# 1AC

### 1AC

#### Contention One is Food Security:

#### Ag markets are heavily consolidated through anticompetitive behavior---threatening the stability of the US supply chains.

Diana L Moss and Laura Alexander 20, President of the American Antitrust Institute and Vice President of Policy at the American Antitrust Institute. “When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains,” American Antitrust Institute, 5-7-2020, https://www.antitrustinstitute.org/work-product/when-covid-19-is-the-symptom-and-not-the-disease-consolidation-competition-and-breakdowns-in-food-supply-chains/

The integrity and stability of the food system is a matter of national health, safety, and security. Disruption of the meat or any other food supply chain is potentially catastrophic. But few analysts have looked beyond the immediate COVID-19 pandemic to isolate one of the deep-rooted causes of weakness, or even breakage, in supply chains. Were our food processing, manufacturing, and distribution markets more competitive, the current crisis (and government intervention) would be neither necessary nor warranted. Much like AAI’s recent commentary on COVID-19 and consolidation in medical equipment markets, this commentary explains how a lack of competition can imperil the stability and security of the food system.[3]

THE ROLE OF COMPETITION IN ENSURING STABLE, RESILIENT FOOD SUPPLY CHAINS

COVID-19-related disruptions are, in part, a symptom of underlying competition problems in our food system, and an early warning sign of the harms yet to come. Competition benefits consumers and producers in myriad ways. These include fair prices, high quality products and services, and incentives to innovate. Another key benefit of competition is promoting diversity and redundancy in sources of agricultural inputs, processing, manufacturing, and distribution. This promotes resiliency and stability in the interconnected markets that form the food system.

Supply chains are routinely subjected to shocks such as extreme weather, disease, and conflict.[4] But those that feature robust competition at various levels are far more likely to ensure the reliable and stable distribution of essential food products. If some parts of the supply chain are disrupted, competition works to ensure that rival suppliers fill the void to meet demand.

As the COVID-19 pandemic illustrates, food supply chains can fail the “resiliency” test. While a number of factors may account for this, we cannot ignore the role played by the wave of consolidation that has fundamentally reshaped the food system in the U.S. over the last two decades. Consolidation has diminished competition in the agricultural inputs, processing, manufacturing, and distribution segments. As the closures of meat processing plants demonstrate, when the few large firms that control these critical segments fail, the supply chain can break.

#### Lackluster antitrust merger enforcement efforts and favorable law allows for firms to engage in anticompetitive mergers.

Diana L Moss and Laura Alexander 20, President of the American Antitrust Institute and Vice President of Policy at the American Antitrust Institute. “When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains,” American Antitrust Institute, 5-7-2020, https://www.antitrustinstitute.org/work-product/when-covid-19-is-the-symptom-and-not-the-disease-consolidation-competition-and-breakdowns-in-food-supply-chains/

Merger control is designed to prevent acquisitions that are likely to substantially lessen competition. This includes acquisitions of head-to-head rivals; customers or suppliers; and potential rivals. Vigorous enforcement prevents harmful outcomes by stopping illegal mergers in their “incipiency.” The U.S. antitrust agencies have historically divided up the food supply chain for the purposes of reviewing food and agriculture mergers. The Federal Trade Commission (FTC) reviews most proposed transactions involving the downstream part of the supply chain, including food manufacturing and retail grocery.[9]

The U.S. Department of Justice (DOJ) reviews mergers in the upper part of the supply chain, such as food processing (e.g., grain milling and meat packing), producers (e.g., cattle feeders and chicken growers), and biotechnology inputs such as GMO traits, seeds, and agrochemicals. It is not clear how the FTC and DOJ coordinate with each other in reviewing mergers along the supply chain, so that the proverbial “right hand knows what the left hand is doing.”

IS MERGER ENFORCEMENT KEEPING UP WITH CONSOLIDATION IN FOOD?

Between 1998 and 2018, almost 1,300 mergers in the processing, manufacturing, and food distribution sectors were reportable to the U.S. antitrust agencies under federal guidelines.[10] Government data reveals that about one-quarter of those transactions were cleared to either the DOJ or FTC for further review. About one-quarter of those “clearances,” in turn, received a request from either agency for additional information. This is a slightly higher rate of “Second Requests” for food mergers, as measured by the percentage of total clearances that received a Second Request, than for mergers across all sectors in the economy. The majority of these deals involved consolidation in the middle part of the supply chain—food processing and manufacturing.

Only a small fraction of the food mergers that were cleared to the DOJ and FTC between 1998 and 2018 were actually challenged by the government. Merger challenges can result in a number of outcomes: successfully enjoining a merger, unsuccessfully enjoining a merger (which then proceeds), forced abandonment of a transaction, and an order containing requirements to remedy competitive harms raised by a deal. The rate at which the government challenged food mergers, as measured by the percentage of total clearances that were challenged, is just below the average across all sectors. More than one-half of the merger deals that were challenged by the agencies were in the retail grocery segment where significant competition has been eliminated over time. The remainder include mergers in beef packing, poultry processing, and dairy, other food products, and broadline foodservice distribution.

Two major government wins were the DOJ’s successful challenge to the merger of two of the largest beef packers (JBS and National Beef) in 2009 and the FTC’s move to block the merger of the two largest broadline food distributors (Sysco and US Foods) in 2015.[11] U.S. consumers and producers need more of this type of aggressive, successful enforcement. But a major failure was the FTC’s approval of the merger of Safeway and Albertsons. The merger was allowed to proceed, subject to the divestiture of almost 150 stores to a regional west-coast grocer, Haggen. The failure of Haggen to maintain the divested stores led to their shuttering only a few months later.[12] In 2019, the DOJ declined to challenge the acquisition of Iowa Premium by one of the largest packers, National Beef, a deal that was opposed by numerous advocacy groups. The merger was projected to adversely affect the important cash market, which determines the base price for cattle sold on contracts or formulas.[13]

As shown in the figure below, over the last 20 years, the intensity with which the agencies have looked harder at food mergers through the Second Request process appears to have waned. The apparent downward trend in Second Requests over the past two decades is troubling. It may signal chronic resource constraints at the agencies. But it also likely reflects the view that has dominated enforcement for the last four decades. Namely, most deals are viewed as pro-competitive because cost-savings and consumer benefits are claimed to outweigh any anticompetitive, harmful effects.

Chart, line chart

Description automatically generated

Regardless of the reason, U.S. consumers are still faced with a swath of mergers that have created larger integrated companies that reach to almost every part of the supply chain. These food goliaths can exercise their market power to suppress competition, which is problematic in its own right. But as the COVID-19 crisis has demonstrated, the lack of competition in food processing, manufacturing, and distribution has also created a fragile and unreliable supply chain.

POLICING ANTICOMPETITIVE CONDUCT IN THE FOOD SYSTEM

It should come as no surprise that in a supply chain with less and less competition, other violations of the antitrust laws, including collusion and monopolization, become more commonplace. Indeed, the dominant firms and oligopolies in food processing, manufacturing, and grocery have given rise to numerous concerns. The public and private antitrust cases in the food industry in recent years reflect both the rising incidence of troubling behavior and the challenges and limitations of antitrust enforcement.

The DOJ, for example, has prosecuted violations of Sections 1 and 2 of the Sherman Act in almost 20 cases in the food industry over the last 20 years. Notably, however, the Sherman Act claims appeared to be an afterthought in the majority of these cases, which were motivated principally by kickback schemes that defrauded the public. Competitive injury, and core antitrust concerns such as collusion or exclusionary conduct, did not feature prominently.[14] Smithfield, one of the largest pork processors in the U.S., which was acquired by the Chinese food behemoth Shuanghui International in 2013, was charged with violations on two separate occasions involving failure to comply with requirements under the Hart Scott Rodino Act before purchasing stock in a rival and pursuing an acquisition.[15] DOJ has launched several cartel investigations in food over the last two decades, but, with few exceptions, those investigations have yet to yield indictments or civil complaints.[16]

#### These anticompetitive mergers force farmers into unsustainable farming practices, specifically monocultures

Patrick Woodall 18, Research Director at Food & Water Watch, “Monopoly Power Corrodes Choice and Resiliency in the Food System,” The Antitrust Bulletin, 63.2, https://doi.org/10.1177/0003603X18770063

But already high and increasing levels of economic concentration in the agricultural and food sectors impact far more than consumer and farmer prices. Consolidation has substantially curtailed the choices available to consumers and farmers. Grocery stores now teem with an illusory cornucopia of different products, but the vast majority of the supermarket items are manufactured by a few firms with dominant market positions.

Horizontal and vertical concentration in the agriculture sector has constrained farmers’ choices and autonomy. Concentration in the seed and fertilizer industries has significantly limited farmers’ cultivation options. Perhaps more importantly, the larger, vertically integrated agribusinesses have pushed farmers to increase the size, scale, and intensity of their farms in order to sell their crops or livestock and maintain economic viability. This limits farmers’ options and autonomy to control production decisions on their farms.

#### Lack of variety in ag inputs means our entire supply line can be wiped out by a single crop disease

Martin 13. DePaul JD, “Seed Savers v. Monsanto: Farmers Need a Victory for Wilting Biodiversity,” 24 DEPAUL J. ART TECH. & INTELL. PROP. L 95, HeinOnline

IV. “PLAGUE OF SAMENESS”: BIODIVERSITY CONSEQUENCES Many describe the increasing genetic uniformity as a “plague of sameness,” overtaking vast fields of crops with monoculture agriculture.’16 The economic effect of this “plague of sameness” is enormous: “pest[] and plant diseases are . . . estimated to exact a toll of $20-33 billion each year nationwide.”’ However, the dangers of this plague are not limited to economic concerns. When crops are threatened by pests or disease, genetically uniform crops could be wiped out. Without the ability to locate genetic resistance in any varieties, the world could lose entire major food crops, such as soybeans, corn, rice, and wheat. A. Genetic Resistance According to Cary Fowler and Pat Mooney, “today’s plant breeder will search for one major gene to confer resistance for the new variety.”’ One-gene resistance provides that there will be only “one line of defense” against pests and diseases.’59 When overcome by pest or disease, the gene can no longer provide resistance. 6 0 Breeding, then, is a “step by step evasion of the pathogen,” and the use of one-gene resistance lacks an “ultimate vision of permanent or stabilized resistance.”’6 ‘ In contrast, the traditional “landrace” confers resistance on a new variety as the product of a large number of genes working together.’6 2 The resistance conferred by the traditional “landrace” is long-lasting, because these varieties have survived among pests and diseases “in the center of diversity.”’ 3 Additionally, heirloom varieties, discussed above, are used to breed insect, disease, and drought tolerance into modern crops.’” In contrast to the conventional three- or four-way hybrid varieties, GE varieties, such as Roundup Ready soybeans, are “single-cross hybrids.”1 65 The “plague of sameness” becomes even riskier when farmers plant pure line varieties instead of a mixture of varieties, or where a “few successful crop varieties replace the great diversity of crop and types found in farmers’ fields.” 66 Monoculture agriculture is prominent in developed countries,’16 largely because of the predictability that single cross varieties offer farmers and the agricultural industry.16 1 With this monoculture agriculture, however, when part of the uniform crop is wiped out by pests or diseases, the entire crop is wiped out.’69 Furthermore, when the neighbor farmer plants the same variety, his crop is also wiped out.’ Finally, “when virtually every farmer plants the same variety or group of varieties, the risk becomes dangerous.””’ The lack of resistance and genetic variability leads to the vulnerability of crops to pests and diseases. B. Pest Management First, the “plague of sameness,” or monoculture agriculture, threatens crop resistance to pests. Specifically, “[p]athogens or insect pests that mutate to overcome a crop’s innate resistance or to escape the effects of fungicides or pesticides, together with monoculture conditions, heighten the risk that such novel pests could rapidly spread and cause great losses in crop yield and quality.”’ 72 In recent years, the percentage of annual crop lost to insects has doubled,’7 3 and global crop loss due to pests.’74 The rise of pest problems is an estimated 30-40% of potential yield is also evident through increased pesticide use: from 1945 to 1975, the amount of pesticide employed rose from less than 200 million pounds to 1600 million pounds.’75 Genetic mutations in these pathogens or pests require quick replacement with varieties that have resistance. 76 These replacements require the screening of gene resources to find new resistance. 7 7 However, with a narrowing genetic resource base, varieties that have resistance are slowly disappearing. C. Vulnerability to Diseases Second, monoculture agriculture increases vulnerability to disease causing widespread damage. Two historical examples show the dangers of monoculture agriculture in the face of disease. Ireland’s potato blight in 1846 that led to the Great Famine, was a result of a lack of crop diversity.”’7 The Irish were dependent on the potato for food, and about 90% of the potatoes eaten were a variety called “Lumper. “l79 When blight infected the potatoes, the Lumper variety lacked resistance in the tubers.’” This lack of resistance and the uniformity of the potatoes allowed the blight to dramatically wipe out Ireland’s potato supply. Potatoes “were the first crop in modem history to be devastated by lack of resistance.””’ Not only were potatoes nearly lost as a major food crop, but 1 to 2 million Irish people died or left Ireland as a result of the famine.18 2 In more recent history, the U.S. corn leaf blight of the 1970s provides another example of the dangers of “monoculture” agriculture. Similar to the uniformity of the Irish potato crop, in 1970, almost 85% of U.S. cornfields were planted with one corn variety, Texas cytoplasmic male sterile.’ This type of corn was highly susceptible to a new type of fungus that wiped out 15% of the corn crop and resulted in a $1 billion loss in the United States.’84 While the U.S. hybrid corn industry only “[took] one year to correct the problem and get resistant varieties back on the market,” Fowler and Mooney point out that biodiversity crises such as these raise many “unanswered questions.”’ One of the most troubling questions is: with such a narrow genetic base, will the seed industry be able to find a quick solution the next time a crisis occurs?’86 A potential soybean “rust” crisis in 2004, with a disease “that could ruin a field in two weeks, and . .. up to 80 percent of yield,” spurred plant scientists to screen seed samples in the USDA U.S. crop gene banks.’ Scientists identified some soybean varieties with weak resistance, but mostly found that none was fully immune to the rust.’ As a result, the scientists had to find resistance in wild relatives of soybeans from China, Taiwan, and Australia-countries where soybeans were first domesticated.’89 The dangers of the “plague of sameness” show that crop diversity needs to be preserved for future generations. The Genetic Resources Conservation Program has found that “[n]early every major U.S. food or fiber crop is battling pests and diseases against which it has no resistance.”’ Without resistant varieties from a diverse genetic resource pool, future plant scientists will not be able to locate or introduce resistance into modem crops. As a result, “without these infusions of genetic diversity, food production is at risk from epidemics and infestations.””’ The Food and Agriculture Organization of the United Nations has found that the Earth’s population will grow by 50% in the next fifty years; thus, “crop diversity must be managed in a manner that promotes productivity with reducing diversity.” 92

#### Extinction

Dr. Bruce E. Tonn 21, Professor of Political Science at the University of Tennessee, PhD in Urban and Regional Planning from Northwestern University, BS in Civil Engineering from Stanford University, Senior Researcher in the Environmental Sciences Division of Oak Ridge National Laboratory, Anticipation, Sustainability, Futures and Human Extinction: Ensuring Humanity’s Journey into The Distant Future, p. 33

This second class of existential risks is primarily found in coupled human–natural systems. These could be seen as extinction-level events in and of themselves, but I think they could be initiating or contributory events to human extinction (again see the scenario at the end of Chapter 4). Technically, we also know how to prevent these events or at least how to adapt to them. Here are four to consider:

(1) Significant loss of biodiversity – It is well documented that human behavior is causing a sixth mass species extinction on the earth.44 This is due to many factors including destruction of habitat, spreading of disease (e.g., Chytrid fungus in amphibians), pollution, and climate change. The risk to humanity is that if too many of the species become extinct, global ecosystems could crash, disrupting essential balances of species needed to support ecosystem services and maybe even threatening global balances of oxygen and nitrogen.45

(2) *Agricultural systems failure* – There are numerous additional potentially catastrophic risks facing the world’s agricultural systems. For example, the world currently relies upon only about 14 different crops.46 Unanticipated and unchecked microbial infections could wipe out major portions of the food supply. Soil erosion, extended droughts, fires, and various other natural disasters could also seriously impact the food supply and cause widespread famine.47 At least 75% of the world’s food is dependent in some way on bees for pollination. Currently, the world’s bee population is under extreme stress.48 Many worry that a catastrophic collapse of the world’s bee population could lead to widespread famine and collapse in human population.

