment of a partisan agenda. For one thing, neither political party is a monolith. Although far more politically aligned than when Democratic conservatives found common cause in the 20th century with Republicans, the major American parties nonetheless are coalitions of centrist and activist wings. For Democrats, the tensions inherent in appeasing all sides became apparent earlier this month when centrists trimmed benefits in the $1.9 trillion coronavirus stimulus package. Neither is single party grip on power secure unless it commands an overwhelming majority in the Senate, thanks to a uniquely American institution: the filibuster. In the Senate, the rules mandate a three-fifths vote before debate over a bill is cut off. In recent decades, it’s become a weapon routinely wielded by the minority party to kill legislation. The upshot is that policy legislation needs supermajority support before it can proceed, meaning the 50 Democrats of today’s Senate have little choice but to resign themselves to the grind of finding Republican supporters. There are limited exceptions. Assuming Democrats stay in unison, they don’t need Republican votes to appoint judges, approve executive branch nominations or pass fiscal legislation such as the coronavirus stimulus that just became law. It’s within Democrats’ power to abolish the filibuster, but for now, the maneuver appears safe. Asked just days ago about the matter, White House spokeswoman Jen Psaki told reporters that the president’s preference is for it to stay in place. “The president is an optimist by nature,” Psaki added. — Hunting for bipartisan consensus — Not every bill introduced in Congress, nor even every bill approved by a committee or even an entire single chamber, makes it through the process because its sponsors believe it’ll become law. There are a host of bills drafted with the intent of sending a message to industry, to independent regulators, to donors, to constituents. There are bills that lawmakers view as setting out a position to influence an ongoing policy debate. Even if it won’t become law this year, it might the next year, or the next, reintroduced and refined along the way. Telltale signs of whether a bill is a serious attempt at law are the number of cosponsors, and whether that list of names includes members of both parties in good stead with their party’s leadership. Bipartisan support is important even in the House, where Democrats have the votes to completely bypass Republicans. Because the House doesn’t have the filibuster to contend with, those with the majority of seats control the chamber. House Democrats can and do pass bills in the face of absolute House Republican opposition, but — special exceptions for fiscal bills aside — those bills are dead on arrival in the Senate. As long as the filibuster exists or Democrats lack a Senate supermajority, the House Judiciary antitrust subcommittee must court Republican support if its intention is to make new law. Finding clues of what House Democrats might seriously achieve, then, may be little more difficult than looking up the policy prescriptions House Republicans favor: giving regulators more resources, shifting the burden of proof in merger cases and boosting data portability and interoperability. A report issued by now-ranking Republican Ken Buck as a rejoinder to last year’s Democratic House Judiciary antitrust subcommittee staff report on competition in digital markets allowed that the GOP shares other Democratic concerns, including predatory pricing, monopoly leveraging and control over marketplace platforms. That conciliatory signal also came weighted, with warnings that Congress should be wary of “handing additional regulatory to agencies in an attempt to micromanage.” Instead, try instead telling enforcers they should return to first principles, the Colorado lawmaker advised. Whether Republicans and Democrats in the Senate can find common cause is an even more fraught question. Unlike its House counterpart, the Senate Judiciary subcommittee on antitrust hasn't conducted a 16-month investigation into digital monopolization. The subcommittee’s senior Republican, Utah’s Mike Lee, is prone to touting the importance of the consumer welfare standard and rails against online platforms “eager to impose the ideological censorship called for by their political benefactors.” Lee also says he’s open to working with subcommittee Chairwoman Amy Klobuchar on strengthening enforcement, adding the caveat that current antitrust laws are sufficient. Klobuchar, a Minnesota Democrat, doesn’t need Lee to get a bill through her subcommittee, but failing to find consensus with Republicans imperils her chances of making law. The prospects for her Competition and Antitrust Law Enforcement Reform Act becoming law as current written aren't good. — 'Big tech is out to get conservatives' — A looming question hanging over any bill, even one tailored to win bipartisan support, is whether it could be derailed by Republican anger at online platforms for alleged anti-conservative bias. A right-wing trope especially spread by President Donald Trump during his last year in office — the belief that platforms use their content moderation powers to silence conservatives — has mainstream acceptance in Republican circles. It’s a refrain almost obligatory for Republican lawmakers to repeat when discussing any issue related to online platforms. “Big tech is out to get conservatives,” House Judiciary Committee ranking member Jim Jordan of Ohio has said more than once. Democrats have their own share of anger at online platforms’ content-moderation practices, to be sure. They accuse online platforms of circumventing consumer protections, undermining civil rights laws and not doing enough to stymie disinformation. It’s Republicans, though, who appear the angriest, and are the more likely to insist that any legislative reform touching online platforms address content moderation, with the intention of making it harder, not easier, for online platforms to remove users, potentially imperiling a compromise measure.

#### That allows the GOP to successfully weaponize misinformation---triggers epistemic decay and cements a perma-GOP government

Carpenter 21, contributing writer for The Nation. She received the James Aronson Award for Social Justice Journalism in 2018, and has been a finalist for the Livingston Awards and the National Awards for Education Reporting. Her writing has also appeared in Rolling Stone, Guernica, and various other publications (Zoe, “Misinformation Is Destroying Our Country. Can Anything Rein It In?,” *The Nation*, <https://www.thenation.com/article/society/right-wing-media-misinformation/>)

Natali Fierros Bock says she could feel this mass delusion calcifying in the wake of the election in Pinal County, a rural area between Phoenix and Tucson where she serves as co–executive director of the group Rural Arizona Engagement. “It feels like an existential crisis,” Bock adds. Many of the Sharpiegate claims online referred to Pinal County, and Gosar, whose district includes a portion of the area, was reportedly responsible for helping organize the January 6 “Stop the Steal” rally in Washington that resulted in the deaths of five people. Mark Finchem, a Republican who represents part of Pinal County in the statehouse, was also in Washington on January 6. The Capitol insurrection threw into relief the real-world consequences of America’s increasingly siloed media ecosystem, which is characterized on the right by an expanding web of outlets and platforms willing to entertain an alternative version of reality. Social media companies, confronted with their role in spreading misinformation, scrambled to implement reforms. But right-wing misinformation is not just a technological problem, and it is far from being fixed. Any hope that the events of January 6 might provoke a reckoning within conservative media and the Republican Party has by now evaporated. The GOP remains eager to weaponize misinformation, not only to win elections but also to advance its policy agenda. A prime example is the aggressive effort under way in a number of states to restrict access to the ballot. In Arizona, Republicans have introduced nearly two dozen bills that would make it more difficult to vote, with the big lie about election fraud as a pretext. “When you can sell somebody the idea that their elections were stolen, they’ve been violated, right? So then you need protection,” Bock says, explaining the conservative justification for the suite of new restrictions in her state. Voting rights is her organization’s “number one concern” at the moment. But Bock’s fears about political misinformation are more sweeping. Community organizing is difficult in the best of times. “But when you can’t agree on what is true and not true, when my reality doesn’t match the reality of the person I’m speaking to, it makes it more difficult to find common ground,” she says. “If we can’t agree on a common truth, if we can’t find a starting place, then how does it end?” Around the time of the 2016 election, Kate Starbird, a professor at the University of Washington who studies misinformation during crises, noticed that more and more social media users were incorporating markers of political identity into their online personas—hashtags and memes and other signifiers of their ideological alignment. In the footage from the Capitol she saw the same symbols, outfits, and flags as those she’d been watching spread in far-right communities online. “To see those caricatures come alive in this violent riot or insurrection, whatever you want to call it, was horrifying, but it was all very recognizable for me,” Starbird says. “There was a time in which we were like, ‘Oh, those are bots, those aren’t real people,’ or ‘That’s someone play-acting,’ or ‘We’re putting on our online persona and that doesn’t really reflect who we are in an offline sense.’ January 6 pretty much disabused us of that notion.” It was a particularly rude awakening for social media companies, which had long been reluctant to respond to the misinformation that flourished on their platforms, treating it as an issue of speech that could be divorced from real-world consequences. Facebook, Twitter, and other platforms had made some changes in anticipation of a contested election, announcing plans to label or remove content delegitimizing election results, for instance. Facebook blocked new campaign ads for the week leading up to the election; Twitter labeled hundreds of thousands of misleading tweets with fact-checking notes. Yet wild claims about election fraud spread virally anyway, ping-ponging from individual social media users to right-wing influencers and media. During the 2016 campaign, most public concern about misinformation centered on shadowy foreign actors posing as news sources or US citizens. This turned out to be an oversimplification, though many on the center and left offered it as an explanation for Hillary Clinton’s defeat in 2016; blaming Russian state actors alone ignored factors like sexism, missteps made by the Clinton campaign itself, and the home-grown feedback loop of right-wing media. In 2020, according to research done by Starbird and other contributors to the Election Integrity Project, those most influential in disseminating misinformation were largely verified, “blue check” social media users who were authentic, in the sense that they were who they said they were—Donald Trump, for example, and his adult sons. DONATE NOW TO POWER THE NATION. Readers like you make our independent journalism possible. Another key aspect in the creation of the big lie was what Starbird calls “participatory disinformation.” Trump was tweeting about the election being stolen from him months beforehand, but once voting got under way, “what we see is that he kind of relies on the crowd, the audiences, to create the evidence to fit the frame,” Starbird explains. Individuals posted their personal experiences online, which were shared by more influential accounts and eventually featured in media stories that placed the anecdotes within the broader narrative of a stolen election. Some of the anecdotes that fueled Sharpiegate came from people who used a felt-tip pen to vote in person, then saw online that their vote had been canceled—though the “canceled” vote actually referred to mail-in ballots that voters had requested before deciding to vote in person. “It’s a really powerful kind of propaganda, because the people that were helping to create these narratives really did think they were experiencing fraud,” Starbird says. Action by content moderators usually came too late and was complicated by the fact that many claims of disenfranchisement by individual users were difficult to verify or disprove. The Capitol riot led the tech giants to take more aggressive action against Trump and other peddlers of misinformation. Twitter and Facebook kicked Trump off their platforms and shut down tens of thousands of accounts and pages. Facebook clamped down on some of its groups, which the company’s own data scientists had previously warned were incubating misinformation and “enthusiastic calls for violence,” according to an internal presentation. Google and Apple booted Parler, a social media site used primarily by the far right, from their app stores, and Amazon stopped hosting Parler’s data on its cloud infrastructure system, forcing it temporarily offline. But these measures were largely reactions to harm already done. “Moderation doesn’t reduce the demand for [misleading] content, and demand for that content has grown during some periods of time when the platforms weren’t moderating or weren’t addressing some of the more egregious ways their tools were abused,” says Renée DiResta, technical research manager at the Stanford Internet Observatory. Deplatforming individuals or denying service to companies that tolerate violent rhetoric, as Amazon did with Parler, can have an impact, particularly in the short term and when done at scale. It reduces the reach of influential liars and can make it more difficult for “alt-tech” apps to operate. A notorious example of deplatforming involved Alex Jones, the conspiracy theorist behind the site Infowars. Jones was kicked off Apple, Facebook, YouTube, and Spotify in 2018 for his repeated endorsement of violence. He lost nearly 2.5 million subscribers on YouTube alone, and in the three weeks after his accounts were cut off, Infowars’ daily average visits dropped from close to 1.4 million to 715,000. But Jones didn’t disappear—he migrated to Parler, Gab, and other alt-tech platforms, and he spoke at a rally in Washington the night before the Capitol attack. One outcome of unplugging Trump and other right-wing influencers has been a surge of interest in those alternative social media platforms, where more dangerous echo chambers can form and, in encrypted spaces, be more difficult to monitor. “Isn’t this just going to make the extreme communities worse? Yes,” says Ethan Zuckerman, founder of the Institute for Digital Public Infrastructure at the University of Massachusetts at Amherst. “But we’re already headed there, and at least the good news is that [extremists] aren’t going to be recruiting in these mainstream spaces.” The bad news, in Zuckerman’s view, is that the far right is now leading the effort to create new forms of online community. “The Nazis right now have an incentive to build alternative distributed media, and the rest of us are behind, because we don’t have the incentive to do it,” Zuckerman explains. He argues that a digital infrastructure that is smaller, distributed, and not-for-profit is the path to a better Internet. “And my real deep fear is that we end up ceding the design of this way of building social networks to far-right extremists, because they are the ones who need these new spaces to discuss and organize.” In March, Trump spokesman Jason Miller said on Fox that the former president was likely to return to social media this spring “with his own platform.” A more fundamental problem than Trump’s presence or absence on Twitter is the power that a single executive—Jack Dorsey, in the case of Twitter—has in making that decision. Social media companies have become so big that they have little fear of accountability in the form of competition. “To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons,” concluded a recent report by the staff of the Democratic members of the House Judiciary Subcommittee on Antitrust. For now, the reforms at Facebook and other companies remain largely superficial. The platforms are still based on algorithms that reward outrageous content and are still financed via the collection and sale of user data. Karen Hao of MIT Technology Review recently reported that a former Facebook AI researcher told her “his team conducted ‘study after study’ confirming the same basic idea: models that maximize engagement increase polarization.” Hao’s investigation concluded that Facebook leadership’s relentless pursuit of growth “repeatedly weakened or halted many initiatives meant to clean up misinformation on the platform.” The modest “break glass” measures Facebook took during the election in response to the swell of misinformation, which included tweaks to its ranking algorithm to emphasize news sources it considered “authoritative,” have already been reversed. Tech companies could do more, as the election-time tweaks revealed. But they still “refuse to see misinformation as a core feature of their product,” says Joan Donovan, research director for the Shorenstein Center on Media, Politics and Public Policy at Harvard University. The problem of misinformation appears so vast “because that’s exactly what the technology allows.” There are some signs of a growing appetite for regulation on Capitol Hill. Democrats have proposed reforms to Section 230 of the Communications Decency Act, which insulates tech companies from legal liability for content posted to their platforms, such as requiring more transparency about content moderation and opening platforms to lawsuits in limited circumstances when content causes real-world harm. (GOP critiques of Section 230, on the other hand, make the false argument that it allows platforms to discriminate against conservatives.) Another legislative tactic would focus on the algorithms that platforms use to amplify content, rather than on the content itself. A bill introduced by two House Democrats would make companies liable if their algorithms promote content linked to acts of violence. Democratic lawmakers are also eyeing changes to antitrust law, while several antitrust lawsuits have been filed against Facebook and Google. But litigation could take years. Even breaking up Big Tech would leave intact its predatory business model. To address this, Zuckerman and other experts have called for a tax on targeted digital advertising. Such a tax would discourage targeted advertising, and the revenue could be used to fund public-service media. Held to account? Twitter CEO Jack Dorsey testified remotely before the Senate Judiciary Committee in November 2020. (Matt York / AP) Social media plays a key role in amplifying conspiracy theories and political misinformation, but it didn’t create them. “When we think of disinformation as something that appeared [only in the Trump era], and that we used to have this agreed-upon narrative of what was true and then social platforms came into the picture and now that’s all fragmented… that makes a lot of assumptions about the idea that everyone used to agree on what was true and what was false,” says Alice E. Marwick, an assistant professor at the University of North Carolina who studies social media and society. Politicians have long leveraged misinformation, particularly racist tropes. But it’s been made particularly potent not just by social media, Marwick argues, but by the right-wing media industry that profits from lies. “The American online public sphere is a shambles because it was grafted onto a television and radio public sphere that was already deeply broken,” argue Yochai Benkler, Robert Faris, and Hal Roberts of Harvard’s Berkman Klein Center for Internet and Society in their book Network Propaganda. The collapse of local news left a vacuum that for many Americans has been filled by partisan outlets that, on the right, are characterized by blatant disregard for journalistic standards of sourcing and verification. This insulated world of right-wing outlets, which stretches from those that bill themselves as objective sources, Fox News chief among them, to talk radio and extreme sites like Infowars and The Gateway Pundit, “represents a radicalization of roughly a third of the American media system,” the authors write. The conservative movement spent decades building this apparatus to peddle lies and fear along with miracle cures and pyramid schemes, and was so successful that Fox and other far-right outlets ended up in a tight two-step with the White House. Fox chairman Rupert Murdoch maintained a close relationship with Trump, as did Sean Hannity and former Fox News copresident Bill Shine, who became White House communications director in 2018. The backlash against Fox in the wake of the election hinted at a possible dethroning of the ruler of the right’s media machine. Its farther-right rival Newsmax TV posted a higher rating than Fox for the first time ever in the month after the election, following supportive tweets from Trump, and during the week of November 9 it passed Breitbart as the most-visited conservative website. But Fox quickly regained its perch. The network backpedaled rapidly during its post-election ratings slump, firing an editor who’d defended the projection of a Biden win in Arizona and replacing news programming with opinion content. According to Media Matters, Fox News pushed the idea of a stolen election nearly 800 times in the two weeks after declaring Biden the winner. The network’s ad revenue increased 31 percent during the final quarter of 2020, while its parent company, Fox Corporation, saw a 17 percent jump in pretax profit. The far-right media ecosystem has become so powerful in part because there’s been no downside to lying. Instead, the Trump administration demonstrated that there was a market opportunity in serving up misinformation that purports to back up what people want to believe. “In this day and age, people want something that tends to affirm their views and opinions,” Newsmax CEO Chris Ruddy told The New York Times’ Ben Smith in an interview published shortly after the election. Claims of a rigged election were “great for news,” he said in another interview. Trump’s departure from the White House won’t necessarily reduce the demand for this kind of content. Since the Capitol riot, two voting-systems companies have launched an unusual effort to hold right-wing outlets and influencers accountable for some of the lies they’ve spread. Dominion Voting Systems, a major provider of voting technology, and another company called Smartmatic were the subjects of myriad outlandish claims related to election fraud, many of which were used in lawsuits filed by Trump’s campaign and were repeatedly broadcast on Fox, Newsmax TV, and OAN. Since January the companies have filed several defamation suits against Trump campaign lawyers Sidney Powell and Rudy Giuliani, MyPillow CEO Mike Lindell, and Fox News and three of its hosts. Dominion alleges that as a result of false accusations, its “founder and employees have been harassed and have received death threats, and Dominion has suffered unprecedented and irreparable harm.” The threat of legal action forced a number of media companies to issue corrections for stories about supposed election meddling that mentioned Dominion. The conservative website American Thinker published a statement admitting its stories about Dominion were “completely false and have no basis in fact” and “rel[ied] on discredited sources who have peddled debunked theories.” OAN simply deleted all of the stories about Dominion from its website without comment. These lawsuits will not dismantle the world of right-wing media, but they have prompted a more robust debate about how media and social media companies could be held liable for lies that turn lethal—and whether this type of legal action should be pursued, given the protections afforded by the First Amendment and the fact that the powerful often use libel law to bully journalists. Alternative reality: Trump supporters in Maricopa County derided Fox for reporting on election night that Biden had won the state. (Hannah McKay / Pool / Getty Images) Ethan Zuckerman has been thinking about how to build a better Internet for years, a preoccupation not unrelated to the fact that, in the 1990s, he wrote the code that created pop-up ads. (“I’m sorry. Our intentions were good,” he wrote in 2014.) Still, he believes that framing misinformation as a problem of media and technology is myopic. “It’s very hard to conclude that this is purely an informational problem,” Zuckerman says. “It’s a power problem.” The GOP is increasingly tolerant of, and even reliant on, weaponized misinformation. “We’re in a place where the Republican Party realizes that as much as 70 percent of their voters don’t believe that Biden was legitimately elected, and they are now deeply reluctant to contradict what their voters believe,” Zuckerman says. Republicans are reluctant, at least in part, because of a legitimate fear of primary challenges from the right, but also because they learned from Trump the power of using conspiracy theories to mobilize alienated voters by preying on their deep mistrust of public institutions. It’s one thing for an ordinary citizen to retweet a false claim; it’s another for elected officials to legitimize conspiracy theories. But holding the GOP to account may prove to be even harder than reforming Big Tech. The radical grass roots have been empowered by small-dollar fundraising and gerrymandering, while more moderate Republicans are retiring or leaving the party. Writer Erick Trickey argued recently in The Washington Post that what undercut a similar wave of conservative crackpot paranoia driven by the John Birch Society in the 1960s was explicit denunciation by prominent conservatives like William Buckley and Ronald Reagan as well as Republican congressional leaders. But today’s party leaders have been unwilling to excommunicate conspiracy-mongers. In the aftermath of the Capitol riot, elected officials who spread rumors that the violence was actually the result of antifascists—including Arizona’s Paul Gosar and Andy Biggs—gained notoriety, while those critical of Trump were publicly humiliated. The embrace of conspiratorial narratives has been particularly pronounced in state GOP organizations. The Texas GOP recently incorporated the QAnon slogan “We are the storm” into official publicity media, and the Oregon GOP’s executive committee endorsed the theory that the riot had been a “false flag” operation. In March, members of the Oregon GOP voted to replace its Trump-supporting chairman with a candidate even farther out on the extremist fringe. Weaponized misinformation could have a lasting impact not only on the shape of the GOP but also on public policy. Republicans are now using the big lie to try to restrict voting rights in Arizona, Georgia, and dozens of other states. As of February 19, according to the Brennan Center for Justice, lawmakers in 43 states had introduced more than 250 bills restricting access to voting, “over seven times the number of restrictive bills as compared to roughly this time last year.” In late March, Georgia Governor Brian Kemp signed a 95-page bill making it harder to vote in that state in a number of ways. Many of the far-right extremists, politicians, and media influencers who spread misinformation about the presidential election are now pushing falsehoods about Covid-19 vaccines. The rumors, which have spread on social media apps like Telegram that are frequented by QAnon adherents and militia groups, among others, range from standard anti-vax talking points to absurd claims that the vaccines are part of a secret plan hatched by Bill Gates to implant trackable microchips, or that they cause infertility or alter human DNA. Sidestepping the craziest conspiracies, prominent conservatives like Tucker Carlson and Wisconsin Senator Ron Johnson, who has become one of the GOP’s leading purveyors of misinformation, are casting doubt about vaccine safety under the pretense of “just asking questions.” Vaccine misinformation plays into the longstanding conservative effort to sow mistrust in government, and it appears to be having an effect: A third of Republicans now say they don’t want to get vaccinated. These are the true costs of misinformation: deadly riots, policy changes that could disenfranchise legitimate voters, scores of preventable deaths. These translate into financial externalities: the additional expense of securing the Capitol, additional dollars devoted to the pandemic response. More abstract but no less real are the social costs: the parents lost down QAnon rabbit holes, the erosion of factual foundations that permit productive argument. The problem with the far right’s universe of “alternative facts” is not that it’s hermetically sealed from the universe the rest of us live in. Rather, it’s that these universes cannot truly be separated. If we’ve learned anything in the past six months, it’s that epistemological distance doesn’t prevent collisions in the real world that can be lethal to individuals—and potentially ruinous for democratic systems.

