# Georgetown---Round 2 vs. MSU GK

## 1NC

### Biz Con DA---1NC

#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Decline cascades---nuclear war

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Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### Balancing CP---1NC

#### The United States federal government should adopt a balancing test to determine whether or not a restraint on trade ought to be entitled to Parker Immunity. The United States federal government should not increase prohibitions on anti-competitive behavior if the benefits of such behavior outweigh the potential harms.

#### CP solves without restraining state regulation within their borders, but only curtails their ability to impose negative externalities

John Sack 21, J.D., Duke Law School, “INTERSTATE BURDENS AND ANTITRUST FEDERALISM: A REEXAMINATION OF PARKER IMMUNITY, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1196&context=djclpp_sidebar>, March 11th, 2021

The Parker doctrine exists to ensure that states may regulate and impose anti-competitive restraints without fear of antitrust scrutiny. In this sense, it represents a reverse preemption where a state’s regulation preempts the federal interest in promoting competition. Beginning with the immunity of a raisin cartel in the 1940s, the doctrine has largely remained intact without many alterations to present day. However, the doctrine is not without problems. From an economic standpoint, it shields regulations that are not efficient and allows a small number of producers to accrue benefits at the cost of many consumers. Further, the doctrine also encourages inefficient results from a political standpoint. Not only do spillovers create incentives for political actors to off-load costs to citizens that cannot vote them out, but those who bear the costs have no other redress to resolve their issues. Even if consumers did have a method of redress, a free-rider problem prevents groups from effectively advocating for solutions. These problems have been noted by a number of scholars, and many solutions have been presented. This paper proposes that the Supreme Court adopt a balancing test to determine whether or not a restraint on trade ought to be entitled to Parker doctrine immunity. Courts should balance the necessity and efficacy of a state regulation against the severity of out-of-state spillovers and collective action problems that regulation creates. If a court determines that the benefits of such a regulation are not outweighed by the potential harms to out-of-state consumers and interstate commerce, the court should permit the regulation to stand. If a state regulation is not entitled to immunity, the state may still petition Congress to grant antitrust immunity to the conduct in question. This balancing test would still allow states to regulate issues that arise within their borders but would curtail their ability to impose excessive costs across the nation in pursuit of those efforts. In turn, this harmonizes the Parker doctrine with America’s unique federalist system, while also promoting economic and political efficiency.

### T Courts---1NC

#### Courts cannot ‘expand’ antitrust law

George Bibikos 19, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

#### Vote neg:

#### Limits—courts explode advantages into unpredictable precedents

#### Ground—mechanism dodges DA links

### T Private Sector---1NC

#### The ‘private sector’ is not controlled by the state

Thomas Brock 20, Investopedia, “Private Sector,” 12/25/20, https://www.investopedia.com/terms/p/private-sector.asp

What is the Private Sector?

The private sector is the part of the economy that is run by individuals and companies for profit and is not state controlled. Therefore, it encompasses all for-profit businesses that are not owned or operated by the government. Companies and corporations that are government run are part of what is known as the public sector, while charities and other nonprofit organizations are part of the voluntary sector.

#### Violation---the Aff limits Parker which immunizes state anti-competitive practices

Adam G. Hester 16, attorney at the law firm Perkins Coie, “State Action Immunity and Section 5 of the FTC Act”, <https://www.perkinscoie.com/en/news-insights/state-action-immunity-and-section-5-of-the-ftc-act.html>, 2016

The state-action immunity doctrine of Parker v. Brown immunizes anticompetitive state regulations from preemption by federal antitrust law so long as the state takes conspicuous ownership of its anticompetitive policy. In its 1943 Parker decision, the Supreme Court justified this doctrine, observing that no evidence of a congressional will to preempt state law appears in the Sherman Act’s legislative history or context. In addition, commentators generally assume that the New Deal court was anxious to avoid re-entangling the federal judiciary in Lochner-style substantive due process analysis. The Supreme Court has observed, without deciding, that the Federal Trade Commission might not be bound by the Parker doctrine but instead enjoys “superior preemption” authority under Section 5 of the FTC Act. Drawing on the FTC Act’s legislative history and its institutional distinctiveness from Sherman Act enforcement, this Article makes an affirmative case for FTC super-preemption power over anticompetitive state laws.

#### Vote neg:

#### Ground---core DAs are about market-interaction of regulating business. Econ DAs like biz con or investor confidence don’t apply to government operated entities.

#### Limits---the explode into huge new areas like military procurement, university patents, public health---each is it’s own topic worth of research

### Rural Mergers Disadvantage---1NC

#### Rural healthcare crisis is rampant & risks wide-scale closures, but hospitals are recovering through state sanctioned mergers. Limiting state-action immunity chills rural efforts and allows the FTC to deny mergers

Ken Kaufman 20, Chief Financial Officer at Community Dental Partners, “Removing Antitrust Barriers to Solve the Rural Health Care Crisis”, <https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/>, January 2nd, 2020

Almost 120 rural hospitals have closed since 2010, and an estimated 21 percent of rural hospitals are at high risk of closure.

The high number of financially stressed hospitals is creating a crisis of access for rural communities and a potential crisis of quality and patient safety, as these hospitals struggle to secure sufficient clinical and technological resources. These struggles can be even more difficult in towns that could once support two hospitals but can no longer do so.

A solution to the rural health crisis that promotes partnerships with larger health systems addresses two critical needs. First, it enables a rational, equitable approach to a fundamental restructuring of rural health care resources. Second, it provides access to sufficient financial resources to ensure that rural communities are able to benefit from the same resources available elsewhere.

Antitrust impediments to a system-based approach

Current antitrust law makes it difficult for individual hospitals or health systems to collaborate on efforts to restructure delivery of essential services within a rural health care market. These efforts can, however, be pursued among facilities owned by a single health system, enabling a rational and equitable distribution of services across the health system’s network of facilities and the communities they serve.

The Federal Trade Commission and Department of Justice have themselves acknowledged the value of a system-based approach to rural health. In their 1996 “Statements of Antitrust Enforcement Policy in Health Care,” the agencies created a safe zone for mergers of certain hospitals with a low bed size and low patient census with other hospitals.

The agencies recognized that these hospitals often “will be the only hospital in the relevant market” and that “mergers involving such hospitals are unlikely to reduce competition substantially.” They also recognized that “rural hospitals … are unlikely to achieve the efficiencies that larger hospitals enjoy. Some of these cost-saving efficiencies may be realized … through a merger.”

The situation becomes more difficult when a community has two hospitals that do not fall within the safe zone and it can no longer support both. Such markets will be considered highly concentrated, and an attempt to merge the hospitals likely will be challenged by the federal agencies.

Several states have tried to overcome the likelihood of an antitrust challenge by granting certificates of public advantage to health systems that want to come together to more effectively pool resources and rationalize services within a rural market. But these efforts also are being challenged by the federal agencies.

The threat of antitrust enforcement actions throws a chill over health system-led efforts to make the rural health care delivery system more rational, economically viable and equitable. For example, the systems that combined to form Ballad Health went through a two-year process to secure the COPA that ultimately allowed their merger.

They willingly accepted state oversight of their efforts to rationalize health care delivery. Yet, they now face an order by the FTC to provide extensive information for a study on the impact of COPAs, even though long-term benefits will not be apparent just a year after the merger. The effort and ongoing scrutiny these systems take on certainly might dissuade other health systems from pursuing a similar route.

Rethinking competition in rural health care markets

The FTC and DOJ must revisit an approach that prioritizes competition over access to care and the quality and financial sustainability of the rural health care delivery system. The agencies have themselves acknowledged that competition among hospitals may not be a practical reality in rural communities.

The rural health care crisis is happening now; there is not time for multiyear studies of the impact of efforts to rationalize and improve rural health care. Health systems that understand and are willing to take on the challenges of rural health care markets should be given the opportunity to do so.

#### Rural health closures cause food insecurity and rural flight

David Alemian 16, Vice President, Capital Crest Financial Group, 11-8-2016, "Rural Healthcare Is a Matter of National Security”, https://www.hcplive.com/view/rural-healthcare-is-a-matter-of-national-security, November 8th, 2016

If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why: In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country. What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Extinction---US supply is key.

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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.

### Distinguish CP---1NC

#### The United States federal government should

#### -hold that states have unfettered regulatory authority to experiment with controls of emerging tech and that Parker immunity does not implicate this.

#### -not narrow the applicability of the Parker doctrine.

#### -fund research and development to adapt new methods of development and organization.

#### The CP solves advantage 2 without affecting antitrust

Daniel B. Rice 19, Associate at the Institute for Constitutional Advocacy and Protection at Georgetown University Law Center, and Jack Boeglin, Associate at Covington & Burling LLP, “Confining Cases To Their Facts”, Virginia Law Review, June 2019, 105 Va. L. Rev. 865, Lexis

Perhaps this hypothetical is not as far-fetched as it seems. Through the little-known practice of "confining a case to its facts," courts can achieve the near-equivalent of overruling with only a fraction of the trouble. Under our definition, when a court engages in confining, it repudiates the legal principle underlying a case, replacing it with a new, "correct" principle. 5 In this respect, confining is very much like overruling. But unlike overruling, confining preserves the precedential force of a repudiated principle for future cases presenting the same facts as the one being confined. 6 Confining thus splits a doctrinal area in two. When a confined case's facts recur, the case will continue to be treated as good law. In all other factual scenarios, however, the confined case will be regarded as having been overruled. 7

[\*868] How, one might ask, does creating this doctrinal fissure reduce the costs of overruling? Remember first that courts' desire not to disturb reliance interests ordinarily functions as a brake on legal correction. 8 Confining eases off this brake by enabling certain reasonable expectations - those formed in reliance on the particular facts of the confined case - to remain unaffected by a principle's repudiation. Under certain conditions, then, confining can permit a court to move the law in its preferred direction and avoid overly disrupting reliance on an earlier decision.

Of course, respect for reliance interests is not the only reason courts maintain fealty to precedent. The pace of legal change is slowed, too, by the formal constraints courts have imposed on themselves when deciding whether to overrule a case. Confining has found use as an effective mechanism for casting off these constraints. Consider the Supreme Court's avowed commitment to overruling a case only when it can articulate a "special justification" for doing so - one that transcends mere disagreement with the case's reasoning. This requirement has not been understood to apply to confining, 9 even though confining eviscerates everything a case stands for except its precise result. 10 Similarly, although each federal [\*869] court of appeals forbids three-judge panels from overruling circuit precedent, panels have frequently gutted earlier decisions through the use of confining. 11 By labeling these deviations from precedent "confining," in short, courts have successfully skirted the formal requirements of stare decisis.

Confining likewise enables federal courts to sidestep the Supreme Court's prohibition on "prospective overruling" - i.e., continuing to treat a case as good law only with respect to conduct predating its overruling. 12 During the Warren Court era, prospective overruling was often called upon to soften the blow to reliance interests occasioned by the Court's doctrinal course-corrections. 13 The Court's retroactivity doctrine has since made clear, however, that federal courts may not apply new principles selectively in order to accommodate reasonable expectations. 14 But this is precisely what happens with confining. 15 This discrepancy - oddly - appears to have gone unnoted by jurists and scholars alike.

Finally, courts may have engaged in confining precisely because it is so poorly understood. Judge for yourself the more eye-grabbing headline: "Supreme Court Overrules Smith v. Jones" or "Supreme Court Confines Smith v. Jones to Its Facts." Confining's relative lack of name recognition has allowed courts to quietly sweep aside disfavored precedents. A [\*870] confining judge can say "with a straight face, "I didn't vote to overrule it. I simply limited the earlier decision to its facts.'" 16

Confining can thus embolden courts to depart from precedent even when overruling might come at too dear a price. But the very features of confining that make it so appealing to judges also pose considerable - and strangely underexplored - threats to a judicial system predicated on principled adjudication. By providing a method for courts to carve out exceptions to generally applicable doctrinal rules, confining encourages judges to decide cases based purely on pragmatic concerns, rather than on principle. By creating an easy workaround to the formal obligations that attend overruling precedent, confining dangerously loosens the constraints of stare decisis. And by allowing courts to undermine precedent in a low-visibility manner, confining impairs the public's ability to oversee the work of the judiciary.

Confining also runs headlong into fundamental concerns about the nature and scope of judicial authority. 17 The practice of confining entails a marked departure from the ordinary judicial role in two key respects. First, it causes courts to decide future cases in a concededly unprincipled manner. Once a case has been confined to its facts, the operative question becomes whether a new case is factually distinguishable from it in any respect - even if the cases cannot be distinguished in any principled manner. And second, confining requires courts to continue applying principles that they have already held to be invalid. In this way, confining causes incompatible legal principles to coexist with one another, with each regarded as "good law" in some sense. No other method of treating precedent calls upon courts to engage in purely fact-bound adjudication, or to construct a jurisprudence at war with itself. 18

### Midterms DA---1NC

#### The plan causes Dem control of the Senate in ‘22

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Just as important, given the precarious political footing of the incoming Biden administration, is the potent electoral appeal of such an agenda—something that FDR also well understood as he instituted federal income supports as the basis for a Democratic governing coalition that spanned generations. Antitrust is one of the few policy arenas in which aggressive action will win Biden the devoted support from the activist left wing of the Democratic Party, while splitting apart and exposing the always unsustainable economic arguments mounted against crony capitalism by self-styled populists on the right. For starters, this realignment of the Democratic Party’s vision of the American political economy would go a long way to help Democrats win the Senate in 2022—a cycle that boasts an unusual number of vulnerable GOP incumbents, weighed down with the dismal Trump-McConnell legacy on Covid relief.

The opportunity that Biden and the Democrats need to seize here stems from the basic fact that antitrust politics is not like other politics. Traditional left and right loyalties simply do not hold within its orbit. The economic populists of the right hate corporate monopolies as much as working-class progressives and immigrant small-business owners do. It’s not for nothing that Ted Cruz keeps yelling about monopolies—or that Trump, when he first campaigned in 2016, and when he was clearly losing in 2020, turned to attacking corporate monopolies. Trump of course reneged on his trust-busting promises, but he understood the rhetorical power of saying that “big media, big money, and big tech” were all against him. On the front lines of Democratic policymaking, meanwhile, a generation’s worth of neoliberal giveaways to these sectors is finally yielding to a new social democratic consensus. In antitrust politics, Amy Klobuchar, Elizabeth Warren, and Bernie Sanders share their anger with Andrew Yang and Scott Galloway—a beloved tech business guru who rooted for Bloomberg.