#### Only the plan can rebuild resiliency to withstand inevitable food supply shocks.

Patrick Woodall 18, Research Director at Food & Water Watch, “Monopoly Power Corrodes Choice and Resiliency in the Food System,” The Antitrust Bulletin, 63.2, https://doi.org/10.1177/0003603X18770063

Concentration can also reduce quality and compromise safety. According to the U.S. Department of Agriculture (USDA), high concentration levels allow the largest companies to extract more economic value from food purchases, but “consumers typically bear the burden, paying higher prices for goods of lower quality.”7 The substantial scale combined with highly concentrated chokepoints make the food system vulnerable to potentially larger, more widespread food safety problems.

The scale of plants in a heavily consolidated industry means that a single problem in one larger plant can now impact the entire food chain. In 2011, Cargill voluntarily recalled more than 36 million pounds of ground turkey after an illness outbreak caused by antibiotic-resistant salmonella.8 The recall represented several months’ worth of production from a single plant in Arkansas in an industry where the top four firms processed 55% of turkey meat.9 In total, 136 people across thirty-four states were infected, causing thirty-seven hospitalizations and one death, disproportionately caused by the bacteria’s resistance to antibiotics.10

Food safety problems at even modestly sized suppliers can infiltrate a significant portion of the food system, when ingredients pass through the highly consolidated food processing sector. In 2007, the Food and Drug Administration (FDA) received reports of 17,000 pet illnesses, including 4,000 dog and cat deaths, believed to be the result of melamine contamination in imported Chinese gluten ingredients used to make pet food.11 Sixty million packages of over 150 brands of pet food were recalled in the United States, the largest recall in history—and all the pet food originated from one Kansas facility that had used the contaminated wheat gluten.12

A year later, the problem of consolidation and chokepoints struck the human food supply. A 2008 peanut butter salmonella outbreak led to nine deaths and more than 700 illnesses in forty-seven states.13 The problem began at a single company’s filthy plants that manufactured 3% of peanut products—but the company’s peanut ingredients passed through a highly consolidated food industry, leading to a recall of over 3,600 products.14

#### Food insecurity sparks AND drives conflict in numerous hotspots.

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 (Figure 5.3).

Chart

Description automatically generated

Each of the world’s food ‘powderkeg regions’ is described below, in ascending order of risk.

United States

In one sense, food wars have already broken out in the United States, the most overfed country on Earth. Here the issue is chiefly the growing depletion of the nation’s mighty groundwater resources, especially in states using it for food production, and the contest over what remains between competing users – farmers, ranchers and Native Americans on the one hand and the oil, gas and mining industry on the other. Concern about the future of US water supplies was aggravated by a series of savage droughts in the early twentyfirst century in the west, south and mid-west linked to global climate change and declining snowpack in the Rocky Mountains, both of which affect not only agriculture but also the rate at which the nation’s groundwater reserves recharge.

‘Groundwater depletion has been a concern in the Southwest and High Plains for many years, but increased demands on our groundwater resources have overstressed aquifers in many areas of the Nation, not just in arid regions’, notes the US Geological Survey.24

Nine US states depend on groundwater for between 50 per cent and 80 per cent of their total freshwater supplies, and five states account for nearly half of the nation’s groundwater use. Major US water resources, such as the High Plains aquifers and the Pacific Northwest aquifers have sunk by 30–50 metres (100–150 feet) since exploitation began, imperilling the agricultural industries that rely on them. In the arid southwest, aquifer declines of 100–150 metres have been recorded (Figure 5.4).

[Figure omitted]

To take but one case, the famed Ogallala Aquifer in the High Plains region supports cropping industries worth more than US $20 billion a year and was in such a depleted state it would take more than 6000 years to replace by natural infiltration the water drawn from it by farmers in the past 150 years. As it dwindles, some farmers have tried to kick their dependence on groundwater – other users, including the growing cities and towns of the region, proceeded to mine it as if there was no tomorrow.25 A study by Kansas State University concluded that so far, 30 per cent of the local groundwater had been extracted and another 39 per cent would be depleted by the mid century on existing trends in withdrawal and recharge.26

Over half the US population relies on groundwater for drinking; both rural and urban America are at risk. Cities such as New Orleans, Houston and Miami face not only rising sea levels – but also sinking land, due to the extraction of underlying groundwater. In Memphis, Tennessee, the aquifer that supplies the city’s drinking water has dropped by 20 metres.

Growing awareness of the risk of a nation, even one as large and technologically adept as the USA, having insufficient water to grow its food, generate its exports and supply its urban homes has fuelled tensions leading to the eruption of nationwide protests over ‘fracking’ for oil and gas – a process that can deplete or poison groundwater – and the building of oil pipelines, which have a habit of rupturing and also polluting water resources. The boom in fracking and piping is part of a deliberate US policy to become more self-reliant in fossil fuels.27 Thus, in its anxiety to be independent of overseas energy suppliers, the USA in effect decided to barter away its future food security for current oil security – and the price of this has been a lot of angry farmers, Native Americans and concerned citizens.

The depletion of US groundwater coincides with accelerating climate risk, which may raise US temperatures by as much as 4–5 C by 2100, leading to major losses in soil moisture throughout the US grain belt, and the spread of deserts in the south and west. Food production will also be affected by fiercer storms, bigger floods, more heatwaves, an increase in drought frequency and greater impacts from crop and livestock diseases. In such a context, it is no time to be wasting stored water.

The case of the USA is included in the list of world ‘hot spots’ for future food conflict, not because there is danger of a serious shooting war erupting over water in America in the foreseeable future, but to illustrate that even in technologically advanced countries unforeseen social tensions and crises are on the rise over basic resources like food, land and water and their depletion. This doesn’t just happen in Africa or the Middle East. It’s a global phenomenon.

Furthermore, the USA is the world’s largest food exporter and any retreat on its part will have a disproportionate effect on world food price and supply. There is still plenty of time to replan America’s food systems and water usage – but, as in the case of fossil fuels and climate, rear-guard action mounted by corporate vested interests and their hired politicians may well [freeze] ~~paralyse~~ the national will to do it. That is when the US food system could find itself at serious risk, losing access to water in a time of growing climatic disruption, caused by exactly the same forces as those depleting the groundwater: the fossil fuels sector and its political stooges. The probable effect of this will, in the first instance, be a decline in US meat and dairy production accompanied by rising prices and a fall in its feedgrain exports, with domino effects on livestock industries worldwide.

The flip-side to this issue is that America’s old rival, Russia, is likely to gain in both farmland and water availability as the planet warms through the twentyfirst century – and likewise Canada. Both these countries stand to prosper from a US withdrawal from world food markets, and together they may negate the effects of any US food export shortfalls.

Central and South America

South America is one of the world’s most bountiful continents in terms of food production – but, after decades of improvement, malnutrition is once more on the rise, reaching a new peak of 42.5 million people affected in 2016.28 ‘Latin America and the Caribbean used to be a worldwide example in the fight against hunger. We are now following the worrisome global trend’, said regional FAO representative Julio Berdegué.29

Paradoxically, obesity is increasing among Latin American adults, while malnutrition is rising among children. ‘Although Latin America and the Caribbean produce enough food to meet the needs of their population, this does not ensure healthy and nutritious diets’, the FAO explains. Worsening income inequality, poor access to food and persistent poverty are contributing to the rise in hunger and bad diets, it adds.30

‘The impact of climate change in Latin America and the Caribbean will be considerable because of its economic dependence on agriculture, the low adaptive capacity of its population and the geographical location of some of its countries’, an FAO report warned.31

Emerging food insecurity in Central and Latin America is being driven by a toxic mixture of failing water supplies, drying farmlands, poverty, maladministration, incompetence and corruption. These issues are exacerbated by climate change, which is making the water supply issue worse for farmers and city people alike in several countries and delivering more weather disasters to agriculture.

* Mexico has for centuries faced periodic food scarcity, with a tenth of its people today suffering under-nutrition. In 2008 this rose to 18 per cent, leading to outbreaks of political violence.32 In 2013, 52 million Mexicans were suffering poverty and seven million more faced extreme hunger, despite the attempts of successive governments to remedy the situation. By 2100 northern Mexico is expected to warm by 4–5 C and southern Mexico by 1.5–2.5 C. Large parts of the country, including Mexico City, face critical water scarcity. Mexico’s cropped area could fall by 40–70 per cent by the 2030s and disappear completely by the end of the century, making it one of the world’s countries most at risk from catastrophic climate change and a major potential source of climate refugees.33
* The vanishing lakes and glaciers of the high Andes confront montane nations – Bolivia, Peru and Chile especially – with the spectre of growing water scarcity and declining food security. The volume of many glaciers, which provide meltwater to the region’s rivers, which in turn irrigate farmland, has halved since 1975.34 Bolivia’s second largest water body, the 2000 square kilometres Lake Poopo, dried out completely.35 The loss of water is attributed partly to El Niño droughts, partly to global warming and partly to over-extraction by the mining industries of the region. Chile, with 24,000 glaciers (80 per cent of all those in Latin America) is feeling the effects of their retreat and shrinkage especially, both in large cities such as the capital Santiago, and in irrigation agriculture and energy supply. Chile is rated by the World Resources Institute among the countries most likely to experience extreme water stress by 2040.36
* Climate change is producing growing water and food insecurity in the ‘dry corridor’ of Central America, in countries such as El Salvador, Guatemala and Honduras. Here a combination of drought, major floods and soil erosion is undermining efforts to raise food production and stabilise nutrition.
* Food production in Venezuela began falling in the 1990s, and by the late 2010s two thirds of the population were malnourished; there was a growing flood of refugees into Colombia and other neighbouring countries. The food crisis has been variously blamed on the Venezuelan government’s ‘Great Leap Forward’ (modelled on that of China – which also caused widespread starvation), a halving in Venezuela’s oil export earnings, economic sanctions by the USA, and corruption. However, local scientists such as Nobel Laureate Professor Juan Carlos Sánchez warn that climate impacts are already striking the densely populated coastal regions with increased torrential rains, flooding and mudslides, droughts and hurricanes, while inland areas are drying out and desertifying, leading to crop failures, water scarcity and a tide of climate refugees.37 These factors will tend to deepen food insecurity towards the mid century. Venezuela’s climate refugees are already making life more difficult for neighbouring countries such as Colombia.
* Deforestation in the Brazilian Amazon has, in recent decades, removed around 20 per cent of its total tree cover, replacing it with dry savannah and farmland. At 40 per cent clearance and with continued global warming, scientists anticipate profound changes in the local climate, towards a drying trend, which will hammer the agriculture that has replaced the forest.38 Brazil has already wiped out the oncevast Mata Atlantica forest along its eastern coastline, and this region is now drying, with resultant water stress for both farming and major cities like São Paulo. Brazil’s outlook for 2100 is for further drying – tied to forest loss as well as global climate change – increased frequency of drought and heatwaves, major fires and acute water scarcity in some regions. Moreover, as the Amazon basin dries out, it will release vast quantities of CO2 from its peat swamps and rainforest soils. These are thought to contain in excess of three billion tonnes of carbon and could cause a significant acceleration in global warming, affecting everyone on Earth.39

Latin America is the world capital of private armies, with as many as 50 major guerrilla groups, paramilitaries, terrorist, indigenous and criminal insurgencies over the past half century – exemplified in familiar names like the Sandanistas (Nicaragua), FARC (Colombia) and Shining Path (Peru).40 Many of these drew their initial inspiration from the international communist movement of the mid twentieth century, while others are right-wing groups set up in opposition to them or else represent land rights movements of disadvantaged groups. However, all these movements rely for oxygen on simmering public discontent with ineffectual or corrupt governments and lack of fair access to food, land and water generally. In other words, the tendency of South and Central America towards internal armed conflict is supercharged significantly by failings in the food system which generate public anger, leading to sympathy and support for anyone seen to be challenging the incumbent regimes. This is not to suggest that feeding every person well would end all insurgencies – but it would certainly take the wind of popular support out of a lot of their sails. In that sense the revolutionary tendency of South America echoes the preconditions for revolution in France and Russia in the eighteenth and twentieth centuries.

Central Asia

The risk of wars breaking out over water, energy and food insecurity in Central Asia is high.41 Here, the five main players – Kazakhstan, Uzbekistan, Turkmenistan, Tajikistan and Kyrgyzstan – face swelling populations, crumbling Soviet-era infrastructure, flagging resource cooperation, a degrading landscape, deteriorating food availability and a changing climate. At the heart of the issue and the region’s increasingly volatile politics is water: ‘Without water in the region’s two great rivers – the Syr Darya and the Amu Darya – vital crops in the downstream agricultural powerhouses would die. Without power, life in the upstream countries would be unbearable in the freezing winters’, wrote Rustam Qobil.42

Central Asia’s water crisis first exploded onto the global consciousness with the drying of the Aral Sea – the world’s fourth largest lake – from the mid 1960s43, following the damming and draining of major rivers such as the Amu Darya, Syr Darya and Naryn. It was hastened by a major drought in 200844 exacerbated by climate change, which is melting the ‘water tower’ of glacial ice stored in the Tien Shan, Pamir and Hindu Kush mountain ranges that feed the region’s rivers. The Tien Shan alone holds 10,000 glaciers, all of them in retreat, losing an estimated 223 million cubic metres a year. At such a rate of loss the region’s rivers will run dry within a generation.45 Lack of water has already delivered a body blow to Central Asia’s efforts to modernise its agriculture, adding further tension to regional disputes over food, land and water.

‘Water has always been a major cause of wars and border conflicts in the Central Asian region’, policy analyst Fuad Shahbazov warned. This potential for conflict over water has been exacerbated by disputes over the Fergana valley, the region’s greatest foodbowl, which underwent a 32 per cent surge in population in barely ten years – while more and more of it turned to desert.46

The Central Asian region is ranked by the World Resources Institute as one of the world’s most perilously water-stressed regions to 2040 (Figure 5.6). With their economies hitting rock bottom, corrupt and autocratic governments that prefer to blame others for their problems and growing quarrels over food, land, energy and water, the ‘Stans’ face ‘a perfect storm’, Nate Shenkkan wrote in the journal Foreign Policy. 47 Increased meddling by Russia and China is augmenting the explosive mix: China regards Central Asia as a key component of its ‘Belt and Road’ initiative intended to expand its global influence, whereas Russia hopes to lure the region back into its own economic sphere. Their rival investments may help limit some of the problems faced by Central Asia – or they may unlock a fresh cycle of political feuding, turmoil and regime change.48

A 2017 FAO report found 14.3 million people – one in every five – in Central Asia did not have enough to eat and a million faced actual starvation, children especially. It noted that after years of steady improvement, the situation was deteriorating. This combination of intractable and deteriorating factors makes Central Asia a serious internal war risk towards the mid twentyfirst century, with involvement by superpowers raising the danger of international conflict and mass refugee flight.

The Middle East

The Middle East is the most water-stressed region on Earth (see Figure 5.5 above). It is ‘particularly vulnerable to climate change. It is one of the world’s most water-scarce and dry regions, with a high dependency on climate-sensitive agriculture and a large share of its population and economic activity in flood-prone urban coastal zones’, according to the World Bank.49

The Middle East – consisting of the 22 countries of the Arab League, Turkey and Iran – has very low levels of natural rainfall to begin with. Most of it has 600 millimetres or less per year and is classed as arid. ‘The Middle East and North Africa [MENA] is a global hotspot of unsustainable water use, especially of groundwater. In some countries, more than half of current water withdrawals exceed what is naturally available’, the Bank said in a separate report on water scarcity.50

[Figure omitted]

‘The climate is predicted to become even hotter and drier in most of the MENA region. Higher temperatures and reduced precipitation will increase the occurrence of droughts. It is further estimated that an additional 80–100 million people will be exposed by 2025 to water stress’, the Bank added.