#### Disinformation undermines collective responses to existential threats

Roston 21, citing Bak-Coleman, PhD, postdoctoral fellow at the University of Washington Center for an Informed Public (Eric, “As Climate Change Fries the World, Social Media Is Frying Our Brains,” *Bloomberg News*, <https://www.bloomberg.com/news/articles/2021-06-29/as-climate-change-fries-the-world-social-media-is-frying-our-brains>)

Amid emergency heat, flooding, and famine, it’s even more critical that people recognize and agree at least on the big picture. And yet, as recent history has shown us time and again, they don’t. Much of that can be blamed on the pandemic of misinformation—concerning climate change, Covid-19, vaccines, and so much more— now running rampant on social media. It reminds Joseph Bak-Coleman of fish. Bak-Coleman is the lead author of a provocative new article in Proceedings of the National Academy of Sciences about scientists’ inability thus far to adequately inform policymakers about how digital technology is impeding efforts to solve climate change and other collective-behavior problems. Individual fish swimming in a school intuit each other so rapidly and clearly that they can instantaneously and in unison pivot away from whatever dangers they encounter. Insofar as that is true, they have a limited error margin for passing along bad information. “It costs energy when you get scared for no reason, and it also costs life if you don’t get scared when you should,” said Bak-Coleman, a University of Washington postdoctoral scholar with expertise in neuroscience and evolutionary biology. “Animal groups are highly tuned to do these really fantastic feats of behavior. But it’s all quite fragile.” The development of digital communications has eroded or vaporized community protections developed over millennia to ensure at least a minimally healthy flow of information, which leads to healthy decision-making. That loss, Bak-Coleman and his co-authors write, “combined with rapid distribution of falsehood, may present one of the larger threats to human well-being.” Think of it like this. If you wanted to make the most obvious statement in the world, you could do worse than: “Technology now allows people to communicate instantaneously and across great distances.” Yet if you wanted to elicit the most tortured answer in the world, you might ask something incredibly similar: “What happens when people can communicate instantaneously and across great distances?” The tension between the obvious statement and the unanswerable question—which holds within it just about all of the world’s large-scale problems, including climate change—is so great, Bak-Coleman and his colleagues propose a whole new academic discipline just to try to understand it. As physiology has medicine and climate science has emissions-mitigation and adaptation–planning, they argue, the digital-misinformation pandemic requires an applied science—or as they call it, a “crisis discipline.” The need for such a discipline is also urgent, they argue, because “given that algorithms and companies are already altering our global patterns of behavior for financial reasons, there is no safe hands-off approach.” Despite the many joys and productive uses of digital communication, it routinely conveys so many falsehoods, so quickly, that many people are left either unable to see or unwilling to fix existential dilemmas, leaving humanity overall in a precarious condition.

### States CP---1NC

The 50 United States and relevant subnational entities should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the extraterritorial scope of its core antitrust laws pursuant to a comity balancing test designed to balance global harmonization with cartel deterrence.

#### State antitrust is enforceable and solvent.

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

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

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

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

## ADVANTAGE 1

### 1NC---Advantage 1

#### No batteries internal link, card is from 2018 before covid supply chains are already in peril and not recovering soon.

#### No REM shortages---stockpiles, new deposits, and recycling.

Lovins 17, Cofounder and Chairman Emeritus of Rocky Mountain Institute, energy advisor to major firms and governments in 70+ countries for 45+ years, has written 31 books and more than 600 papers, advised major firms and governments worldwide, and received 12 honorary doctorates and many international awards. (Amory, 5-23-2017, "Clean energy and rare earths: Why not to worry", *Bulletin of the Atomic Scientists*, https://thebulletin.org/2017/05/clean-energy-and-rare-earths-why-not-to-worry/)

Rare earths’ uses are highly specialized but diverse. These elements are used in mobile phones, superstrong magnets and hence advanced motors and generators, some oil-refinery catalysts, certain lasers and fluorescent-lamp or flat-screen phosphors, some batteries and superconductors, and other technologies important to modern life. Some rare earths are particularly useful in energy applications. Around 2010, some articles and commentators warned that shortages of rare earths, or China’s near-monopoly on them, could choke off the West’s shift to renewable energy and other clean technologies. This was never true—but the myth persists.

Bubble and burst. Rare earths concerned only specialists until about 2009–10. In the mid-1990s, China had consolidated its control over most of the global rare-earth market, and the last US mine and mill, once the world’s dominant producer, closed in 2002 because it was unprofitable. China began imposing export quotas in 2006, and limited exports to Japan (a major user of rare earths for high-tech miniature motors) during a diplomatic spat in 2009–10, so global prices and anxieties soared. US government agencies published urgent reports about the rare-earth crisis and its threat to national security. Could China’s control of these crucial elements—roughly 97 percent at the time—block Washington’s ability to produce Tomahawk missiles, F-35 jets, and night-vision goggles, as some military writers warned, never mind electric vehicles and wind-power turbines?

As a technologist who had advised major mining companies, written two books on metal mining and a 445-page text on efficient motor systems, done rare-earth physics experiments at MIT Lincoln Laboratory, and consulted for MIT’s Francis Bitter Magnet Laboratory, I knew enough to be unconvinced by rare-earth alarm bells. It all felt like a commodity bubble, based more on a shortage of understanding—of rare earths, economic geology, and resource efficiency and substitution—than on a shortage of rare earths.

Sure enough, the debate was heavy on the supply of rare earths but light and often misinformed on the demand side. The few observers who focused more on demand suspected that rare earths’ price spike wouldn’t last long, whether or not it reflected mining-stock hype. I called the coming crash, to general ridicule, in 2010. Rare-earth prices soared through spring 2011—when a rare-earth bonanza was fondly predicted for Helmand Province in Afghanistan—but then plummeted.

US supplier Molycorp reopened its California rare-earth mine in 2012, but went broke in 2015 when low world prices wouldn’t support its high costs. By 2015, MIT Technology Review asked, “What Happened to the Rare-Earths Crisis?” It misleadingly called rare earths “crucial to the permanent magnets used in wind turbines and motors in hybrid or electric cars,” and concluded that worries about them had “seemingly dissipated without much fanfare” as “demand fell more than expected,” but never connected the dots by asking why demand did that. By 2016–17, the market was in the doldrums, with China planning to limit annual production to 140,000 metric tons beginning in 2020 to try to raise prices again. An investor in the rare-earth industry in 2007 would have lost 81 percent of her portfolio value after a classic decade-long boom-and-bust wild ride (see the chart at the top of this article from buyupside.com).

This is not how a durably scarce and valuable commodity behaves. What happened? Just what you’d expect of a thin market influenced by ignorance but ultimately tamed by reality. When prices soared, stockpiles rose, idle mines reopened, explorers sought and found new deposits, and recycling increased (for example, cerium in glass polishing). Most important, as customers from General Electric to Toyota to Ford sought to cut costs and boost performance, the costlier materials were used more frugally and often replaced with cheaper, better solutions—all as I’d predicted in 2010. Prices fell accordingly.

#### No energy wars.

Meierding 20, assistant professor of national security affairs at the Naval Postgraduate School in Monterey, California. (Emily, 8-2-2020, "The Exaggerated Threat of Oil Wars", *Lawfare*, https://www.lawfareblog.com/exaggerated-threat-oil-wars)

Happily, the historical record indicates that China and its neighbors are unlikely to escalate their energy sparring. Contrary to overheated rhetoric, countries do not actually “take the oil,” to use President Trump’s controversial and inaccurate phrase. Instead, my recent research demonstrates that countries avoid fighting for oil resources. No Blood for Oil Between 1912 and 2010, countries fought 180 times over territories that contained—or were believed to contain—oil or natural gas resources. These conflicts ranged from brief, nonfatal border violations, like Turkish jets entering Greek airspace, to the two world wars. Many of these clashes—including World War II, Iraq’s invasion of Kuwait (1990), the U.S. invasion of Iraq (2003), the Iran-Iraq War (1980-1988), the Falklands War (1982), and the Chaco War between Bolivia and Paraguay (1932-1935)—have been described as classic oil wars: that is, severe international conflicts in which countries fight to obtain petroleum resources. However, a closer look at these conflicts reveals that none merits the classic “oil war” label. Although countries did fight over oil-endowed territories, they usually fought for other reasons, including aspirations to regional hegemony, domestic politics, national pride, or contested territories’ other strategic, economic, or symbolic assets. Oil was an uncommon trigger for international confrontations and never caused major conflicts. On approximately 20 occasions, over almost a century, countries engaged in minor conflicts to obtain oil resources. However, these “oil spats” were brief, mild, mostly nonfatal, and generally involved countries whose hostility predated their resource competition. Greece and Turkey have prosecuted oil spats. So have China and Vietnam, Guyana and Venezuela, and a dozen other pairs of countries. These confrontations inspired aggressive rhetoric while they were underway, but none of them ever escalated into a larger armed conflict.