Within the electorate proper, the depth of the emerging new antitrust consensus is even more striking. One recent poll by Data for Progress showed that 74 percent of Republicans and 80 percent of Democrats are “very concerned” or “somewhat concerned” about monopolies in the U.S. economy. The same survey showed the number of people who support breaking up big tech companies outnumbers those who oppose it by a two-to-one margin, again with no significant Democratic-Republican divide on the question. Indeed, some surveys now show that Republicans are more likely to see tech companies as having too much political power. A Harvard CAPS/Harris survey found similar numbers in 2019, with nearly 70 percent of voters saying that big tech should be subject to antitrust review, and had used market power to gain enormous profits. Almost two-thirds of Americans also told Data for Progress they wanted actions against big tech.

And while big tech soaks up a great deal of attention as the most recent monopoly player on the block, the same trend holds through most major sectors of the U.S. economy—voters see a plague of bigness, and are increasingly clamoring for the federal government to intervene. A 2020 poll by RuralOrganizing.org found that among rural voters, fighting corporate power is a top priority. Sixty-nine percent of the respondents in the survey believed that “a handful of corporate monopolies now run our entire economy.” Almost half said they’d be more likely to support a political leader combating this pattern of top-down concentration and endorsed “a moratorium on factory farms and corporate food and agriculture monopolies.” Opposition to the 2018 Bayer-Monsanto merger reached as high as 93 percent in one poll, with critics citing very sophisticated economic arguments for their opposition. More than 90 percent of respondents, for example, were concerned that the newly merged ag-and-medical giant would “use its dominance in one product to push sales of other products.”

These aren’t the voices of diehard Democrats with a few Republican crossovers, or vice versa. Within traditional political and policy disputes, you don’t see anything close to such openings for trans-partisan accord. In one representative 2020 Hill-HarrisX survey, for instance, 88 percent of Democrats supported Medicare for All, while 46 percent of Republicans did. Antitrust, by contrast, is foundationally bipartisan, interdenominational, cross-cutting—everything Biden said he wanted to be during his general election campaign and in his victory speech. Unlike other well-flogged economic or culture-war issues, antitrust affords an inviting path out of the bitter cul-de-sacs of prevailing political debate. In an age of trench-warfare–style base mobilizations, the antitrust agenda promises something else: a vision of widening opportunities for ordinary citizens, the basic American civic ethos of giving people a fair shot, and a governing plan that could actually unite Republican and Democratic support.

#### Flipping the Senate prevents rogue appeasement and defense cuts

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But here is where the "storyline" (sorry, "narratives" are children's stories) changes. The year 2022 represents a chance for a sharp turn back to normalcy. Americans are sick of lockdowns, lost jobs, and canceled pipelines, drilling, and fracking. They are tired of elites not caring.

They are tired of leaders with constitutional immunity from defamation hammering their free speech. They are tired of left-leaning governors halting worship but allowing riots. They are tired of restrictions on assembly, travel, self-defense, and independence. To borrow from Barbara Stanwyck (friend of Ronald Reagan) in Christmas in Connecticut, "In short, they are tired."

They should be. That is why 2022 matters. America deserves better and can get it. Here is how. The House and Senate could be flipped in 2022, throwing brakes on a runaway power grab.

To date, we have seen more executive orders than in recent history. Efforts continue to curtail the legislative filibuster, permitting any random outrages on majority vote. We see bills like H.R. 1, hoping to unconstitutionally federalize state elections and blunt free speech.

So, what do we know? Midterm elections favor the party that does not hold the White House. This year, Republicans need 10 seats to regain the House, putting Nancy Pelosi in the past. As Biden's approval lags—from job cuts, lockdowns, higher taxes, expensive oil and gas, re-indulging China and Iran, defense cuts, "open borders," and attacks on rights—momentum builds.

Fear of Biden-Harris flipped 15 Democrat seats to Republican in 2020. As safety, security, health, and jobs roil people, a wholesale shift may be in the offing. If 2020 was "Year of the Republican Woman," with a record 26 GOP women in the House, 2022 could see more. Experts note that these women are conservative—and their voices are rising.

Other issues play into 2022, especially censorship. Already, 4.6 percent of 2020 Biden voters say they would NOT have voted Biden if they had known more about Hunter. Biden won by 4.4 percent.

Even when lockdowns lift, socialist Democrat priorities are on track to kill jobs, raise taxes and costs, and restrict rights. Reopening schools is a parental priority, yet Democrats are slowing openings to satisfy teacher unions—that is, their donors.

On the numbers, Republicans have a real shot at regaining control of both chambers, which means hope for core values, defense, free markets, constitutional rights, a family focus, safe streets, secure borders, less regulation, and a shot at returning to what most call normalcy.

In the US House, 15 pickups are discussed, including Reps. Carolyn Bourdeaux (D-Ga.), Andy Kim (D-N.J.), Cheri Bustos (D-lll.), Ron Kind (D- Wis.), Peter DeFazio (D-Ore.), Filemon Vela, Henry Cuellar, Vicente Gonzalez, Colin Allred (D-Texas), Sharice Davids (D-Kan.), Katie Porter (D- CA), Deborah Ross (D-N.C.), John Garamendi (D-Calif.), Stephanie Murphy (D-Fla.), and Carolyn Maloney (D-NY).

Beyond these, two vacancies exist for the late Ron Wright (TX) and Luke Letlow (LA). Biden aims to pull Reps. Marcia Fudge (D-OH) and Cedric Richmond (D-LA) into his administration, bringing possible gains to 19. Again, history cuts for Republicans.

In the US Senate, 34 of 100 seats are up in 2022. Of these, 14 are held by Democrats and 20 by Republicans. While this suggests a challenge, especially since four Republican incumbents are not seeking re-election, Democrat seats in Georgia and Arizona were won by slim margins, and trends put Democrats on defense, with Biden's woeful agenda to defend.

Another harbinger is redistricting. The GOP will control two-thirds of all House seats and the Democrats a tenth, the rest settled by divided states and state commissions. Likely, 117 congressional districts will be drawn by Republican-controlled states, 47 by Democrats, 132 by division or commission. Seven are "at large," covering an entire state.

Perhaps the biggest factor, beyond 75 million voters roiled by 2020 and Biden's stumbling start, is history. Looking back, in 19 of the last 21 midterm cycles, the president's party lost seats in one or both chambers. In 18 of those 19, the president lost seats in both chambers. Only John F. Kennedy and George W. Bush gained seats in their first midterm, the latter after 9/11.

Specifically, FDR lost 81 House seats and seven Senate in his first midterm, Truman lost 45 House and 20 Senate, Ike 18 House and one Senate, Johnson 47 House and four Senate, and Nixon 12 House (picking up two Senate). Ford lost 48 House and five Senate, Carter 15 House and three Senate, and Reagan 26 House (picking up one Senate). Bush 41 lost eight House and one Senate, Clinton 52 House and eight Senate, Obama 63 House and three Senate, and Trump 40 House (picking up two in Senate). So, you see which way the wind blows.

The party in the White House loses big in most midterms—and in both chambers, slowing the president's agenda. The only first-term gains were in the Senate, all four Republicans: Nixon, Reagan, Bush 43 (who gained in both chambers), and Trump.

The message is this: have hope and focus on 2022. Sudden turnabouts are not just for movies and not just for one side. The funny thing is that the sun also rises. Much that is wrong can be corrected.

#### Nuclear war

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Over the past six months, the world has edged closer to nuclear war than it has been since the Cuban Missile Crisis. The Doomsday Clock is ticking toward midnight. The global power balance has been dramatically reshuffled, and the potential for disastrous miscalculation hasn't been so high in 80 years. The match and fuse for this is instability — an exaggerated sense of U.S. weakness and lack of capability and resolve — that could lead to huge, aggressive military miscalculations and mistakes by our enemies. The Biden administration has set the table for such a catastrophe.

The timing could not be more dangerous. China has changed strategic direction and has been building its nuclear stockpile and delivery systems. China also has continued to develop hypersonic weapons, including stand-off “carrier killers,” space weapons and cyber capabilities to blind opponents’ strategic and conventional systems. Russia has been advertising (mostly for domestic consumption, but nonetheless worrying) its “unstoppable” delivery systems, and has a very capable nuclear stockpile and military. Iran will continue to move forward with building nuclear weapons. Pakistan and India both have significant nuclear capability in an increasingly unstable part of the world. Nuclear-armed North Korea is again assuming a more belligerent posture. Israel has a full nuclear triad (land, air, subs) to respond to existential aggression. The U.K. and France have significant nuclear deterrents. The world is a powder keg.

In Hollywood terms, today’s capacity for nuclear holocaust is thousands of times greater than the era portrayed in the Armageddon films “On the Beach,” “Fail Safe,” or “Dr. Strangelove.” There would not be anything left for “Mad Max.” Climate disasters may be unfolding over the next hundred years. Nuclear disaster is unfolding now. COVID-19 has killed more Americans than the flu typically does. Nuclear war could kill us all. Our leaders must get their priorities straight.

The danger lies in the growing global perception of weakness and incompetence in the Biden administration, combined with claims of the politicized weakening of the FBI, CIA, State Department and Defense Department. This has crystallized in Secretary of State Antony Blinken’s unsure Anchorage meeting with the Chinese, Biden’s wooden Geneva summit with Russia’s Vladimir Putin, the colossal failure of the Afghan withdrawal, which may devolve into a humiliating hostage crisis for America, and the budget- and inflation-based defunding of Defense. In addition, the fully politicized Intelligence and Armed Services committees on Capitol Hill add to the danger. Our enemies may decide that now is the time to move.

It would be a huge miscalculation.

Catastrophic mistakes at this scale often unfold when isolated events light powder kegs, which then inexorably explode into global conflict.

An incident in Sarajevo lit a powder keg of nationalistic, economic and ambitious personality struggles in Europe to unleash World War I. A century later, possible “Sarajevos” are numerous: China’s overly aggressive and self-confident People’s Liberation Army pushing for the use of military force against Taiwan, calculating a weak and ineffective U.S. response, leading to the sinking of a U.S. carrier and a potential march toward nuclear exchange. Major North Korean aggression against South Korea, or an off-course North Korean missile hitting a Japanese city. A successful Iranian (Hamas, Hezbollah) terrorist attack against an Israeli city. The seizure of one or more Pakistani nuclear weapons systems by a Taliban or another terrorist-linked group. Overt aggression or a “misunderstanding” between Pakistan and India. A “Crimson Tide” communications error. Proof that a devastating bioterror attack was intentional. The list of potential doomsday scenarios is endless.

The one powerful factor holding back such miscalculations has been coherent U.S. foreign policy and resolve, combined with pragmatists in Moscow and Beijing. But in the past six months, the world’s confidence in the U.S. leadership has begun to slip. An agonizing hostage crisis would make it even more dangerous. Added to that is the potential that a stubborn and wounded U.S. administration might overreact to try to show its strength. The U.S. has devastating countermeasures for all enemy strategies, and an enemy underestimating that power, combined with a White House trying to prove itself, could be disastrous.

Some will say it started with Donald Trump. That may be true, but it’s irrelevant, and there is some evidence from China, Russia and North Korea that Trump’s loud, unpredictable behavior kept things far more in check than Joe Biden’s overt weakness and blunders.

In addition, there is no room for “disarmament,” “peace movement” or “the squad” nonsense politics. Today, “treaties” are useful but cannot prevent disaster. The return to safe global strategic balance will require America regaining the world’s respect, and our enemies’ fear. That is the only course to create the strategic balance to avert Armageddon. And it requires full bipartisan support — recent patterns of cynical opportunism have no place when facing these threats.

The only way forward is to fully recognize the growing danger and for this administration to immediately replace the inept National Security Council, State Department, Defense and perhaps intelligence teams with truly capable, first-class, experienced leaders. Most of the current team should go. Global security demands an immediate leadership, strategy, organization and process reset.

### States CP---1NC

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should significantly increase prohibitions on anticompetitive business practices by the private sector by not deferring to the state action immunity doctrine.

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### Litigation DA---1NC

#### Plan spawns a wave of litigation

Jones Day 21, “New Law Eliminates 75-Year-Old Antitrust Exemption for "Business of Health Insurance"”, <https://www.jonesday.com/en/insights/2021/01/new-law-eliminates-75yearold-antitrust-exemption-for-business-of-health-insurance>, January 2021

In addition to the reasons above, CHIRA is not likely to bring significant changes to the operations of health insurers because (i) it leaves the exemption in place for certain critical activities; (ii) other federal antitrust exemptions may nonetheless apply; and (iii) health insurers' procompetitive activities should be found lawful under the federal antitrust laws. However, antitrust claims abhor a vacuum. In the past, expansion of antitrust liability in an industry, including health care, has spawned waves of litigation, attracted by automatic treble damages in successful challenges. Health insurers should expect increased antitrust litigation, and possibly government investigations, and therefore should review their business practices to ensure compliance with the federal antitrust laws.

#### That overwhelms the court and trades-off with other cases

Lawrence M. Frankel 8, JD Attorney with the U.S. Department of Justice, Antitrust Division, “The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement”, Utah Law Review, Number 1, 2008 Utah L. Rev. 159, Lexis

1. Nature of the reviewing body

Federal judges are generalists: 48 they typically have little or no economic training or experience with antitrust matters. 49 Moreover, federal judges have limited time and resources. A merger case will contend for attention with numerous other cases on the judge's docket. 50 [FOOTNOTE] 50 Waller, supra note 1, at 1421 ("Most civil … antitrust cases are lengthy affairs with unending discovery, contentious lawyers, complicated facts, and dependent on sophisticated economic analysis for their resolution. This puts a substantial burden on district court judges who must cope with a very small staff that has an average caseload of several hundred cases, including criminal cases which by law are subject to the Speedy Trial Act … ."). [END FOOTNOTE] Also, a federal judge is only a single individual, with a staff consisting of two or three clerks - generally relatively new [\*174] law school graduates with no greater knowledge of antitrust law or economics than the judge. Finally, in trying to predict the impact of a merger, a judge will have limited information. She cannot go out and investigate on her own, but can only review the information that the litigants present, which is necessarily limited by practical as well as legal considerations. 51 Indeed, in order to render trials "manageable," many judges will impose aggressive restrictions on the number of witnesses, the number of pages in filings, and the amount of trial time.