The region’s population of 300 million in the late 2010s is forecast to double to 600 million by 2050. Average temperatures are expected to rise by 3–5 C and rainfall will decrease by around 20 per cent. The result will be vastly increased water stress, accelerated desertification, growing food insecurity and a rise in sea levels displacing tens of millions from densely populated, low-lying areas like the Nile delta.51 The region is deemed highly vulnerable to climate impacts, warns a report by the UN Development Programme. ‘Current climate change projections show that by the year 2025, the water supply in the Arab region will be only 15 per cent of levels in 1960. With population growth around 3 per cent annually and deforestation spiking to 4 per cent annually... the region now includes 14 of the world’s 20 most water-stressed countries.’ 52

The Middle East/North Africa (MENA) region has 6 per cent of the world’s population with only 1.5 per cent of the world’s fresh water reserves to share among them. This means that the average citizen already has about a third less water than the minimum necessary for a reasonable existence – many have less than half, and populations are growing rapidly. Coupled with political chaos and ill governance in many countries, growing religious and ethnic tensions between different groups – often based on centuries-old disputes – a widening gap between rich and poor and foreign meddling by the USA, Russia and China, shortages of food, land and water make the Middle East an evident cauldron for conflict in the twentyfirst century.

Growing awareness of their food risk has impelled some oil-rich Arab states into an international farm buying spree, purchasing farming, fishing and food processing companies in countries as assorted as South Sudan, Ethiopia, the Philippines, Ukraine, the USA, Poland, Argentina, Australia, Brazil and Morocco. In some food-stressed countries these acquisitions have already led to riots and killings.53 The risk is high that, by exporting its own food–land–water problems worldwide, especially to regions already facing scarcity, the Middle East could propagate conflicts and government collapses around the globe. This is despite the fact that high-tech solar desalination, green energy, hydroponics, aquaponics and other intensive urban food production technologies make it possible for the region to produce far more of its own food locally, if not to be entirely self-sufficient.

Dimensions of the growing crisis in the Middle East include the following.

* Wars have already broken out in Syria and Yemen in which scarcity of food, land and water were prominent among the tensions that led to conflict between competing groups.
* Food, land and water issues feed into and exacerbate already volatile sentiment over religion, politics, corruption, mismanagement and foreign interference by the USA, China and Russia.
* The introduction of cheap solar-powered and diesel pumps has accelerated the unsustainable extraction of groundwater throughout the region, notably in countries like Libya, Egypt, Saudi Arabia and Morocco.54
* Turkish building of new dams to monopolise waters flowing across its borders is igniting scarcity and potential for conflict with downstream nations, including Iraq, Iran and Syria.55
* Egypt’s lifeline, the Nile, is threatened by Ethiopian plans to dam the Blue Nile, with tensions that some observers consider could lead to a shooting war.56
* There are very low levels of water recycling throughout the region, while water use productivity is about half that of the world as a whole.
* There is a lack of a sense of citizen responsibility for water and food scarcity throughout the region.
* Land grabs around the world by oil-rich states are threatening to destabilise food, land and water in other countries and regions, causing conflict.
* A decline in oil prices and the displacement of oil by the global renewables revolution may leave the region with fewer economic options for solving its problems.
* There is a risk that acquisition of a nuclear weapon by Iran may set off a nuclear arms race in the region with countries such as Saudi Arabia, Syria and possibly Turkey following suit and Israel rearming to stay in the lead. This would translate potential food, land and water conflicts into the atomic realm.

Together these issues, and failure to address their root causes, make the Middle East a fizzing powder keg in the twentyfirst century. The question is when and where, not whether, it explodes – and whether the resulting conflict will involve the use of weapons of mass destruction, including nuclear, thus affecting the entire world.

China

China is the world’s biggest producer, importer and consumer of food. Much of the landmass of the People’s Republic of China (PRC) is too mountainous or too arid for farming, but the rich soils of its eastern and southern regions are highly productive provided sufficient water is available and climate impacts are mild. Those, however, are very big ‘ifs’.

In 1995, American environmentalist Lester R. Brown both irked and aroused the PRC Communist Party bosses with a small, hard-hitting book entitled Who Will Feed China? Wake-Up Call for a Small Planet. 57 In it he posited that Chinese population growth was so far out of control that the then-agricultural system could not keep up, and China would be forced to import vast amounts of grain, to the detriment of food prices and availability worldwide. His fears, so far, have not been realised – not because they were unsoundly based, but because China managed – just – to stay abreast of rising food demand by stabilising and subsidising grain prices, restoring degraded lands, boosting agricultural science and technology, piping water from south to north, developing high-intensity urban farms, buying up foreign farmland worldwide and encouraging young Chinese to leave the country. What Brown didn’t anticipate was the economic miracle that made China rich enough to afford all this. However, his essential thesis remains valid: China’s food supply will remain on a knife-edge for the entire twentyfirst century, vulnerable especially to water scarcity and climate impacts. If the nation outruns its domestic resources yet still has to eat, it may well be at the expense of others globally.

Some western commentators were puzzled when China scrapped its 35-year ‘One Child Policy’ in 2015, but in fact the policy had done its job, shaving around 300 million people off the projected peak of Chinese population. It was also causing serious imbalances, such as China’s huge unmarried male surplus. Furthermore, rising urbanisation and household incomes meant Chinese parents no longer wanted large families, as in the past. Policy or no policy, China’s birthrate has continued to fall and by 2018 was 1.6 babies per woman – well below replacement, lower than the USA and nearly as low as Germany. Its population was 1.4 billion, but this was growing at barely 0.4 per cent a year, with the growth due at least in part to lengthening life expectancy.58

For China, female fertility is no longer the key issue. The critical issue is water. And the critical region is the north, where 41 per cent of the population reside. Here surface and groundwaters – which support not only the vast grain and vegetable farming industries of the North China Plain but also burgeoning megacities like Beijing, Tianjin and Shenyang – have been vanishing at an alarming rate. ‘In the past 25 years, 28,000 rivers have disappeared. Groundwater has fallen by up to 1–3 metres a year. One consequence: parts of Beijing are subsiding by 11 cm a year. The flow of the Yellow River, water supply to millions, is a tenth of what it was in the 1940s; it often fails to reach the sea. Pollution further curtails supply: in 2017 8.8 per cent of water was unfit even for agricultural or industrial use’, the Financial Times reported.59 On the North China Plain, annual consumption of water for all uses, including food production, is about 27 billion cubic metres a year – compared with an annual water availability of 22 billion cubic metres, a deficit that is made up by the short-term expedient of mining the region’s groundwater.60

To stave off disaster, the PRC has built a prodigious network of canals and pipelines from the Yangtse River in the water-rich south, to Beijing in the water-starved north. Hailed as a ‘lifeline’, the South–North Water Transfer Project had two drawbacks: first, the fossil energy required to pump millions of tonnes of water over a thousand kilometres and, second, the fact that while the volume was sufficient to satisfy the burgeoning cities for a time, it could not supply and distribute enough clean water to meet the needs of irrigated farming over so vast a region in the long run, nor meet those of its planned industrial growth.61 Oft-mouthed ‘solutions’ like desalination or the piping of water from Tibet or Russia face similar drawbacks: demand is too great for the potential supply and the costs, both financial and environmental, prohibitive.

China is already among the world’s most water-stressed nations. The typical Chinese citizen has a ‘water footprint’ of 1071 cubic metres a year – three quarters of the world average (1385 cubic metres), and scarcely a third that of the average American (2842 cubic metres).62 Of this water, 62 per cent is used to grow food to feed the Chinese population – and 90 per cent is so polluted it is unfit to drink or use in food processing. Despite massive investment in water infrastructure and new technology, many experts doubt that China can keep pace with the growth in its demand for food, at least within its own borders, chiefly because of water scarcity.63 Adding to the pressure is that China’s national five-year plans for industrialisation demand massive amounts more water – demands that may confront China with a stark choice between food and economic growth. ‘The Chinese government is moving too slowly towards the Camel Economy. It has plans, incentives for officials; it invests in recycling, irrigation, pollution, drought resistant crops; it leads the world in high voltage transmission (to get hydro, wind and solar energy from the west of China). None of this is sufficient or likely to be in time’, the Financial Times opined.64

As the world’s leading carbon emitter, China is more responsible for climate change than any other country. It is also, potentially, more at risk. The main reason, quite simply, is the impact of a warming world on China’s water supply – in the form of disappearing rivers, lakes, groundwater and mountain glaciers along with rising sea levels. To this is coupled the threat to agriculture from increasing weather disasters and the loss of ecosystem services from a damaged landscape.65

China is thus impaled on the horns of a classic dilemma. Without more water it cannot grow its economy sufficiently to pay for the water-conserving and food-producing technologies and infrastructure it needs to feed its people. Having inadvertently unleashed a population explosion with its highly successful conversion to modern farming systems, the challenge for China now is to somehow sustain its food supply through the population peak of the mid twentyfirst century, followed by a managed decline to maybe half of today’s numbers by the early twentysecond century. It is far from clear whether the present approach – improving market efficiency, continuing to modernise agricultural production systems, pumping water, trying to control soil and water losses and importing more food from overseas – will work.66

China has pinned its main hopes on technology to boost farm yields and improve water distribution and management. Unfortunately, it has selected the unsustainable American industrial farming model to do this – which involves the massive use of water, toxic chemicals, fertilisers, fossil fuels and machines. This in turn is having dreadful consequences for China’s soils, waters, landscapes, food supply, air, climate and consumer health. Serious questions are now being asked whether such an approach is not digging the hole China is in, even deeper. Furthermore, some western analysts are sceptical whether the heavy hand of state control is up to the task of generating the levels of innovation required to feed China sustainably.67

Plan B, which is to purchase food from other countries, or import it from Chinese-owned farming and food ventures around the world, faces similar difficulties. Many of the countries where China is investing in food production themselves face a slow-burning crisis of land degradation, water scarcity, surging populations and swelling local food demand. By exporting its own problems, China is adding to their difficulties. While there may be some truth to the claim that China is helping to modernise food systems in Africa, for example, it is equally clear that the export of food at a time of local shortages could have dire consequences for Africans, leading to wars in Africa and elsewhere. How countries will react to Chinese pressure to export food in the face of their own domestic shortages is, as yet, unclear. If they permit exports, it could prove catastrophic for their own people and governments – but if they cut them off, it could be equally catastrophic for China. Such a situation cannot be regarded as anything other than a menace to world peace.

Around 1640, a series of intense droughts caused widespread crop failures in China, leading to unrest and uprisings which, in 1644, brought down the Ming Dynasty. A serious domestic Chinese food and water crisis today – driven by drought, degradation of land and water and climate change in northern China coupled with failure in food imports – could cause a re-run of history: ‘The forthcoming water crisis may impact China’s social, economic, and political stability to a great extent’, a US Intelligence Assessment found. ‘The adverse impacts of climate change will add extra pressure to existing social and resource stresses.’ 68

Such events have the potential to precipitate tens, even hundreds, of millions of emigrants and refugees into countries all over the world, with domino consequences for those countries that receive them. Strategic analysts have speculated that tens of millions of desperate Chinese flooding into eastern Russia, or even India, could lead to war, including the risk of international nuclear exchange.69

Against such a scenario are the plain facts that China is a technologically advanced society, with the foresight, wealth and capacity to plan and implement nationwide changes and the will, if necessary, to enforce them. Its leaders are clearly alert to the food and water challenge – and its resolution may well depend on the extent of water recycling they are able to achieve. As to whether the PRC can afford the cost of transitioning from an unsustainable to a sustainable food system, all countries have a choice between unproductive military spending and feeding their populace. A choice between food or war. It remains to be seen which investment China favours.

However, it is vital to understand that the problem of whether China can feed itself through the twentyfirst century is not purely a Chinese problem. It’s a problem, both economic and physical, for the entire planet – and it is thus in everyone’s best interest to help solve it. For this reason, China is rated number 3 on this list of potential food/war hotspots.

Africa

Food wars – that is, wars in which food, land and water play a significant contributing role – have been a constant in the story of Africa since the mid twentieth century, indeed, far longer. In a sense, the continent is already a microcosm of the world of the twentyfirst century as climate change and resource scarcity combine with rapid population growth to ratchet up the tensions that lead competing groups to fight, whether the superficial distinctions between them are ethnic, religious, social or political.

We have examined the particular cases of Rwanda, South Sudan and the Horn of Africa – but there are numerous other African conflicts, insurgencies and ongoing disturbances in which food, land and water are primary or secondary triggers and where famine is often the outcome: Nigeria, Congo, Egypt, Tunisia, Libya, Mali, Chad, the Central African Republic, the Maghreb region of the Sahara, Mozambique, Cote d’Ivoire and Zimbabwe have all experienced conflicts in which issues of access to food, land and water were important drivers and consequences.

The trajectory of Africa’s population in the first two decades of the twentyfirst century implies that the number of its people could quadruple from 1.2 billion in 2017 to 4.5 billion by 2100 (Figure 5.6). If fulfilled, this would make Africans 41 per cent of the world population by the end of the century. The UN Population Division’s nearer projections are for Africans to outnumber Chinese or Indians at 1.7 billion by 2030, and reach 2.5 billion in 2050, which represents a doubling in the continent’s inhabitants in barely 30 years.70 While African fertility rates (babies per woman) remain high by world standards – 4.5 compared with a global average of 2.4 – they have also fallen steeply, from a peak of 8.5 babies in the 1970s. Furthermore, the picture is uneven with birthrates in most Sub-Saharan countries remaining high (around five to six babies/woman), while those of eight, mainly southern, countries have dropped to replacement or below (i.e. under 2.1). As has been the case around the world, birth rates tend to drop rapidly with the spread of urbanisation, education and economic growth – whereas countries which slide back into poverty tend to experience rising birthrates. Food access is a vital ingredient in this dynamic: it has been widely observed that better-fed countries tend to have much lower rates of birth and population growth, possibly because people who are food secure lose fewer infants and children in early life and thus are more open to family planning. So, in a real sense, food sufficiency holds one of the keys to limiting the human population to a level sustainable both for Africa and the planet in general.

[Figure omitted]

Forecasting the future of Africa is not easy, given the complexity of the interwoven climatic, social, technological and political issues – and many do not attempt it. However, the relentless optimism of the UN and its food agency, the FAO, is probably not justified by the facts as they are known to science – and may have more to do with not wishing to give offence to African governments or discourage donors than with attempting to accurately analyse what may occur. Even the FAO acknowledges however that food insecurity is rising across Sub-Saharan Africa as well as other parts.

In 2017, conflict and insecurity were the major drivers of acute food insecurity in 18 countries and territories where almost 74 million food-insecure people were in need of urgent assistance. Eleven of these countries were in Africa and accounted for 37 million acutely food insecure people; the largest numbers were in northern Nigeria, Democratic Republic of Congo, Somalia and South Sudan

the agency said in its Global Report on Food Crises 2018.71

The FAO also noted that almost one in four Africans was undernourished in 2016 – a total of nearly a quarter of a billion people. The rise in undernourishment and food insecurity was linked to the effects of climate change, natural disasters and conflict according to Bukar Tijani, the FAO’s assistant director general for Africa.72

Even the comparatively prosperous nation of South Africa sits on a conflict knife-edge, according to a scientific study: ‘Results indicate that the country exceeds its environmental boundaries for biodiversity loss, marine harvesting, freshwater use, and climate change, and that social deprivation was most severe in the areas of safety, income, and employment, which are significant factors in conflict risk’, Megan Cole and colleagues found.73

In the Congo, home to the world’s second largest tropical forest, 20 years of civil war had not only slain five million civilians but also decimated the forests and their ecological services on which the nation depended. Researchers found evidence that reducing conflict can also help to reduce environmental destruction: ‘Peace-building can potentially be a win for nature as well, and... conservation organizations and governments should be ready to seize conservation opportunities’. 74

As the African population doubles toward the mid century, as its water, soils, forests and economic wealth per capita dwindle, as foreign corporations plunder its riches, as a turbulent climate hammers its herders and farmers – both industrial and traditional – the prospect of Africa resolving existing conflicts and avoiding new ones is receding. The mistake most of the world is making is to imagine this only affects the Africans. The consequences will impact everyone on the planet.

A World Bank study has warned that 140 million people will have to leave just three regions of the world as climate refugees before 2050 – and the vast majority of these, some 86 million, would be displaced from their homes in Sub-Saharan Africa.75 The second decade of the twentyfirst century has already witnessed a blow-out in the number of Sub-Saharan Africans fleeing north, across the desert into the already dangerously overstressed region of North Africa. From there many have headed by boat for Europe, with shocking loss of life on the way – up to 5000 deaths due to drowning in a single year. The number of Africans fleeing across the Mediterranean has fluctuated, climbing as high as a third of a million people (in 2016) with most of them headed for Italy, followed by Greece, Cyprus and Spain. By this time Europe already had a population of five million Sub-Saharans.76

It is worth recalling, for a moment, that a food failure in the North African grainbowl in the third and fourth centuries was a primary factor in the collapse and demolition of the Roman Empire, from Britain to Asia Minor.