#### Grid resilient.

Niiler 19, citing a study by the Electric Power Research Institute. (Eric, 4-30-2019, "The Grid Might Survive an Electromagnetic Pulse Just Fine", *Wired*, https://www.wired.com/story/the-grid-might-survive-an-electromagnetic-pulse-just-fine/)

The study, by the Electric Power Research Institute, a utility-funded research organization, finds that existing technology can protect various components of the electric grid to buffer it from the effects of solar flares, lightning strikes, and an EMP from a nuclear blast all at the same time: a three-for-one surge protector. “We have a strong technical basis for what the impacts [of an EMP] might be,” says Randy Horton, EPRI project manager and author of the report being released today. “That is one thing that didn’t exist before.”

Horton says that EPRI technicians worked with experts at the Department of Energy labs at Los Alamos and Sandia to simulate some effects of an EMP on substations and distribution systems. They also did real-world testing of electrical equipment at an EPRI laboratory in Charlotte, North Carolina. The study, which took three years to complete, looks at the effects of three kinds of energy spawned by a nuclear detonation.

The first high-energy wave occurs in just a few nanoseconds and is called an E1. The second wave, called an E2, lasts up to a second and can fry electric systems the way a lightning strike does, unless they are properly grounded. Effects of an E2 wave on the grid are expected to be minimal. The third kind of wave can last for tens of seconds and is similar to what utility operators might expect from a low-frequency, long-duration solar flare or geomagnetic storm. The report says that the combination of an E1 and E3 would cause the most damage over the widest area.

Horton says simulations and testing by EPRI contradicts earlier findings that an EMP would wipe out the US grid. “You could have a regional voltage collapse, but you wouldn’t damage a large number of bulk power transformers immediately,” Horton says. “That was the difference in our finding. There were some studies that said you could damage hundreds of transformers. We just didn’t find it.”

#### No EMP use OR extinction.

Barrett 17, digital director at WIRED. Citing Philip Coyle, a senior science fellow at the Center for Arms Control and Non-Proliferation, who served as the Assistant Secretary of Defense and Director of Operational Test and Evaluation at the Pentagon, and spent decades studying nuclear weapons at Lawrence Livermore National Laboratory. (Brian, 11-1-2017, "North Korea's Plenty Scary Without an Overhyped EMP Threat", *Wired*, https://www.wired.com/story/north-korea-emp-threat/)

Scary stuff, especially that 90 percent number, which was first offered by representative Roscoe Bartlett in a 2008 Congressional hearing, and backed by a physicist—and leading voice in the EMP issue—named William Graham. But Bartlett himself sourced the figure from a work of science fiction, William R. Fostchen’s One Second After. And while an EMP surge, be it from a hydrogen bomb detonated high above North America or powerful solar storm, would surely impact daily life, the extent of the possible repercussions remains uncertain. At least where North Korea is concerned, that lack of an assured outcome should help ease—if not totally erase—EMP concerns.

Blackout or Bust

It’s important to note early that the EMP threat has become an unlikely live wire. Its most extreme proponents genuinely fear near-total annihilation; its vocal detractors dismiss the threat as science fiction.

In between, though, lie some important subtleties. Crucially, you won’t find much disagreement on the very basic science. In fact, both the US and Russia have proven this out in practice. In 1962, the US conducted a nuclear test known as Starfish Prime, in which it detonated a 1.4 megaton nuclear warhead 240 miles above the Pacific. The resulting EMP knocked out hundreds of street lights, and some telephone communications, 900 miles away in Hawaii. Russian tests at around the same time, over Kazakhstan, reportedly resulted in an EMP that took out a 300-mile communication line, among other assorted impacts. Evidence persists beyond those specific corollaries as well.

“You don’t need to do high-altitude nuclear tests to know the EMP threat is real,” says Dr. Peter Pry, who served on the Congressional EMP Commission and has published several books about its potential impacts. Pry points to data gleaned from underground nuclear tests and EMP simulators, all of which, he says, indicate the strong potential for devastation.

“I’m sure you’ve had the experience of driving a car down the road, listening to the radio, and then you’ve driven under a high power line, and suddenly your radio doesn’t work. You come out the other side and it works again. What’s happened is you’ve passed through an electromagnetic field that upset your radio,” says Pry. “I don’t think you have to be Albert Einstein to realize that if that electromagnetic field were, say, a billion times more powerful, that your radio would not just be upset but it would be destroyed, the electronics in your car destroyed. Imagine that now not being a localized phenomenon, but extended to the whole North American continent.”

The commission Pry served on—tasked with investigating the threat—laid out that case in a 200-plus page 2008 report, and Pry himself speaks passionately on the topic. But EMP skeptics still abound, particularly in the North Korean context. And the EMP Commission shut down on September 30, after the Department of Defense and Department of Homeland Security didn't seek funds from Congress to continue its operation.

“The fact that North Korea has tested a larger yield nuclear weapon than before is of concern because of the yield of the nuclear weapon, not because of EMP,” says Philip Coyle, a senior science fellow at the Center for Arms Control and Non-Proliferation, who served as the Assistant Secretary of Defense and Director of Operational Test and Evaluation at the Pentagon, and spent decades studying nuclear weapons at Lawrence Livermore National Laboratory.

Coyle acknowledges that EMPs can be a problem—the electromagnetic pulse from an 1859 solar storm, known as the Carrington Event, would have devastating consequences if repeated today—but he and others remain skeptical as to the true impact of the type of nuclear-based attack outlined by the EMP Commission.

“I don’t know how the proponents of EMP get such huge results. I just don’t follow their logic,” says Coyle. “There just isn’t a scientific basis to get these huge results, these huge numbers.”

“There’s still not proof that it would destroy a wide area of electrical equipment today," says Sharon Burke, who served as Assistant Secretary of Defense for Operational Energy in the Obama administration and is currently a senior adviser at the New America Foundation, a non-partisan think tank. "There’s no actual proof that this would happen.”

Pry dismisses those who regard EMP as science fiction as “idiot naysayers.” But Coyle, Burke, and others who have raised doubts don’t deny the underlying scientific principles. “Nuclear weapons do put out electromagnetic pulses of different varieties, and some of them are quite dangerous,” Burke says. “You’ll find that a lot of US military equipment, at least from the Cold War, was shielded against those kinds of EMPs.”

For EMP threat skeptics, though, decades-old tests and modern simulations don’t equal a guaranteed result today. Which means the right question to ask isn’t if North Korea could explode a nuclear weapon high over the United States. It’s whether Kim Jong Un would take that risk, uncertain of the ultimate effect, but knowing that his country would receive the full weight of American military response in return.

Or, as Burke puts it: “If you’re a country that wants to go to war with the United States, and you want to cause maximum damage, you want to be pretty sure it’s going to work.”

Risky Business

North Korea attacking the US with an EMP would be a fantastically high-risk maneuver, with uncertain gains. And even if it did incapacitate much of the US power grid, it wouldn’t prevent a counterstrike. US military equipment is hardened, and its response could come from plenty of places other than North America.

In fact, even testing the effects of an EMP attack could provoke US military engagement, says Bruce Bennett, who specializes in asymmetric threats at the Rand Corporation.

“The North Korean foreign minister recently threatened to detonate a nuclear weapon over the Pacific to demonstrate their missile capabilities. I think if he even does that, not as EMP, there is a fairly significant chance that the US would respond,” says Bennett.

That sort of provocation would be out of character for Kim Jong Un, who despite the public bluster has historically known where the boundaries are, and managed not to cross them. His main objective is the survival of his regime; exploding a nuclear weapon above the United States would almost certainly assure its destruction.

## ADVANTAGE 2

### 1NC---Advantage 2

#### Litany of reasons SGDs fail – poor climate protections, lack of G20 leadership and commitment, budget commitment failure

Bertelsmann-Stiftung 19

“Long in words but short on action: UN sustainability goals are threatened to fail,” *Bertelsmann-Stiftung*, 6/19/19. https://www.bertelsmann-stiftung.de/en/topics/latest-news/2019/june/long-in-words-but-short-on-action-un-sustainability-goals-are-threatened-to-fail

What began as a historic summit could end up as mere lip service. In 2015, 193 states agreed to implement the 17 UN Sustainable Development Goals by 2030. The fight against poverty and hunger is just as important as the commitment to more climate protection or better educational opportunities. This year, the heads of state and government want to meet for the first time for an interim review in New York. The results should be sobering: The latest edition of the SDG Report\* shows that no country is currently on track to meet all targets by 2030.

The industrialized countries play an ambivalent role in their implementation. On the one hand, they come closest to fulfilling the goals. On the other hand, they hinder global implementation by incurring environmental and economic costs for third countries due to high living standards and consumer preferences. These are the findings of the current Sustainable Development Report, based upon which we and the Sustainable Development Solutions Network (SDSN) have been analyzing the implementation of the UN goals since 2015.

[Image omitted]

Need for catching up in the protection of climate and environment and in sustainable consumption

Sweden, Denmark and Finland have achieved the highest rankings in the country comparison with around 83 points. In other words, these countries have already met three quarters of the requirements of the UN goals. Overall, the authors see the greatest need for catching up in the indicators relating to climate protection and sustainable consumption.

On the whole, all OECD countries scored the worst here. Another weak point is agriculture, which accounts for a quarter of the world's greenhouse gas emissions. On top of this is soil pollution: More than two-thirds (78 percent) of all countries surveyed are in the red for nitrate pollution caused by fertilizers and pesticides, and have thus scored poorly. The authors have criticized the disparity between malnutrition and an overproduction of food: One third of food worldwide ends up in garbage cans or is disposed of unused, even though more than 800 million people are malnourished, according to the authors.

Poor role models: The richest states do not do enough

On a structural level, the authors have above all criticized G20 states for being poor role models. Apart from the "No Poverty" and "Quality Education" goals, the G20 countries are responsible for around half of the implementation gaps in achieving the goals, according to the authors. Brazil, China, India, Indonesia and the US account for around two percent of this negative weight alone.

"The G20 countries have a decisive role in making the UN goals a success. This includes financial support, for example through development aid. However, out of the G20 club, only a few countries have given the 0.7 percent of gross domestic product (GDP) as required by the UN for development aid," according to Christian Kroll, co-author of the study.

[Image omitted]

Consumption preferences in G20 states cause costs abroad

Further major grounds for criticism of the G20 is its role as a cost driver: "The living standards and consumer preferences in industrialized countries often incur costs in third countries," said Christian Kroll. Other examples of external costs include intense demand for palm oil in industrialized countries, fueling deforestation in the tropics, or support for tax havens and secret accounts that can also contribute to the misappropriation of public funds or development funds; money that is urgently needed in developing countries.

At the top of the list of cost drivers are small, internationally networked industrialized countries such as Luxembourg, Singapore and Switzerland. In addition, there is a lack of budget commitments for the implementation of the UN goals. Sustainability targets are actually mentioned in the national budget plans of only 18 of the 43 G20 and emerging economies surveyed. Only Bangladesh and India have expressly provided funds to implement the goals.

#### No African instability OR US draw-in.

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

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

#### No nuclear terrorism.

Ward 18, analyst on the Defence, Security, and Infrastructure team at RAND Europe. Citing Dr Beyza Unal, a research fellow in nuclear policy at think tank Chatham House. (Antonia, 7/27/18, "Is Nuclear Terrorism Distracting Attention from More Realistic Threats?", *RAND*, https://www.rand.org/blog/2018/07/is-the-threat-of-nuclear-terrorism-distracting-attention.html)

Despite Obama's remarks in 2016 and these two incidents, experts and officials contest the viability of the nuclear terrorism threat. Dr Beyza Unal, a research fellow in nuclear policy at think tank Chatham House, argued there is currently no evidence that terrorist groups could build a nuclear weapon. Similarly, a report by the Council on Foreign Relations in 2006 emphasized how building a nuclear bomb is a difficult task for states, let alone terrorists. This is because of the issues involved in accessing uranium and creating and maintaining it at the correct grade (enriched uranium).

While nuclear terrorism is a concern, the majority of terrorist attacks are conducted with conventional explosives. The 2017 Europol Terrorism Situation and Trend Report states that 40 percent of terrorist attacks used explosives. These explosives originate from a wide variety of countries across the world. According to a study by Conflict Armament Research, large quantities of explosive precursor chemicals used to make bombs as seen in the 7/7 attack in London in 2005 and the 2017 Manchester Arena attack, have been linked to supply chains in the United States, Europe, and Asia via Turkey. The threat from the spread of chemical precursors prompted the EU to begin looking at ways to tighten the regulations of these chemicals (PDF).

A nuclear terrorist attack would have grave consequences, but it is currently not a realistic or viable threat given that it would require a level of sophistication from terrorists that has not yet been witnessed. The recent focus of terrorist groups has been on simplistic strikes, such as knife and vehicular attacks. If countries are concerned about nuclear terrorism, the best way to mitigate this risk could be to tighten security at civilian and government nuclear sites. But governments would be better off focusing their efforts on combatting the spread and use of conventional weapons.

# 2NC

## CP

#### FIRST---Fear of incarceration drives anticompetitive behavior underground. That increases market power AND magnifies the link to tradeoff.

Benton-Wells 11, Deputy Dean at the Melbourne Business School and a Professorial Fellow at the Melbourne Law School. She is the former Director of the University's Competition Law & Economics Network and co-Director of the Global Competition and Consumer Law Program. She is also a lay Member of the Australian Competition Tribunal. (Caron, “Criminalising Cartels: Critical Studies of an International Regulatory Movement,” Research Gate)

On a broader stage, criminalisation of cartel conduct is telling of the high priority assigned by governments across the world to competition policy. In tandem with the expansion of free market capitalism and liberal democracy, competition policy has achieved a ‘constitutional’ status in many jurisdictions across the globe.87 There is, of course, a paradox in the way in which the premium increasingly placed on free enterprise (as expressed through trends of privatisation, liberalisation and deregulation) has seen a corresponding increase in government intervention through intensive and, in the present context, penal regulation.88 It is this paradox that has facilitated thinking about phenomena such as the ‘regulatory state’ and ‘regulatory capitalism.’89 Cartel criminalisation is relevant to this regulatory discourse. There are significant unanswered questions about how companies will respond over the long-term to the increasingly hostile and aggressive regulatory environment governing contacts and collaborations between competitors. One scenario, as suggested in several contributions in this book, is that it may see collusive behaviour become even more clandestine and hence more difficult to detect. Another scenario is that companies will seek to formalise their relations through joint ventures and mergers to a greater extent,90 and thereby force competition authorities to apply complex and resource intensive effects-assessments avoided under the per se rules that feature in anti-cartel laws and enforcement. It will be important to monitor and attempt to map these trends given that the result may be increased concentration and market power and correspondingly diminished competition — the antithesis of the objectives to which criminalisation is directed.