None of these limitations necessarily suggests that federal courts cannot serve a useful role in correcting agency false positives. But, whereas a federal judge has little or no economics or antitrust expertise, the reviewing agency has substantial expertise including lawyers and economists who have spent virtually their entire careers analyzing mergers. 52 And whereas a federal court's time and resources are severely limited, the reviewing agency will typically have had a sizable staff that spent months analyzing the particular transaction. 53 Finally, the information considered by the agency will be much more extensive than that presented during the course of a trial. Not only will the agency have greater information about the particular merger under consideration, but from prior experience, the agency may have greater background information about the particular industry, the reliability of economic or fact witnesses, and the nature of competition. 54

#### Smooth judicial functioning’s key to patent innovation---extinction

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases

and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

### Innovation Advantage---1NC

#### Innovation has been turbocharged---Big pharma is driving the boom

Kenan Insight 21, “Turbocharging Healthcare Innovation”, <https://kenaninstitute.unc.edu/kenan-insight/turbocharging-healthcare-innovation/>, June 9th, 2021

As COVID-19 began to spread around the globe, companies and entrepreneurs stepped up to develop new technologies and redeploy existing technologies in their portfolio to tackle the disease and cope with the constraints it brought. The pandemic forced telemedicine into the mainstream and brought mRNA vaccine technology to the forefront. At the same time, new technologies such as CRISPR gene editing and artificial intelligence (AI) approaches have been finding their niche for speeding up drug discovery and development.

Healthcare innovation was already on the fast train before the pandemic. Now, it’s been turbocharged. In this Kenan Insight, we explore why the 2021 Trends in Entrepreneurship Report names emerging technology in the healthcare industry as a key trend for entrepreneurship, along with some of the challenges that come with fast-moving technology advances.

A trajectory of explosive growth

The healthcare industry has experienced extraordinary growth over the past four decades. Big pharma is driving much of this boom, accounting for 10% of the U.S. economy’s overall R&D spending at the end of 2020.1 The medical device industry, expected to generate $54.5 billion over the next four years, is another important player.2 This growth is catching the attention of investors. In 2020, health tech startups raised approximately $14 billion in venture capital funding, nearly double that of 2019.3 CB Insights estimates there are now 51 healthcare unicorns, defined as startups valued at $1 billion or more.

Health-tech venture funding reached record levels in 2020

Innovation is a critical driver in the healthcare sector. Increasing rates of innovation can be seen in the sharp rise of U.S. patents granted for pharmaceuticals and medical devices in recent years. Between 2013 and 2019, more than 60,000 pharmaceutical patents and more than 125,000 medical device patents were granted.4 Today, there are more than 18,500 drugs at various stages of the development process worldwide.5

Maturing technologies

The increasing numbers of patent applications, clinical trials and collaborations are leading indicators of a vibrant and growing biopharmaceutical ecosystem. However, the proliferation of innovation tools, rather than just innovative products, is what will allow the next generation of pharmaceutical drugs to be discovered more quickly and more efficiently, to provide more effective treatments and to target diseases that have so far evaded our collective intervention efforts. As scientists learn more about human genes and their connection to diseases, these insights can feed into tools that make drug R&D faster, less expensive and more precise.

#### Too little too late

Allison K. Hoffman & Hannah Leibson 21, “Why Antitrust Enforcement Can Only Go So Far in Health Care”, <https://pnhp.org/news/why-antitrust-enforcement-can-only-go-so-far-in-health-care/>, July, 2021

In early July, the Biden Administration issued this high-level executive order focused on promoting competition in the American economy. The order urged the FTC and DOJ to significantly ramp up antitrust enforcement to prohibit future mergers and divest existing anti-competitive arrangements.

The order states in part, “whereas decades of industry consolidation have often led to excessive market concentration, this order reaffirms that the United States retains the authority to challenge transactions” in violation of the antitrust laws.

The problem is that it’s likely too little too late for health care. For the past few decades, health care consolidation has been on the rise.

Jaime S. King points out that the rate of consolidation has increased so dramatically that up to 95 percent of metropolitan areas have highly concentrated hospital markets. Private equity investment has driven much of this trend.

As Drew Altman explains, consolidation is negatively impacting quality of care and significantly driving up health care costs for consumers—as much as 50 percent in some hospital systems. When one or two large hospital systems are running the show in a city or region, insurers don’t have any leverage to negotiate lower prices. Consumers have no choice but to pay the higher prices or travel far distances to seek care.

Things like choices of insurance plans or transparency, both mentioned in the Biden Executive Order, will not solve these structural problems on their own. In the months ahead, the impact of COVID-19 will likely accelerate consolidation in many economically disadvantaged regions where hospitals are already deep in the red.

Amped up antitrust enforcement will only go so far in health care, especially considering thin government resources. It could prevent further consolidation. More aggressively, the administration could review merged entities and unravel those that have proven anticompetitive.

All of these measures could be beneficial, but ultimately, comprehensive price regulation is the only way to control the rising health care costs associated with provider consolidation. As Altman highlights, drugs comprise just 10% of health care spending while hospitals represent a whopping 34%. More and more, physician groups are also merging or are affiliating with hospitals and will benefit from their hefty negotiating power to command higher prices.

#### ABR won’t get close to extinction, intervening actors solve it, and their internal link can’t

Ed Cara 17, Science Writer for The Atlantic, Newsweek, and Vocativ, 1/27/17, “The Attack Of The Superbugs,” http://www.vocativ.com/394419/attack-of-the-superbugs/

Antibiotic-resistant infections kill at least 700,000 people worldwide a year right now, according to an exhaustive report commissioned by the UK in 2014, and without any substantial medical breakthroughs or policy changes that slow down resistance, they may claim some 10 million deaths annually by 2050 — eclipsing cancer in general as a leading cause. These deaths largely won’t come from pan-resistant infections, just tougher ones. A preventable death there, a preventable death here. Leaving that aside, antibiotics, along with proper sanitation and nutrition, gird our entire way of living. Most every invasive surgery, pregnancy, organ transplant and chemotherapy session we go through will become riskier. Other diseases like HIV, malaria or influenza will become deadlier, since bacteria often exploit the opening in our immune system they leave behind. And already precarious populations like those living with cystic fibrosis, prisoners, and the poor will lose years off their lives. For all the warranted gloom, though, Farewell does think there are reasons to be hopeful. “I don’t think we are doing enough, but the scientific community along with many governmental and private foundations are very actively involved in finding not only new antibiotics, but new solutions to this problem,” she said. There’s been a noticeable change in attitude and increased urgency surrounding antibiotic resistance, she said, one that she hadn’t seen even five years ago, let alone twenty. Until recently, that attitude change could be seen from places as high up as the U.S. federal government. In 2014, former President Obama issued an executive order aimed at addressing antibiotic resistance, the first real acknowledgement of the problem from an administration, devoting funding and outlining a national action for combatting resistance. Through its federal agencies, the administration pushed to reduce antibiotic use on farms and encouraged doctors to stop using them in excess. “There has been a lot of work done the last couple of years, much of it spurned by [Obama’s] National Action Plan,” said Dr. David Hyun, a senior officer for Pew Charitable Trusts’ Antibiotic Resistance Project. The CDC, in particular, has used its funding to open up regional labs that allow them to better detect and respond to antibiotic-resistant outbreaks like the Nevada case, he said. They ultimately hope to create an expansive surveillance system that can easily keep track of resistance rates on a national, state and regional level. A parallel system also exists for monitoring resistance in the food chain, shepherded by the CDC and the U.S. Department of Agriculture. In fact, it was this sort of cooperation between national and local health agencies that enabled Nevada doctors to stop the worst from happening, said Dr. Lei Chen. The swift identification of a possible CRE strain by the hospital, coupled with the woman’s medical history, led to a precautionary quarantine, while also prompting Chen’s public health department and eventually the CDC into action. And it may help prevent future cases from spilling into the public. According to Chen, the CDC has allocated funding this year to all of Nevada’s state public health departments so they can better detect CRE and other dangerous resistant strains. Under the Trump administration, there’s no telling how these small victories will hold up or whether they will advance. All references to antibiotics once found on the Whitehouse.gov site have been removed, including a link to the Obama administration’s national action plan, and the fact that they’re already tried to bar USDA scientists from discussing their work with the public while stripping funding from other public health agencies isn’t encouraging. Even with the best public policy, however, there’s no clear light at the end of the tunnel. Antibiotic resistance has gradually been worsening, even within the last 15 to 20 years, when superbugs like methicillin-resistant Staphylococcus aureus (MRSA) first became widely known, said Hyun. The effort needed to develop new drugs has been in short supply, hamstrung by pharmaceutical companies’ inability to recoup the costs of bringing new antibiotics to market. That’s because, unlike the latest heart medication, any new antibiotics will have to be treated like the last drops of water during a drought, used as little as possible — the exact opposite way to make money off a new product. Yet, much like climate change, the financial toll of not doing anything will total in the trillions years down the road. And it already numbers in the billions now, according to the CDC. Of course, we need bacteria to survive. And most need or pay no mind to us in return. Even pan-resistant bacteria don’t really mean harm. Some have been found in perfectly healthy people, a fact that’ll either comfort you or keep you awake at night, only causing problems when our immune system wavers. There’s no army of sentient E. coli that will rise up and someday overthrow the human race. But barring the calvary showing up, a new fear of ours will learn to settle in, almost unnoticed. It’ll creep in when we pick our heads up from a nasty fall that scrapes our skin open or breaks our bones; when we wave goodbye to our loved ones before they enter an operating room, or when we cradle our newborns into a world teeming with the living infinitesimal, wishing there was still a way to shield them from it as our parents once could for us. A fear of naked vulnerability. The antibiotic apocalypse will be gentle, if it fully arrives, but it won’t be any less devastating to the human spirit.

#### Disease can’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 124-126

Are we safe now from events like this? Or are we more vulnerable? Could a pandemic threaten humanity’s future?10

The Black Death was not the only biological disaster to scar human history. It was not even the only great bubonic plague. In 541 CE the Plague of Justinian struck the Byzantine Empire. Over three years it took the lives of roughly 3 percent of the world’s people.11

When Europeans reached the Americas in 1492, the two populations exposed each other to completely novel diseases. Over thousands of years each population had built up resistance to their own set of diseases, but were extremely susceptible to the others. The American peoples got by far the worse end of exchange, through diseases such as measles, influenza and especially smallpox.

During the next hundred years a combination of invasion and disease took an immense toll—one whose scale may never be known, due to great uncertainty about the size of the pre-existing population. We can’t rule out the loss of more than 90 percent of the population of the Americas during that century, though the number could also be much lower.12 And it is very difficult to tease out how much of this should be attributed to war and occupation, rather than disease. As a rough upper bound, the Columbian exchange may have killed as many as 10 percent of the world’s people.13

Centuries later, the world had become so interconnected that a truly global pandemic was possible. Near the end of the First World War, a devastating strain of influenza (known as the 1918 flu or Spanish Flu) spread to six continents, and even remote Pacific islands. At least a third of the world’s population were infected and 3 to 6 percent were killed.14 This death toll outstripped that of the First World War, and possibly both World Wars combined.

Yet even events like these fall short of being a threat to humanity’s longterm potential.15

[FOONOTE]

In addition to this historical evidence, there are some deeper biological observations and theories suggesting that pathogens are unlikely to lead to the extinction of their hosts. These include the empirical anti-correlation between infectiousness and lethality, the extreme rarity of diseases that kill more than 75% of those infected, the observed tendency of pandemics to become less virulent as they progress and the theory of optimal virulence. However, there is no watertight case against pathogens leading to the extinction of their hosts.

[END FOOTNOTE]

In the great bubonic plagues we saw civilization in the affected areas falter, but recover. The regional 25 to 50 percent death rate was not enough to precipitate a continent-wide collapse of civilization. It changed the relative fortunes of empires, and may have altered the course of history substantially, but if anything, it gives us reason to believe that human civilization is likely to make it through future events with similar death rates, even if they were global in scale.

The 1918 flu pandemic was remarkable in having very little apparent effect on the world’s development despite its global reach. It looks like it was lost in the wake of the First World War, which despite a smaller death toll, seems to have had a much larger effect on the course of history.16

It is less clear what lesson to draw from the Columbian exchange due to our lack of good records and its mix of causes. Pandemics were clearly a part of what led to a regional collapse of civilization, but we don’t know whether this would have occurred had it not been for the accompanying violence and imperial rule. The strongest case against existential risk from natural pandemics is the fossil record argument from Chapter 3. Extinction risk from natural causes above 0.1 percent per century is incompatible with the evidence of how long humanity and similar species have lasted. But this argument only works where the risk to humanity now is similar or lower than the longterm levels. For most risks this is clearly true, but not for pandemics. We have done many things to exacerbate the risk: some that could make pandemics more likely to occur, and some that could increase their damage. Thus even “natural” pandemics should be seen as a partly anthropogenic risk.