The risk of a tsunami of people attempting to escape Africa for Europe, and to a lesser degree the Middle East, in coming decades is building with ominous intensity. The stress in SubSaharan Africa is already forcing conditions in North African countries closer to crisis point. Were their food systems to fail in domino-succession, the scale of potential movement of desperate people into Europe can only be guessed – but is certainly in the range of tens to hundreds of millions. Large enough, in other words, to swamp the nations of Italy, Spain and Greece and eliminate their governments altogether, forcing many of their own people in turn to flee into northern Europe. Given the crisis caused by a million Syrians fleeing into Europe in 2013, the consequences for European stability and the world economy of an African eruption tens or hundreds of times the size can only be imagined.

The good news is that, in the view of the World Bank, up to 80 per cent of Africa’s climate refugees could be prevented from leaving their homes in the first place by timely climate and development (i.e. food, land and water) action taken by the rest of the world. The bad news, however, is that most of the world’s large oil and coal companies and their climate-denying puppet governments remain implacably opposed to the sort and scale of action necessary, preferring to pull the global house down on their own heads.

Canadian ecologist Paul Chefurka argued in a far-sighted paper that the outlook for Africa by 2040 was grim, even if the continent were able to lock in a 1 per cent year-on-year increase in farm yields. Even then Africa might still be forced to spend half its wealth – an almost impossible proportion – on food imports by 2050, assuming sufficient affordable food was available globally to supply them. Chefurka argued the solutions were:

First, the developed world must get its act together when it comes to foreign aid. Our lack of performance with regard to the Millennium Development Goals is beyond contemptible. A minuscule sliver of the GDP of the richest nations could help prevent a catastrophic outcome for hundreds of millions of people and scores of countries. That we have failed our African brothers and sisters so egregiously is a shame that should follow all of us into the afterlife.

Second, and most importantly, we must develop an immediate crash program of education and contraception in all the regions at risk from this gathering storm. Africa may be the first, but the conditions are ripe for much of South Asia to follow in their footsteps. We must blanket Africa with schools and family planning clinics.77

There is substance to both points. Unfortunately expanding conventional farming with a view to feeding all the Africans in 2050 and 2100 is unlikely to succeed. It is a twentieth-century solution to a twentyfirst-century problem, even with more advanced farming technologies added. It would unleash cataclysmic soil and water loss, gross pollution, the spread of deserts and animal, plant and human diseases, accelerate climate change (through land clearing and the use of fossil fuels and fertilisers) and extinguish the last of Africa’s wildlife. The combined outcome of this would be war, potentially on a continent-wide scale – and it is for this reason Africa ranks second on this list of world food and war hotspots.

Where the true solutions to Africa’s and the world’s food challenges may lie is dealt with in the concluding chapters of this book.

South Asia

The constellation of burgeoning food demand, water scarcity, degrading land, a turbulent climate, social, political and religious feuding and rampant militarisation make the region of South Asia – India, Pakistan, Bangladesh and Sri Lanka – the most dangerous of all for civilisation during the twentyfirst century.

The population of the region has more than tripled since the 1960s. India alone is looking at a population of 1.73 billion by 2050, Pakistan at 306 million, Bangladesh 202 million and Sri Lanka at 23 million – a combined total approaching 2.3 billion.78 The Indo-Gangetic Plain is the bread-basket of the three largest countries and currently feeds more than 900 million from both surface and groundwater.

‘India is facing a perfect storm in managing water. Centuries of mismanagement, political and institutional incompetence, indifference at central, state and municipal levels, a steadily increasing population that will reach an estimated 1.7 billion by 2050, a rapidly mushrooming middle class demanding an increasingly protein-rich diet that requires significantly more water to produce – together, these are leading the country towards disaster', says Professor Asit Biswas of the National University of Singapore.79 ‘India is now facing a water situation that is significantly worse than any that previous generations have had to face. All Indian water bodies within and near population centres are now grossly polluted... Not a single Indian city can provide clean water that can be consumed from the tap on a 24x7 basis’, he adds. This was underlined by a warning from the Indian Supreme Court in 2018 that the capital, New Delhi – population 25 million – was on track to run out of groundwater completely.80 Facing similar water scarcity were 20 other Indian cities, including Bangalore and Hyderabad – heartbeat of the Indian high-tech boom – menacing the lives and jobs of 600 million Indians.81

Free electricity and cheap diesel pumps led to an explosion in the extraction of groundwater across the Indo-Gangetic plain. ‘The best estimate is that at present India uses 230–250 cubic kilometres of groundwater each year. This accounts for about one-quarter of the global groundwater use. More than 60% of irrigated agriculture and 85% of domestic water use now depends on groundwater.’ Over large areas, India’s groundwater levels have been falling precipitously, in places at rates of a metre or more a year, since the start of the twentyfirst century and scientists fear its reserves will be largely exhausted by 2050.82

The World Resources Institute, which keeps a hawk-like gaze on global water issues, notes that more than half of India is already water stressed, affecting more than 600 million people – and the situation will become extremely grave towards 2040 (Figure 5.7).83

Climate change is only making matters worse for South Asia – the rising intensity of droughts, floods and heatwaves threatens to undermine the region’s fragile ability to feed itself. Indeed, according to some projections, parts will be so hot as to become uninhabitable and unfarmable.84 Recent climate modelling identified India as the world’s second most vulnerable country for climate-related hunger, and Bangladesh third, with the situation worsening towards 2 C of global warming.85 The Indian Ministry of Finance concurs, warning that climate could shrink agricultural incomes by as much as 25 per cent in unirrigated farmland and 18 per cent in irrigated areas by 2100.86

[Figure omitted]

South Asia’s main water reserve, the glacial ice of the Hindu Kush and Himalaya which supports two billion people, is in dire straits, according to a study by 210 scientists. A third of it will be gone by 2100, in a ‘climate crisis you haven’t heard of’, said lead author Philippus Wester. Its loss due to global warming holds catastrophic consequences for rivers, groundwater, food production and the cities that rely on it.87

‘Climate change is likely to have a detrimental effect on South Asia out to 2030 and beyond, mainly because of its ability to exacerbate one of South Asia’s biggest challenges: an expanding population and the challenge of feeding, housing, clothing, watering and employing it’, wrote analyst Benjamin Walsh.88 Melting glaciers, increased evaporation and swelling cities are all intensifying existing food and water insecurity and, since climate change cannot be prevented in the short run, governments had better prepare for it, he said. In this sense, Walsh and Biswas tender similar advice: whether or not South Asia can ride out the ‘perfect storm’ will depend on the competence and determination of hitherto somewhat inept governments in taking the essential steps to conserve water and find new ways to produce food. The subcontinent’s existing food and water model is broken and cannot survive the mid century.

On the positive side is the enthusiasm with which South Asia has embraced renewable energy and the IT revolution, expressed in the region’s strong economic growth. These demonstrate that vast and rapid national and regional changes are possible. Water, land and food, however, present far more intractable problems – social, political and technical – on which age-old disputes over religion, ethnicity and caste lie like a pall.

Since India and Pakistan partitioned in 1947, there has been ongoing low-level conflict over the waters of the Indus and the territory of Kashmir. Pakistan considers India is stealing its water and trying to assert hegemony through dam-building, while India claims Pakistan is losing water due to climate change: the scarcer water becomes for either country, the more the tensions escalate. Both sides are heavily armed: India has 2.1 million soldiers under arms, and Pakistan 644,000. Both nations have 120+ nuclear warheads. Between them, they spend US$65 billion a year on their militaries.89 How close they have been to open war is highlighted by legal expert Dr Waseem Quereshi: ‘The tension over water conflicts between India and Pakistan has been soaring. India has threatened that it will scrap the IWT [Indus Waters Treaty] entirely. In response, Pakistan has stated that such a revocation of a bilaterally agreed treaty would be considered an act of war’. 90

Large-scale food, land and water failures anywhere on the Indian subcontinent could spark immense refugee movements in the tens or hundreds of millions, capable of obliterating neighbour countries and igniting wars. They are liable to be on a scale that dwarfs the Syrian refugee problem into insignificance, with worldwide repercussions. For example, some 130 million people on the subcontinent inhabit low-lying coastal regions that will be under the sea by 210091, and that is but a single dimension of the climate–water crisis. The World Bank rates the Indian subcontinent the world’s second most vulnerable region for enforced climate migration, with 40 million climate refugees alone in India by 2050.92 These estimates take no account of the scale of migration that could result from major failures in food or water, or people fleeing resulting conflicts.

The scenario of major collapse in the South Asian food and water system is so appalling that no government or agency, as yet, seems prepared even to contemplate its possibility, or to risk the displeasure of South Asian governments and peoples by speaking openly about it. As a result, the world at large is doing little to forestall or prevent it. However, for whatever the vox populi is worth, when the website Debate.org asked readers to vote on the question “Will India Collapse?”, 76 per cent of respondents (mostly Indians) were of the view that it would.93 The Oslo Peace Research Institute, in a rather more structured attempt to predict the likelihood of future conflicts based on past behaviour, rated Pakistan, India, Afghanistan and Sri Lanka among the countries more likely to face wars up to 2050.94

The great issue for humanity is South Asia’s combined arsenal of 250+ nuclear weapons. Though many of these are thought to be ‘battlefield’ or tactical nukes (as opposed to city busters), there are enough of them to cause a worldwide famine affecting everybody and lasting several years. This insight arises out of the increasing sophistication of global climate models, which can now describe the impact of nuclear release on the global climate system with far greater precision than ever before. Meteorologist Alan Robock from Rutgers University and physicist Brian Toon from the University of Colorado have devoted 30 years to projecting the effects of nuclear war. They estimate that a limited nuclear exchange between India and Pakistan would throw up at least five million tonnes of dust and smoke from burning forests and incinerated cities, lofting it into the high atmosphere where it will linger for up to 20 years. In climatic terms, this would be the equivalent of an asteroid impact on Earth or a large volcanic eruption, they said – enough to unleash a worldwide ‘nuclear winter’. 95

‘We put it into a NASA climate model and found it would be the largest climate change in recorded human history’, Brian Toon told a journalist. ‘The basic physics is very simple. If you block out the Sun, it gets cold and dark at the Earth’s surface’. 96

He continued: ‘We hypothesized that if each country used half of their nuclear arsenal, that would be 50 weapons on each side. We assumed the simplest bomb, which is the size dropped on Hiroshima and Nagasaki – a 15 kiloton bomb. The answer is the global average temperature would go down by about 1.5 degrees Celsius. In the middle of continents, temperature drops would be larger and last for a decade or more’. The effects of this snap cooling on agriculture worldwide were then calculated. The answer was equally chilling: harvests would crash by 20–40 per cent for five years, and for the next five years, linger 10–20 per cent below the pre-war norm. This would result in malnourishment, if not outright starvation, for most of the world’s population (Figure 5.8).

Diagram, engineering drawing

Description automatically generated

Such an event would be more severe than the Little Ice Age of the eighteenth century – which was, it may be recalled, a likely contributing factor in the hunger that led to the French Revolution – or the cool period that brought down the Roman Empire in the fourth century. In today’s overcrowded world it would unleash global hunger, reducing the average daily caloric intake from 2900 to 1900–2000 calories or fewer, which is borderline malnutrition. For people already hungry, such an outcome would be fatal.

Yet that is not the worst of it. A report by International Physicians for the Prevention of Nuclear War (IPPNW) concluded that China, lying immediately downwind of India/Pakistan, would be worst affected by the nuclear winter effects of even a limited atomic war in South Asia. Chinese winter wheat production would fall by up to half, and the rice crop by 21 per cent.

Two billion people in India and China would starve within months, government in both countries would probably disintegrate and, in an echo of their own and Roman histories, the remnants of society would doubtless be riven among local warlords. Most of the nations of Southeast, West, North and Central Asia on their borders would be swept away before the tide of people fleeing the catastrophe.97

How such events would play out for the rest of the world are not easy to predict – but, in all likelihood, the panic occasioned by rising global hunger, soaring global food prices and the loss of two of its largest traders would crash the world economy, toppling more governments and igniting further civil and international conflict, some of it potentially nuclear.

Thus, even a relatively limited nuclear exchange, such as between India and Pakistan, could bring civilisation as we know it to an end. From this brief assessment it can be seen that the Indian subcontinent, more than any region on Earth, holds the key to the future of world food security and hence, the fate of civilisation in this century. For this reason, the South Asian region is rated as the Number One Risk on this list, in terms of food, land and water insecurity and conflict risk, above all others.

The Human Tide

Since lack of food, or fear of it, is a primary motive for people to leave their homes, the number of refugees and displaced people worldwide offers stark testimony to the increasing pressures facing human civilisation and its food supply, as we bang up against the finite limits of the planet we inhabit.

The actual number of refugees and internally displaced people more than doubled in the first two decades of the twentyfirst century, from 32 million in the late 1990s to 68.5 million in 2018.98 Furthermore, the proportion of the world population in flight rose nearly tenfold, from 0.1 per cent to almost 1 per cent, meaning – as the World Economic Forum pointed out – that around one person in every hundred has fled their home.99 In 2018, the UN High Commissioner for Refugees noted these were ‘the highest levels of displacement on record’, that nearly half of all refugees were children under 18 and that, on average, 20 people were being displaced every minute.

On top of this the UN reported 258 million ‘economic migrants’ in 2017,100 mostly from Asia and mainly educated people who had foreseen potential trouble in their homelands, including China and India, and had the resources to move themselves and their families out of harm’s way and to other more secure parts of the globe. Together, then, almost a third of a billion human beings now roam the planet every year in search of new homes and opportunities, freedom from war or hunger. Such a vast number of people already on the road – equivalent to the entire population of the USA – gives some inkling of the colossal people movements which could eventuate from large scale conflicts over food, land and water as the century advances.

It is time to face the fact that movements of a billion humans or more are now entirely possible over a comparatively short time – even though many may die in the process.

In case anyone should consider such vast movements to be impossible, the World Bank notes that the number of global tourists alone already exceeds 1.25 billion a year – which simply goes to illustrate the capacity of modern transport systems.101 Most of those tourists travel by air, road, rail or passenger vessel – however, it should be noted the world also has 52,000 merchant ships, 312,000 general aviation aircraft, 4.6 million fishing boats and tens of millions of larger recreational craft102 capable of being commandeered by fleeing people, should their needs be fierce enough.

As mentioned before, the Bank anticipated that at least 140 million ‘climate refugees’ may be forced to quit just three highly vulnerable regions by the mid twentyfirst century: SubSaharan Africa, South Asia and Latin America.103 In the Bank’s analysis, the main drivers for these immigrants, it should be noted, are factors such as water scarcity, crop failure, sea-level rise and storm surges – not the wars these impacts may also ignite. They would make the exodus much larger. Furthermore, the Bank’s analysis does not include other at-risk regions such as China, Central Asia and the Middle East/North Africa.

The FAO, in its report on the state of world food security,104 commented as follows.

* ‘The number of conflicts is... on the rise. Exacerbated by climate-related shocks, conflicts seriously affect food security and are a cause of much of the recent increase in food insecurity.’
* ‘Conflict is a key driver of situations of severe food crisis and recently re-emerged famines, while hunger and undernutrition are significantly worse where conflicts are prolonged and institutional capacities weak.’

It is important to understand that such disasters are preventable, with sufficient forward recognition of the driving factors, early implementation of suitable preventative strategies and with the co-operation of the global community. At present this cooperation is fragmentary, and few countries feel responsible for preventing the kinds of events described in this chapter, especially those taking place in distant, overseas countries. Yet it is increasingly in their own interests to do so, in view of unavoidable consequences for themselves, both physical and economic.