#### SECOND---Host-country alienation. Criminal antitrust enforcement causes global backlash.

Simmons 18, executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University. (Jay Kemper, “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” *Southern California Law Review*, https://southerncalifornialawreview.com/2018/11/02/whats-in-a-claim-challenging-criminal-prosecutions-under-the-ftaias-domestic-effects-exception-note-by-jay-kemper-simmons/#\_ftnref166)

Extraterritoriality principles further counsel departure from the prevailing interpretation of the FTAIA’s domestic effects prong. Notions of comity and fairness undergird extraterritorial antitrust jurisprudence. These adjudicatory principles also clarify U.S. competition policy for foreign governments and firms, as courts share legal authority with the executive and legislative branches where extraterritorial liability is involved. This discussion reflects that adherence to these principles would be best advanced by interpreting the FTAIA to presumptively prohibit domestic criminal prosecutions of wholly foreign conduct under the domestic effects prong.

The international comity doctrine historically served a central role in limiting the extraterritorial jurisdiction of federal courts. And today, even under the far narrower “direct conflict” standard set forth in Hartford Fire,[132] American courts regularly invoke “reasons of international comity” while describing the FTAIA as limiting “the extraterritorial application of U.S. antitrust law.”[133] Judge Posner’s statement is characteristic:

[A]re we to presume the inadequacy of the antitrust laws of our foreign allies? Would such a presumption be consistent with international comity, or more concretely with good relations with allied nations in a world in turmoil? . . . “Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”[134]

Comity similarly counsels courts in criminal matters under the FTAIA. American laws should not presumptively supplant foreign governments’ judgments concerning criminal liability, particularly in an interconnected global marketplace. Application of criminal punishment thus warrants hesitation upon consideration of “good relations with allied nations in a world in turmoil.”[135] The principles of fairness and reasonableness help to outline a doctrinally consistent conception of the FTAIA’s domestic effects prong, as these principles have historically aided federal courts in crafting remedies and resolving international conflicts.[136]

#### That backlash makes global antitrust enforcement less likely

Kava 19, JD/MBA Candidate @ JU (Samuel, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization,” 15 J. Bus. & Tech. L. 135, Lexis)

However, if the United States Congress amends the FTAIA to ensure a broad international comity analysis is applied and/or the federal courts begin to take international comity more seriously, the international community may become more amenable to accepting the extraterritorial application of the Sherman AntiTrust Act. The Executive Branch would have the opportunity to negotiate bi-lateral treaties that advocate for unified laws. The President of the United States, using the presidential power granted under Article II, Section 2, Clause 2, could “propose and chiefly negotiate agreements” that provide certainty regarding what nations laws will apply if a cross-border dispute were to arise. Thus, the President of the United States should attempt to negotiate bi-lateral treaties that advocate for unified laws with the intent of: (1) providing certainty and predictability to consumers and producers, and (2) achieving international support on the extraterritorial application of the Sherman Anti-Trust Act. After negotiating these bi-lateral agreements, the President of the United States should fast track the proposal for Congressional approval to avoid “regular legislative procedures…[that] can be time consuming.”176 CONCLUSION: BI-LATERAL TREATIES AND NEW COMITY OF NATIONS TEST Overall, technological advances have enabled the exponential growth of the global economy. While producers and consumers have largely benefited from globalization, the contradictory laws between trading nations has created judicial uncertainty that may lead to adverse economic effects. The United States’ aggressive pursuit of applying the Sherman Anti-Trust Act extraterritorially has led many foreign nations to adopt blocking statutes. These blocking statutes, while they were dormant for a period of time after the FTAIA was enacted, will have a resurgence following the further depletion of territorial boundaries with globalization. Specifically, because all conduct today has a “direct, substantial, and foreseeable impact on U.S. commerce,” the FTAIA does not limit the extraterritorial application of the Sherman Act. Furthermore, in lieu of the Hartford Fire Insurance Co. case, courts have narrowed the ability of defendants to bar the extraterritorial application of the U.S. anti-trust laws to only situations where compliance with U.S. law and foreign law would be impossible. The Sherman Act is likely to expand its extraterritorial reach, yet again, based on the outcome of the Apple v. Pepper case.177 To avoid an economic lull, all three branches of the United States government need to work diligently to find solutions that provide: (1) consumers and producers with certainty and predictability as to the law that will be applied with cross-border transactions, (2) foreign nations with confidence that the federal courts within the United States will respect the sovereignty of its nation, and (3) its citizens with assurance that they will not be victims of large corporations seeking supra-competitive profits. To achieve these goals, the United States Congress must amend the FTAIA to include a comprehensive international comity test that requires courts to balance the interests of all stakeholders. The federal courts of the United States, on its own accord, should begin to take the international comity analysis more seriously and apply it rigorously in all cases that involve cross-border transactions. Last, the President of the United States, in an effort to gain international support and avoid a resurrection of blocking statutes, needs to negotiate bi-lateral treaties that are more detailed and provide mechanisms for the extraterritorial application of the Sherman Anti-Trust Act.

#### Identifying conduct as punishable by treble damages deters behavior through private litigation. Avoids the tradeoff DA.

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

V. Monetary Remedies

The antitrust-remedial system in the United States is not limited to conduct and structural remedies. There are also a variety of monetary remedies available that can both deter future anticompetitive conduct and help restore injured parties to the position they would have been in without the unlawful conduct. Private plaintiffs in antitrust cases can seek monetary damages, which by law are trebled automatically.(126) Similarly, the federal government may seek treble damages in instances in which anticompetitive conduct harmed the United States itself,(127) and the states may recover damages they suffered themselves as well as on behalf of injured citizens in their parens patriae capacity.(128) In addition, certain monetary equitable remedies, such as disgorgement and restitution, may be available.(129) The antitrust enforcement agencies, however, do not have the authority to impose civil fines. Private Monetary Remedies--Treble Damages The U.S. antitrust laws permit private plaintiffs to recover three times the damages they prove they have suffered. Although treble damages can increase deterrence and overall enforcement, a number of observers argue that, in the section 2 context, treble damages also can chill procompetitive conduct and that the rationale for trebling is weaker here than in other contexts. As explained below, these concerns have led to questions about the appropriateness of treble damages in private section 2 cases. A successful plaintiff in a section 2 case is entitled to recover "threefold the damages by him sustained."(130) Plaintiffs also may recover attorneys' fees and, in limited circumstances, pre-judgment interest.(131) These private monetary remedies provide incentives for private enforcement and advance at least three important goals: deterrence, punishment of wrongdoers, and compensation of victims.(132) Trebling damages generally increases deterrence by compensating for the possibility that anticompetitive conduct will not be detected and prosecuted.(133) Likewise, the possibility of winning multiple damages enhances plaintiffs' incentives to seek out and detect anticompetitive conduct and to bear the time, expense, and uncertainty of bringing suit.(134) The Department believes that private actions and resulting monetary remedies play an important role in overall antitrust enforcement. The government has finite resources to prosecute antitrust violations; private enforcement supplements these efforts. Indeed, private plaintiffs, rather than the government, undertake a significant portion of antitrust enforcement, including section 2 enforcement.(135) Moreover, by deterring violations, private damages can reduce the need for government enforcement in the first instance. Panelists expressed a variety of opinions regarding the suitability of treble damages in section 2 cases. A number voiced policy concerns. One argued that enhanced incentives for bringing suit lead to baseless litigation.(136) Other commentators suggest that the prospect of treble damages has led courts to apply section 2 more narrowly than they might otherwise.(137) Along these lines, one panelist stressed that the prospect of treble damages should not distort the agencies' analysis of potential section 2 liability.(138) Some commentators and panelists argued that the key goals of trebling--deterrence, punishment of violators, and compensation of victims--apply less forcefully in the section 2 context. With regard to deterrence, to ensure that the expected penalty for violating the antitrust laws exceeds the benefit to the perpetrator, the penalty must be set as a multiple of the actual harm to compensate for the possibility that the violation will not be detected.(139) However, one panel moderator suggested that because section 2 violations are rarely covert and instead are typically open and known to customers, competitors, and the public, the justification for trebling damages is weaker in most section 2 contexts than with regard to other antitrust violations.(140) Further, private section 2 cases sometimes follow on government investigations into the same conduct. In those cases, a plaintiff bears substantially reduced risk and expense, and treble damages may not be necessary to create incentives to sue. In addition to deterrence, treble damages have a punitive element. In most civil actions, a defendant is required to pay for damage actually caused, and that amount is not multiplied. Antitrust, in contrast, adds the punitive element of trebling. However, in section 2 cases, determining whether the conduct is anticompetitive or procompetitive often requires a probing analysis.(141) For example, in predatory-pricing cases, consumers benefit from deep discounts in the short run; similarly, tying and exclusive-dealing arrangements, which sometimes have anticompetitive impact, can have procompetitive effects as well. Resolving whether these types of business conduct are unlawfully exclusionary in particular contexts usually requires a difficult and fact-intensive inquiry. Punishment through treble damages, some observers conclude, may be inappropriate because it could chill similar conduct that may be procompetitive.(142) Treble damages also may be unnecessary to compensate victims of anticompetitive conduct adequately. As one treatise observes, compensation is generally aided by "liberal proof of damages, other procedural and substantial rules favorable to plaintiffs, and awards of substantial attorney's fees."(143) Accordingly, it notes, "excessive awards only encourage increasingly marginal suits."(144) These qualms regarding treble damages are by no means universally shared. A number of panelists countered that the length and cost of a typical section 2 case, the general lack of pre-judgment interest, and the promotion of deterrence and private enforcement provide support for trebling damages.(145) For example, a panelist observed that damages may not compensate fully for foregone sales and may not be awarded to all who bear the burden of higher prices.(146) Similarly, one commentator concludes, "[T]he reality is that plaintiffs are unlikely to undertake the arduous task of prosecuting a civil antitrust claim if their recovery is limited to actual damages. Without trebling, therefore, antitrust violators may not be sued and may well be able to reap the benefits of their illegal conduct."(147) Civil Fines The federal enforcement agencies lack civil-fine authority.(148) Several panelists, however, suggested that civil fines would be a potentially useful federal-enforcement remedy. Civil fines would be particularly useful, they contended, when a section 2 violation is otherwise difficult or costly to remedy.(149) A remedial scheme under which government agencies have authority to seek civil fines as part of a comprehensive array of remedies may have certain attractive aspects. Coupled with a prohibitory provision, fines may prevent recurrence without resort to more costly and disruptive remedies. Under the current U.S. antitrust remedial scheme, however, private litigation has the potential to impose similar, if not greater, payment obligations than a system of civil fines.(150) In comparison, jurisdictions with civil fine authority tend not to have as robust a system of private monetary remedies as the United States.(151) Thus, adding civil fines to existing private remedies could run the risk of making total available monetary remedies unduly punitive.(152) Further, the availability of civil fines in the section 2 context could lead to chilling of procompetitive business conduct. At present, defendants in section 2 cases generally face an injunction from government enforcement and treble-damage liability from private enforcement. The possibility of additional substantial fines from governmental enforcement may discourage firms from engaging in conduct that would not violate the antitrust laws, especially without clear, objective standards for defining violations.(153) Some have raised the issue whether it might be appropriate to reduce the private section 2 remedy to single damages but, at the same time, enable the antitrust enforcement agencies to seek civil fines.(154) The Department believes that further consideration of the appropriate monetary-penalty system for section 2 violations may be useful. Such consideration would need to examine the complicated interplay among various factors, including adequate deterrence of anticompetitive behavior, chilling procompetitive behavior, the role of private enforcement, the pros and cons of governmental civil-fine authority, and the full compensation of section 2 victims. VI. Conclusion Early and careful consideration of remedies in section 2 cases is vitally important. Designing and implementing appropriate remedies may be at least as challenging as reaching the initial determination of liability, if not more so. Remedies should terminate the defendant's unlawful conduct, prevent its recurrence, and re-establish the opportunity for competition in the market. Engineering a specific market outcome that may favor a given rival or achieve a particular market structure should never be the goal. Section 2 remedies must carefully balance a number of potentially conflicting considerations. A remedy should be sufficiently specific to allow a defendant to comply with its terms and the court to supervise that compliance, but should also be flexible enough to handle changed circumstances. Duration should be considered carefully. Considerations of efficacy must be evaluated alongside concerns with administrability and the desire to maintain efficiency and innovation. Because prohibitory remedies are generally the least costly to implement and supervise and also the least disruptive in this context, the Department generally prefers them in section 2 cases when they are sufficient to re-establish the opportunity for competition. In other instances, however, more extensive affirmative-obligation remedies may be needed. Finally, when warranted by the circumstances, the Department may seek divestiture or other structural relief. In each case, the Department will seek to ensure that its chosen remedy preserves and protects competition and does more good than harm. The availability of monetary remedies for section 2 violations encourages private enforcement efforts and thus supplements injunctive relief by providing deterrence. The Department believes further consideration of the range and level of monetary remedies available in section 2 cases would be useful to determine whether adjustment may be appropriate.

#### FIRST---per se. “Prohibition” requires a declaration of per se illegality

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

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

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

#### Per se violations are criminally prosecuted

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

Under stated policy, the Antitrust Division does not criminally prosecute cases under the more permissive rule of reason standard, but reserves its discretion only to charge conduct considered to be per se illegal—that is, restraints of trade classified as unlawful without assessing potential precompetitive benefits and overall market impact. So a judicial finding that charged conduct comprises an offense that should be evaluated under the rule of reason effectively amounts to a dismissal. The trial court’s ruling in Kemp precluding antitrust prosecutors from proceeding on a per se theory, and the Tenth Circuit’s criticism of that ruling, provide unique insight into the modern use of the Sherman Act as a criminal statute.

The Sherman Act, and in particular a per se violation of the Sherman Act, often functions as a blunt prosecutorial instrument. The Sherman Act tends to limit the per se rule of illegality to those restraints among horizontal competitors, with which courts have had considerable experience and where the restraints are deemed facially anticompetitive and lack any plausible business justification. But such condemnation is not static. The principles animating antitrust law have evolved with the century-old Sherman Act, dynamically moving from the formalistic approach towards horizontal price-fixing agreements applied in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940), to the recognition that not all price-fixing arrangements unreasonably eliminate competition in Broadcast Music v. Columbia Broadcasting System, 441 U.S. 1, 23 (1979), to more complex notions that emphasize economic realities of business relationships as set forth in Business Electronics v. Sharp Electronics, 485 U.S. 717, 726 (1988).

As with antitrust doctrines themselves, the judgment that guides prosecutorial discretion should take into consideration the complexities and nuances of markets. This article reviews a series of criminal antitrust cases in which indicted defendants have challenged the application of the per se rule of illegality, with only a small degree of success. Still, to the extent the Sherman Act continues to be a weapon of choice for U.S. prosecutors, practitioners should consider whether the rule of reason can function as a useful tool in pre-charging discussions and, if need be, seeking dismissal of an indictment.

Policy and Provenance

The DOJ’s policy on prosecuting antitrust crimes focuses, as a matter of institutional discretion, on per se unlawful conduct. The current version of the U.S. Attorneys’ Antitrust Manual provides that “current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.” U.S. Dep’t of Justice, Antitrust Division, Manual at III-12 (5th ed. 2018). The Antitrust Manual, however, states that “[t]here are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate.” According to the Manual, those “situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.”

#### That guarantees DOJ involvement

Cullen 20 (Anne, “Justices Skip Case Over 'Per Se' Rule In Antitrust Convictions,” https://www.law360.com/articles/1233751/justices-skip-case-over-per-se-rule-in-antitrust-convictions)

The DOJ pursues criminal antitrust cases only under the per se evidence test — pegging certain violations of the Sherman Act, such as bid-rigging and price-fixing, as automatically illegal — rather than the tougher-to-prove rule of reason, which weighs overall consumer costs and benefits of an activity.