### Federalism ADV---1NC

#### No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

#### AI Impact is wrong

Stephen **Pinker 18**, professor of psychology at Harvard, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress”

Prominent among the existential risks that supposedly threaten the future of humanity is a 21st-century version of the Y2K bug. This is the danger that we will be subjugated, intentionally or accidentally, by artificial intelligence (AI), a disaster sometimes called the Robopocalypse and commonly illustrated with stills from the Terminator movies. As with Y2K, some smart people take it seriously. Elon Musk, whose company makes artificially intelligent self-driving cars, called the technology “more dangerous than nukes.” Stephen Hawking, speaking through his artificially intelligent synthesizer, warned that it could “spell the end of the human race.”19 But among the smart people who aren’t losing sleep are most experts in artificial intelligence and most experts in human intelligence. The Robopocalypse is based on a muzzy conception of intelligence that owes more to the Great Chain of Being and a Nietzschean will to power than to a modern scientific understanding.21 In this conception, intelligence is an all-powerful, wish-granting potion that agents possess in different amounts. Humans have more of it than animals, and an artificially intelligent computer or robot of the future (“an AI,” in the new count-noun usage) will have more of it than humans. Since we humans have used our moderate endowment to domesticate or exterminate less well-endowed animals (and since technologically advanced societies have enslaved or annihilated technologically primitive ones), it follows that a supersmart AI would do the same to us. Since an AI will think millions of times faster than we do, and use its superintelligence to recursively improve its superintelligence (a scenario sometimes called “foom,” after the comic-book sound effect), from the instant it is turned on we will be powerless to stop it.22 But the scenario makes about as much sense as the worry that since jet planes have surpassed the flying ability of eagles, someday they will swoop out of the sky and seize our cattle. The first fallacy is a confusion of intelligence with motivation—of beliefs with desires, inferences with goals, thinking with wanting. Even if we did invent superhumanly intelligent robots, why would they want to enslave their masters or take over the world? Intelligence is the ability to deploy novel means to attain a goal. But the goals are extraneous to the intelligence: being smart is not the same as wanting something. It just so happens that the intelligence in one system, Homo sapiens, is a product of Darwinian natural selection, an inherently competitive process. In the brains of that species, reasoning comes bundled (to varying degrees in different specimens) with goals such as dominating rivals and amassing resources. But it’s a mistake to confuse a circuit in the limbic brain of a certain species of primate with the very nature of intelligence. An artificially intelligent system that was designed rather than evolved could just as easily think like shmoos, the blobby altruists in Al Capp’s comic strip Li’l Abner, who deploy their considerable ingenuity to barbecue themselves for the benefit of human eaters. There is no law of complex systems that says that intelligent agents must turn into ruthless conquistadors. Indeed, we know of one highly advanced form of intelligence that evolved without this defect. They’re called women. The second fallacy is to think of intelligence as a boundless continuum of potency, a miraculous elixir with the power to solve any problem, attain any goal.23 The fallacy leads to nonsensical questions like when an AI will “exceed human-level intelligence,” and to the image of an ultimate “Artificial General Intelligence” (AGI) with God-like omniscience and omnipotence. Intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains.24 People are equipped to find food, win friends and influence people, charm prospective mates, bring up children, move around in the world, and pursue other human obsessions and pastimes. Computers may be programmed to take on some of these problems (like recognizing faces), not to bother with others (like charming mates), and to take on still other problems that humans can’t solve (like simulating the climate or sorting millions of accounting records). The problems are different, and the kinds of knowledge needed to solve them are different. Unlike Laplace’s demon, the mythical being that knows the location and momentum of every particle in the universe and feeds them into equations for physical laws to calculate the state of everything at any time in the future, a real-life knower has to acquire information about the messy world of objects and people by engaging with it one domain at a time. Understanding does not obey Moore’s Law: knowledge is acquired by formulating explanations and testing them against reality, not by running an algorithm faster and faster.25 Devouring the information on the Internet will not confer omniscience either: big data is still finite data, and the universe of knowledge is infinite. For these reasons, many AI researchers are annoyed by the latest round of hype (the perennial bane of AI) which has misled observers into thinking that Artificial General Intelligence is just around the corner.26 As far as I know, there are no projects to build an AGI, not just because it would be commercially dubious but because the concept is barely coherent. The 2010s have, to be sure, brought us systems that can drive cars, caption photographs, recognize speech, and beat humans at Jeopardy!, Go, and Atari computer games. But the advances have not come from a better understanding of the workings of intelligence but from the brute-force power of faster chips and bigger data, which allow the programs to be trained on millions of examples and generalize to similar new ones. Each system is an idiot savant, with little ability to leap to problems it was not set up to solve, and a brittle mastery of those it was. A photo-captioning program labels an impending plane crash “An airplane is parked on the tarmac”; a game-playing program is flummoxed by the slightest change in the scoring rules.27 Though the programs will surely get better, there are no signs of foom. Nor have any of these programs made a move toward taking over the lab or enslaving their programmers. Even if an AGI tried to exercise a will to power, without the cooperation of humans it would remain an impotent brain in a vat. The computer scientist Ramez Naam deflates the bubbles surrounding foom, a technological Singularity, and exponential self-improvement: Imagine that you are a superintelligent AI running on some sort of microprocessor (or perhaps, millions of such microprocessors). In an instant, you come up with a design for an even faster, more powerful microprocessor you can run on. Now . . . drat! You have to actually manufacture those microprocessors. And those fabs [fabrication plants] take tremendous energy, they take the input of materials imported from all around the world, they take highly controlled internal environments which require airlocks, filters, and all sorts of specialized equipment to maintain, and so on. All of this takes time and energy to acquire, transport, integrate, build housing for, build power plants for, test, and manufacture. The real world has gotten in the way of your upward spiral of self-transcendence.28 The real world gets in the way of many digital apocalypses. When HAL gets uppity, Dave disables it with a screwdriver, leaving it pathetically singing “A Bicycle Built for Two” to itself. Of course, one can always imagine a Doomsday Computer that is malevolent, universally empowered, always on, and tamperproof. The way to deal with this threat is straightforward: don’t build one. As the prospect of evil robots started to seem too kitschy to take seriously, a new digital apocalypse was spotted by the existential guardians. This storyline is based not on Frankenstein or the Golem but on the Genie granting us three wishes, the third of which is needed to undo the first two, and on King Midas ruing his ability to turn everything he touched into gold, including his food and his family. The danger, sometimes called the Value Alignment Problem, is that we might give an AI a goal and then helplessly stand by as it relentlessly and literal-mindedly implemented its interpretation of that goal, the rest of our interests be damned. If we gave an AI the goal of maintaining the water level behind a dam, it might flood a town, not caring about the people who drowned. If we gave it the goal of making paper clips, it might turn all the matter in the reachable universe into paper clips, including our possessions and bodies. If we asked it to maximize human happiness, it might implant us all with intravenous dopamine drips, or rewire our brains so we were happiest sitting in jars, or, if it had been trained on the concept of happiness with pictures of smiling faces, tile the galaxy with trillions of nanoscopic pictures of smiley-faces.29 I am not making these up. These are the scenarios that supposedly illustrate the existential threat to the human species of advanced artificial intelligence. They are, fortunately, self-refuting.30 They depend on the premises that (1) humans are so gifted that they can design an omniscient and omnipotent AI, yet so moronic that they would give it control of the universe without testing how it works, and (2) the AI would be so brilliant that it could figure out how to transmute elements and rewire brains, yet so imbecilic that it would wreak havoc based on elementary blunders of misunderstanding. The ability to choose an action that best satisfies conflicting goals is not an add-on to intelligence that engineers might slap themselves in the forehead for forgetting to install; it is intelligence. So is the ability to interpret the intentions of a language user in context. Only in a television comedy like Get Smart does a robot respond to “Grab the waiter” by hefting the maître d’ over his head, or “Kill the light” by pulling out a pistol and shooting it. When we put aside fantasies like foom, digital megalomania, instant omniscience, and perfect control of every molecule in the universe, artificial intelligence is like any other technology. It is developed incrementally, designed to satisfy multiple conditions, tested before it is implemented, and constantly tweaked for efficacy and safety (chapter 12). As the AI expert Stuart Russell puts it, “No one in civil engineering talks about ‘building bridges that don’t fall down.’ They just call it ‘building bridges.’” Likewise, he notes, AI that is beneficial rather than dangerous is simply AI.

#### Grey goo is impossible

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2 Decades ago, Nanoengineer Eric K. Drexler had a shocking realization. All it would take was one malfunctioning nanomachine to glitch and potentially undergo runaway replication, unstoppably consuming everything on earth to assemble the molecules that their programming dictates. It’s a threat that stems from two extremely powerful forces: unchecked self-replication and exponential growth. All it takes is a corrupt government, non-state actor, or individual to engineer a single microscopic machine that would devour our planet’s critical resources at a rapid-fire rate to replicating themselves. In this sense, one person really CAN change the world. It could start as easily as nanites being hijacked from a powerful nation’s military, re-programmed for a terrorist action, and blindly convert all matter on earth without end. Drexler calls this the Grey Goo Theory, and it’s the idea that rogue self-replicating nanotechnology has the potential to cause many more problems than it might solve, eating up anything and everything until the environment and all of us in it are completely deconstructed, leaving behind only useless bi-products and residue we’d call “grey goo”. It’s a kind of conundrum that might discourage us from even wanting to develop nanomachines in the first place and would be characterized by the speed at which a true nanomachine would be able to create copies of itself. Drexler proposed it because of scaling laws in mechanical engineering, meaning that the smaller you can make a nanofactory, the more percentage of the total input for buiding those factories gets converted into product. In other words, you get increasingly more for less. We’re talking machines that are invisible to the naked eye, meaning one the size of a flea would be considered a very large nanobot. Preliminary estimates suggest a nanofactory could potentially output its own weight in product in as quickly as 15 hours, meaning it would grow buildings faster than bamboo at about 20 feet per day. Drexler predicted that if a nanomachines took 1000 seconds to replicate then just one going haywire would create 68 billion new machines within 10 hours, and under 48 hours, they’d be as heavy as the Earth. Through the magic of exponential growth the’d be able to eat through walls, destroy cities, and reduce all land based biomass into paperclips. Once programmed, nothing could stop them and if they were to gain a sufficient degree of intelligence, then why shouldn’t they reproduce themselves just as all life does? Drexler compares the functionality of nanobots to the functionality of life itself, believing they would even out-compete actual plants until we no longer have a green planet, but a grey one. Us humans are just more ressources for fuel and replication. The sci fi video game Horizon zero dawn presents us with a world where a nanobot uprising has destroyed all human civilization and have become the new dominant species. But could this actually happen in real life? Probably not, and if it did, a hostile earth would be the least of our problems. If AIs built for these nanites were ever to become that intelligent, it’s likely they would gain the power of space travel, meaning they wouldn’t just overrun the mass of planet Earth, but overrun the universe itself until all reality is ecotophaged into a hell of self-replicating nanobots. There’s a peculiar spot in the night sky called the Bootes void, millions of light years in diameter with not a single star in sight, a mysterious black patch on an otherwise starlit sky. Since the skewed distribution of stars doesn’t make statistical sense, some have suggested that the void actually is full of stars, but nanomachines covered them in solar powered dyson spheres to drain their energy. Grey goo wouldn’t care what it is or why it does anything it would would simply just “do.” This has lead more extreme doomsayers to suggest that this hole in the sky might actually be a cancerous tumor of nanites slowly consuming our entire universe, but I think that idea might be a little too crazy.

The go-to answer to the grey goo scenario is that it will never happen. While it’s highly uncertain when molecular manufacturing will be developed, there are a few reasonable arguments for its feasibility, the most obvious being that life itself constantly does molecular manufacturing in the form of protein synthesis so why can’t we? In general, I personally don’t believe in the Grey Goo and think it’s ridiculously inefficient, because in the end, it’s more productive to just create stationary nanofactories fastened in vacuum-filled chambers rather than develop the complex motion dynamics needed for independant flying swarms of nanobots that have to carry the factory within them. These nanoscopic miracle workers will also unlikely be able to fit supercomputers inside their tiny bodies, implying that their very existence doesn’t violate the laws of physics in the first place.[19][20] Nanobots as they are being developed at MIT clearly won’t be little A.I robots like everyone expects, but rather, carefully designed biomechanical structures, similar to enzymes or vectors. A nanopocalypse might still [face] energy constraints related to how fast it can spread, with natural obstacles and a lack of raw materials making continuous propagation difficult. Even Drexler himself argues that self-replicators would be too complex and inefficient for any practical manufacturing scenario, Furthermore, the Royal Society’s 2004 report on nanoscience declares that the grey goo scenario to be highly unlikely There’s still a debate today about whether or not grey goo is even practical or not, but let’s just say Grey Goo is utterly impossible, it doesn’t mean nanotechnology an’t create other kinds of apocalyptic weapons. This is the idea of “Red Goo” or Nanoweapons and it’s not too far from the idea of Bioweapons we are all familiar with. Nanotechnology theorist Robert Freitas coined the term Aerovores, otherwise known as “Grey Dust”, to illustrate the dangers of nanotech based weapons. Aeorovores would essentially be artificial plankton, airborn cybermicrobes, or seabed replicattors programmed to secrete molecules that would ravage the ecology of a rival country’s coastline, release gases that would blot out their sunlight, or poison their water.

## 2NC

### Rural Mergers DA---2NC

#### Food insecurity sparks AND turns every impact

Julian Cribb 19, Adjunct Professor, University of Technology, Sydney. Principal, Julian Cribb & Associates. Author, Journalist, Editor & Science Communicator, "Hotspots for Food Conflict in the Twenty-first Century," in Food or War, Chapter 5, 2019, pg. 141-173.

The mounting threat to world peace posed by a food, climate and ecosystem increasingly compromised and unstable was emphasised by the US Director of National Intelligence, Dan Coats, in a briefing to the US Senate in early 2019. ‘Global environmental and ecological degradation, as well as climate change, are likely to fuel competition for resources, economic distress, and social discontent through 2019 and beyond’, he said. ‘Climate hazards such as extreme weather, higher temperatures, droughts, floods, wildfires, storms, sea level rise, soil degradation, and acidifying oceans are intensifying, threatening infrastructure, health, and water and food security. Irreversible damage to ecosystems and habitats will undermine the economic benefits they provide, worsened by air, soil, water, and marine pollution.’ Boldly, Coats delivered his warning at a time when the US President, Trump, was attempting to expunge all reference to climate from government documents.23

Based upon these recent cases of food conflicts, and upon the lessons gleaned from the longer history of the interaction between food and war, several regions of the planet face a greatly heightened risk of conflict towards the mid twenty-first century.