In the twentyfirst century the risk of mass migration and conflict driven by insecurity of food, land and water is higher than in any previous age of human history. The World Economic Forum (WEF) rated enforced mass migration as the sixth most likely of its top 30 global risks in 2018 and the second worst in terms of its societal impact. It identified ‘profound social instability’ as the risk factor most highly connected to the prevailing range of global trends.105 Furthermore, the ominous and destabilising rise of right-wing populism and renascent fascism in western countries, especially, is in part a direct response to rising fears of mass immigration.106

Eight out of the WEF’s top ten risks of 2018 related to global food security. Furthermore, the World Food Programme (WFP), in its report At the Root of Exodus: Food Security, Conflict and International Migration, drew a direct line between food, war and mass migration: ‘The WFP study found that countries with the highest level of food insecurity, coupled with armed conflict, have the highest outward migration of refugees. Additionally, when coupled with poverty, food insecurity increases the likelihood and intensity of armed conflicts; something that has clear implications for refugee outflows’, it said.107

Food, land and water must therefore now be viewed as strategic components of defence and international security as elemental as naval fleets, air power, armies or weapons. There is no logic to arming ourselves against the possibility of global conflict if, by ignoring its causes, we inadvertently set in motion the very machinery that drives it. Neglecting the strategic importance of food, land and water will deliver increased risk of war and mass migration – while the opposite is also true: attending to them can yield a vital peace dividend by extinguishing or damping down an important casus belli. This issue is developed in Chapter 7.

#### The plan’s market wide approach solves---it changes the institutional and legal framework for evaluating mergers

Peter Carstensen et al 08, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL, MADISON, SENATOR HERBERT H. KOHL (D-WI) WITNESSES PANEL I: DOUGLAS ROSS, SPECIAL COUNSEL FOR AGRICULTURE, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, DC; PETER CARSTENSEN, , WI.; PANEL II: WESLEY M. BATISTA, CEO, NORTH AMERICA, JBS SWIFT AND COMPANY, GREELEY, CO; STEVE HUNT, CEO, U.S. PREMIUM BEEF, KANSAS CITY, MO; BILL BULLARD, CEO, RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, BILLINGS, MT; DILLON M. FEUZ, PH.D., DEPARTMENT OF ECONOMICS, UTAH STATE UNIVERSITY, LOGAN, UT; MICHAEL STUMO, LEGAL COUNSEL, ORGANIZATION FOR COMPETITIVE MARKETS, LINCOLN, NE; DAVID BALTO, SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS “HEARING OF THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS OF THE SENATE JUDICIARY COMMITTEE; SUBJECT: CONCENTRATION IN AGRICULTURE AND AN EXAMINATION OF THE JBS SWIFT ACQUISITIONS”, 5-7-2008, govinfo.gov/content/pkg/CHRG-110shrg45064/html/CHRG-110shrg45064.htm, Lexis

MR. ROSS: –- but I would like to begin with a brief statement now.

The Department of Justice is committed to maintaining an active involvement in the agricultural sector and to protecting competition there through aggressive antitrust enforcement as warranted. The department takes very seriously the concerns expressed by agricultural producers about competitive problems. In antitrust analysis and enforcement, the department carefully considers market power issues both on the sell side, which is often seen as monopoly, and on the buy side described as monopsony.

The department hears and takes into account monopsony or buy-side market power as a particular concern in merger enforcement for agricultural producers who often sell their products to large agribusinesses. The department has brought a number of enforcement actions in the agricultural sector in recent years and has undertaken special outreach to the agricultural community. We have, for many years, regularly consulted the Department of Agriculture, to obtain the benefit of their expertise in our agricultural work.

The department's legal authority in this area is the antitrust law. Other agencies have other legal authority and agricultural policy is far bigger than antitrust. In our area of authority, we are constantly on the lookout for possible antitrust violations and will not hesitate to take appropriate enforcement action when warranted.

My statement demonstrates that we have been active in enforcing the antitrust laws in the agricultural sector, having filed several important cases to remedy anticompetitive effects that were likely to resolve from proposed mergers and acquisitions, and to stop collusive anticompetitive practices that adversely affected farmers and competition in this key sector of the economy.

I look forward to your questions about our work. Thank you.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you, Mr. Ross.

Mr. [Carstensen](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0).

MR. [CARSTENSEN](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Wow, he was able to get through that in only two-and-a-half minutes. No professor is going to be able to top that performance.

I am truly honored to be offered this opportunity to express my views on the state of antitrust enforcement in markets related to agriculture. I have a longer statement which I hope will be included in the record.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): We'll do it.

MR. [CARSTENSEN](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you. In a nutshell, the government agencies charged with enforcing antitrust law have repeatedly failed to challenge or to remedy competitive problems that confront American agriculture. Most conspicuous failures come in merger enforcement, where a series of decisions either not to challenge mergers or settle for weak, even anticompetitive remedies has resulted in increased concentration on both the input and the output side of agriculture.

What we have in for the American farmer has been caught in an economic vice. When they seek to buy various inputs they need, seed, fertilizer, equipment, herbicide, they face an increasingly concentrated market and exploitive strategies by producers. When they attempt to sell their products, especially I think in the dairy, meat, and grain areas, they have only a very limited number of buyers who use their buyer power to drive down the prices paid for these products.

What I'd like to do is to give you the highlights out of a few -- out of several of the lessons that I think, and example that I think highlight this point. I want to start with the concern that Senator Grassley expressed in particular about the pork industry. Doug Ross says on page 5 of his written statement that mergers that increase market power violate Section 7, and so I want to use the pork industry as an example where there has been a failure to do this.

Smithfield bought farmland in about 2002-2003 and has recently been allowed to buy premium standard brand. First lesson: Buyer power already exists. The RTI study of livestock markets done for GIPSA found that there was statistically significant buyer power in hogs in that period 2002 to 2005 that is during the period when the acquisition of farmland occurred.

But what is important is that the PSB merger, the acquisition of PSB necessarily increased buyer power to the detriment of farmers. Yet the Department of Justice raised no objection, ignored the empirical analysis, and in its statement justifying its failure to sue it made inaccurate factual statements.

The second lesson is a very important one, is that buyer power –- and this comes from the RTI study –- buyer power rises from much lower levels of concentration when measured by the HHI index number than one would find on the -- would expect to predict buyer -- seller power on the seller side of markets. That is, the concentration was in the 1,000 to a 1,300 level in this period when the RTI study found the existence of buyer power. It's an important lesson that has been totally ignored by our law enforcers.

As to milk, Mr. Ross' statement describes the theory of the settlement, none without litigation, no -- there is no consent decree, there's no opportunity to comment on this. The theory was when Suiza bought Dean, that there would be a divestiture and no exclusive dealings. Since then DFA, Dairy Farmers of America, has both become associated with both, the successor to the Dean-Suiza facilities, also gotten linked to Hood and has managed to get exclusive dealing contracts. There is -- and I think Senator Kohl referenced this in his comments, there's an ongoing Justice Department investigation of many years standing of a number of these bad business practices. Apparently nobody has informed Mr. Ross of all the problems that came out of this consent decree.

I've got some hostile comments about the Monsanto Delta Pine and Land settlement which again results, it seems to me, in some very unfortunate results. There are several other comments about that. I will not elaborate further on that. We know that the next panel is going to deal a lot more with the beef industry. But I want to emphasize and it's clear in Mr. Bullard's testimony that the Justice Department is known about of number of anticompetitive, apparently collusive or monopolistic practices in that industry for a number of years. They're well-documented and they've done nothing.

So the bottom line here is that we have a passive and inactive antitrust enforcement process that has resulted in increased concentration, harms to producers of agricultural products, and of course harms then to consumers.

What can Congress do, because you unfortunately can't bring the lawsuits, which I'd love to have you do? First I think, hearings like this do deliver a message to Mr. Ross, and I hope you're just going to take it back to the Justice Department. Secondly, I think your staff can do more to ask for confidential briefings on some of these decisions, yourselves attend those briefings so that you are better able to understand why they are not doing the things that they ought to be doing.

You could also get a GAO study of some of these key decisions in terms of what happened afterwards. Because I think if you look at pork, if you look at dairy, you look at some of these other industries you're going to see the actual harms.

Finally, you know, I actually -- Doug's my sparring partner. We've done these kinds of shows across the country. He's a dedicated civil servant, and he comes down here and he tries his best to justify what his masters are doing. The problem is he was brought in to be a more focused person ready to engage the issues of agriculture, to make sure that the Department of Justice actually understood things. And sadly, it is just clear that those who actually make the decisions haven't got the message.

Therefore, I think it is really time to change the institutional and legal framework for evaluating mergers and anticompetitive conduct in agricultural markets. I think the Grassley-Kohl bill, the Agricultural Competition Enhancement Act, S. 1759 is a really necessary step in that direction. I congratulate you Senator Kohl for being a sponsor of that legislation. It's a great contribution.

Farmers need workably competitive markets. They need a kind of antitrust enforcement that will control both the structure of those markets and the conduct that is allowed to occur.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you, Professor [Carstensen](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0).

Mr. Ross, we often hear from farmers and ranchers that they have little bargaining power in comparison to the largest agribusiness conglomerates. Many of them claim that the Justice Department has not fulfilled its responsibility to prevent anticompetitive mergers and practices in the agriculture sector of the economy.

Do you believe that the farmers' concerns about increasing levels of consolidation among agribusiness firms are warranted, and if so why has the Justice Department permitted these consolidations to take place?

MR. ROSS: Senator, we hear the same concerns about market power and we take them very seriously. In fact, they have been important parts of each of the investigations that we have done. And I point, for example, to the Cargill-Continental matter in which the issue of market power was the key one.

We did an analysis and established that in nine regional markets, the buyer power of the merged firm would be anticompetitive. As a result, our relief required that 10 divestitures of port and grain elevators be done in order to preserve competitive alternatives for farmers to sell their grain and soybean.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Well, Professor, what is your view of what you've just heard. Are the farmers and ranchers concerns warranted, and in your opinion has the Justice Department done enough to stop these consolidations especially among food processors?

MR. [CARSTENSEN](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): I think the concerns are very much warranted, and as I referenced, that RTI study in the pork industry which is the most recent confirmation that we have very serious problems of buyer power that are being increased. And if you go back and look at the Justice Department's explanation for why they didn't object to the Smithfield Premium Standard Brand merger, they announced that finished hogs could be hauled 400 miles from North Carolina to Kentucky for processing, and that therefore the farmers of North Carolina were at no risk of being exploited. This is in the face of data that shows that they're at about a 10 percent discount in North Carolina whenever there is a full supply of hogs in the markets, because it's costly to haul your hogs anywhere.

So –- and I think the Continental-Cargill is another example of minimalist enforcement. It was a clearly bad merger. They did the least that they possibly could do. We've not seen a good follow-up on what the consequences of that merger are.

Anecdotally when I talked to grain farmers, what I hear is we went from having two or possibly three buyers to at most two buyers and in many more areas we're seeing only one buyer for our corn, for our soybeans et cetera. This is one of the things that's made ethanol really interesting because those plants do create a different kind of competition right now in corn markets. It doesn't do much for soybeans, doesn't do much for wheat. But it does change the dynamic because there are competitive buyers in the marketplace.

So we really need more focus on this. And again, something I said earlier, the analysis of buyer power is different. Buyers are different from sellers in terms of when they get leverage in the market, what kinds of market shares give you leverage. As a buyer, you are the decider. You're the decision maker with respect to whether or not you buy. That creates power at much lower levels of concentration. We simply have not seen from the Justice Department any recognition of that inherent economic fact.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Professor Carstensen, at this time as you know, millions of consumers all across the United States are suffering from rising food prices in many basic commodities. Do you believe that increasing concentration that we are witnessing in agriculture is a big cause of the higher food prices paid by a consumer? And if that is true, do these higher prices find their way back into the farmers' and ranchers' hands?

MR. CARSTENSEN: The first part is, yes, the concentration has two levels. It has an effect downstream or I should say upstream on the farmers. And it has an effect down stream on the consumers. That is, both ends of this process are subject to exploitation by lower prices to farmers, higher prices to consumers. Best documentation of that comes from Professor Cotterel (ph) in a hearing, I think before this committee a few years involving New England dairy products.

And again, Mr. Bullard's written statement for the committee has a number of -- has a good deal of the documentation that shows that increasing spread between what's being paid at the farm-gate, which is constant or declining, and what's being charged to consumers. So what we are seeing is no, it's not coming back to the farm-gate, it's not coming back to the farmer, but the price to the consumer is going up, it's getting caught in those two levels of concentration.

One of the things I emphasize in my written statement is concentration of retail grocery markets, which is really where you get the leverage over the consumer, and then concentration at the production level.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you.

Mr. Ross, what is your view? Does reduced competition among agribusiness companies inevitably will lead to higher prices and isn't strong antitrust enforcement very important to prevent such loss of competition?

MR. ROSS: Senator, the antitrust laws couldn't be more important to protecting consumer prices and effective competition leads to all kinds of benefits like better quality of products, greater innovation, and the ability of farmers as consumers as well as producers to benefit from a competitive economy.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you.

Senator Hatch.

SEN. HATCH: Well, thank you, Mr. Chairman. And Professor Carstensen, you have written, quote "Strategic behavior by market dominating firms as weakened or eliminated the open market process that in turn give agricultural producers the freedom of flexibility to be the genuinely independent entrepreneurs," Unquote.

Now some think that may be nostalgia for a bygone era. Has not the Department of Justice merely been fulfilling its mandate by only taking actions when it believes that a competitive market happens to be in jeopardy? Or put another way, are you not advocating the department become a regulator ensuring survival of small producers when the department's responsibilities under the law will be to ensure competitive markets, not the competitors themselves.

MR. CARSTENSEN: My father was a historian of agriculture so I -- maybe I've got some residual nostalgic genes.

No, I -- let's be clear about this. Markets are going to change, what's an efficient level of production is going to change. But the benefit of workably competitive markets is those changes are driven by economic fundamentals not by strategic behavior. What I was concerned with in the passage you quoted was the kinds of strategic behavior that adversely affects the functioning of the market and favor some players in the market not based on their inherent efficiencies.

The most recent USDA studies, for example, in pork, show that small pork producers relatively –- hog producers, I guess I should say –- have the same level of efficiency that very large ones do. The problem is going to be market access, finding fair rules. And if we're going to go to a contract world, and I'm not opposed to that necessarily, if contracts are what we do then we need proper rules for the contract market so that again it's fair, open, and efficient. And "efficient" is key here because we do want to have those markets be dynamic to change with the changing technology.

SEN. HATCH: Now, on a related point, you wrote a law review article entitled "Concentration and the Destruction of Competition in Agricultural markets: The Case for Change in Public Policy." And this article was described by the National Agricultural Law Center. It's arguing in favor of using antitrust law to protect independent farmers.

Now, there has been a tremendous amount of consolidation in the livestock markets. However, according to the Congressional Research Service, ranchers and farmers still hold fewer than the 100 cows still -- the ranchers and farmers that hold fewer than 100 cows still control half of the market.

Now, the top 30 feedlots only control 40 percent of the cattle on feed. In fact the USDA believes that there are more than 88,000 lower-capacity feedlots in operation today. Now, my question would be, why should the government interfere in a marketplace where half of the cow-calf businesses appear to be held by smaller farms, and there is more than an ample number of smaller feedlots?

MR. CARSTENSEN: Well, if we were talking about a merger among feedlots, I'd agree with you. I don't see an antitrust issue there. But we're talking about mergers among the buyers from those feedlots that are going to reduce the numbers from five to three and are going to create, I think, and certainly this is consistent with all the other data that we have, going to create substantially more buyer power.

As the next panel is going to focus I think much more on the specifics of the beef industry, the problem is access to the fodder facility. The problem is the terms and conditions under which those feedlots get to sell. We've seen a cyclical long-term decline in the number of feedlots that exist and in the number of cattle that are being put on feed, and what that tells us generally is that we're looking at the kind of situation that looks a lot like there's exploitation of monopsony power or oligopsony power, that is buyer power, on these downstream --I'm sorry -- upstream suppliers.

One of the important points that your data makes fundamentally is that if you're going to be a 100-head feeder or a 10,000-head feeder, looks like you can compete in the market as long as you have access to the meat processors, to the cattle slaughter facilities. What we're focused on here today is a merger at that buying level. That's the place where the problem will exist for all of the different feeders that you're identifying.

SEN. HATCH: Okay. And Mr. Ross, just have some questions to you. During the previous administration Cargill acquired Continental in the already concentrated grain trader market. Specifically, the number of grain traders was reduced from four to three. However, the Department of Justice insisted that the combined Cargill-Continental sell 10 percent of its operations to a competitor. Why then in 2003 did the Department of Justice decline to take action on the Smithfield-purchased Farmland Food's pork processing plants? Was this also not a highly concentrated market? And why the difference in enforcement action, just so we understand better?