#### SECOND---pay to play. Damages do not prohibit the conduct, they deter it. So, any firm could choose to continue the conduct under the counterplan [we say they wouldn’t, because of deterrence / financial determinations]

Schwartz 19, JD (David, “WHEN TO PURSUE INJUNCTIVE RELIEF VS. MONETARY DAMAGES,” <https://www.lodhs.com/blog/when-pursue-injunctive-relief-vs-monetary-damages/>)

Types of relief that may be obtained for business torts include:

Compensatory damages - the amount of money the plaintiff lost where the defendant’s tort was the “legal” cause of the loss

Punitive damages - additional financial award to the plaintiff to deter the defendant from repeat offenses where the defendant acted with “malice”

Injunctive relief - a court order prohibiting the defendant from continuing or repeating the tortious behavior

#### That violates “prohibition”---because it doesn’t ban the behavior

Supreme Court of Delaware 95 (VEASEY-Chief Justice. Opinion in Snell v. Engineered Systems & Designs, Inc., 669 A.2d 13 (Del. 1995).date accessed 7/13/21)

The interpretation of the statute is aided by the synopsis to a recent amendment to Section 2825. This synopsis states that the amendment "clarifies the limitations on the public use of the word engineering by those not authorized to practice engineering for the general public." 68 Del.Laws, c. 24 (emphasis added). Had the General Assembly intended to ban all uses of the word "engineer" by those not certified, it would have been more logical for it to have used the word "prohibition" (or the equivalent) rather than the word "limitations" in the synopsis.[7] Section 2825 must be analyzed, therefore, with the understanding that it bans only uses of the term "engineer" which would "lead to the 18\*18 belief that such person is entitled to practice **eng.ineering**" — i.e., a misleading use of any derivative of the word "engineer."

#### Even if conduct is restricted by damages, that’s not a prohibition

Oregon Court of Appeals 20 (BREWER, S. J. Opinion in Moore v. City of Eugene, 482 P.3d 190, 308 Or. App. 318 (Ct. App. 2020). Google scholar caselaw. Date accessed 7/13/21).

As pertinent context, petitioner observes that, in ORS 195.305(3)(a), (b), and (d), the voters employed the term "prohibit" disjunctively to "restrict" in setting out exemptions under Measure 49, whereas the provision at issue here contains the term "restrict" but not "prohibit." Petitioner relies on the principle that, when a statute uses two different terms, they are presumed to have distinct meanings. ORS 174.010; Dept. of Transportation v. Stallcup, 341 Or. 93, 103, 138 P.3d 9 (2006).

#### In topic-context, remedies are opposed to prohibitions

Barros et al 10 (Pedro Pita Barros\* is Professor of Economics at Universidade Nova de Lisboa where he teaches industrial organization and health economics. Joseph Clougherty\*\*-Professor of Business Administration @ University of Illinois at Urbana-Champaign. Jo Seldeslachts\*\*\*-Wissenschaftszentrum Berlin (WZB). “How to Measure the Deterrence Effects of Merger Policy: Frequency or Composition?” , *International Journal of the Economics of Business* 17.1 (2010): 1-8. <https://run.unl.pt/bitstream/10362/2655/1/BarrosEtAl.IJEB_04.sept.09.pdf> , date accessed 9/18/21)

Akin to D’Antoni and Galbiati (2007), the antitrust authority is better informed than the merging parties about the potential negative welfare implications of the merger. Accordingly, whenever is below , the merger is cleared by the antitrust authority: an event occurring with probability . Furthermore, when is above , two situations may occur: the merger elicits a prohibition or a remedy from the antitrust authority. The remedy option is taken when the proposed restrictiveness level is not particularly high: when is above but below . The parameter – the remedy solution range – denotes the extra level of restrictiveness the authority is willing to accept as long as remedies are imposed. The prohibition option is taken when is above . Hence, also denotes the authority’s permissiveness in the sense that a larger eliminates the prohibition option.

#### No shielding: inclusion of any criminal punishment ensures the DOJ aggressively pursues it

Benton-Wells 11, Deputy Dean at the Melbourne Business School and a Professorial Fellow at the Melbourne Law School. She is the former Director of the University's Competition Law & Economics Network and co-Director of the Global Competition and Consumer Law Program. She is also a lay Member of the Australian Competition Tribunal. (Caron, “Criminalising Cartels: Critical Studies of an International Regulatory Movement,” Research Gate)

Competition is premised on the idea that companies act in their self-interest. Yet, self-interested corporate conduct will not always guarantee the outcomes that politicians promise and, in the process, may damage sectional interests that for reasons other than competition policy, governments are concerned to, and be seen to, protect.25 The politics of competition regulation is accentuated by the introduction of criminal sanctions. This development shifts the debate between government and the business sector from what might be seen as the value-neutral objective grounds of economic regulation, to the more value-laden and subjective grounds of what is seen as honest or fair in business dealings. It involves the government drawing a line in the sand from which it will be difficult if not impossible to retreat, regardless of future change in economic circumstance (even change occasioned by global influences beyond the government’s control). Further, having made the case for criminalisation based on the prevalence of conduct that threatens the economic fabric of society, an expectation is raised that investigations, prosecutions, convictions and jailings will follow. Yet, as many of the chapters in this book attest, such expectations may be very difficult to meet. Failure to meet expectations raised by the rhetoric of cracking down on big business carries political risk. At the same time, there is as much if not more political risk in chilling business initiative through legislation that is over-reaching and uncertain, and thereby failing to produce the economic benefits that the public expects government produce in managing the economy.26

#### The counterplan solves the balancing test part of the plan. Their solvency is about private litigation.

1AC Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

Chiefly, this balancing test would supplement the FTAIA. The underlying impetus for the FTAIA’s enactment – responding to international criticism of expansive US extraterritorial jurisdiction and to calls for recognizing foreign sovereignty where the basis for US prescriptive jurisdiction is weak – functions as this balancing test’s modus operandi. While the difficulty in interpreting “direct” has instigated its introduction, the balancing test does not attempt to shed any more light on the FTAIA’s contemplation of “direct.” Instead, it provides an alternative framework to properly apply the FTAIA where the statute’s language makes it impossible to do so.

As was the balancing test in Timberlane, a balancing test here may also be criticized as leaving too much discretion over political inquiries (i.e., foreign policy considerations) to the judiciary rather than to the executive and legislative branches, where such decisions may rightly belong.200 Professor William Dodge, while asserting that US courts should engage in judicial unilateralism rather than international comity considerations, points out that the judiciary plays an important complementary role to a country’s political branches by encouraging dialogue and negotiation between sovereigns.201 Though Congress and antitrust agencies may be better suited than courts to take account of the interest of other nations, courts are nonetheless faced with the task of weighing those interests when judging a party’s right to redress in private antitrust litigation.202

Footnote 201:

201. Dodge, supra note 2, at 106-07. American courts are also well-versed in taking into account foreign interests through allowing sovereign representatives to articulate official positions in litigation. See, e.g., Empagran, 542 U.S. at 167-68 (relying on non-US government amicus curiae briefs asserting national interests in considering international comity); In re Vitamin C Antitrust Litig., 837 F.3d at 179 (“When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.”); BREYER, supra note 7, at 92 (“Since there is no Supreme Court of the World, national courts must act piecemeal, without direct coordination, in seeking interpretations that can dovetail rather than clash with the working of foreign statutes. And so our Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices.” (emphasis added)).

“Judicial unilateralism,” as defined by Professor Dodge, implies that courts should only consider whether or not the forum’s legislature intended to regulate the conduct at issue without regard to foreign interests. See Dodge, supra note 2, at 104-05 (“[A] court should apply a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations.”); see also supra note 16.

End of footnote 201.

The balancing test should be an exercise in both comity and cooperation, an attempt to harmonize counterpoints in the debate over antitrust extraterritoriality. As Professor Fox posits, the question is not “when should we defer to the inconsistent interests of other nations?” but rather “how can the antitrust jurisdictions of the world work together to maximize their shared interest in competitive markets, to the benefit of consumers and robust or potentially robust business?”203 Indeed, this comports with Supreme Court’s current approach to comity analysis of harmonization rather than avoiding conflict among laws.204 Accordingly, the test will have a slightly different focus than the one constructed by the Ninth Circuit in Timberlane, which reflects an outdated period of international antitrust regulation lacking potent modern enforcement tools such as amnesty programs. It will, however, encourage the growth of overall worldwide antitrust enforcement, both public and private, which ultimately contributes to properly functioning international markets.205

The challenge of achieving proper adjudication of an antitrust claim consisting of conduct and injury in two different jurisdictions is that national laws must conform to a market that ignores national borders.206 With this in mind, the goal should be to promote adjudication in the most efficient locale in an effort to maximize world welfare, foster growth of antitrust jurisdictions, and avoid overregulation.207 There are currently over 120 antitrust jurisdictions, many of which are new antitrust jurisdictions or have enacted fresh laws allowing for greater access to private redress, such as Israel (2006), China (2008), the European Union (2014), the United Kingdom (2015), and Hong Kong (2015).208 Letting the laws of these jurisdictions develop and inculcate international standards for antitrust enforcement strengthens the deterrence of anticompetitive behavior and the ability of injured parties to seek recompense.209 Achieving greater international involvement in turn would ostensibly mitigate some of the need behind extraterritorial application of US antitrust law.210

Footnote 209:

209. See, e.g., First, supra note 16, at 732-34 (arguing that international political consensus is integral to effective international antitrust enforcement and that the case-by-case common law process of law development is the optimal path to that consensus in the absence of a single system of or approach to market place regulation); Org. for Econ. Co-operation & Dev., Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 2 (May 1998), http://www.oecd.org/daf/competition/2350130.pdf [https://perma.cc/35HUTEWZ] (last visited Oct. 26, 2017) (“[C]loser co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade.”). As noted above, while national recourse for compensating private loss is currently available in a minority of antitrust jurisdictions, it is increasingly acknowledged as a necessary tool for under-resourced national competition authorities. See Pheasant, supra note 11, at 59 (explaining that the European Commission “decided that it would be appropriate to enhance the role of private enforcement to support and supplement public enforcement of the competition rules” given insufficient resources for governmental competition authorities); Edward Cavanagh, Antitrust Remedies Revisited, 84 OR. L. REV. 147, 153-54 (2005) (“Congress created the private right of action to supplement public enforcement because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of antitrust laws.”); see also supra note 25.

End of footnote 209.

#### It’s net better to harmonize around private rights of action, because international authorities will be under-funded

1AC Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

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End of footnote 209.

#### Their solvency is about private recourse!

1AC Murray ’17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

VI. Conclusion

This Note argues that in order to create a suitable environment for international private redress an international comity balancing test should be introduced into US jurisprudence through the opportunity provided by the FTAIA “direct effect” criterion. Though the United States has historically acted as the world’s courtroom for victimized private parties to seek recovering of antitrust injury, worldwide jurisdictions are beginning to develop their own legal regimes of antitrust enforcement, deterrence, and private recompense. To encourage this development, US courts should embrace the current Supreme Court’s approach to comity as one predicated upon global harmonization rather than conflict avoidance.

The recent efforts of resolving the “direct effect” definition dispute have been unfruitful and have ultimately produced puzzling decisions, including one in which foreign defendants were subject to criminal liability under the Sherman Act but not civil liability. The proposed balancing test responds to the current confusion stemming from these efforts by providing an alternative framework through which to realize the statute’s purpose. While the late Justice Scalia cautioned against using comity balancing tests to determine whether to properly subject foreign defendants to US antitrust law, limiting parameters provided by existing case law establish sufficient conditions to permit a balancing test.

This balancing test would guide courts in determining the propriety of extraterritorial application of US antitrust law for specific cases involving proscribed foreign anticompetitive conduct under the auspices of promoting the development of global antitrust enforcement and maximizing world economic welfare. However, instead of weighing traditional comity considerations as in Timberlane, the comity balancing test proposed in this Note would focus instead on these objectives, i.e., promoting the development of global antitrust enforcement and maximizing world economic welfare, as an extension of the Supreme Court’s harmonization approach. Ultimately, the balancing test would better allow the United States to contemplate and incorporate foreign interests in whether to apply US antitrust law, promoting international dialogue and encouraging growth of foreign private antitrust recourse.

#### Treble Damages solve.

2AC Leonardo ’16 [Lizl; 2016; J.D. Candidate, DePaul University College of Law, B.S. from De La Salle University-Manila, Philippines; DePaul Law Review, “A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce,” vol. 66]

The Ninth Circuit’s logic and reasoning should prevail in subsequent cases. It allows for a more rigid, yet necessary, rule in the rapid growth of the economy. By the Ninth Circuit’s logic, foreign cartels that harm U.S. commerce will be reached by U.S. antitrust laws. Treble damages will disincentivize these foreign companies from pursuing anticompetitive conduct; products will not be overpriced as a result of cartels’ price-fixing; transactions among domestic and/or foreign producers will be much smoother because both parties are at ease. U.S. Supreme Court involvement, interpreting how the FTAIA applies to non-import trade, would provide answers to questions that federal courts have been struggling to answer for many years, and it would reverberate the United States’ firm position against conspiracies that adversely impact U.S. consumers and the U.S. economy.

#### Criminalization does not deter. The empirical research record is overwhelmingly clear.

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Testing Key Assumptions Underpinning Cartel Criminalisation (Part E) Given the host of substantial legal and practical challenges associated with designing and successfully enforcing a criminal cartel regime, together with the ramifications of perceived failure, it is important that the objectives of criminalisation be both clear and realistic. If the ultimate objective of cartel criminalisation is the significant reduction, if not eradication, of cartel conduct, this means in effect changing business attitudes and behaviour so that companies and business people desist voluntarily from engaging in collusive activity. The view of criminalisation proponents is that such change is to be achieved primarily, if not solely, through deterrence and, more particularly through deterrence by the prospects of formal legal sanctions. As indicated above, as ‘optimally’ deterrent fines against companies are seen either as unachievable or as undesirable, the sanctions promoted as necessary to achieve deterrence are jail sentences for individuals. Thus, the choices for deterrence-seeking lawmakers and law enforcers are presented rather starkly, and simplistically, as ‘optimal’ corporate fines with potentially disastrous and counterproductive effects on the one hand, and ‘sub-optimal’ corporate fines supplemented by the threat of imprisonment for individuals on the other hand.60 Part E of the book aims to test the basis for these views and assumptions. Chapters 11 and 12 focus on the assumptions commonly made about the reasons why companies and individuals choose to engage, or not to engage, in cartel activity and the implications of such assumptions for criminalisation as a deterrence-driven strategy of cartel enforcement. Chapters 13 and 14 highlight the ways in which these assumptions about corporate and individual behaviour have been manifested in and have constrained thinking about the design of cartel prohibitions and cartel sanctions. In each chapter the assumptions made most commonly in support of the case for cartel criminalisation are placed under the microscope and found wanting. In chapter 11, compliance scholar Christine Parker reports on her systematic review of empirical studies to date bearing on the question of how cartel behaviour is affected by legal sanctions and enforcement. 61 She reaches the forceful conclusion that classical deterrence theory, with its reliance on ‘the supercharged deterrent of jail’ to induce greater compliance, ‘has no basis in empirical evidence about why people actually participate in cartel behaviour in the complexity of everyday business life.’62 Parker highlights the methodological limitations in the studies to date but she also observes that most such studies are US-oriented and their results may therefore have limited generalisability in the context of different legal and social cultures.63 Subject to these caveats, Parker uses the work to date to elicit some tentative propositions about how people perceive and are affected in their behaviour by the costs and gains of compliance and non-compliance. She concludes that there is a need to develop, based on empirical research, a more thorough and sophisticated understanding of such perceptions and behaviour. In particular, Parker argues for research that investigates how normative and social influences affect compliance. Chapter 12 by behavioural economics scholar, Maurice E Stucke, adds further weight to the thesis that many of the key assumptions underpinning a criminal approach to cartel conduct warrant interrogation.64 His starting point is that, despite record level prosecutions, convictions and penalties for cartel activity in the US there are few signs that ‘optimal’ deterrence has been reached. If anything, there are signs that the number, scale and harmfulness of discovered cartels are on the increase. In light of this, Stucke calls for reconsideration of the assumption made in neoclassical economic theory, and underpinning the simple deterrence paradigm, that price fixers behave as rational profit maximisers. He draws on theoretical and empirical studies in behavioural economics to argue that dispositional and situational factors play important roles in human decision-making about whether to enter into and continue to participate in a cartel. Stucke goes on to make a series of recommendations as to how competition authorities might enhance the effectiveness of their cartel enforcement strategies based on a greater appreciation of the complexities and nuances of human behaviour.