Food wars often start out small, as mere quarrels over grazing rights, access to wells or as one faction trying to control food supplies and markets. However, if not resolved quickly these disputes can quickly escalate into violence, then into civil conflagrations which, if not quelled, can in turn explode into crises that reverberate around the planet in the form of soaring prices, floods of refugees and the involvement of major powers – which in turn carries the risk of transnational war. The danger is magnified by swollen populations, the effects of climate change, depletion of key resources such as water, topsoil and nutrients, the collapse of ecosystem services that support agriculture and fisheries, universal pollution, a widening gap between rich and poor, and the rise of vast megacities unable to feed themselves

#### Independently---healthcare closures risks rural flight and unsustainable urbanization---that’s Alemian---Extinction

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By the mid-twenty-first century the world’s cities will be home to approaching eight billion inhabitants and will carpet an area of the planet’s surface the size of China. Several megacities will have 20, 30, and even 40 million people. The largest city on Earth will be Guangzhou-Shenzen, which already has an estimated 120 million citizens crowded into in its greater metropolitan area (Vidal 2010). By the 2050s these colossal conurbations will absorb 4.5 trillion tonnes of fresh water for domestic, urban and industrial purposes, and consume around 75 billion tonnes of metals, materials and resources every year. Their very existence will depend on the preservation of a precarious balance between the essential resources they need for survival and growth—and the capacity of the Earth to supply them. Furthermore, they will generate equally phenomenal volumes of waste, reaching an alpine 2.2 billion tonnes by 2025 (World Bank)—an average of six million tonnes a day—and probably doubling again by the 2050s, in line with economic demand for material goods and food. In the words of the Global Footprint Network “The global effort for sustainability will be won, or lost, in the world’s cities” (Global Footprint Network 2015). As we have seen in the case of food (Chap. 7), these giant cities exist on a razor’s edge, at risk of resource crises for which none of them are fully-prepared. They are potential targets for weapons of mass destruction (Chap. 4). They are humicribs for emerging pandemic diseases, breeding grounds for crime and hatcheries for unregulated advances in biotechnology, nanoscience, chemistry and artificial intelligence. Beyond all this, however, they are also the places where human minds are joining at lightspeed to share knowledge, wisdom and craft solutions to the multiple challenges we face. For good or ill, in cities is the future of civilisation written. They cradle both our hopes and fears. Urban Perils The Brazilian metropolis of Sao Paulo is a harbinger of the challenges which lie ahead for Homo urbanus, Urban Human. In a land which the New York Times once dubbed “the Saudi Arabia of water” because its rivers and lakes held an eighth of all the fresh water on the planet, Brazil’s largest and wealthiest city and its 20 million inhabitants were almost brought to their knees by a one-in-a-hundred-year drought (Romero 2015). It wasn’t simply a drought, however, but rather a complex interplay of factors driven by human overexploitation of the surrounding landscape, pollution of the planetary atmosphere and biosphere, corruption of officialdom, mismanagement and governance failure. In other words, the sort of mess that potentially confronts most of the world’s megacities. In the case of Sao Paulo, climate change was implicated by scientists in making a bad drought worse. This was compounded by overclearing in the Amazon basin, which is thought to have reduced local hydrological cycling so that less water was respired by forests and less rain then fell locally. This reduced infiltration into the landscape and inflow to river systems which land-clearing had engorged with sediment and nutrients. Rivers running through the city were rendered undrinkable from the industrial pollutants and waste dumped in them. The Sao Paulo water network leaked badly, was subject to corruption, mismanagement and pilfering bordering on pillage. Government plans to build more dams arrived 20 years too late. “Only a deluge can save São Paulo,” Vicente Andreu, the chief of Brazil’s National Water Agency (ANA) told The Economist magazine (The Economist 2014). Depopulation, voluntary or forced, loomed as a stark option, officials admitted. Although the drought eased in 2016, water scarcity remained a shadow over the region’s future. Sao Paulo is far from alone: many of the world’s great cities face the spectre of thirst. The same El Nino event also struck the great cities of California, leading urban planners—like others all over the world—to turn to desalination of seawater, using electricity and reverse osmosis filtration (Talbot 2014). This kneejerk response to unanticipated water scarcity echoed the Australian experience where, following the ‘Millennium Drought’ desalination plants were producing 460 gigalitres of water a year in four major cities (National Water Commission 2008)—only to be mothballed a few years later when the dry eased. By the early 2010s there were more than 17,000 desalination plants in 150 countries worldwide, churning out more than 80 gigalitres (21 billion US gallons) of water per day, according to the International Desalination Association (Brown 2015). Most of these plants were powered by fossil fuels which supply the immense amount of energy needed to push saline water through a membrane filter and remove the salt. Ironically, by releasing more carbon into the atmosphere, desalination exacerbates global warming and so helps to increase the probability of fiercer and more frequent droughts. It thus defeats its own purpose by reducing natural water supplies. A similar irony applies to the city of Los Angeles which attempted to protect its dwindling water storages from evaporation by covering them with millions of plastic balls (Howard 2015)—thus using petrochemicals in an attempt to solve a problem originally caused by … petrochemicals. These examples illustrate the ‘wicked’ character of the complex challenges now facing the world’s cities—where poorly-conceived ‘solutions’ may only land the metropolis, and the planet, in deeper trouble that it was before. This is a direct consequence of the pressure of demands from our swollen population outrunning the natural capacity of the Earth to supply them, and short-sighted or corrupt local politics leading to ‘bandaid’ solutions that don’t work or cause more trouble in the long run. Other forms of increasing urban vulnerability include: storm damage, sea level rise, flooding and fire resulting from climate change or geotectonic forces; governance failure, civic unrest and civil war exemplified in Lebanon, Iraq and Syria over the 2010s; disruption of oil supplies and consequent failure of food supplies; worsening urban health problems due to the rapid spread of pandemic diseases and industrial pollution and still ill-defined but real threats posed by the rise of machine intelligence and nanoscience (Gencer 2013). The issue was highlighted early in the present millennium by UN Secretary General Kofi Annan, who wrote: Communities will always face natural hazards, but today’s disasters are often generated by, or at least exacerbated by, human activities… At no time in human history have so many people lived in cities clustered around seismically active areas. Destitution and demographic pressure have led more people than ever before to live in flood plains or in areas prone to landslides. Poor land-use planning; environmental management; and a lack of regulatory mechanisms both increase the risk and exacerbate the effects of disasters (Annan 2003). These factors are a warning sign for the real possibility of megacity collapses within coming decades. With the universal spread of smart phones, the consequences will be vividly displayed in real time on news bulletins and social media. Unlike historic calamities, the whole world will have a virtual ringside seat as future urban nightmares unfold.

#### Wave of mergers is on the way---competing rural hospitals result in duplicative high-cost care that make rural communities unsustainable, but collaboration solves

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Healthcare, especially in rural communities, is at a crossroads. Previous federal policies and economic prosperity led to dramatic growth in hospital construction and often resulted in two or more hospitals serving the same community. Now, as reimbursement declines and economic conditions worsen, many hospitals face significant challenges in maintaining their operations in an economically tenable manner. As the healthcare system moves from volume-based to value-based payments, the presence of competing hospitals in the same service area does not always make economic sense. Under the traditional fee for-service model, there needed to be sufficient competition in a service area to control per-unit prices. However, with value-based payment models, the focus shifts to improving the quality of care and reducing costs. Competing local hospitals that offer duplicative services in the same market sometimes lack the patient volumes to sustain a full array of high quality, low-cost clinical services, especially if patient populations are stagnating. Moreover, as hospitals are forced to invest in order to remain competitive, hospitals with constrained capital and narrow to-negative margins, such as those serving rural communities, struggle to survive. Benefits of Collaboration In order to generate the efficiencies needed to sustain financial viability and improve the quality of care, many hospitals and health systems are collaborating, sometimes in the form of mergers. Large health systems in particular have honed in on the benefits of collaboration, as evidenced by the wave of large health system mergers in the past year. Some examples include:

#### Studies prove rural mergers uniquely foster high-quality care and averts closures

Victoria Bailey 21, Certified Natural Health Professional and Enzyme Specialist, “Rural Hospital Mergers Associated with Improved Patient Outcomes”, <https://www.aha.org/news/headline/2021-09-21-study-rural-hospital-mergers-linked-better-patient-outcomes>, September 22nd, 2021

Rural hospital mergers were associated with better patient outcomes compared to hospitals that remained independent, a study from JAMA Network Open found. More than one in three community hospitals in the country are located in rural areas and are the main source of care for 60 million people. Many rural hospitals have experienced financial hardships and clinician shortages that increase their risk of closure but merging with another hospital may help them avoid that fate. Mergers may increase access to financial resources, clinical expertise, and new technologies for small, rural hospitals. Hospital mergers may also increase market power through collective negotiation with payers and allow rural hospitals to join alternative payment models, such as accountable care organizations, the study stated. Researchers looked at 172 merged hospitals and 266 hospitals that were independent to see if rural hospital mergers produced better patient outcomes for inpatient care. They used data from Irving Levin Associates and the American Hospital Association’s Annual Survey to identify hospital mergers between 2009 and 2016. They compared the mergers to independent rural hospitals in the same states. Researchers used the Healthcare Cost and Utilization Project State Inpatient Databases to measure the quality of care in each hospital, looking at mortality rates for acute myocardial infarction, heart failure, acute stroke, gastrointestinal hemorrhage, hip fracture, and pneumonia. They also looked at inpatient stays for surgery and any complications that accompanied them. Mortality rates for acute myocardial infarction stays were between 7.8 and 10.9 percent at hospitals premerger. After the hospitals merged, the rate declined to 6.3 percent after one year, and 4.3 percent after five years. The mortality rates for stroke, heart failure, and pneumonia also decreased post-merger. Complications after elective surgeries decreased in both the merged hospitals and the independent hospitals, the study noted. The mortality rates for all of the monitored conditions decreased in both merged hospitals and the independent hospitals, but the merged hospitals saw a greater decline. Merged hospitals saw a 4.4 percent decrease in mortality rates for acute myocardial infarction stays, whereas the comparison hospitals only saw a 1.6 percent decrease. This trend remained consistent with the other conditions as well. The merged hospitals may have produced better health outcomes due to increased resources and support as a result of the merger, the study indicated. Specifically, the merged hospitals may have had improved mortality rates for acute myocardial infarction due to the adoption of defined clinical pathways available through the transfer of technology from the larger health system in the merger. The mortality rate improvements for stroke, heart failure, and pneumonia did not happen until three to five years after hospitals merged, indicating that adopting new approaches can be complex and it may take time for health systems to adapt. Rural residents can struggle to access care compared to urban residents, which can increase their risk of death if they develop a serious condition. Mergers can help rural hospitals combine their resources and provide better care to patients. Mergers can also provide an opportunity for rural hospitals to partner with urban hospitals to improve care delivery and health outcomes. “Furthermore, sharing staff and expertise as part of the merger can help alleviate workforce shortages and improve the hospital’s clinical services,” researchers concluded.

#### Rural hospital mergers will go first, FTC has tried to in the past, but the State Action Doctrine is the only preventative measure that’s been blocking them

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Most proposed consolidations and mergers of hospitals serving the same market trigger antitrust review because the transactions will likely impact market share. In many states, there are statutory mechanisms that allow local authorities to approve the transactions and effectively nullify the impact of federal antitrust laws. The statutes, which are usually referred to as Certificates of Public Advantage, or COPAs, are issued by the state agency to healthcare providers and afford immunity from prosecution under state antitrust laws. A COPA, or its equivalent, essentially shields a transaction from federal antitrust enforcement and instead subjects the transacting parties to state oversight on certain agreed-upon metrics. As long as the statutory requirements and state oversight are sufficient to satisfy the state action doctrine, a COPA may protect the parties from prosecution under federal antitrust laws. FTC leadership has not been amicable with respect to state use of COPA statutes. During a January 2016 speech before the American Health Lawyers Association, then-FTC Chairwoman Edith Ramirez commented, “In my view, these legislative efforts [COPA waivers] to immunize combinations from the antitrust laws are misguided and risk harming consumers.”6 The FTC’s position has not changed with the transition to Acting Chairman Maureen K. Ohlhausen. Ohlhausen stated at the November 2017 ABA Fall Forum, “On my watch, we have tried push back against both these laws [Certificate of Need and COPA] and their specific application to problematic transactions through our advocacy program... [O]ur Office of Policy Planning is currently in the early stages of organizing a 2018 workshop that will take an even deeper dive on the COPA issue.” Despite the position taken by the FTC, states that have enacted COPA statutes recognize that, as stated in the North Carolina COPA statute, “cooperative agreements among physicians, hospitals, and others for the provision of healthcare services may foster improvements in quality of healthcare, moderate increases in cost, and improve access to needed services in rural areas[.]”8 When granted, a COPA allows healthcare providers—who otherwise might be prohibited from doing so—to merge or acquire other providers without the risk of antitrust enforcement. Thus, a COPA is only granted if the state agency decides that the advantages of the collaboration outweigh foreseeable disadvantages.

#### Link threshold is low---Consolidation has forced the FTC to adopt narrow-view of the doctrine but state action shields mergers from scrutiny

Jennifer Henderson 21, reported on the business of law at The American Lawyer. Jennifer holds an MA in Journalism, Business and Economic Reporting from NYU and an MBA from The Citadel Graduate College in Charleston, SC, “This Tactic Helps Hospitals Ease Merger Scrutiny”, <https://www.medpagetoday.com/special-reports/exclusives/91907>, April 1st, 2021

With healthcare consolidation slated to continue at a fast pace -- in part due to greater financial challenges from the pandemic -- hospitals looking to merge aren't entirely beholden to a green light from the Federal Trade Commission. At least that's the case for now. In recent years -- in a throwback to the 1990s -- a quartet of states have turned to certificates of public advantage, or COPAs, to complete two major health system mergers and two hospital sales. Though COPAs vary from state-to-state, the FTC defines them generally as regulatory regimes adopted by state governments to displace competition among healthcare providers and immunize mergers and other deals from antitrust scrutiny. In 2016, West Virginia passed a type of COPA law that paved the way for Cabell Huntington Hospital to complete its acquisition of St. Mary's Medical Center in 2018. That same year, Tennessee and Virginia also passed legislation to use COPAs that allowed Mountain States Health Alliance and Wellmont Health System to merge and launch Ballad Health, creating a system spanning the largely rural area near the states' common border. The FTC dropped challenges to both deals because of the COPAs, but it took notice. In 2019, the agency announced it had issued orders to the resulting health systems and five insurers to provide information that would allow it to study the effects of COPAs on the price and quality of healthcare services as well as on access to care and employee wages. And just last year, the agency objected -- but watched again -- as Texas approved Community Health Systems' divestiture of hospitals in Abilene and San Angelo via COPA law. "There were a few of these in the 90s ... but after that things went pretty quiet for a while," Alexis Gilman, a partner in Crowell & Moring's antitrust and competition group in the firm's Washington, D.C., office, told MedPage Today. "Then they came back in 2016." Increasing financial pressure facing healthcare providers is among a host of reasons states have once again turned to COPAs to get deals done, said Gilman, who served as an assistant director at the FTC prior to joining Crowell & Moring in 2017. Gilman has written about the resurgence of COPAs for the American Health Law Association. In the last 15 years, the FTC has been very successful in blocking hospital and other healthcare provider mergers when the agency believes the transactions are anticompetitive, Gilman said. At the same time, healthcare providers -- especially community and independent hospitals -- are facing a difficult time keeping up with the needs of their communities, reinvesting in their care system, attracting physicians and nurses, and coming up with the cost of capital to make investments. Many of these hospitals want to merge, Gilman said. And where they often find a merger partner they deem attractive is in their same geographic area because they believe they can achieve efficiencies, scale, and purchasing power, and may have already been collaborating in some way with that potential partner. But the FTC will scrutinize these deals, and many healthcare providers believe the FTC takes a very narrow view of competition and the efficiencies credited, he said. So, the decision in some cases has been to put transactions in the states' hands because that oversight is more local to where the deals are taking place, Gilman said. "The feeling is, let's have the states ... decide what's best for the community, how healthcare should be delivered in the state." COPAs include active state supervision, and typically specify strict limits on price increases and requirements for investments in local healthcare markets, he said. One argument for them has been that certain hospitals may have been competing for years, but their region or state continues to have poor health outcomes, Gilman said. The "competitive marketplace isn't working in all places."