MR. CARSTENSEN: Thank you, Senator. We welcome opportunities to be more transparent about the bases on which we decide to enforce or not, where appropriate.

In the Cargill matter, we did extensive analysis of the market including talking to many experts in the area including farmers, and our analysis showed that there would be the kind of any competitive consequences, that is a substantial lessening of competition in a market in nine regional markets and therefore we required relief of the sort that we have described.

By contrast, in the pork matter involving Smithfield farmland, we did a similar kind of analysis and the fact showed a different result. We looked at the procurement areas for each of Farmland's plants and how many packers would buy hogs in the same procurement areas and the slaughter capacity of each of the competing packers.

Our conclusion was that neither Smithfield nor Cargill, which you will recall was one of the potential buyers there, would make as much as 30 percent of the live hog purchases if it had acquired Farmland's assets. And our conclusion was that there would still be at least six competing packers where the acquirer had competing plants. So we thought that was a basis on which not to take action because there was no anticompetitive result.

SEN. HATCH: Thank you, Mr. Chairman. My time is up.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you, Senator Hatch.

I'd like to say that we are going to –- as a result of our concern about these mergers and their impact on higher food prices, we are asking the GAO to make a study to look at whether or not there really is a correlation between these two critical factors.

Professor Carstensen, Senator Grassley, and I have written a bill that would shift the burden of proof so that merging parties and agricultural mergers have to justify that their mergers do not harm competition rather than the other way round which is as it is now. Do you support this idea, and if you do tell us why?

MR. CARSTENSEN: I think it's a very good idea because it really requires not just the vague waving of hands in the Justice Department office saying that there are going to be no harms, but actual proof in a court of law where the defendant merging parties have to come in and genuinely justify the non-anticompetitive implication of the merger.

And especially as the court decisions have accumulated of late, courts have really been putting an extraordinary burden on the Justice Department, the Federal Trade Commission, to establish that any particular merger will tomorrow result in serious harm. The statute actually only calls for evidence that the merger may substantially lessen competition or tend to create a monopoly, so that this restores in many respects the classic statement of what the standard should be, and I think it's a wonderful idea.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Mr. Ross, I assume you agree. (Laughs.)

MR. ROSS: Senator, surprisingly enough, Professor Carstensen has also referred to me as his punching bag and here again we will disagree. (Laughs.) The Antitrust Division is satisfied that the burden of proof in all merger enforcement actions should be the same, whether for agriculture or any other part of the economy that it works effectively and I'm aware of no case in which we wouldn't decline to take a case to court because of the burden of proof.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you.

Senator Feingold?

SEN. RUSSELL D. FEINGOLD (D-WI): Thank you, Mr. Chairman. Before I get to my statement and questions let me specifically welcome Professor Carstensen. I've known him and been friends for many years with him and his wife Carol (ph) who was a distinguished and long- serving school board member in Madison.

MR. CARSTENSEN: Just finished.

SEN. FEINGOLD: I'm aware of that.

MR. CARSTENSEN: After 18 years.

SEN. FEINGOLD: I read the paper that comes to my door there -- (laughs) -- and she did a wonderful job. It's good to see you and I thank you for all -- you and all the other witnesses –- for appearing this afternoon.

Mr. Chairman, thank you for holding the hearing to shed light on an important issue for farmers and consumers.

Before I talk about agriculture specifically, I want to note the overall troubling state of concentration across multiple sectors of the economy.

Over the past few years consolidation and related competition concerns have increased a variety -- in a variety of areas including freight, railroads, food retailers, and radio stations, just to mention a few. Just two weeks ago the same subcommittee chaired by my distinguished colleague from Wisconsin considered proposed mega- mergers among airlines and now we are turning to a merger that would reduce the number of major beef meat packers from five to three. This growing concentration rates is today's question about the Department of Justice's enforcement of existing laws as well as the adequacy of those laws to ensure fair, open, and equitable markets.

Increased consolidation and market concentration are serious problems for agricultural producers throughout the nation. As I travel around our state of Wisconsin, as the chairman knows, these issues are consistently raised by farmers and growers with respect to the proposed [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)acquisition that is important to my constituents that the facilities in Wisconsin remain operational and there's no loss of jobs. I also have various concerns, serious concerns, that the combination of the third, fourth and fifth largest beef meat packers will significantly reduce the number of potential cattle buyers, and as a result depress prices.

Wisconsin is not the leader in beef cattle production. The prices for these animals form the basis for the prices paid for cull dairy cows, and could therefore have a significant impact on the bottom line of thousands of Wisconsin's family dairy farmers.

Exacerbating this horizontal concern is the significant vertical integration that the post-merger company would enjoy from the major cattle feeding operation of Five Rivers Ranch Cattle Feeding. Both the prepared testimony of Mr. Stumo and Mr. Bullard highlight how this captive supply will negatively impact competition prices paid to farmers and ranchers.

Earlier this year, I signed a letter with several of my colleagues expressing some of these concerns to the attorney general. Mr. Chairman, I would ask unanimous consent that that be included in the record.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): It will be done.

SEN. FEINGOLD: Mr. Chairman, I hope that the Justice Department will get serious of our protecting consumers and agricultural producers from increased consolidation and market concentration.

Mr. Ross, in Professor Carstensen's written testimony he says, quote, "The Antitrust Division has an open investigation of the conduct of the milk industry. But the matter has been pending for years without any action." Unquote. The statement goes on to describe the industry as rife with a panoply of anticompetitive practices that have resulted in serious losses of income and coercion of farmers.

And I have heard similar frustration directly from dairy farmers and others in the dairy industry in Wisconsin. What do you have to say with regard to the status of the investigation, and Professor Carstensen's observation?

MR. ROSS: Senator, we take concerns about the dairy industry as well as any other part of the important agriculture economy very seriously. Without confirming or denying a particular investigation which should be inappropriate, we continue to monitor any anticompetitive practices that are brought to our attention and we do an extensive analysis to determine whether an antitrust enforcement action is appropriate.

As my statement indicates, we have been active in the dairy industry involving the Suiza-Dean merger and other dairy areas. So we continue to have active knowledge and monitoring of the important sector in agriculture that involves a key industry in your state.

SEN. FEINGOLD: I look forward to following on that, Mr. Ross. Also, Professor Carstensen described the controls that DOJ placed on the Dean-Suiza merger as ineffective, specifically as written testimony says -- quote -- "In addition, the press release announcing approval implied that the new firm would not enter into a long-term exclusive dealing contract with dairy farmers of America, the largest cooperative. However, Dean and DFA quickly found a way around that commitment." Unquote. Could you shed some light on that, on the merger commitment? Did the Antitrust Division err in not making the provision broader to include partnerships and joint ventures in that prohibition?

MR. ROSS: Senator, our analysis was a careful and thorough one, and the remedy we devised before allowing that merger to go forward was one that was based on extensive analysis of the market conditions on the ground. If there are concerns about what has happened subsequently, we welcome anybody bringing that to our attention and we will examine it very seriously.

SEN. FEINGOLD: Well, it does sound like a potentially troubling oversight to me.

Professor, do you have anything to add on that?

MR. CARSTENSEN: (Laughs.) The investigation was completed. The staff recommended that there be litigation. It has been sitting, at least according to the information I have, in the assistant attorney general's office for more than a year.

The key regional attorney, I believe, has now reached retirement and retired. And the government -- this alleged complaint –- that was never a complaint in Dean-Suiza; it was what's called a "fix-it- first." They bargained for about nine months about the divestiture. More divestiture was made than originally proposed. It was settled with whatever confidential documents were exchanged between the parties.

Since there was no consent decree, there was no Tunney Act disclosure requirement, no opportunity for anybody to comment on this. And then all kinds of problems began to emerge for the dairy world because the -- of this relationship not only with Dean, new Dean, but also NDH, National Dairy Holdings that was owned in substantial part by DFA and then it gets linked to Hood. So you've got one, two, and three all tied together.

One credit to the Justice Department. They did go after a small dairy acquisition –- and it's in Mr. Ross' statement –- in Kentucky, that DFA attempted to pull off and one of the good things about that particular piece of litigation, because they actually went to trial on that, was that it did bring to light a good deal of the dubious transactions, the discriminatory transactions within the DFA empire. But for the Justice Department to claim that they're monitoring the situation is to say that they're doing nothing.

SEN. FEINGOLD: And in it -- although Mr. Ross indicated willingness to be open to any sort of things that have happened since, it sounds to me like this could have been prevented in the first place by proper drafting. Is that a correct statement?

MR. CARSTENSEN: If they had gone the consent decree route, yes, they could have drafted that. The state attorneys general are involved in these investigations. The Justice Department is the party that hasn't been heard from.

SEN. FEINGOLD: Chairman, may I ask one more question?

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Go ahead.

SEN. FEINGOLD: Thank you very much for the additional time. As the Chairman knows and I am grateful for his support, I have worked with Senator Grassley for a number of years on legislation called the Fair Contracts for Growers Act that would make mandatory arbitration clauses and agricultural contracts unenforceable.

Now, the Judiciary Committee passed this bipartisan bill early in this Congress by a wide margin and the farm bill seems poised to at least take a step in the right direction by requiring that growers be given a specific option to opt in or out of any mandatory arbitration clause.

But the government needs to make sure that this provision has some teeth and I'll explain why by asking our witnesses to put themselves in the work boots of a poultry grower.

So first off you've taken out a loan for several hundred thousand dollars to build poultry houses.

There's only one poultry company contracting with growers in your region and they supply you with chicks and feed and determine your payment based on the weight gain and condition of the animals at the end of each approximately seven-week flock-to-flock contract.

Your most recent contract has a new clause that commits you to mandatory binding arbitration, with arbitration of procedures dictated by the company. As required by the new farm bill language you were told you have a choice whether to opt in or opt out of this provision. You've seen some information about large upfront fees required for arbitration and don't think you have enough cash to cover them if a dispute arises. So you want to decline the arbitration clause knowing that you may have a chance to go to the arbitration if a dispute arises and the company still wants to arbitrate after the fact.

Well, what if one of your neighbors opted out earlier in the year and he has since been plummeting down the grower ranking for weight gain or is being threatened with termination as a bad, quote, "bad producer" unquote. Does that make you think twice before opting out?

Seem like law school here?

MR. CARSTENSEN: (Laughs.) Yes, yes and I'm on the wrong side of the table, suddenly.

SEN. FEINGOLD: For once -- (laughs.)

MR. CARSTENSEN: Yeah, yeah. That's -- I mean that must be the –- an enormous problem with an opt-in/opt-out legislation of this sort. It - you know I am -- arbitration, when agreed to by the parties at the time of dispute is fine. It can be actually a very efficient dispute resolution mechanism when it is imposed on parties, and especially when there is unequal bargaining power as in the poultry example that you have and that's a very real world example. Opt in, opt out, do you want to continue to be my poultry raiser, you know, in which case you're going to opt for whatever I want you to opt for, because I'm -- I as the contractor, I'm going to have the power.

So it's such a theoretically interesting step if you imagined equal bargaining power, but in the real-world terms it really doesn't solve the problem.

SEN. FEINGOLD: Mr. Ross, do you want to comment on that?

MR. ROSS: Certainly, Senator, this sounds like a provision in which there may be disagreement among farmers over whether they like it or they don't like it. Some may and some may not. In any event contract provisions really fall outside the purview of antitrust enforcement action except when they are a part of a larger analysis in a merger context.

SEN. FEINGOLD: All right. And thank you for the additional time, Mr. Chairman.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you very much, Senator Feingold. And gentlemen, we appreciate you being here today. You have brought to light many of the important issues that we're discussing and studying and thanks for coming.

(New panel introduced.)

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): We'll turn now to the second panel.

Our first witness on the second panel will be Wesley Batista. Mr. Batista is the president and the CEO of [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)and Company. Prior to becoming CEO of [JBS Swift,](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)Mr. Batista was the chief operating officer of JBS' beef operations in Brazil and in Argentina.

Our next witness will be Steve Hunt. Mr. Hunt is the CEO and cofounder of U.S. Premium Beef and chairman of the board of National Beef Packing Company. Prior to his involvement with the U.S. Premium Beef, Mr. Hunt worked in various areas of commercial banking including direct agricultural lending and credit training.

Our next witness will be Bill Bullard. Mr. Bullard is the CEO of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America or R-CALF USA. Prior to joining R-CALF USA, Mr. Bullard served as the executive director of the South Dakota Public Utilities Commission. He's also a former cow and a calf rancher.

Our next witness will be Dillon Feuz. Professor Feuz teaches agricultural economics at Utah State University. His primary research interests are livestock marketing as well as farm and ranch marketing -- management.

Next, we'll have Michael Stumo. Mr. Stumo serves as the general counsel for the Organization of Competitive Markets which is a nonprofit research and advocacy organization with a focus on competition issues in agriculture.

And finally, we'll have David Balto. Mr. Balto's a senior fellow at the Center for American Progress where he focuses on competition policy, intellectual property laws as well as health care. He has also worked as an antitrust attorney at the Antitrust Division of the Department of Justice, Federal Trade Commission, as well as in the private sector. We appreciate all of you being here today.

If you will rise and raise your right hand?

(Witnesses sworn in.)

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Mr. Batista, we will start with you.

MR. BATISTA: Mr. Chairman and other members of the committee, thank you for the opportunity to introduce [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)to the Committee and to discuss our commitment to invest in America's meatpacking industry.

I am the CEO of [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)and want to share with you today, JBS' vision. Our goal through this transaction is to invest our skills, energy and expertise and money to grow the U.S. (meat pack?) industry. We want to expand U.S. sales of beef and pork domestically and around the world. In the process, we will keep and create U.S. jobs.

We are operators of beef, pork, and lamb processing plants, not financial investors. My father started our business in 1955 when he slaughtered just one or two animals per day to supply restaurants in the new capital city of Brasilia. We are still a family business. JBS now has global operation that we plan to use as a platform to expand the sales of U.S. beef and pork around the world.

Our history is clear. When we acquired Swift last year, we expanded operations, we added shifts -- additional shifts, we hired more employees, we improved operation, and we bought more cattle. With respect to the Smithfield and National facilities, we will do the same – buy more animals, expand operation, and hire more workers.

That's what we are doing right now. We will continue to compete aggressively for the purchase of cattle and the sales of beef by all available commercial means, and we will increase our demands and sales over time. This will benefit ranchers and feedlots.

We will keep plants open, make them more efficient, and expand sales of U.S. beef. We also look forward to hiring more workers consistent with changes in U.S. immigration law. We view the U.S. labor force as a great resource.

A couple of questions have been raised that we would like to address. The first is our relationship with producers. We will continue to work with producers as we always have. I have had meetings with employees, cattle producers, and community leaders in Kansas, Colorado, Texas, and we feel -- and feel we are being embraced. I will continue to do this.

There is one major region in the nation which contains the vast majority of all the major slaughtering plants for steers and heifers. That region is the beef belt. It includes North Texas, Colorado -- not North Texas I'm sorry, Oklahoma, Iowa, Kansas, Nebraska, and Eastern Colorado. None of the Smithfield plants are in the beef belt. Most of the Smithfield plants handle primarily Holstein steers and cows.

Regarding the crucial beef belt, after this merger, JBS, Cargill, Tyson, and the regional and local plants will continue to compete intensively for the purchase of cattle.

With cattle moving on trucks, there will be many competing plants wanting to buy animals in the beef belt.

In terms of consumer price, beef products are sold throughout the nation by numerous competitors of all size. [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)sells primarily, commodity beef and some case-ready beef and pork. In contrast, National Beef sells very successful branded beef products, and we plan to expand those operations. Swift and National will continue to sell into different and competitive national markets. In fact, when selling to large national retailers, there will be intensive competition among national, regional and local players.

I want to end with one final point. The JBS history in the U.S. is before you. Swift was floundering, had reduced its work force shutting down shifts, and sold plants before JBS purchased Swift. Then, after we bought Swift, we expanded operation, added additional shifts and hired more workers. We kept local managers.

We are investing billions of our company's money in the United States with a goal to grow the industry, to hire more U.S. workers, and increase demand for U.S. beef and pork around the world. We are fully cooperating with the Department of Justice review and hope that the review can conclude as swiftly as possible so that we can implement our growth strategy on beef and pork.