## 1

#### COVID thumps.

Kim & Karpinski 20, \*Tae-Yoon, MA in Global Energy Management and Policy, World Energy Outlook Analyst. \*\*Milosz, BSc, Staff Project Engineer at Cenovus Energy (IEA, 5-6-2020, "Clean energy progress after the Covid-19 crisis will need reliable supplies of critical minerals", *IEA*, https://www.iea.org/articles/clean-energy-progress-after-the-covid-19-crisis-will-need-reliable-supplies-of-critical-minerals)

As the Covid-19 pandemic has pushed many countries into some form of lockdown and hit mining operations across the globe, the risks around clean energy supply chains, including those of minerals, have come into sharper focus. Peru’s copper-mining activities, which are responsible for 12% of global production, ground to a halt because of the country’s confinement measures. South Africa’s lockdown disrupted 75% of the global output of platinum, a key material in many clean energy technologies and emissions control devices, although the country later allowed mines to operate at 50% capacity. Although prices for many important minerals have fallen as global demand has slumped, recent developments have highlighted a number of reasons why the world should not take secure supplies for granted.

#### 2. No shocks---the market is resilient and self-corrects

Blagden & Porter 21, \*David, Senior Lecturer in International Security at the University of Exeter, \*\*Patrick, Professor of International Security and Strategy at the University of Birmingham. (2-21-2021, “Desert Shield of the Republic? A Realist Case for Abandoning the Middle East”, *Security Studies*, DOI: 10.1080/09636412.2021.1885727, pg. 26-27)

The hydrocarbon market itself is changing and becoming more resilient, meanwhile.80 Western economic exposure to oil shocks is reducing, thanks to increases in efficiency. These increases come from several factors, including the development of North American shale, other stocks becoming increasingly accessible through improving extraction technologies, better-managed shipping routes/fleets, and the capacity to call on public/private inventories and the redistributing function of the International Energy Agency. Spare capacity and strategic petroleum reserves are also now better used to moderate supply shocks. The United States already has adaptive mechanisms, apart from security guarantees and bases, that it can use to mitigate disruptions. Indeed, in every oil shock since 1973, these mechanisms have been used, increasing production from other sources.81 And such market evolutions simultaneously diminish supply manipulation’s utility as a coercive lever, both for OPEC as a whole and for major vendors therein. Even the 1973 oil embargo crisis was created not primarily by the drop in production, which only fell by 2–4%, but by the Nixon administration’s imposition of price controls.82 Large-scale disruptions to oil markets—for instance, the Iran–Iraq War of the 1980s—historically led to rapid third-party adaptation, meanwhile.83 As Justin Logan observes, “a major disruption in one location, temporarily reducing global supply and raising prices, incentivizes producers elsewhere to increase oil production.”

#### The grid could survive a nuke.

Cash 19, staff writer at NRECA. (Cathy, 4-30-2019, "Report: Electromagnetic Pulse Would Not Have Widespread Impact on Electric Grid", *NRECA*, https://www.electric.coop/report-electromagnetic-pulse-would-not-have-widespread-impact-on-electric-grid)

The U.S. electric transmission system would largely survive a high-altitude electromagnetic pulse event caused by a nuclear warhead atmospheric explosion, an intensive investigation by the Electric Power Research Institute has found.

EPRI released its three-year study, “High-Altitude Electromagnetic Pulse (EMP) and the Bulk Power System—Potential Impacts and Mitigation Strategies,” on April 30.

Researchers conducted laboratory testing and analysis to determine the effect on the transmission grid from an EMP triggered by the unlikely event of a nuclear warhead detonated approximately 30 kilometers—about 18 miles—above Earth’s surface.

An EMP is a series of fast-moving waves of electromagnetic energy that can damage or destroy electronic components and equipment and also possibly result in voltage stability challenges and high-voltage transformer damage.

There are concerns that an EMP triggered at the right altitude could bring down the U.S. transmission grid as well as other critical infrastructures like telecommunications, emergency services and hospitals.

But EPRI’s study found that, while direct exposure to the initial pulse could damage or disrupt some transmission electronics, existing resiliency built into the grid would likely prevent catastrophic failure. Recovery from an EMP would be similar to that from other large-scale power outages, EPRI said.

“An EMP is an extremely unlikely event, but one that the electric industry needs to clearly understand and ensure that cost-effective potential mitigation measures do not result in unintended consequences or impacts,” said NRECA CEO Jim Matheson. “This comprehensive study by EPRI will be a vital tool in that process.”

## 2

#### SGDs fail at achieving material improvements – perceived as symbolic, trade off with other goals

Deighton 19

Ben Deighton, “SDGs ‘failing to create transformational change’,” *SciDev,* February 2, 2019. https://www.scidev.net/global/news/sdgs-failing-to-create-transformational-change/

The Sustainable Development Goals (SDGs) are often failing to produce the profound changes needed to achieve their ambitious objectives due to a lack of coordination across the 17 separate goals, the American Association for the Advancement of Science (AAAS) annual meeting heard.

“The reality is that if they are just seen as aspirational goals what happens is — what is actually happening now — is that governments are just labelling what they are doing anyhow as being in the obligation of the SGDs,” Peter Gluckman from the University of Auckland, New Zealand, told a panel discussion during the event, held in Washington, DC from 14-17 February.

The SDGs were adopted by the United Nations in September 2015, and call for governments to achieve goals such as ending poverty, eradicating hunger and ensuring everyone has access to clean, affordable energy by 2030.

However, global hunger has risen for the third year in a row, according to the latest UN’s world food security report, while fewer than five per cent of countries are on track to meet childhood obesity and tuberculosis targets, according to a study published in The Lancet in 2017.

Global carbon emissions were also set to rise by two per cent in 2018 to hit an all-time high, according to a report by the UK’s University of East Anglia and the Global Carbon Project. The trend is driven by rises in the use of coal, oil and gas.

“Don’t get me wrong, those [the SDGs] are critically important and we are fully committed — but let’s be honest about lots of words and lots of talk, but perhaps little action,” Daan du Toit, deputy director-general for international cooperation at the South African Department of Science and Technology, said during a panel discussion.

Nakao Ishii, chief executive of the DC-based funding organisation Global Environment Facility, said that in her native Japan, people would wear SDG badges at policy meetings, but that did not always mean they understood the changes that are required to implement the objectives.

“It’s almost an order if you go to those meetings you have to wear the SDG badge, but the question is to what extent they really do understand the need of transformation, which is not the incremental approach anymore,” she said.

Trade-offs

One of the problems, according to the panel, is that there is often a trade-off between different SDGs, meaning that one goal is achieved to the detriment of other goals.

One example is that of the Aral Sea on the border between Kazakhstan and Uzbekistan, formerly the fourth largest inland lake in the world. The rivers that feed the lake have been diverted to irrigate desert farmland, causing it to shrink by over 90 per cent since the 1960s.

“The irrigation of the farmland helped to achieve one SDG goal, number two, that aims to enhance food security,” said Hongbo Yang, from the US-based Smithsonian Conservation Biology Institute.

“But that progress is achieved as a sacrifice of another goal which is SDG number 14, which aims to protect aquatic wildlife.”

One solution is for governments to conduct a broad analysis of how issues like land use, biodiversity and climate affect one another as they formulate policy, said Guido Schmidt-Traub, from the France-based Sustainable Development Solutions Network.

However, in many countries this is not being done. “It’s a bit like central banks setting interest rates without a macroeconomic model,” he said.

Similarly, science funding also needs to be better coordinated to ensure that the conflicting and interdependent nature of the SDGs is taken into account in research projects, one panel meeting heard.

For example, organisations such as the US funding agency the National Science Foundation (NSF) should be set up to work on a global scale in order to encourage research on the SDGs to be relevant globally and not just according to national or regional priorities, according to Thomas Hertel, from Purdue University in the US state of Indiana.

“That’s what we’re missing right now, is a global entity,” he told the meeting.

The important thing is for researchers and policymakers to come to together to address the trade-offs between different goals and different regions of the world, the meeting heard.

“That is the motivation behind this symposium,” said Jianguo Liu, from Michigan State University, who was an organiser of one of the side meetings on the SDGs. “To try to take the first step to address those kinds of issues, not just among those different goals, but also the goals across different places across the world.”

#### No incentive for African escalation.

Thrall 15, MA, Scholar in Residence at University of Colorado Boulder. (Lloyd, “China's Expanding African Relations”, *RAND*, pg. 78-79, Accessible at: https://www.rand.org/pubs/research\_reports/RR905.html)

There is little credible potential for a Sino-American conflict over resources in Africa. Contrary to popular and perennial assumptions about resource wars, industry and energy analysis sources project adequate supply of conventional hydrocarbons beyond 2035.6 Given reservoir depletion curves, any tightening of supply would be gradual. The adequacy of supply is further augmented when tertiary production and unconventional sources are considered (such as shale and tar sands). U.S. strength in unconventional sources, and potential energy independence, further reduces the likelihood of a conflict. Even in a future with vastly inflated hydrocarbon prices, these costs pale in comparison to those associated with a Sino-American war, the economic costs of which likely fall more heavily on China than the United States.7 Global hydrocarbon resources are distributed via a fungible global market, with many stakeholders and moderate diversity of supply. This enables importing states to buy a predictable supply of hydrocarbons at reasonable and competing prices over long contracts. African sources do not constitute a majority of this supply chain, and supposed victory in a theoretical great-power resource war would not guarantee security of resource supply. In sum, the potential for either China or the United States to be willing to enter war with a nuclear adversary over African oil, let alone other, less valuable resources, is extraordinarily small.8

# 1NR

#### 1---energy wars---food price spikes disrupt energy markets.

Dancy 12 – Professor of Law @ SMU

(Joseph, “Record Food Prices Will Likely Disrupt Energy Markets,” October, http://www.financialsense.com/contributors/joseph-dancy/record-food-prices-will-likely-disrupt-energy-markets)

Researchers at the New England Complex Systems Institute (CSI) studied periods of social unrest in the Middle East and North Africa to attempt to explain the underlying causes of the riots that swept these areas in 2008 and 2011. The Cambridge-based researchers looked at a variety of factors that could trigger unrest – poverty, oppression, unemployment, etc. in an attempt to explain the disturbances.¶ food index 2004 2012¶ The study found the factor most responsible for triggering riots and social unrest was rising food prices. High food prices do not trigger riots themselves according to the research, but created conditions in which social unrest could flourish.¶ Since the majority of the world's crude oil is produced and exported from the Middle East and North Africa – roughly one of every two barrels is exported from this region – instability in this area would create major global economic problems.¶ While the anti-U.S. riots in Libya, Egypt, Yemen, Iran and elsewhere in the Middle East and North Africa that broke out last month were blamed on an American-made video, the study claims that periods of social instability in this region can be accurately predicted by food prices – and the film happened to be the trigger for the unrest.¶ CSI Findings - Plotting global food prices, as measured using the United Nation’s Food and Agriculture Organization’s (FAO’s) Food Price Index, against the dates of recent unrest the researchers found a high degree of correlation between the high food prices and periods of instability. The chart above (from the CSI report) covers the period from January 2004 to May 2011.¶ When the FOA’s Food Price Index climbed above the threshold level of 210 the researchers found that conditions tend to ripen into periods of social unrest. The study doesn’t claim that a breach of the 210 level immediately leads to riots, just that the probability of instability becomes much greater.¶ The FAO Food Price Index is at 216 in September, slightly above the instability threshold identified in the report. The FAO Index has been above the threshold level for most of the year. Going forward the price of food is expected to move upward with the drought in the U.S. and Russia adding to pricing pressures, thus increasing the probability of unrest.¶ For the millions of people in developing economies food comprises anywhere from 35% to 80% of routine household expenses. The Middle East and North Africa are major importers of grains and foodstuffs, so increasing food costs are quickly reflected in local prices. In the more developed economies household expenditures on food are more like 10% to 15%. High food prices have a larger and more direct impact on households in developing economies, posing a challenge for these governments.¶ One of the authors of the report predicted another “massive food price spike” this fall and winter, even bigger than the last one seen in 2011. This crest will be exacerbated by this summer’s drought and heat wave in many grain growing areas. He noted that “when people are unable to feed themselves and their families, widespread social disruption occurs. We are on the verge of another crisis, the third in five years, and likely to be the worst yet, capable of causing new food riots and turmoil on a par with the Arab Spring.”¶ fao food index 2001 to 2013Rabobank Report - World food prices are forecast to hit an all-time high in the first quarter of next year - and then keep rising - as crops in the U.S. have been hit by the country's worst drought since 1936 according to a new report issued last month by Rabobank, a financial institution specializing in agriculture economics and research.¶ Food prices, as measured by the United Nations FAO Food Price Index, could climb by 15% from current levels according to Rabobank, reaching a record 244 by July, 2013 (see chart). This price level would be well into the zone where the probability of instability in the Middle East increases substantially. The FAO index previously hit an all-time high in February, 2011, just as the ‘Arab Spring’ ignited riots across the

#### Shortages institutional presence in Africa, preventing SDG implementation.

**Bellinger and Kattelman 20** , Assistant Professor of Political Science, Boise State University. Assistant Professor of Political Science, Fairleigh Dickinson University. (Nisha and Kyle, “How the coronavirus increases terrorism threats in the developing world,” *The Conversation*, <https://theconversation.com/how-the-coronavirus-increases-terrorism-threats-in-the-developing-world-137466> Date Accessed: 5/31/2021)