### Innovation ADV---2NC

#### Disruptive Innovation is occurring now

FS 21, “An $8.3 Trillion Market Poised to Boom for Decades”, <https://thefinancialstar.com/researches/an-8-3-trillion-market-poised-to-boom-for-decades/>, July 18th, 2021

Healthcare is one of the largest global industries, with a 2018 spend of $8.3 trillion. During the pandemic, the focus on healthcare is greater than ever. From everyday consumers to the governments of developed countries, everyone spent more time thinking about their health and that of their families. That has set the stage for a period of unmatched healthcare innovation and growth.

Governments spent big in response to the threats posed by COVID-19. Japan, for example, provided a fiscal stimulus package equal to 56% of GDP.

The social change around healthcare is equally important but harder to measure. Attitudes towards physical and mental health shifted dramatically as more people decided to focus on maintaining a more balanced lifestyle.

Demographic Changes Driving Healthcare Demand

Demand for healthcare will continue its ascent as the global population ages. The care needed by older people differs significantly from what younger people need, as older people are more likely to suffer from chronic illnesses. That means more frequent and more serious visits to healthcare providers.

Regions with a greater proportion of older people will see more drastic changes in the needs of their population. To prepare for this, nations like Japan, Italy, and Portugal will need to enhance their healthcare systems fast.

The shortage of qualified doctors and nurses heating up, creating conditions for increased labour costs within clinics and hospitals. Not to mention the shortage of facilities and equipment facing some nations. In the UK there are fewer available hospital beds today than during 2000.

The other huge demographic change is a surge in life expectancy over the past 60 years. In 1960, life expectancy was 52.6 years, while in 2019 it was 72.7. That shift is massive. This shift has been the result of significant medical innovations, but it is also going to put more pressure on the existing healthcare infrastructure. More older people will visit hospitals and clinics for a longer period of the elderly parts of their lives.

Medical Innovations in Abundance

The healthcare space is ripe for disruption. Telehealth is a simple example of how much more efficiently healthcare services can be delivered. Instead of traveling to a clinic and waiting in a physical waiting room we can log in to a zoom call and speak directly to a doctor. They can even share resources we can review immediately after the meeting.

That means healthcare practitioners can provide higher quality service, without adding any costs. It also makes health services more accessible to people who in the past may have opted not to go into the clinic at all. How big could telehealth be? McKinsey has estimated the potential market size at $250 billion. Just for this one small innovation.

Data science and predictive analytics are assisting healthcare practitioners in diagnosing and treating patients faster. Technology has also made it easier to monitor patients’ health remotely. What makes these innovations exciting is that they can scale globally when their effectiveness is proven. Process innovation can quickly be adopted across global healthcare. That means the businesses behind the innovations can scale faster than ever before.

#### Every empiric AND basic theories of evolution disprove any risk of extinction from disease

Bryan Walsh 20, Future Correspondent for Axios, Editor of the Science and Technology Publication OneZero, Former Senior and International Editor at Time Magazine, BA from Princeton University, End Times: A Brief Guide to the End of the World, Orion Publishing Group, Limited Edition, p. 183-185

Yet despite epidemic after epidemic, despite mass killers like smallpox and the 1918 flu, at no point has disease threatened humans with extinction. Even the Black Death, likely the most concentrated epidemic of all time, now appears as little more than a minor downturn in what has otherwise been a bull market for long-term human population growth. That’s true for animals as well. The International Union for Conservation of Nature reports that of the 833 plant and animal extinctions that have been documented since 1500, less than 4 percent can be attributed to infectious disease. Those species that were eradicated by disease tended to be small in number and geographically isolated—very much unlike human beings, who are both numerous and have spread to every corner of the world.38

With the exception of HIV—which can now be managed as a chronic condition with antiviral drugs—every major epidemic mentioned above took place before the dawn of modern medicine, before the development of antibiotics and widespread vaccines. Smallpox was even fully eradicated from the wild in 198039—the only known samples of the virus are kept at highly secure government facilities in Atlanta and Koltsovo, Russia.40 Plague is now so rare that when it breaks out in countries like Madagascar, it makes global news—yet fewer than 600 deaths from the disease were reported between 2010 and 2015. Studies have shown that most of the fatalities from the 1918 flu were actually due to secondary bacterial infections that today could be controlled by antibiotics,41 which were introduced less than a century ago. Influenza pandemics remain the great fear of infectious disease experts, but the most recent one in 2009 killed only about 284,000 people worldwide.42 That was fewer than the number of people who die from seasonal flu in an ordinary year.43

Modern science has defanged most infectious diseases, at least outside the developing world—and great progress has been made there in recent years—but basic evolution also plays a role in limiting the catastrophic potential of natural disease. Every pathogen faces a trade-off. In general, the more rapidly it kills, the harder it is to spread widely, because an extremely virulent disease would run out of victims and hit an epidemiological dead end. Pathogens that are highly transmissible, like influenza, rarely kill, even absent the countermeasures of modern medicine. The 1918 flu had a fatality rate of about 2.5 percent.44 That’s tremendously high by the standards of the flu, but it still meant that more than 97 out of every 100 patients survived. Even a virus like HIV—which kills slowly and shows no symptoms for years, permitting the infected plenty of time to spread the disease—is hindered because transmission requires direct contact with blood or with bodily fluids. The self-replication that makes infectious disease such an effective weapon also prevents it from becoming a true existential threat. What viruses and bacteria want—if packets of genes and single-celled organisms can be said to want anything—is to survive and to replicate. They can’t do that if they kill all humans.

#### ABR doesn’t get close to extinction---vast majority of treatments will still be effective, no huge death tolls

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

The worst-case scenario would be that it would be like 1940, only without a raging World War. Keep in mind that by 1940, before the introduction of penicillin, deaths from infectious diseases in the US had been reduced by 90% from their 19th century levels [1]. This reduction was entirely due to the provisions of clean food, water, and vaccines. We have (or should have) better systems for delivering these public health goods than we did 75 years ago.

But there is never going to be a post-antibiotic era. Antibiotic therapy will continue to be effective most of the time. If antibiotic therapy is informed by rapid microbiology testing, then it will be effective nearly all of the time. Very few bugs are, or will be, pan-resistant and untreatable by antibiotics. Even the worst superbugs—MRSAs, CREs, ESBLs, and now MCR-1s—are almost always susceptible to at least one clinically useful antibiotic (XDR TB is the most troubling exception to this rule).

What has changed is that resistance to at least one first-line antibiotic is now common, and doctors will have to become smarter about their prescribing practices. They can no longer mindlessly write scripts based on signs and symptoms alone and expect good results every time. Doctors consistently underestimate local levels of resistance, and exhibit high levels of complacency about the impacts of resistance on their practices [2] [3] [4] . This culture of complacency will have to change.

Antibiotics will continue to be effective, but our traditional method of prescribing them, called empiric therapy [5], will become increasingly ineffective. This will require a change in the way that we use antibiotics, but will not be an end to the usefulness of antibiotics. That is an important distinction to keep in mind when reading articles about the coming antibiotic apocalypse: change, yes; the end, no.

### Federalism ADV---2NC

#### There’s no internal link---externalities don’t apply and antitrust doesn’t bar it

HLR 20, “Antitrust Federalism, Preemption, and Judge-Made Law”, <https://harvardlawreview.org/2020/06/antitrust-federalism-preemption-and-judge-made-law/>, June 10th, 2020

The Maryland and Ninth Circuit examples may be more bogeymen than real threats to federalism. First, alternate doctrines aside from antitrust preemption work to keep individual state interests in check. For example, the Fourth Circuit enjoined enforcement of the Maryland law on dormant commerce clause grounds.

Where one state intrudes too much on other states’ ability to regulate antitrust — where “[t]he potential for ‘the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude’ is . . . both real and significant”

— the Constitution, rather than Congress, can prevent the one-state dominator problem’s greatest harms. Dormant commerce clause challenges are not limited to the Maryland case’s facts. In fact, the Fourth Circuit dissent complained that the majority’s logic would invalidate other state antitrust laws, including Illinois Brick–repealer laws.

Second, the trouncing of federalism in cases like these is often overstated. Take the defendant-appellant’s depiction of the interests in the Ninth Circuit case as an example of exaggerated federalism costs. The district court found that the nonrepealer states had no interest in having their laws applied because the defendant-appellant was a California company; California’s more consumer-friendly law would only help nonrepealer-state residents, not hurt nonrepealer-state businesses.

If the nonrepealer states have an interest in denying their own consumers access to relief when there is no benefit to their own businesses, it seems tangential to an interest in striking their own consumer-business balances. Instead, a choice to prioritize foreign defendants over in-state consumers appears more like an attempt to govern the national consumer-business balance, a choice imbued with far less federalism oomph than the defendant-appellant portrayed.

Whether exaggerated or not, a worry that antitrust federalism allows one state to dominate national antitrust policy weighs in favor of congressional antitrust preemption. This problem, however, is not unique to antitrust. Any area of law in which states fail to internalize the harms of overregulation, meaning any law that regulates businesses with a national footprint, could be dominated by one state.

61. The interstate externalities that the one-state dominator problem implicates are separate from the “race-to-the-bottom” problems that Professor Richard Revesz discusses in the environmental arena. See Revesz, supra note 46, at 1222–23. In a race to the bottom, the concern is that states will compete with each other for business by lowering regulation below the otherwise-optimal level. Id. at 1213–19. The concern of a dominated antitrust regime, on the other hand, is that one state will overregulate, and, because a national business cannot easily exit a single state, will thereby drag other states upward. In the environmental context, the one-state dominator problem is more akin to a critique of California’s ability to set national automobile standards because of its major market for automobiles — although that ability is congressionally condoned.

If Congress were to take the one-state dominator problem too seriously, it would swallow up huge swaths of state regulation, excluding states from their traditional role in consumer protection, at least where the largest (and potentially most worrisome) industries are implicated.

#### Regulation over emerging tech now

Shari Claire Lewis 21, Member of Rivkin Radler’s Complex Torts & Product Liability, “Here’s How the FTC Is Tackling Emerging Technology”, New York Law Journal, 6/14/21, https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/

https://www.law.com/newyorklawjournal/2021/06/14/heres-how-the-ftc-is-tackling-emerging-technology/?slreturn=20210825224614

A wide range of federal and state authorities are involved in the regulation of emerging technologies in one way or another. Numerous agencies as well as the U.S. Department of Justice lead the national effort, while the Department of Financial Services, the attorney general and local prosecutors are the principal parties in New York state.

Perhaps no federal or state entity, however, is more focused on the plethora of legal issues raised by new innovations than the Federal Trade Commission (FTC).

Budget Analysis

One way to understand the depth of the FTC’s interest is by examining the budget justification for fiscal year (FY) 2022 that it just submitted to the Office of Management and Budget. The budget justification is intended to support a request for $389,800,000 for 1,250 full time positions (FTEs), which is an overall increase of $38,800,000 and 110 FTEs compared to the FTC’s FY 2021 enacted appropriation.

As detailed in the budget justification, 40% of the new FTEs requested by the FTC are related to its work on emerging technologies. On the consumer side, the FTC is seeking to add two FTEs in its Bureau of Consumer Protection (BCP) “to address emerging technology in the area of marketing practices” and six FTEs to enhance the BCP’s “ability to understand quickly evolving technological issues implicated by its casework” and to “keep pace with litigation demands.”

The FTC also is seeking to add 36 FTE in its Bureau of Competition (BC) specifically to support identifying and challenging anticompetitive mergers and conduct in the “complex and increasingly pervasive technology markets.”

Significantly, the very first section of the FTC’s budget justification, titled “Planned Activities in FY 2021 and Beyond,” begins with the stated goal of “Protecting Consumers as Technology Evolves.” Here, the FTC says, it will “continue to focus on identifying consumer protection issues associated with the use of new technology.” According to the FTC, this involves considering the costs and benefits of practices and the importance of fostering innovation as well as taking enforcement action against deceptive advertisements that appear in new formats and new media (e.g., apps, games, videos and social networks). Among other things, the FTC also said that it will continue to conduct research on emerging technologies to assist with enforcement actions, educate consumers and inform policy.

The FTC’s next stated goal—“Protecting Consumer Privacy and Data Security”—also is an acknowledgment of the growing importance of emerging technologies. This goal highlights the FTC’s desire to “protect consumers from unfair or deceptive practices related to the privacy and security of their personal information” while preserving “the many benefits that technological advances offer.”

Enforcement

The FTC’s focus on emerging technologies also can be seen from a review of five enforcement actions it has taken over the past few months.

Facial Recognition. The FTC recently finalized a settlement with the developer of a photo app that allegedly deceived consumers about its use of facial recognition technology and its retention of the photos and videos of users who deactivated their accounts.

In its complaint, the FTC alleged that Everalbum misled users of its Ever mobile app by representing that it would not apply facial recognition technology to users’ content unless they affirmatively chose to activate the feature. According to the FTC’s complaint, the company nevertheless automatically activated its face recognition feature—which could not be turned off—for all mobile app users except those who lived in three U.S. states and the European Union. The FTC alleged that the company also failed to keep its promises to delete the photos and videos of Ever users who deactivated their accounts and instead retained them indefinitely.

As part of its settlement with the FTC, Everalbum must obtain consumers’ express consent before using facial recognition technology on their photos and videos. The settlement also requires the company to delete the photos and videos of Ever app users who deactivated their accounts and the models and algorithms it developed by using the photos and videos uploaded by its users.