We appreciate this opportunity to tell our story before this committee and looking forward to answering your questions.

On a personal note, my family and I greatly enjoy living in America, in our home in Fort Collins. This is a great country.

Mr. Chairman, thank you very much.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you Mr. Batista.

Mr. Hunt.

MR. HUNT: Chairman Kohl, I appreciate this opportunity to come before you today to talk about JBS' proposed transaction to carve National Beef from U.S. Premium Beef.

I'm the CEO of U.S. Premium Beef and the chairman of National Beef, but most importantly, I'm a fifth generation cattle producer. I speak to you today on behalf of U.S. Premium Beef owners and independent producers, which on March 14th overwhelmingly voted to favor proceeding with this transaction. They believe the livelihood of all cattle producers is dependant upon health and growth of the beef industry and that's why we agree with JBS' vision.

U.S. Premium Beef is a one-of-kind producer-owned beef processing company, formed to link producers with consumers through ownership of processing. As a result, we've been able to design a supply of cattle specifically bred and managed to meet consumer preferences, which results in premiums back to the producers and the processing company.

U.S. Premium Beef was formed in 1997. In addition to processing customer cattle throughout the United States, we have processed over six million cattle of U.S. Premium Beef members. In addition to that we have paid out over $117 million in cash premiums to our members since we began. We've also paid an additional $87 million in cash dividends. That was the result of our ownership in processing.

In other words, our producer owners have become beef processors through U.S. Premium Beef. We have been able to realize the financial rewards from the ranch to the consumer's plate. Simply put, through value-based pricing our company gives producers economic incentive to deliver more valuable consumer-preferred beef.

Since our formation, we have been working to diversify our business geographically through expansion, acquisition of other protein businesses, and pursuit of businesses in markets outside the United States. This has been essential in managing risks our owners take in ownership of processing. This is a strategy that our producers pursue on the ranch and other producers and other businesses pursue as well.

Since the discovery of BSE in the United States in 2003 and a subsequent loss of the export market, losses and prospects of the declining herd have left the beef industry in a position where few want to invest. In 2006, Hicks Muse announced that they were selling Swift. Smithfield Foods has also made the decision to exit the beef processing industry.

Whereas prior to 2003, our company was routinely approached by willing investors and partners, today we witness very few, if any, parties willing to invest in the U.S. beef processing industry, except one.

JBS, a family owned business based in Sao Paolo, Brazil –- you've just heard from Wesley Batista –- with U.S. headquarters in Greeley, Colorado, is willing to invest over $3 billion dollars in our U.S. meat processing industry. They believe that by putting our companies together, we can create more value and increase efficiencies not only necessary to sustain our industry, but to begin growing it again.

More importantly, JBS has the same vision for industry growth and success as we do. Since acquiring Swift last year, JBS has expanded production and purchased more cattle. They also have looked for ways to expand demand for U.S. beef by pushing into new international markets. They're able to use their unique perspective to introduce U.S. beef to foreign companies and new customers.

For U.S. Premium Beef, this partnership with JBS is a natural decision that enables our producer owners to broaden our investment into a well-diversified, multi-protein world leader in value-added products while at the same time we're able to maintain our founding principles of value-based pricing and dissemination of valuable carcass data to every single producer on every single animal.

JBS respects what we have accomplished at U.S. Premium Beef/National Beef, and wants to build upon value-added strategy to help bring more value to producers so we can begin expanding production once again. After completion of our proposed transaction with JBS, more producers will have the ability to market through our unique producer-owned company by delivering cattle to more plants, thus reducing freight costs and improving efficiencies for producers and the processing company. Our confidence in JBS' dedication to expanding demand for U.S. beef through this strategy is exemplified -- is a strategy that is exemplified by U.S. Premium Beef's agreement to become a substantial investor in JBS.

The farmer and rancher owners of U.S. Premium Beef have a right and an obligation to pursue sound business strategies employed by our competitors, recommended by universities and applauded by Congress. These include value-added strategies through vertical integration from the bottom up, product diversification to lay off risk and foreign investment to participate in a growing consumer global market.

As you know, the Department of Justice is reviewing the proposed transaction. I am confident its review will be thorough and when complete will lead to and will recognize the benefits of this transaction.

The beef processing industry is highly competitive, with Cargill, Tyson, JBS and a number of other processors remaining to compete fiercely for cattle and to sell beef to our sophisticated customer base. This transaction will enhance this competition by allowing the combined company to perform more efficiently and provide a platform for growth in the future.

Mr. Chairman, thank you for this opportunity, and I look forward to answering questions later.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you Mr. Hunt.

Mr. Bullard.

MR. BULLARD: Mr. Chairman, thank you for this opportunity.

I represent the thousands of men and women who own and operate cattle operations all across this country. As the CEO of R-CALF USA our organization endeavors to ensure that our independent cattle producers can remain profitable long into the future.

I want to describe our industry to you. United States cattle industry is the single largest segment of American agriculture.

It produces $50 billion annually, 11 states produce over a $1 billion a year. This industry is intrinsically important to the overall prosperity of rural America. It's important that the subcommittee realize that while the four major packers do control the steer and heifer market, that steer and heifer market represents only 27 million of the 45 million cattle that are sold every year.

Our U.S. cattle industry is a dynamic industry and in that industry we have various value-added segments. So while we have 45 million cattle sold every year, 27 million are sold into this highly concentrated marketing structure consisting of just four firms. And it is at this segment of the industry that –- which serves as the portal to actually cause harm throughout the industry if there's any price distortion that occurs within that segment.

Our industry can be viewed as a pyramid. At the base of the pyramid you have the seed stock producers, the breeders. The breeders sell breeding animals to the cow-calf producers. The cow-calf producers produce a new calf every year. They'll keep that calf for four to six months. That calf is then sold to a backgrounder. A backgrounder will grow that animal to what might be called its adolescent years. The backgrounder could then sell that animal to a stocker. The stocker would run that animal for about four months. So it takes about 18 months from the time that an animal is birthed until it's actually sold in the steer and heifer market to one of these four (animals?).

Our industry in this pyramid, those segments that I described, the breeder, the cow-calf producer, the stocker, the feeder, we have about 970,000 of them left in the United States. And as you move up this pyramid you get closer to the feeding sector, there's about 93,000 feeders left in the United States. But that industry is becoming increasingly consolidated as well, because there's now fewer than 2,500 feeders that actually sell approximately 23 million cattle to these four meat packers.

So what I've described is an industry, a dynamic industry that is intrinsically important to the prosperity of rural America, that's valuable in every state of the union. But this industry has the price-making segment at the top of the pyramid, and any distortion in that price will reverberate all the way down through the industry.

A 3 percent reduction in price, for example, which is about what they found in terms of detrimental impacts of further concentrations in this industry, a 3 percent impact would reduce that $50 billion annual revenue generations down to $1.5 billion, a loss of $1.5 billion. This would be damaging to the 970,000 independent producers as well as damaging to the rural communities that they support.

This industry has been besieged by market power for quite some time. And we have ample evidence to demonstrate this and I've provided that in my written testimony. For example we've lost 40 percent of our producers just since 1980. We had 1.6 million cattle producers in 1980; we're down to about 975,000 today.

Our size of the U.S. cattle herd has been reducing for many, many, years. We have decreased the size of the herd today to where it was about back in 1950s. And while we have reduced the size of our production capacity by reducing our herd size, we have also been experiencing a disruption of the historical cattle cycle. That cattle cycle has provided a bellweather indicator of the competitiveness of this industry. And recently, USDA acknowledged that the analogous hog industry that is also experiencing a loss in its hog cycle, that loss is attributed to a changing market structure, a market structure that is evident by further consolidation in concentration.

I want to leave you with this: Our industry is in a state of emergency right now. We continue to experience contraction. This merger is going to exacerbate the current contraction of this industry, and like the hog industry as already described –- we had 667,000 producers in the '80s down to 67,000 today; you lost 90 percent of all the producers in that industry –- we're going to see the same thing in the cattle industry unless the Department of Justice and unless the U.S. Senate and the U.S. House take specific action to reverse the pressing course. Because like Congress was unaware of the tremendous exodus of hog producers, we will -- you will be unaware of the exodus of cattle producers, because it will happen one cattle operation at a time, in one rural community at a time until we wake up one morning and see we've lost the critical mass within this industry to maintain a viable market.

Thank you.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you, Mr. Bullard.

Mr. Feuz -- Dr. Feuz.

MR. FEUZ: Thank you Senator Kohl for the opportunity to speak to the committee --

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): I don't think your mike is on.

MR. FEUZ: Thank you Senator Kohl.

I want to begin my comments by just reiterating the change that has taken place in the packing industry over the last 20 years, when you look at the major players, Tyson who acquired IBP, Smithfield who acquired Moyer Packing, and Packerland; ConAgra who was a major player in 1987, exited the industry in 2002, and most recently Swift who went out with the JBS acquisition of those.

I point that out to -- as a fact that this is not a static industry but one where firms continue to enter and exit the industry. From a pure economic point of view I would have much greater concern about the level of concentration in market power if I did not see firms entering and exiting the industry.

Secondly, I point out that there are likely as not excessive profits being generated in this industry due to the level of concentration, or you would likely see the players that are there remaining in that industry to capture those excessive profits. Certainly, I don't think if IBP were strong enough, they would have allowed Tyson to acquire them. Nor would have ConAgra, a major agribusiness firm that continues to be involved in agriculture, divested themselves of both cattle feeding and beef packing had they been earning excessive profits due to concentration.

As I look specifically at this merger, I see three potential benefits. First of all, as [JBS Swift](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0)has noted, they bring outside capital and new ideas into an industry, that's probably needing both. As you look at the packing industry of the last couple of years, margins have been very small in that industry. And certainly some of the existing players are probably in a financial condition that they would not be able to continue operations without an additional capital. Perhaps even more important is the addition of some new ideas, particularly I think in the export market area where JBS Company has shown a history of being very aggressive in the world export markets. And I think that they can bring that level of expertise to the U.S. and increase our exports, particularly into some markets where we have previously not had access.

Another benefit I think has been highlighted somewhat by Mr. Hunt from U.S. Premium Beef. They have had one of the premier pricing grids for fed cattle, particularly upper-quality fed cattle that has been in the industry, that has allowed independent producers to receive a premium if they were producing a higher-quality animal.

Unfortunately, in the present situation, transportation has restricted the producers that could really benefit from that, because all those cattle had to be slaughtered, basically in Western Nebraska's two national plants. With this merger, that will become much more geographically dispersed into the Northeast, the Western markets as well as throughout Iowa, Nebraska, Kansas, and Texas, as there's greater plants that would have that grid available.

And lastly, I think on the market-power issue alone, perhaps three strong players competing for a limited supply of cattle would be more aggressive in the market place than what I view as currently two strong majors and one weak major within two regional competitors, one of which itself was probably in some financial difficulty. As I talked with the one feedlot operator in Utah, he mentioned to me that perhaps one strong player in the market would be better than a weak or no player.

On a couple of cautionary notes, certainly, the loss of a bidder in a market place is a concern. Going from four major players to three in the primary cattle feeding area will be of concern. However, if the plants stay open you'll still have the same competition for the number of cattle.

Perhaps of greater concern would be in the cow/calf and dairy market in the Southwest where you may be going from two independent firms, Smithfield and National to one in those areas. That could be a concern.

Lastly, I want to close –- I've heard several comments today about a concern for the overall food price level and what this merger may do, and I would suggest that if the Senate is concerned about the price of food, it would be much more advantageous to look at what I view as a ill-advised corn ethanol policy that is doing far more damage than the livestock industry, and will continue for the next few years than what this merger or others would do in that industry.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): Thank you, Dr. Feuz. Stumo.

MR. STUMO: Thank you, Senator Kohl. I would ask that my written comments be submitted in the records, please.

[SEN. KOHL](https://advance.lexis.com/document/?pdmfid=1519360&crid=b23b8151-6dd7-4bd9-a94e-c025c1c31293&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4SGH-1HG0-TWK7-H0KX-00000-00&pdcontentcomponentid=8104&pdteaserkey=sr0&pditab=allpods&ecomp=wbxnk&earg=sr0&prid=b1a756dc-6c07-4f18-8e9b-67d2a8da90f0): It will be done.

MR. STUMO: The organization for competitive markets is -- has members including feeders, large, medium, and small, across the spectrum. They're not here speaking today because they're afraid.

They're afraid of retaliation in the marketplace, if they say that their fears about the lack of competition when the packer/buyers discipline them every week, and every day in the market.

When my members speak to DOJ, they insist on confidentiality agreements, so nobody will find out, so they won't lose yet another buyer.

They insist on it. They wish competition -- they appreciate the packers, they appreciate Tyson, Cargill, Swift, National and Smithfield, all of them, but they do not appreciate the chokehold on market access that public policy and the packers have combined to create.

That chokehold is choking off the number of open, negotiated market shackle space in these plants that is available for these sellers and feedlots to sell into.

When you exert market power, you want to grab the bottleneck. In the oil market, in the oil merger of BP-Amoco, Cushing, Oklahoma was the bottleneck pipeline where price was set, and that's where you wanted to have your hands wrapped around.

Here you want to have your hands wrapped around rationing shackle space. There is the Great Plains; you'll see the overlap between JBS plants and National Beef plants. People will tell you that feeders in that area all have four buyers there.

They do not. They may have three, two, or the small guys may beg for someone to come look at their cattle. It didn't use to be. Through the consolidation -- people say it makes no difference. They come up with "happy theories" as to why it will be happy for everybody.

We have heard them today. They are untrue. The results are that a declining number of cow operations and declining cowherd -- We have 300 million people in this country today, increased from 200 million in 1967.

They eat a lot of beef. We should produce more beef to feed them. We don't. Oligopsony power is predicted to be inefficient because it depresses prices, it depresses output.

Oligopsony in this industry has met that prediction. As we concentrate, we depress price, we depress output. We hear vague claims of over-capacity, but yet we're going to expand the capacity. Which one is it?

If there's over-capacity, it's because of Oligopsony depressing price and depressing production, and that is bad. We could produce more beef. We could produce more beef to feed the U.S.

This is what public policy has wrought. It is poor performance. DOJ has failed. DOJ gets all wrapped up in competitive conduct. The judges have not treated them well.

Structure matters. This is -- 65-miles-an-hour is the speed we set on the highway. It's clear everybody knows you can drive safe over that, but it's highly likely to create more accidents than going the speed-limit.

Structure is the same. We can argue about whether there's going to be unreasonable practices or something, but it's highly likely we will have bad results like you see on the right, we have had.

It is a poorly performing country when we eat more food -- our ag sector. DOJ has failed in the Smithfield versus Premium Standard merger, because of marginally competitive market they allowed merger to monopoly in the southeast U.S.

Ghastly result. One packer -- they allowed it. Not an objection. Monsanto bought Delta and Pine Land Company. That merger was rejected in 2000, but they took another run at it and by golly, this DOJ let it happen, with an insignificant divestiture of Stonefield (ph).

Thus Monsanto has 50 percent of the cottonseed market in the U.S., 75 percent in some key regions. Prices go way up, they also choked off competing research by other competitors like DuPont, Syngenta, and others to kill the baby in the crib, so there will not be competition in the future, with future innovation.

We like innovation and choice, and we like competition. We don't have it. All the arguments that say we do, are based as you heard, perhaps, may, this could happen, that sort of thing, there's no proof.

That's why your Bill 1759 shifts the burden of proof so they have to actually prove it. They can't just think and utter happy thoughts, so judges accept it and ignore all the proof of anticompetitive harm.

Antitrust is out of balance. We could have a flourishing agriculture in diary, beef and pork. We could have lower seed prices, more choice and innovation in seed corn, cotton, and soy.

We do not because of the failures of the Department of Justice. 1759 is a good start and DOJ needs to stop allowing marginal competitive industries to become more non-competitive.

Thank you.

#### That restores competition by making companies proactively justify their practice

Pat Mooney et al. 17, co-founder and executive director of the ETC group, IPES Food Panel, October 2017, “TOO BIG TO FEED”, http://www.ipes-food.org/\_img/upload/files/Concentration\_FullReport.pdf

Implementation of current legislation poses further problems. In the US, of all 15,000 M&A deals that took place between 2005 and 2014, only about 3% were subject to scrutiny by anti-trust regulators (The Economist, 2016). In the EU, of the 1,300 mergers considered between 2004 and 2012, 83 – or 6.4% of cases – were found to raise concern (European Competition Network, 2012), but only 8 were prohibited as only M&As passing a certain market turnover threshold27 are considered relevant for anti-trust.