As the coronavirus reaches [developing countries in Africa and Asia](https://coronavirus.jhu.edu/map.html), the pandemic will have effects beyond public health and economic activity. As the disease wreaks its havoc in areas poorly equipped to handle its spread, terrorism likely will increase there as well. We are political scientists who study the [developing world](https://works.bepress.com/nisha-bellinger/) and [political conflict](https://scholar.google.com/citations?user=iEBROwoAAAAJ&hl=en&oi=ao). Our recently [published research](https://doi.org/10.1057/s41268-020-00191-y) identifies a potential link between the pandemic and an uptick in violence. We find that food insecurity – the lack of both financial and physical access to nutritious food, which leads to malnutrition and undernourishment in a population – makes citizens angry at their governments. Citizens conclude that their political leaders are either unable or unwilling to ease their suffering. This anger gives terrorist groups opportunities to recruit new members by providing them a violent outlet for venting their frustrations. In many cases, terrorist organizations do what their governments can’t or won’t do: give people the food and money they badly need to survive. An existing food crisis Extreme weather, political conflict and economic shocks tend to [increase food insecurity](https://www.fsinplatform.org/sites/default/files/resources/files/GRFC_2020_ONLINE_200420.pdf), especially among children, the elderly, the poor and people with disabilities. In [2019](https://www.fsinplatform.org/sites/default/files/resources/files/GRFC_2020_ONLINE_200420.pdf), about 55 countries from regions in Africa, Latin America and the Middle East and Asia were in food crisis. The [coronavirus pandemic is causing political and economic problems](https://www.fsinplatform.org/sites/default/files/paragraphs/documents/Key%20takeaways%20Preventing%20a%20food%20catastrophe%20during%20the%20COVID-19%20pandemic.pdf) even in wealthy countries. As the crisis extends to the developing world, nations will face serious problems feeding their people – and keeping the peace. Difficult days ahead in Africa The types of conflicts plaguing Africa before the pandemic arrived mostly consist of bands of terrorist organizations using violence to cause political or social changes in their home countries, such as Boko Haram’s violent insurgency in [Nigeria](https://www.cfr.org/interactive/global-conflict-tracker/conflict/boko-haram-nigeria). These conflicts happen in places where the government is too weak to monitor and capture the terrorists and their group leaders. Due to weak governance and lack of border restrictions between countries, the violence often spills into [neighboring](https://www.aljazeera.com/news/2020/05/niger-75-boko-haram-fighters-killed-operations-200513115236405.html) weak states, enveloping entire regions. Even before the pandemic broke out, regional conflicts had already created food crises in parts of [Africa](https://www.voanews.com/covid-19-pandemic/africa-coronavirus-adds-stress-food-shortages). The national lockdowns will help contain the coronavirus, but they also [cause other civic and economic problems](https://www.reuters.com/article/us-health-coronavirus-food-africa-insigh/how-africa-risks-reeling-from-a-health-crisis-to-a-food-crisis-idUSKCN2260M2) that can lead to violence. For example, Nigeria has a large number of [self-employed people](https://theconversation.com/lockdown-will-hit-nigerias-smallscale-entrepreneurs-hard-what-can-be-done-135362) who are now unable to earn a living due to the lockdown. As a result, they do not have [enough to eat](https://www.reuters.com/article/us-health-coronavirus-hunger-africa/millions-face-hunger-as-african-cities-impose-coronavirus-lockdowns-idUSKCN21Y14E), and the government has been unable to provide food to everyone in need. This food scarcity has led to [protests](https://www.bbc.com/news/world-africa-52445414) in Abuja and food [stampedes](https://www.dw.com/en/severe-hunger-threatens-africa-during-covid-19-lockdowns/a-53212565) to collect food supplies from the government in Lagos, Nigeria. People are frustrated with the government’s response in dealing with the pandemic and its inability to provide essential food for all who need it. Terrorist organizations such as Boko Haram, an organization dedicated to the creation of an Islamic state within Nigeria, are actively using the grief caused by the coronavirus to [strengthen](https://www.independent.co.uk/independentpremium/voices/coronavirus-boko-haram-nigeria-niger-cameroon-chad-a9470861.html) their [campaigns of violence](https://www.dw.com/en/increased-terror-attacks-in-africa-amid-coronavirus-pandemic/a-53066398). Boko Haram is known for recruiting [unemployed young adults](https://www.thenewhumanitarian.org/fr/node/255134) from families who live in poverty without sufficient food. The group is now [increasing its recruitment](https://guardian.ng/news/boko-haram-iswap-recruiting-in-lake-chad-region-says-mnjtf/) of young men to carry out ambushes, kidnappings and bombings in the region. These efforts have resulted in renewed violence across the Lake Chad region, where a recent Boko Haram attack against the [Nigerian military](https://www.premiumtimesng.com/news/headlines/383704-how-boko-haram-killed-47-nigerian-soldiers-official.html) killed 47. In neighboring Chad, the group ambushed a large group of Chadian soldiers, killing 92. It was the [deadliest attack ever](https://www.telegraph.co.uk/news/2020/03/25/islamists-kill-92-soldiers-chad-one-deadliest-attack-five-year/) on Chad’s military. Even as Nigeria is gradually lifting lockdown measures, [unemployment](https://www.voanews.com/episode/coronavirus-job-losses-worsen-nigerias-unemployment-status-experts-say-4286451) is likely to persist, diminishing people’s ability to afford basic goods such as food. This pattern of violence is extending to other war-torn areas. [Mozambique](https://www.dailymaverick.co.za/article/2020-03-24-mozambique-jihadists-capture-strategic-port-in-major-victory/) and [Mali](https://www.reuters.com/article/us-mali-security-idUSKBN2163WS), for example, are experiencing an increase in attacks from Islamist insurgents in the wake of the pandemic. It is likely that food insecurity brought on by the coronavirus pandemic is playing a role there as well. Increasing violence in Asia In Asia, Pakistan was experiencing a [food crisis](https://www.wfpusa.org/countries/pakistan/) before the pandemic began, with 60% of the population facing food insecurity because of drought and [poor economic conditions](https://www.fsinplatform.org/sites/default/files/resources/files/GRFC_2020_ONLINE_200420.pdf). Now, there are over 48,000 positive COVID-19 cases in [the country](https://coronavirus.jhu.edu/map.html). Lockdown measures are making it difficult for day laborers and tradesmen to earn a living, and [hunger](https://www.npr.org/2020/04/14/833876062/coronavirus-pandemic-further-hurts-pakistans-poor-and-hungry) is an even greater immediate concern. The government’s efforts to provide food to its citizens may not be able to meet the need. Particularly worrisome are the [one-third](https://www.npr.org/sections/goatsandsoda/2020/04/14/831753354/pakistan-has-a-plan-to-keep-millions-from-going-hungry-during-shutdown-will-it-w) of Pakistani citizens who are illiterate and face difficulty reading and applying for aid. The worsening conditions in Pakistan brought on by the coronavirus are causing an [increase](https://theprint.in/defence/how-pakistan-deep-state-is-using-coronavirus-cover-to-fuel-terrorism-in-kashmir/417857/) in terrorism. The Pakistani-based terrorist groups Lashkar-e-Taiba and Jaish-e-Mohammad are currently approaching people who have been affected by the coronavirus and [offering to provide essential services and assistance](https://reliefweb.int/report/india/covid-19-and-insurgency-kashmir). In return, they [gain the loyalty of local populations](https://timesofindia.indiatimes.com/india/let-jaish-and-other-terror-groups-exploiting-covid-19-to-recruit-jihadis-warn-western-anti-terror-experts/articleshow/75114794.cms) and access to a new pool of recruits for their efforts to set up an Islamist government in the contested territory of Kashmir. The effort by the two terrorist groups has led to an [increase in the number of terrorist training camps](https://economictimes.indiatimes.com/news/defence/pakistan-terror-factories-get-active-spike-in-cross-border-firings/articleshow/75037075.cms) in the region. Indian intelligence sources also indicate that the groups, along with their ally Hizbul Mujahideen, may [send terrorists into northern India](https://www.hindustantimes.com/india-news/pakistan-groups-trying-to-send-200-terrorists/story-8L2qwLkWH4Hw6rBgS2w1sJ.html) in an effort to seize the contested land from the Indian government. We are seeing similar recruitment tactics in other parts of the continent. In [Turkey](https://central.asia-news.com/en_GB/articles/cnmi_ca/features/2020/04/16/feature-02), Islamic State recruiters are targeting migrants from Turkmenistan who have lost their jobs as a result of the pandemic. The Islamic State frequently recruits unemployed and disillusioned individuals to join its efforts to create an independent state dedicated to the teachings of its extremist brand of Sunni Islam. Across the developing world, the coronavirus is magnifying existing societal problems, worsening food and financial shortages that give rise to terrorist violence.

#### Enforcement high, resources key, sustained focus solves consolidation

King 21, John and Marylyn Mayo Chair in Health Law and Professor of Law at the University of Auckland (Jaime, “Stop Playing Health Care Antitrust Whack-A-Mole,” Harvard Bill of Health, <https://blog.petrieflom.law.harvard.edu/2021/05/17/health-care-consolidation-antitrust-enforcement/>)

The time has come to meaningfully address the most significant driver of health care costs in the United States — the consolidation of provider market power. Over the last 30 years, our health care markets have consolidated to the point that nearly 95% of metropolitan areas have highly concentrated hospital markets and nearly 80% have highly concentrated specialist physician markets. Market research has consistently found that increased consolidation leads to higher health care prices (sometimes as much as 40% more). Provider consolidation has also been associated with reductions in quality of care and wages for nurses. In consolidated provider markets, insurance companies often must choose between paying dominant providers supracompetitive rates or exiting the market. Unfortunately, insurers have little incentive to push back against provider rate demands because they have the ability to pass those rate increases directly to employers and individuals, in the form of higher premiums. In turn, employers take premium increases out of employee wages, contributing to the growing disparity between health care price growth and employee wages. As a result, rising health care premiums mean that every year, consumers pay more, but receive less. Dynamic health care antitrust enforcement is an idea whose time has finally come, but addressing the ills of consolidation in America’s health care system will require a comprehensive and multi-faceted approach. We have seen repeatedly how an entity with market power can respond quickly to negate the benefits of unilateral policy approaches, leading to an endless cycle of competition policy whack-a-mole. For instance, in the last decade, as health system merger and acquisition challenges became more successful, joint ventures and affiliations, especially with urgent care centers and private equity firms, became more frequent. Further, COVID-19 has exacerbated the threat of health care consolidation by leaving many independent hospitals and physician groups struggling financially and vulnerable to acquisition. Fortunately, the Biden/Harris administration appears uniquely poised to implement a comprehensive initiative to address health care consolidation. First and foremost, Biden has positioned key personnel with antitrust expertise, often with distinct knowledge of the health care industry, throughout his administration. For instance, the nomination of former California Attorney General Xavier Becerra, who championed health care antitrust efforts in the state, as Secretary of Health and Human Services was an inspired choice and presents a unique opportunity to enhance competition through Medicare policy. Biden’s appointment of Tim Wu to the National Economic Council and nomination of Lina Khan to one of five seats on the Federal Trade Commission (FTC) also signal a strong commitment to strengthening antitrust enforcement writ large. Second, the Biden administration should support recent efforts in Congress to address health care antitrust concerns. Senator Amy Klobuchar (D-MN) recently introduced a bill, the Competition and Antitrust Law Enforcement Reform Act, which introduces sweeping reforms that would expand funding to the Department of Justice (DOJ) and the Federal Trade Commission, strengthen prohibitions against anticompetitive mergers by forbidding mergers that “create an appreciable risk of materially lessening competition,” shift the burden of proof to require merging entities to demonstrate that the merger will not harm competition, and take steps to prevent dominant firms from engaging in anticompetitive conduct. Likewise, Senator Patty Murray’s (D-WA) Lower Health Care Costs Act of 2019 demonstrated a sophisticated understanding of how health care entities can use market power to obscure health care prices and negotiate anticompetitive contract terms, like all-or-nothing bargaining, gag clauses, and anti-steering provisions, and provided solid policy solutions to both issues. Providing support for bills like these will be essential to developing a comprehensive competition strategy. Third, on September 17, 2020, the Federal Trade Commission announced much needed plans to revamp the Merger Retrospective program. The Biden administration should provide substantial funding and resources to reinvigorate this program. Merger retrospectives, like Steven Tenn’s Sutter-Summit retrospective in 2008, have been pivotal and provided the FTC with much needed insight on how hospital mergers have leveraged the market power necessary to increase prices and harm consumer welfare. A newly revamped Merger Retrospective program holds great promise for antitrust enforcement in health care, especially if used to gain insight into whether and how vertical and cross-market health care mergers create anticompetitive harms. While a majority of consolidating transactions in health care include vertical or cross-market acquisitions, federal antitrust enforcement has been absent in this area. Fourth, Congress and the Trump Administration have moved mountains to expand price transparency in health care, which will greatly facilitate research into the effects of different types of health care consolidation and contracting practices on prices. The Biden Administration should stand firm on requiring hospitals, insurers, and self-insured employers to report negotiated health care prices, and dedicate resources to analyze that data to determine both the drivers of health care prices and the effectiveness of public policy initiatives designed to control prices. In addition, the Biden administration should promote transparency in health care consolidation by requiring all health care providers (hospitals, clinics, provider organizations, etc.) to report any material change in ownership to the Department of Health and Human Services and the FTC to allow the agencies to monitor consolidation patterns and look for stealth consolidation. All winds seem to blow in the direction of the Biden Administration taking significant action to address rampant consolidation in health care and its harms. Yet, doing so requires funding and willpower. Funding for the FTC and DOJ has decreased in relative dollars since 2010, despite a near doubling in merger filings. The FTC and DOJ need increased funding to expand their ability to review and challenge anticompetitive transactions and practices by dominant health care entities, revamp and expand the scope of their Merger Retrospective Review program, and provide technical assistance to state antitrust enforcers. Furthermore, the FTC should be granted the authority and requisite funding to challenge anticompetitive behavior by non-profit organizations, as they have developed a significant expertise in health care provider markets. Challenging the existing market dynamics in health care also demands the political will to take on some of the biggest industries in the nation (who make some of the largest lobbying contributions). As we have seen in recent challenges to the practices of dominant health care providers, the battle will be hard-fought. Yet, the alternative — allowing the health care industry to continue to siphon off ever-increasing portions of the economy and wages — is unacceptable and irresponsible. The Biden administration must make every attempt to improve the functioning of health care markets where possible, and implement price regulations in markets where competition has failed. Antitrust enforcement agencies must use the full force of their legal arsenal to restore competition in health care — and this may include breaking up large health systems that exploit their market power. For too long, the notion of “unscrambling the egg,” i.e., unwinding a previously consummated hospital merger, has been a non-starter in enforcement circles. To truly restore some form of competition in many health care markets, antitrust enforcers need to break up large systems, or at least have a credible threat of doing so. The Biden administration has an opportunity to reinvigorate our health care markets, but only if it is willing to adopt a bold, determined, and comprehensive competition strategy.

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

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

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

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

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

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

#### Top of the agenda

Mitchell 21 (Joseph, “FTC cracks down on health tech: 7 things to know,” <https://www.beckershospitalreview.com/healthcare-information-technology/ftc-cracks-down-on-health-tech-7-things-to-know.html>)

Healthcare's data privacy and monopoly concerns top the FTC's agenda as its chair, Lisa Khan, completes her first two months in the role, according to the report. Seven things to know A trial kicked off Aug. 24 examining monopoly concerns in cancer screening technology. At issue is the acquisition of startup biotech firm Grail by genetic sequencing giant Illumina. The case was in the works before Ms. Khan's confirmation, but it showcases that health IT is part of the FTC's agenda, Politico reported. The way healthcare and tech companies handle sensitive data “is an area that I'm sure [Ms. Khan’s] very, very interested in," said Jessica Rich, former director of the FTC’s consumer protection bureau. The FTC will also closely watch hospital mergers, Ms. Rich said. "I expect her and the commission to take a very bold approach to what constitutes harm for both," Ms. Rich said. "I expect her to pay close attention to algorithms and potential discrimination in healthcare, both denials and pricing issues which the FTC's laws can address."