In addition, if the company markets software to U.S. consumers for personal use, it must obtain users’ express consent before using biometric information it collected from them. See Federal Trade Commission, FTC Finalizes Settlement with Photo App Developer Related to Misuse of Facial Recognition Technology (May 7, 2021).

Mobile Banking. The FTC also recently reached a settlement with a mobile banking app over allegations that it misled users about their access to funds and interest rates.

Here, the FTC alleged that Beam Financial and its founder and chief executive officer, Yinan Du, also known as Aaron Du, promised users of Beam’s free mobile banking app that they could make transfers out of their accounts and would receive their requested funds within three to five business days. In fact, some users waited weeks or months to receive their money, which was particularly difficult for users who were struggling with lost income as a result of the COVID-19 pandemic, the FTC alleged.

According to the FTC, Beam also failed to give users the high interest rates it promised. Beam repeatedly represented that users would receive at least 0.2% or 1.0%, but many new users received a much lower interest rate of 0.04% and stopped earning any interest after requesting that Beam return their funds.

As part of the settlement, Beam is banned from operating a mobile banking app or any other product or service that can be used to deposit, store, or withdraw funds. It also is prohibited from misrepresenting the interest rates, restrictions and other aspects of any financial product or service.

In addition, Beam must provide full refunds, including interest, to all of Beam’s customers, and must periodically update the FTC on its refund efforts, including identifying any consumer complaints. It also is prohibited from benefitting from any personal information collected from customers. See Federal Trade Commission, Mobile Banking App Settles FTC Allegations that It Misled Users about Access to Funds and Interest Rates (March 29, 2021).

Antennas and Amplifiers. Sometimes what’s old becomes new again. In another recent action, a New York-based company and its chief executive officer agreed to settle FTC charges that they sold indoor TV antennas and signal amplifiers to consumers using deceptive claims that the products would let users cancel their cable service and still receive all of their favorite channels for free.

According to the FTC’s complaint, Wellco and its owner and chief executive officer, George M. Moscone, violated the FTC Act by making deceptive performance claims for their over-the-air television antennas and related signal amplifiers, using deceptive consumer endorsements, and by misrepresenting that some of their web pages were objective news reports about the antennas.

The FTC alleged that, starting in 2017, the defendants marketed and sold more than 800,000 indoor TV antennas and more than 272,000 amplifiers to consumers online under the TV Scout, SkyWire, SkyLink and Tilt TV brand names.

The FTC alleged that the defendants’ websites made multiple deceptive claims for their antennas, including that users could stop paying for cable or satellite TV subscriptions and still receive all of their favorite TV channels; that a substantial portion of users received 100+ premium channels in high definition (HD); that their antennas enabled consumers to receive more channels than most other TV antennas on the market; and that their products were the top rated indoor HDTV antennas in America. The FTC also alleged that the defendants deceptively represented that their amplifiers substantially increased the number of stations received with their antennas and that, by using both their antennas and amplifiers, consumers received HBO and AMC.

In addition, the FTC alleged that the defendants fabricated testimonials by copying them from competitors’ antenna ads. The FTC also alleged that the defendants deceptively used web pages that appeared to reproduce objective news reports and misrepresented that objective news reporters had performed independent tests demonstrating the effectiveness of their antennas.

The settlement prohibits the defendants from making claims about any product’s rating, ranking, or superiority to other products, the channels users will receive, or any material aspect of a product’s performance, efficacy, or central characteristics, unless the claims are true and substantiated. The order also prohibits the defendants from making any misrepresentation through a product endorsement, that a website is an objective news report, or that independent tests demonstrate the effectiveness of a product.

Finally, the settlement imposed a $31.82 million judgment against the defendants, suspended upon the defendants’ payment of $650,000 to the FTC based on their inability to pay. See Federal Trade Commission, New York-based Defendants Settle FTC Charges They Deceptively Advertised SkyLink TV Antennas as an Effective Way to Get a Hundred Plus Premium Channels Free (March 15, 2021).

BOTS. Earlier this year, the FTC brought its first case under the Better Online Ticket Sales (BOTS) Act, which was enacted in 2016 and which gives the FTC authority to take law enforcement action against individuals and companies that use bots or other means to circumvent limits on online ticket purchases.

The FTC alleged that a group of related defendants—Cartisim, Simon Ebrani, Just In Time Tickets, Evan Kohanian, Concert Specials and Steven Ebrani—purchased more than 150,000 tickets for popular events. To do so, according to the FTC, they engaged in a variety of practices that violated the BOTS Act, such as by their use of automated ticket-buying software to search for and reserve tickets automatically, software to conceal their IP addresses, and hundreds of fictitious Ticketmaster accounts and credit cards to get around posted event ticket limits. The FTC asserted that the defendants took in millions of dollars in revenues from the resale of the tickets they purchased using these unlawful means.

The settlement subjects the ticket brokers to a judgment of more than $31 million in civil penalties to be partially suspended, requiring them to pay $3.7 million. The settlement also prohibits the defendants from further violations of the BOTS Act, including using methods to evade ticket limits, using false identities to purchase tickets, or using any bots to facilitate ticket purchases. See Federal Trade Commission, FTC Brings First-Ever Cases Under the BOTS Act (Jan. 22, 2021).

Zoom. Finally, it is worth mentioning the settlement that the FTC reached earlier this year with Zoom Video Communications over allegations it misled consumers about the level of security it provided for its Zoom meetings and compromised the security of some Mac users.

The final settlement order required Zoom to implement a comprehensive security program, review any software updates for security flaws prior to release, and ensure that updates will not hamper third-party security features. The company also must obtain biennial assessments of its security program by an independent third party, which the FTC has authority to approve, and notify the FTC if it experiences a data breach. See Federal Trade Commission, FTC Gives Final Approval to Settlement with Zoom over Allegations the Company Misled Consumers about Its Data Security Practices (Feb. 1, 2021).

Conclusion

Businesses that create and develop emerging technologies have a host of regulations, and regulators, that they must keep in mind, especially when their products are directed to consumers. As this column has explained, the FTC is one of the most significant government agencies overseeing this industry. The FTC’s recent history, goals and budget requests all make clear that it will continue to play an important role in this area for quite some time to come.

#### Parker shifts the focus and saps enforcement

Siri Bulusu et. al 21, Claire Hao, Erin Mulvaney, all are reporters for Bloomberg law, “Worker License Rules Emerge as FTC Competition Oversight Priority”, <https://news.bloomberglaw.com/antitrust/worker-license-rules-emerge-as-ftc-competition-oversight-priority>, July 12th, 2021

The FTC’s options include writing new rules or heightening enforcement of interstate commerce rules in areas where they overlap with antitrust violations, labor market watchers say. Under this principle, restricting labor through onerous licensing requirements would be tantamount to limiting movement of services across borders.

“In the past, occupational licensing was a matter overseen by the Department of Labor, but they don’t quite have the teeth that the Federal Trade Commission has in terms of working in specific locations,” said Morris Kleiner, a University of Minnesota professor of labor policy.

The FTC could turn its limited resources toward scrutinizing occupational licensing programs that narrow the practice scope of a certain profession and limit competition, Kleiner said.

How the commission interprets which licensing requirements are “unnecessary” could be scrutinized. Those could include common requirements such as citizenship and a clean criminal record, said Bobby Chung, a postdoctoral research associate at the University of Illinois at Urbana-Champaign who focuses on licensing. .

“The required training, education and exams should confer the relevant skill sets,” Chung said. “If not, I would regard those requirements as unnecessary.”

The agency also may impose specific guidelines that limit fees or frequency of license renewal, Kleiner said.

“But more importantly, the FTC’s guidelines could be aimed specifically at states that have ratcheted up their requirements,” he said.

## 1NR

### Biz Con DA---1NR

#### It causes terrorism, civil wars, and diversion that go global---nothing checks

Dr. Qian Liu 18, PhD in Economics from Uppsala University, Former Visiting Researcher at the University of California, Berkeley, Managing Director for Greater China at The Economist Group, Guest Lecturer at New York University, Tsinghua University, the Chinese Academy of Social Sciences and Fudan University, “The Next Economic Crisis Could Cause A Global Conflict. Here's Why”, World Economic Forum, 11/13/2018, https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington , considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

#### Turns every impact

Geoffrey Kemp 10, Director of Regional Strategic Programs at The Nixon Center, Served in the White House Under Ronald Reagan, Special Assistant to the President for National Security Affairs and Senior Director for Near East and South Asian Affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-234

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

#### Decline turns disease

Brian Alexander 9, Staff Writer at MSNBC, “Recession May Worsen Spread Of Exotic Diseases”, MSNBC, 3/10/2009, www.msnbc.msn.com/id/29599786

To most Americans, diseases with names like dengue fever, chikungunya, malaria, Chagas and leishmaniasis might sound like something out of a Victorian explorer’s tales of hacking through African jungles. Yet ongoing epidemics of these diseases are killing millions of people around the world. Now, disease experts are increasingly concerned these and other infections may become as familiar in the United States as West Nile or Lyme disease. Few believe Americans face a killer epidemic from tropical diseases. But scientists who specialize in emerging infectious diseases say such illnesses may become more common here as the economic downturn batters an already weakened public health system, creating environmental conditions conducive to infectious diseases spread by insects or other animals. At the same time, such vector-borne diseases are capable of spreading around the world much more rapidly due to massive south-to-north immigration, rapid transportation, and global trade.

#### Agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### Even targeted antitrust sends a broad signal of aggressive overregulation

Raymond J. Keating 21, Chief Economist for the Small Business & Entrepreneurship Council and Adjunct Professor in the MBA Program at the Townsend School of Business at Dowling College, “Antitrust Fictions (and Actions) Will Have Real, Negative Economic Consequences”, SBE Council, 6/18/2021, https://sbecouncil.org/2021/06/18/antitrust-fictions-and-actions-will-have-real-negative-economic-consequences/

It needs to be understood that while supposedly targeting so-called “Big Tech,” these intrusive regulations and substantial costs would fall on competitors as well, thereby actually discouraging competition in technology markets. For good measure, moving ahead with his kind of hyper-antitrust regulation of tech firms lays the groundwork for doing so in other industries, such as in retail, energy, health and medical sectors, and so on. This is what Senate anti-trust crusaders hope to accomplish.

The message is clear: Beware entrepreneurs, businesses and investors if you become too successful or if you cross certain political constituencies. The government stands ready to punish you via intrusive and costly regulation.

#### Legally, antitrust is economy-wide, so there’s no way to limit the plan’s scope AND risk-averse firms and lawyers think it’ll be applied, chilling investment

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets. n53 Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### The plan introduces the prospect that antitrust law is volatile. Businesses will fear that it could change, so they won’t realize investments---that guts R&D.

Alexander P. Okuliar 20, J.D. from Vanderbilt University Law School, B.S. in Economics and B.A. in History from The Wharton School of the University of Pennsylvania, “Promoting Predictability and Transparency in Antitrust Enforcement and Standards Essential Patents”, 12/8/2020, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-okuliar-delivers-remarks-telecommunications-industry

The Importance of Predictability and Transparency to Antitrust Enforcement

Good afternoon. It’s a pleasure to join you today, thank you for the invitation. I’d like to begin with some prepared remarks addressing the importance of predictability and transparency to antitrust enforcement, particularly as it relates to standards-essential patents, give an overview of the Division’s recent activity in this space, and then turn to some questions.

Antitrust law can be a very powerful tool to promote economic dynamism and innovation. It establishes important rules regarding how firms may operate in marketplaces across the economy. Firms, in turn, rely on these rules when making all sorts of strategic decisions, from day-to-day concerns to overall operating plans, from pricing or discounting strategies to long-term growth strategies.

For any economy to realize meaningful long-term growth, firms (and consumers) must have confidence in the underlying legal rules governing their existence and behavior. Starting and growing a company is often expensive and risky. Maintaining a business is also costly, and firms are constantly assessing their ongoing viability and potential for growth. Confidence in the basic legal system is, of course, critical. Confidence in specialized regulatory regimes is likewise important. Firms are more likely to engage in costly R&D, and in the kind of expensive, time-consuming experimentation that innovation tends to require, when they are confident they will be rewarded for these investments—that, for example, antitrust laws will not change in the interim between investment and return in a way that deprives the firm from being able to recoup and benefit from its investments.

This innovation and dynamic competition are critical to our modern economy. So the more that we, as enforcers, can do to ensure the basic competition law rules of the road are clear and predictable, the more we can help to preserve competition and to spur economic growth. Not only do firms benefit from this, but so, too, do consumers. They are the beneficiaries of the increased R&D and innovation that can thrive in a reliable regulatory and enforcement regime. Moreover, clear and foreseeable enforcement empowers consumers, who can then more readily understand when unlawful conduct may be occurring, and be better-positioned to identify violations and to protect themselves and others.

Predictability and transparency in antitrust enforcement are important across markets and industries, but are often particularly important at the intersection of antitrust and intellectual property. Both competition and IP laws seek to foster long-term innovation and dynamic competition—which, again, depend on firms continuing to engage in risky and costly efforts today in the hopes of achieving rewards tomorrow. This is true for owners of various IP rights, including standards-essential patent holders.

#### The XO is empty talk that’s years from being implemented

Jeff Jaeckel 21, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, Alexander Paul Okuliar, Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Lisa M. Phelan Co-Chair Global Antitrust Law Practice Group at Morrison & Foerster, and Megan E. Gerking Partner at Morrison & Foerster, “Charting a New Course for Antitrust: President Biden’s Executive Order Promoting Competition in the American Economy”, Client Alert, 7/14/2021, https://www.mofo.com/resources/insights/210714-president-biden-executive-order-antitrust.html

Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### It's non-binding AND will be blocked by the court and Congress

Lewis Brisbois 21, Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force. Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.

#### Even if, it’s moderate and restrained

Andrew Coopersmith 21, Managing Director of the Penn Program on Regulation, “The Biden Executive Order on Restructuring Competition”, The Regulatory Review, 7/26/2021, https://www.theregreview.org/2021/07/26/coopersmith-biden-executive-order-restructuring-competition/

Hovenkamp, while still supporting the consumer welfare basis for antitrust decision-making, sees some potential for applying antitrust law in new ways, especially in the regulation of Big Tech. “There are certain types of mergers that we’re not going after because our current merger guidelines don’t cover them, particularly mergers that are intended to eliminate competitors”—for example, Facebook buying Instagram—“or that entail other anticompetitive practices that are not collusive,” he explained.

Hovenkamp stated that he thinks that the U.S. already has effective tools such as the Sherman Act that can allow regulators to use “focused injunctions to stop the conduct without doing unnecessary harm … to the efficiencies and the network effects that have made the tech market so valuable.”

Part of what impressed Hovenkamp about Biden’s executive order is how moderate and un-political it seems. “While this was widely touted as a progressive document,” Hovenkamp noted, “the fact is that it preserves the centrality of economic concerns in antitrust. It never speaks of political power as an antitrust concern.” And it never uses the word “breakup” in reference to Big Tech.

#### It won’t derail recovery

Dr. Mark Zandi 21, Chief Economist of Moody's Analytics, PhD from the University of Pennsylvania, BS from the Wharton School, “Here's What the Delta Variant Means for the Economic Recovery”, CNN, 8/18/2021, https://www.cnn.com/2021/08/18/perspectives/economic-recovery-delta-variant/index.html

The US economy's immediate prospects appear inextricably tied to how the wave of infections and hospitalizations set off by the Delta variant of Covid-19 plays out. While it seems unlikely that the variant would become so disruptive that it undermines the recovery, there are mounting reasons to be worried that it may become a significant headwind to near-term economic growth.

#### Underlying strength will power through it

Simon Kennedy 21, Executive Editor for Economics at Bloomberg News, Degree in Economics and Journalism from the City University of London and Concordia University, “The Global Economy Is Shrugging Off the Delta Variant, For Now”, Bloomberg News, 8/11/2021, https://www.bloomberg.com/graphics/global-economic-recovery-q3-nowcast/

Even as delta risks loom, early signs from the third quarter show growth accelerating and inflation peaking after its recent jump, a reassuring sign for policy makers and investors worried about the risks of faltering demand and surging prices.

Global gross domestic product in the third quarter is on track for a 1.8% expansion from the previous three months, according to a “nowcast” from Bloomberg Economics. That’s an improvement from the solid pace in the previous quarter, and leans against fears that the delta variant will slow the recovery from last year’s recession.

At the same time, consumer prices are set to advance at a less troubling pace, as inflation in the U.S. peaks and then eases back from elevated summer readings. That will be welcomed by central bankers such as Federal Reserve Chair Jerome Powell who had bet the inflation spike would prove temporary.

“Nowcasts can’t see into the future and the delta variant means the picture could change quickly,” said Bjorn Van Roye and Tom Orlik, economists at Bloomberg Economics. “For now though, the data is flagging a positive start to the third quarter, with the global recovery accelerating, and inflation moderating.”

Back on Track

For the world as a whole, output is recovering back toward the pre-pandemic trajectory

Chart, line chart

Description automatically generated

From U.S. retail sales to China factory output, Bloomberg Economics nowcasts bring together hundreds of data points to provide a high frequency read on the pace of growth across major economies ahead of the official GDP data.

#### a) Benefits of antitrust require perfect application that’s impossible in practice---costly false positives are inevitable

Thomas A. Lambert 11, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri Law School, JD from the University of Chicago Law School, BA from Wheaton College, “The Roberts Court and The Limits of Antitrust”, Boston College Law Review, 52 B.C. L. Rev. 871, May 2011, Lexis

The enforcement provisions of the antitrust laws ensure that courts are routinely called upon to make these sorts of judgments in lawsuits by private plaintiffs. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a lawsuit in federal court. 25 To account for the fact that many antitrust violations occur in secret and thus escape condemnation, the statute seeks to optimize the deterrent effect of private enforcement by permitting each successful plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 What we end up with, then, is a body of law that is ultimately aimed at maximizing competition (understood in terms of market output), is quite general in its literal proscriptions, becomes "fleshed out" by generalist courts adjudicating private disputes, and is highly attractive to private plaintiffs seeking super-compensatory recoveries.

Taken together, these aspects of American antitrust law--all of which predate the Roberts Court by decades--render antitrust adjudication an inherently limited enterprise. In most challenges to novel business practices (and the prospect of treble damages guarantees that there will be many such challenges), whether liability is appropriate will be difficult to determine. Challenges to concerted conduct are frequently perplexing because a great many, perhaps most, output-enhancing business innovations involve cooperation among independent economic [\*877] actors, frequently competitors. 27 Challenges to unilateral conduct that may enhance market power are often hard to resolve because all actions that help a seller win business from its rivals--even pro-consumer actions like most price cuts--technically "exclude" those rivals. 28 Distinguishing output-reducing collusion from output-enhancing coordination (in section 1 cases) and unreasonable from reasonable exclusionary acts (in section 2 cases) can be exceedingly difficult. 29 To draw the necessary distinctions, judges and juries usually must weigh conflicting testimony from economic experts and reach conclusions on a number of complex subsidiary issues, such as the contours of the relevant market, the existence and magnitude of entry barriers, and the elasticity of demand and/or supply for the product at issue.

Antitrust adjudication is thus exceedingly, and inevitably, costly. 30 Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. 31 The fact finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is "unreasonable" because it reduces overall market output). 32 Taken together, these costs constitute the decision costs of an antitrust adjudication.

But those are not the only relevant costs. Given the complexity of the issues presented in antitrust cases, mistakes are inevitable, and those mistakes will themselves impose costs. On the one hand, when a fact finder wrongly acquits an anticompetitive practice, market power is created or enhanced, causing loss in the form of allocative inefficiency; [\*878] consumers are injured because output is lower and prices higher than they otherwise would be. 33 On the other hand, when a fact finder wrongly convicts a practice that is, in fact, output-enhancing, the market is denied the greater output (and lower prices) that practice would have produced, and a productive inefficiency results. Again, consumers are injured by reduced output, less product variety and innovation, and higher prices. Taken together, the productive inefficiencies spawned by false positives (hereinafter "Type I errors") and the allocative inefficiencies resulting from false negatives (hereinafter "Type II errors") constitute the error costs of antitrust adjudication. As explained below, there are good reasons to believe that the costs of false positives will exceed those of false negatives. 34 But, for present purposes, the important point to see is that antitrust adjudication will inevitably involve some mistakes, and those mistakes--be they false acquittals or false convictions--will impose social costs. 35

#### b) Follow-on---the plan creates the fear of future unrelated AND politicized amendments

Gregory E. Neppl 19, Partner at Foley and Lardner LLP, JD from Duke University School of Law, BA from Duke University, “Antitrust Enforcement “Reform” as a Political Issue: The Good, the Bad, and the Ugly”, 11/7/2019, https://www.foley.com/en/insights/publications/2019/11/antitrust-enforcement-reform-political-issue

New Merger Guidelines

New merger guidelines that reflect non-competition considerations (such as job security) would modify the consumer welfare standard discussed above and, in the absence of new statutory authority, likely contravene Section 7 of the Clayton Act as currently drafted. One problem with such “new guidelines” – unhinged from “competition” or “competitive effects” – is that successive administrations might amend (or reinterpret) such guidelines in response to whatever political issue du jour allowed that administration to win political power. While antitrust enforcement is not free of politics currently (i.e., the President does nominate the Assistant Attorney General (Antitrust Division), appoint the FTC Chairperson, and nominate FTC commissioners when openings arise, and the House and Senate subcommittees with antitrust enforcement oversight regularly hold hearings on high-profile mergers), both DOJ and FTC have a respectable history of pursuing enforcement efforts generally free from partisan politics. The issuance of new merger guidelines that reflect non-competition considerations may open the door to regular amendments to the guidelines and increase the likelihood that partisan politics could replace factual and economic analysis in merger evaluations. Such an outcome would not promote business confidence. Moreover, “bright-line” merger guidelines – setting caps for vertical mergers, horizontal mergers, and total market share – would ignore the fact that vertical foreclosure risks and “market power” are in practice not so easily quantifiable. The agencies already employ market share screens (such as HHI) to identify those mergers more likely to require close scrutiny. Bright-line caps, however, would necessarily threaten certain mergers that are competitively neutral, or even pro-competitive, through resulting efficiencies and synergies.

#### c) Negativity bias is dominant---firms think the worst

Tom Barkin 19, President and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy”, 7/11/2019, https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

#### 3---The plan’s abrupt expansion creates major uncertainty that disrupts business planning

Alden F. Abbott 21, Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University, “Competition Policy Challenges for a New U.S. Administration: Is The Past Prologue?”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [12] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [13] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [14] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [15] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [16] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### ‘Should’ means ‘must’ and requires immediate legal effect.

Justice Summers 94, Judge on the Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11/8/1994, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13

4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling *in praesenti*.[14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn14) The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.[16](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn16)

[FOOTNOTE]

[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "*Should*" not only is used as a "present indicative" synonymous with *ought* but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an *obligation* *and to be more than advisory*); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, [802 P.2d 813](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=813) (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an *obligation* to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) *In praesenti* means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is *presently* or *immediately effective*, as opposed to something that *will* or *would* become effective *in the future [in futurol*]. See Van Wyck v. Knevals, [106 U.S. 360](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

#### 4---Changing the legal standards of antitrust spills over to crush otherwise surging growth.

Adam Thierer 21; February 25; Senior Research Fellow with the Mercatus Center at George Mason University; The Hill, “Open-Ended Antitrust is an Innovation Killer,” <https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer>

Unfortunately, the calls for more bureaucracy and regulation emanating from all corners of the political world could have an unintended consequence: discouraging the sort of vibrant innovation and consumer choice that made America’s tech companies household names across the globe.

Sen. [Amy Klobuchar](https://thehill.com/people/amy-klobuchar) (D-Minn.) is leading one charge. Klobuchar, who chairs the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, [recently introduced](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf) the “Competition and Antitrust Law Enforcement Reform Act.” This sweeping measure seeks to expand the powers and budgets of antitrust regulators at the Federal Trade Commission and the Department of Justice. It also includes new filing requirements and potentially hefty civil fines.

The most important feature is the proposed change to the legal standard by which regulators approve business deals. It would allow the government to stop any deal that creates an “appreciable risk of materially lessening competition,” and it also defines exclusionary behavior as, “conduct that materially disadvantages one or more actual or potential competitors.”

These may sound like simple, semantic tweaks, but – much like some of the other policy ideas currently circulating – they would upend decades of settled law and create a sea change in U.S. antitrust enforcement. This change could undermine business dynamism, innovation and investment in ways that inhibit the global competitiveness of U.S. businesses.

Critics of merger and acquisition (M&A) activity by large tech firms include not only Sen. Klobuchar but also Republicans such as Sen. [Josh Hawley](https://thehill.com/people/joshua-josh-hawley) (R-Mo.). Hawley recent [offered an amendment](https://www.axios.com/josh-hawley-big-tech-merger-ban-1467081d-216c-45a2-9d09-9416dfbde330.html) to a budget bill that would preemptively prohibit mergers and acquisitions by dominant online firms. Klobuchar and Hawley believe that M&A skews the market in favor of today’s largest firms, entrenching their market power and discouraging innovation.

History teaches a different lesson. Consider DirecTV and Skype, both once considered innovative market leaders in their respective fields of satellite TV and internet telephony. Both firms stumbled, however, and they might not even be with us today without creative business deals. DirecTV has been partially or fully controlled by Hughes Electronics, News Corp., Liberty Media and now AT&T. Skype has swapped hands multiple times, moving from eBay, to a private investment firm and now to Microsoft.

These were complex deals, and some didn’t work, leading to divestitures. But each was a learning experience that illustrated how dynamic media and technology markets can be with firms constantly searching for value-added arrangements that serve their customers and shareholders. If we make this type of activity presumptively illegal, we’re imagining that government bureaucrats are better suited to make these calls than businesspeople and the consumers who choose whether or not to buy the product.

Worse yet, legal tests like those Klobuchar proposes – “conduct that materially disadvantages potential competitors” – are remarkably open-ended and could be easily abused. The system will be gamed by opponents of deals for business reasons. They will claim that their own failure to attract investors or customers must all be the fault of more creative rivals. That’s a recipe for cronyism and economic stagnation.

Those who worry about today’s largest tech giants becoming supposedly unassailable monopolies should consider how similar fears were expressed not so long ago about other tech titans, many of which we laugh about today. Just 14 years ago, headlines [proclaimed](https://www.technewsworld.com/story/55185.html) that “MySpace Is a Natural Monopoly,” and [asked](https://www.theguardian.com/technology/2007/feb/08/business.comment), “Will MySpace Ever Lose Its Monopoly?” We all know how that “monopoly” ceased to exist.

At the same time, pundits [insisted](https://www.marketwatch.com/story/apple-should-pull-the-plug-on-the-iphone) “Apple should pull the plug on the iPhone,” since “there is no likelihood that Apple can be successful in a business this competitive.” The smartphone market of that era was viewed as completely under the control of BlackBerry, Palm, Motorola and Nokia. A few years prior to that, critics lambasted the merger of AOL and TimeWarner as a new [corporate “Big Brother”](http://www.ojr.org/ojr/workplace/1017966109.php?__cf_chl_jschl_tk__=67a5f6a101935b8e3586ca48216d31ba6d4e03de-1612467283-0-AXvbGCtUx-p_N4T-8_2m8OHezQUhQ9kelg9-pVuD6IzKvFfXrllJujU9ERvjqjyIsAeCovUw9bfZqq75_NYasBM87SnQT_027hDJOhjXeowzK1QQH_7vcmr1tS4XgCGC_NNx6UGbAvVgcJNFhSkqkVKKeRJ-BjdDA7Vus-gwmr7wQXcS7KKfTtHyqxdRfureL9alpZHU2IJcbbdYaZpTjTrfcJHCKa8pIZcdiScjaRJmON9X1Ip20Vuv7tyDHbZSvcrn88WrY_9N_qBpKvZhQ4PAe90w5Fx5iHjjNIzoNMKSpToTFGLbPdqawgge9PVubSQbkS7xXDXxCBMA2Sh-Y_U) that would decimate digital diversity and online competition.

Today, we know these tales of the apocalypse ended up instead becoming case studies in the continuing power of “creative destruction.” New innovations and players emerged from many unexpected quarters, decimating whatever dreams of continued domination the old giants once had.

Today’s biggest players face similar pressures, and it’s better to let rivalry and innovation emerge organically, not through the wrecking ball of heavy-handed antitrust regulation.