#### Oversight now

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

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

#### It’s all interconnected.

Macy & Lee 17, \*Creighton J., Attorney, Baker McKenzie. Formerly served as chief of staff and senior counsel in the Department of Justice Antitrust Division, working as a senior advisor to the acting assistant attorney general on civil and criminal antitrust enforcement and policy matters, as well as budget and personnel issues. \*\*Craig Y., Attorney, Baker McKenzie. Leads the Firm’s global cartel task force (12-14-2017, "When Merger Review Turns Criminal", *American Bar Association*, https://www.americanbar.org/groups/business\_law/publications/blt/2017/12/07\_lee/)

But that separation of criminal and civil enforcement sections at the Antitrust Division does not create walls or silos. The different criminal offices often work together on large investigations and trials. Similarly, the size of many civil investigations requires pulling resources from the various civil sections, as well as from the Antitrust Division’s Appellate, International, and Competition Policy and Advocacy sections. But the collaboration does not end there. Coordination between the civil and criminal sections is the norm. Section managers meet regularly to discuss matters and often consult on an informal basis. Cross‑pollination occurs at the trial attorney level as attorneys are detailed to other sections for specific matters or periods of time. And understanding this collaboration between the civil and criminal sections is vital to attorneys and their clients subject to the merger review process. A recent case not only shows how in sync the Antitrust Division’s criminal and civil sections are, but also highlights the implications of that collaboration. In December 2014, two packaged seafood companies announced their proposed merger. As is customary to the review process, the parties submitted documents to one of the Antitrust Division’s civil sections. What followed was anything but routine. However, based on the level of collaboration within the Antitrust Division, it should not have been unexpected. From document review to charges for price-fixing The Antitrust Division’s civil attorneys reviewed the documents submitted by the parties and uncovered information that raised concerns of price‑fixing. When the parties walked away from the deal on December 3, 2015, then-Assistant Attorney General Bill Baer’s statement in the press release made a veiled reference to their problematic documents. He said, “Our investigation convinced us—and the parties knew or should have known from the get-go—that the market is not functioning competitively today, and further consolidation would only make things worse.” The parties’ abandonment of the deal did not end the Antitrust Division’s investigation. Instead, the civil attorneys conducting the merger review shared their findings with their criminal counterparts. A criminal section proceeded to open a price‑fixing investigation based on the shared materials. That investigation has borne fruit and is ongoing. To date, three individuals and one company have been charged for participation in a price‑fixing conspiracy. Criminal antitrust violations, such as price-fixing, have serious implications. Not only are the criminal penalties substantial, but companies can be subject to civil suits with treble damages (15 U.S.C. § 15.). For individuals, the maximum penalties are 10 years in prison and a $1 million fine. For corporations, the maximum fine is $100 million. Fines for both individuals and corporations can exceed the statutory maximum amount by up to twice the gain derived or twice the loss by victims. See, e.g., Price Fixing, Bid Rigging and Market Allocation: An Antitrust Primer, Department of Justice Antitrust Division, available at https://www.justice.gov/atr/priceifxing-bid-rigging-and-market-al location-schemes (discussing the Sherman Act). While it is not public what specific information was contained in the documents that raised the attention of the reviewing attorneys, or exactly how the process happened, the Antitrust Division did state that the criminal investigation was triggered by “information and party materials produced in the ordinary course of business.” Until more information is revealed, several questions remain, including whether similar criminal investigations based on documents submitted for merger review could be waiting to surface. The packaged seafood matter is not the first criminal case to stem from a civil investigation and likely will not be the last. The hand‑in‑hand coordination between the civil and criminal sections of the Antitrust Division will continue. Companies need to be increasingly aware of the risks that ordinary course documents present, not just in impacting merger approval but also in criminal implications. Merger review does not exist in a vacuum. Once documents fall into the Antitrust Division’s (or FTC’s) hands, parties can expect that they will be closely reviewed with an eye toward both civil and criminal actions. Documents always tell a story—and attorneys need to be sure that the story told is one to support a proposed deal and not a criminal investigation. Similarly, the FTC and Antitrust Division share a close working relationship. We will continue to explore and monitor the collaboration between those two agencies as well as with state attorneys general. We also plan to address the collaboration among competition agencies around the world. Stay tuned.

#### Antitrust authorities would be included in enforcement

Warin 13, PD, Partner @ (“The Global Reach of American Criminal Law ,” <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Warin-TheGlobalReachofAmericanCriminalLaw-0213.pdf>

U.S. antitrust law has a similarly broad reach—for corporations and individuals. U.S. courts and enforcement agencies have long held that the Sherman Antitrust Act12—the main federal statute prohibiting anti-competitive conduct—applies to foreign conduct that is intended to produce and did produce substantial effect in the United States. DOJ and the United States’ Federal Trade Commission (“FTC”) enforce the federal antitrust laws, including the Sherman Antitrust Act.13 DOJ prosecutes antitrust violations both as criminal and civil offenses; the FTC prosecutes them only as civil offenses. Criminal prosecution may lead to severe penalties. Corporations convicted of a criminal violation of the Sherman Antitrust Act can be fined up to $100,000,000; and individuals can be fined up to $1,000,000 and receive a prison sentence of up to ten years. Several key U.S. court decisions recognize the extraterritorial reach of the U.S. antitrust laws. In a 1945 civil antitrust action, a U.S. appellate court held in United States v. Aluminum Co. of America14 that conduct perpetrated abroad could violate the Sherman Act if it was “intended to affect imports and did affect them.”15 In 1982, U.S. Congress adopted the Foreign Trade Antitrust Improvement Act (“FTAIA”)16 to limit the application of the Sherman Act in cases in which there was no effect on U.S. commerce. The FTAIA provided that the Sherman Act applied to foreign conduct (other than import commerce) that “has a direct, substantial, and reasonably foreseeable effect” on U.S. commerce. Eleven years later, the U.S. Supreme Court stated in with respect to import commerce that it was “well established . . . that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”17 In 1997, an appellate court extended this extraterritoriality test to a criminal matter involving a pricefixing conspiracy that occurred entirely in Japan.18 DOJ and the FTC reflected these principles in their 1995 guidance regarding their “international enforcement policy.”19 The 1995 Antitrust Enforcement Guidelines for International Operations firmly state that “[a]nticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.”20 DOJ has been successful in bringing criminal enforcement actions against foreign corporations and individuals. For example, Mitsubishi Corporation was found guilty of aiding and abetting a criminal violation of Section 1 of the Sherman Antitrust Act involving a price-fixing conspiracy among graphite electrode producers.21 Mitsubishi encouraged its 50%-owned U.S. producer of graphite electrodes to fix prices, participate in cartel meetings, sell products at fixed prices, and conceal the cartel activity. Mitsubishi was sentenced to a $134 million fine, one of the largest in the history of U.S. criminal antitrust enforcement. In another example, DOJ obtained convictions last year against Taiwanese company AU Optronics Corporation, its U.S. subsidiary, and two executives for fixing the prices of LCD panels sold into the United States, as agreed during meetings with their competitors occurring in Taiwan.22 AU Optronics was fined $500 million—“matching the largest fine imposed against a company for violating U.S. antitrust laws”—the gain that the jury found the company derived from the conspiracy, as well as was required to adopt an antitrust compliance program and retain an independent compliance monitor.23 The two Taiwanese executives were each sentenced to three years in prison and fined $200,000.24 Earlier that year, two Japanese suppliers of auto parts—Yazaki Corporation and DENSO Corporation—agreed to plead guilty and to pay criminal fines of $470 million and $78 million, respectively, for their roles in multiple auto parts price-fixing and bid-rigging conspiracies.25 Yazaki’s fine was the second largest criminal fine secured by DOJ’s Antitrust Division for a Sherman Act violation.26 This was also one of the many cartel investigations in which the Antitrust Division cooperated closely with foreign cartel authorities, including the European Commission, the Canadian Competition Bureau, and the Japanese Fair Trade Commission.27 With respect to individuals, DOJ continues to state that it is “committed to ensuring the culpable foreign nationals, just like U.S. co-conspirators, serve jail sentences in order to resolve their criminal liability.”28 In FY 2011, foreign executives faced average prison sentences of 10 months for antitrust violations.29 In FY 2012, DOJ continued to obtain long prison sentences for foreign nationals, including a 24-month sentence for two executives of Japan-based Yazaki Corporation, who voluntarily submitted to U.S. jurisdiction, imposed in connection with their involvement in international conspiracies to fix prices for auto parts sold to automobile manufacturers in the United States.30 Overall, approximately 97% of the $6.4 billion in criminal antitrust fines imposed in the United States from FY1997 to the end of FY2011 were “in connection with the prosecution of international cartel activity” and “51 foreign defendants from France, Germany, Japan, South Korea, Taiwan, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom” received prison sentences during the same period.31

#### Healthcare funding sufficient now.

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

During my years as an executive in the FTC’s Bureau of Competition and as FTC general counsel, I became quite familiar with FTC antitrust development and policy research applicable to healthcare. In my opinion, the FTC staff possesses the legal tools (with the exception of the nonprofit limitation, discussed earlier) to fully investigate and take action against anticompetitive behavior in this sector. What’s more, the FTC has had an excellent enforcement track record, including in hospital mergers. It currently is addressing a broad range of healthcare-related activity. Existing agency guidance, including the 2020 Vertical Merger Guidelines, provide ample support for appropriate, evidence-based, economically sound enforcement. New general legislation is not needed.

#### Merger antitrust solves.

LaPointe 21 (Jacqueline, “How Policy, Regulation Will Challenge Consolidation in Healthcare,” Recycle Intelligence, https://revcycleintelligence.com/news/how-policy-regulation-will-challenge-consolidation-in-healthcare)

However, the executive order has some serious implications for healthcare organizations—and not just hospitals and health systems—looking to join forces with others in their market. RevCycleIntelligence spoke with industry experts to learn what healthcare leaders need to know about the executive order and how it will impact consolidation in healthcare moving forward. WHAT WILL BE DIFFERENT? Antitrust enforcement should continue to be top of mind for hospital and health system leaders engaging in merger and acquisitions deals. But now more than ever, leaders should know that just because a deal passes the first hurdle does not mean it is out of the woods yet. “Hospital leaders should be mindful that the agencies can challenge consummated transactions at any time,” says Ken Vorrasi, antitrust litigation partner at Faegre Drinker. “They shouldn't take solace in the fact that they've received front-end Hart-Scott-Rodino clearance. In reviewing past transactions, the agencies—the FTC or state attorney general—could issue subpoenas and ask about price changes, what costs have been cut, what efficiencies have been realized, what quality benefits there are, and try to do an assessment as to whether or not the transaction was pro-competitive for insurers and patients or not.” The executive order highlights the FTC’s ability to challenge healthcare merger and acquisition deals that were not previously challenged by an administration. Prior to this order, the FTC has also recently revamped its Merger Retrospective Program to expand and formalize retrospective analyses of consummated mergers, including those in healthcare. But most notably, the FTC has unraveled a healthcare deal successfully in the past. In 2004, the FTC challenges Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital and eventually ordered a restoration of the competition lost as a result of the acquisition. This type of challenge is rare but could become more common. "It is fair to say that an action like that one is more realistic and likely today than it was before the executive order and the new antitrust leadership," Vorrasi stated. READ MORE: Rapid Pace of Health System Consolidation to Continue, Experts Say “Healthcare leaders also need to be mindful of the impact and assessing the risk with their transactions that are vertical in nature, whether upstream or downstream, because those transactions have the attention of the agencies as well.” While much attention has been paid to antitrust review of health system and hospital mergers, healthcare leaders should also not forget about vertical integration. “We’re going to see more scrutiny in these areas, particularly with the new vertical merger guidelines the FTC and DOJ issued in 2020. That is certainly top of mind to the FTC and the FTC has substantial experience with hospital-physician consolidation and continues to actively study its effects on competition and quality,” Vorrasi said.

#### High enforcement prioritization chills consolidation

LaPointe 21 (Jacqueline, “How Policy, Regulation Will Challenge Consolidation in Healthcare,” Recycle Intelligence, https://revcycleintelligence.com/news/how-policy-regulation-will-challenge-consolidation-in-healthcare)

Healthcare mergers and acquisitions have promised to bring lower costs, higher quality, and better access to care. But a new executive order is challenging the rapid pace of consolidation in healthcare, directing policy and regulation to put a chill on deals the administration feels are harmful to patients.

#### Health care enforcement is high, but requires significant resources---new demands require cuts elsewhere

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

Antitrust enforcement vis-a-vis horizontal transactions among health care providers or payers is active, although enforcers do not have sufficient resources to be as active as needed. In the past few years, the DOJ, together with state plaintiffs, successfully blocked two proposed mega-mergers of large health insurers. In the past decade, the FTC and DOJ have successfully challenged over a dozen hospital mergers and a number of mergers among other health care providers, including matters settled with consent decrees requiring divestitures to preserve competition and matters the parties abandoned in the face of agency opposition. However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts. To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses. The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices.

#### Right to repair solved now.

Moran 21, Civil Eats, (July 13th, 2021, “Farmers Will Soon Have the Right to Repair their Tractors”, https://civileats.com/2021/07/13/farmers-just-got-a-new-right-to-repair-their-tractors/)

This lack of agency on the part of today’s farmers costs them time and money, and it has enabled equipment manufacturers to monopolize the repair industry.

But it all may be about to change as the Biden Administration moves to weaken the consolidated power of agribusiness, including the three major corporations—Deere & Company, CNH Industrial, and AGCO—that manufacture farm equipment in North America. Last Friday, the administration signed a comprehensive executive order designed to “[promote competition in the American economy”](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/) that includes 72 actions across 12 agencies. This includes asking the Federal Trade Commission (FTC) to curtail the “unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment.”

“What we’ve seen over the past few decades, there’s less competition and more concentration that holds our economy back. We’ve seen it in Big Agriculture, Big Tech, and Big Pharma. The list goes on,” said President Biden in remarks prior to signing the executive order. “Rather than competing for consumers, they are consuming their competitors.” The executive order includes other measures to reduce agribusiness consolidation, including giving livestock farmers [more power to negotiate price discrimination](https://civileats.com/2020/01/17/new-meatpacker-rules-wont-support-or-protect-farmers/) and improving small food processors’ and farmers’ access to retail markets.

Safeguarding consumers’ right to repair the products they buy will apply to many different electronic industries, but could especially be beneficial to the nation’s over 2.2 million farms. Advocates and farmers say that this will also improve food security, preventing delays in repair that threaten to disrupt a farm’s operations, and boost the thin margins on many smaller-scale farms.

“It’s a very critical problem for the production of food. You can lose a whole crop if you can’t plant or fertilize because some stupid sensor or part of your machine just went down and you can’t fix it,” said Gay Gordon-Byrne, the executive director of the [Repair Association](https://www.repair.org/), which is part of a coalition fighting for consumers’ right to repair electronics. “It’s really a fundamental problem.”

#### States solve.

[Nathan Proctor](https://uspirg.org/staff/usp/nathan-proctor) 21 \*Senior Director, Campaign for the Right to Repair; (“Deere in the Headlights as 21 states consider Right to Repair”, https://uspirg.org/blogs/blog/usp/deere-headlights-21-states-consider-right-repair)

Meanwhile, efforts to advance the Right to Repair for farm equipment have surged, with three hearings on agricultural Right to Repair bills this week. The Florida Senate version of this effort has already passed through two committees and is before the Senate Rules committee.

We are up to 21 states in ‘21

Over the last month, seven additional states have introduced RIght to Repair legislation, and there are now 33 bills in 21 states (Note: Several states have separate bills making their way through both state houses).

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

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

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