However, the tide may now be turning. In 2016, regulators from 26 jurisdictions28 intervened in more merger cases than they had done in previous years (Allen & Overy LLP, 2017). While 7 deals were prohibited and 13 deals abandoned in 2015 in all sectors of the economy, 2016 saw 8 deals prohibited and 23 deals dropped (ibid). Of note, only 2 of the 8 deals were prohibited by EU legislators and none by the US, though both jurisdictions are still considered global leaders in anti-trust.29

The agri-food sector has itself remained largely immune from the new tide of anti-trust activity. In its 2014 review of mergers, the OECD acknowledged that the regulatory trend is to make M&As easier for merging parties, and recognized that current policies tend to play out to the detriment of those most negatively affected by food system concentration (OECD, 2014). The capacity of anti-trust regulators to keep pace with rapidly expanding agri-food M&As remains weak (Schanbacher, 2014). Even though fines have been levied against several companies for abuses of power, regulators (particularly in the EU and US) have come under increasing fire for failing to address the impacts of existing agri-food sector concentration and the new generation of M&As (Leonard, 2014) – including the influence exerted by firms over political processes. The reluctance to file cases in major agricultural industries has itself been alleged to reflect corporate lobbying influence (see Impact 8).

Nonetheless, the growing resolve to tackle anti-competitive practices across the economy may now be permeating food systems. Steps being taken in a variety of different jurisdictions and in a variety of sectors may be starting to create a less conducive environment for M&A activity. In some cases, these measures seek to redefine anti-competitive practices and to reframe the scope of anti-trust rules. Steps to date may not be sufficient to reverse the current direction of travel. However, they point the way to key entry points where action is already occurring and could be taken further:

i) Addressing unfair practices in supply chains. Legislative and judicial bodies around the world are showing more interest in tackling excessive power in food supply chains and its impact on farmers and consumers alike:

• In 2010, an investigation by the South African Competition Commission charged a number of leading milk processors with price fixing for raw and processed milk, and restricting market competition.

• In June 2017, the South African Commission began an investigation into the grocery retail market, on the basis of unfair competition practices within the sector.

• In 2016, the European Commission published a report on unfair business-to-business trading practices in the food supply. The EU Directive on Unfair Commercial Practices adopted in 2005 is also currently undergoing evaluation to assess whether the regulatory framework is meeting its purpose of supporting small and medium sized enterprises and curbing abuses within the food supply chain.

ii) Considering the collective impact of sector-wide consolidation and redefining a competitive market. As M&A activity has escalated, a number of calls have been made for mergers to be considered as a whole, rather than in isolation, to acknowledge the unprecedented power a handful of consolidated firms to collectively shape food system dynamics (ETC, 2017; Friends of the Earth, 2017; TWN, 2017). Actions are being taken and proposals are being made for new ways of defining and measuring anti-competitive practices, often on the basis of considering food systems as a unique sector with high social importance:

• “Creeping concentration”, i.e. a series of minor mergers leading to high levels of market concentration, is coming to the attention of regulators in Australia and elsewhere.

• In Ireland, the Competition Authority considers concentration along the whole supply chain in order to assess market power resulting from vertical integration (OECD, 2014).

• In France, the M&A vetting process has been amended to give more space to the participation and the concerns of competing enterprises not immediately affected by the proposed merger. A related law further stipulates that companies looking to close a site – including following a takeover – must frst set it up for public sale and/or attempt to find a buyer.

• In South Africa, the 2012 review of the Walmart (US) and Massmart (South Africa) merger sparked unprecedented public debate. Though the merger was ultimately approved with conditions, it highlights the possibility of drawing on a more integrated competition review process. During the review, a number of government departments brought forward opinions and conditions on the case, allowing authorities to recognize the impacts of mergers beyond consumer welfare and competition, including employment and displacement of small business suppliers.

iii) Shifting the burden of proof onto companies. Some proposals are now being made for companies to proactively justify their M&A activity:

• In July 2017, the US Democrats presented their new political platform, the “Better Deal”, urging a new precautionary approach to current and future mergers. The vision included setting new standards for a more holistic, long-term view of concentration’s effects on the economy and society, and better monitoring of a company post-merger. While still focused on consumer welfare, in September 2017, Democrats on the US Senate Judiciary Committee’s anti-trust panel stipulated that companies seeking a mega-merger would have to show that the deal would not hurt consumers and demonstrate its benefits, rather than simply relying on the FTC to judge the impact of mergers on consumers (US Democrats, 2017). The Better Deal goes so far as to acknowledge the detrimental impact on farmers and rural communities likely to result from the Dow-Dupont, Monsanto-Bayer and Syngenta-ChemChina mergers, as well as the influential role large corporate actors have in shaping policy. It identifies the food and beverage sectors as two of the five key industries requiring more stringent anti-trust monitoring.

#### Absent federal enforcement, lobbying is inevitable

John Ikerd 20, BS, MS and PhD in Agricultural Economics from the University of Missouri, former Head of Extension Agricultural Economics at the University of Georgia, Professor Emeritus from the University of Missouri, February 2020, “Reclaiming the Future of Farming”, Prepared for presentation at the MOSES Organic Farming Conference, <http://web.missouri.edu/~ikerdj/papers/WIMOSESFutureFoodFarming.pdf>.

What happened to stop, or at least delay, the great agricultural transformation that seemed so promising at the turn of the century? I think the futurists, myself included, failed to appreciate the growing economic and political power of the multinational agribusiness corporations and their determination to dominate the agricultural economy. When the federal government essentially quit enforcing corporate antitrust policy in the 1980s, it essentially freed the large corporations to take control of government. Economic colonization3 is a term that seems appropriate to describe the corporate domination of rural areas around the world, including rural America. The term is typically used in reference to the so-called developed nations using their economic power to continue dominating less-developed nations that were previously colonized politically. Instead of colonization by national governments, the colonization today is being carried out by large, multinational corporations. Much like colonial empires of the past, the economically valuable ecological and societal resources of rural areas, including rural people and cultures, are being exploited not to benefit rural people but instead to increase the wealth of corporate investors. These large, publicly traded corporations are purely economic entities with no capacity for concern or commitment to the future of rural communities. Their only interest is in extracting economic wealth from rural areas.

Whether intentional or coincidental, industrial agriculture has been the primary means of colonizing rural America. Agribusiness corporations gain political legitimacy and elicit economic concessions from local government officials through false promises of rural economic development. The largely unregulated industrial agriculture erodes the fertility of the soil and poisons the air and water with chemical and biological wastes. Comprehensive corporate contracts replace thinking, caring farmers with tractor drivers and corporate hired-hands. Once the productivity of an area has been depleted, the corporations will simply move their operations to other areas of the nation or world where land is still productive and labor costs are cheaper— as we have seen in with pineapple and sugar cane production moving out of Hawaii. Rural communities are left with depleted soils and aquifers, streams and groundwater polluted with agricultural chemical and biological wastes, and farmers who no longer know how to farm.

Obviously, farming communities did not become places where the knowledge workers of the 21st Century have chosen to work and live. Wendell Berry—farmer, philosopher, and author—in a 2017 letter to the New York Times described it this way: “The business of America has been largely and without apology the plundering of rural America, from which everything of value—minerals, timber, farm animals, farm crops, and “labor”—has been taken at the lowest possible price. As apparently none of the enlightened ones has seen in flying over or bypassing on the interstate highways, its too-large fields are toxic and eroding, its streams and rivers poisoned, its forests mangled, its towns dying or dead along with their locally owned small businesses, its children leaving after high school and not coming back. Too many of the children are not working at anything, too many are transfixed by the various screens, too many are on drugs, too many are dying.”4

The promise of a social and economic renaissance became social and economic desecration. A 2017 Wall Street Journal article labeled rural America as the “New Inner City.” In terms of poverty, education, teenage births, divorce, premature death, disability, and unemployment, rural counties now rank below inner cities.” 5 Drug abuse and crime, once urban problems, now plague rural communities. The rural communities that thrived socially and economically during the 1940s and 1950s, when I was a member of Future Farmers of America, are but a distant memory.

What did we gain from all of this economic desecration of rural America? Very little! Admittedly, American consumers on average spent less of their disposable income on food in the late 1990s than in the 1970s. Over the past 20 years, however, food prices have risen faster than the overall rate of inflation.6 Furthermore, industrial agriculture didn’t feed the hungry. In fact, more people are now classified as “food insecure” than back in the 1960s.7 In 2018, one-in-nine Americans were classified as food insecure and one-in-seven American children lived in foodinsecure homes.8 Whatever has been gained by lower food costs has been more than offset by rising costs of health care. An epidemic of diet related illnesses; obesity, diabetes, hypertension, heart disease, and cancers, now threatens the physical and financial future of the nation. Costs of health care are projected to account for one-fifth of the GDP by 2016.9

Why did we Americans let this happen? Or was it inevitable? The industrialization of American agriculture was made possible by post-World War II agrochemical and mechanical technologies, however, it was “made inevitable” by supportive government policies. The specialized, mechanized, large-scale nature of industrial farming that makes it economically efficient also makes it inherently economically risky. Farmers are forced to make large investments in land, buildings, and equipment in operations that are inherently vulnerable to unpredictable weather that can devastate crops, diseases that can wipe out livestock and poultry operations, and to unprofitable prices in markets characterized by periodic overproduction. So, American taxpayers were asked to absorb much of these risks through U.S. farm policies— including various kinds of price supports, deficiency payments, subsidized crop insurance, disaster payments, subsidized interest rates, loan guarantees, and investment tax credits. All of these programs, in one way or another, incentivize or subsidize industrial agriculture.

The industrialization of agriculture was a bold experiment, and it was well-intended—at least by many of its earlier advocates. I was one of those advocates during the first half of my 30 year academic career. I thought by improving the economic efficiency of farming, we would bring down the cost of food and make good food affordable for everybody. I thought the focus on economic efficiency would create profit opportunity for progressive farmers and support economically viable rural communities. However, during the farm financial crisis of the 1980s, I was forced to face the hard, cold reality that it had done none of these things. The industrialization of agriculture was well intended, but it simply didn’t work.

Regardless, many farmers continue to support it because they feel trapped by large investments in land, buildings, and equipment. They are trapped by government policies that encourage and enable them to keep doing what they are doing. They are also trapped by a “commercial farming culture” that has been skillfully crafted and protected by corporate agribusiness. So, what will it take to reclaim the future of farming? One of my professors at the University of Missouri, and later a mentor, was Harold Breimyer—a distinguished agricultural economist. Harold frequently reminded his students and others that “Americans can have any kind of agriculture we want.” He said we simply need to implement the right farm policies to get it. He was right. If we are to fundamentally change American agriculture, we must fundamentally change U.S. farm policy.

So what will it take to bring about another transformation in American farm policy? I personally believe it will take nothing less than a major consumer/taxpayer revolt. The corporate agri-food establishment has used its economic power to gain political power and now has firm control of the farm and food policy making in Washington DC and in statehouses across the country. No substantive change in farm policy can survive the political process without the endorsement or acquiescence of the corporate agricultural establishment.

Each new Farm Bill promises to conserve and protect natural resources and support independent family farms and rural communities. With each new Farm Bill the negative environmental and societal impacts of agriculture continue to grow and there are fewer independent family farms and fewer economically viable farming communities. Conservation programs such as Sod Buster, Swamp Buster, and the Conservation Reserve Program that limit crop production are more about temporary surplus reduction than permanent environmental protection. If we keep accepting the same kinds of farm policies we have accepted in the past, under both Democratic and Republican administrations, we are going to keep getting the same kind of agriculture we have been getting.

We need to start with a common understanding that the only politically defensible justification for government farm policies is to ensure domestic food security. That’s why government food assistance programs have always been administered through the U.S. Dept. of Agriculture (USDA). Logically, programs promoting farm exports should be administered by the Dept. of Commerce and biofuels programs by the Department of Energy. Domestic food security was the political justification for the initiation of U.S. farm policies of the 1930s, which included the Food Stamp program. The nation was in an economic depression. Farm families were going broke in numbers that put the nation’s food security was at risk. Depression era farm programs attempted to provide domestic food security by providing economic security for family farmers.

Domestic food security was also the political rationale for the later shift in farm policies in the early 1970s to programs that incentivize and subsidize industrial agriculture. Hunger in America had again become a major public concern during the 1960s. During the early 1970s, the Nixon/Butz administration used the promise of domestic food security to convince Congress of a need to change U.S. farm policy—and it worked. U.S. farm policies since the 1970s have succeeded in creating the kind of agriculture envisioned by the Nixon/Butz era policy experts. They simply failed to anticipate the negative environmental, social, and economic consequences.

However, for the first time since the 1970s, I see the possibility for a revolutionary, transformational change in U.S. farm policies. We have presidential candidates who are vowing to take on the corporate agricultural establishment and restore economic competitiveness to agricultural markets. Several candidates have also vowed support for a 2019 Congressional Resolution calling for a Green New Deal10 that would fundamentally change U.S. environmental, social, and economic policies—including farm policies. Perhaps most important, it reaffirms the responsibility of government to ensure domestic food security—enough good, healthful food for all. The resolution focuses on the challenges of climate change but calls for fundamental changes that would reach far beyond reducing emissions of greenhouse gasses. The ecological, social, economic inequities in farming, rural communities, and society in general are but different dimensions of same basic problem and will require a common solution.

The Green New Deal has not been approved by the U.S. Congress. It is simply a proposed congressional resolution that has never been formally debated in Congress or put to a serious vote. Still, it has been endorsed, to one extent or another, by every major contender for the Democratic nomination for President of the United States for the upcoming 2020 national election. This is the first time since the 1970s that many of the policy proposals have even been seriously discussed. The Green New Deal will be opposed by virtually every major organization and by many farmers who feel trapped in the current industrial system of commodity production. However, it is supported by a large number of progressive farm organizations and by many farmers who have been advocates for sustainable agriculture, by one name or another, for decades—without the support of their government. In the Green New Deal, there is still hope that the bright future of small, family farms I talked about in 1999 will become a reality.

### 1AC

#### Plan: The United States federal government should establish a structural presumption against agricultural mergers.

### 1AC

#### Contention Two is Sustainable Ag

#### Conventional farming requires chemical inputs that destroy ecosystems and pollinators and bio-accumulate, risking extinction---a disruptive collapse is inevitable unless a transition starts now

Friedemann 17 – Alice Friedemann, Systems Architect and Engineer For Over 25 Years, Science, Energy, and Agriculture Writer, Investigative Journalist and Energy Expert, Founder of Energy Skeptic, Author of When Trucks Stop Running: Energy and the Future of Transportation, “Chemical Industrial Agriculture is Unsustainable. Here’s Why”, Resilience, 5-27, http://www.resilience.org/stories/2017-03-27/chemical-industrial-farming-unsustainable-heres/

We hear a lot about how we’re running out of antibiotics. But we are also doomed to run out of pesticides, because insects inevitably develop resistance, whether toxic chemicals are sprayed directly or genetically engineered into the plants.

Worse yet, weeds, insects, and fungus develop resistance in just 5 years on average, which has caused the chemicals to grow increasingly lethal over the past 60 years. And it takes on average eight to ten years to identify, test, and develop a new pesticide, though that isn’t long enough to discover the long-term toxicity to humans and other organisms.

And this devil’s bargain hasn’t even provided most of the gains in crop yields, which is due to natural-gas and phosphate fertilizers plus soil-crushing tractors and harvesters that can do the work of millions of men and horses quickly on farms that grow only one crop on thousands of acres.

Yet before pesticides, farmers lost a third of their crops to pests, after pesticides, farmers still lose a third of their crops.

Even without pesticides, industrial agriculture is doomed to fail from extremely high rates of soil erosion and soil compaction at rates that far exceed losses in the past, since soil couldn’t wash or blow away as easily on small farms that grew many crops.

But pest killing chemicals are surely accelerating the day of reckoning sooner rather than later. Enormous amounts of toxic chemicals are dumped on land every year — over 1 billion pounds are used in the United State (US) every year and 5.6 billion pounds globally (Alavanja 2009).

This destroys the very ecosystems that used to help plants fight off pests, and is a major factor biodiversity loss and extinction.

Evidence also points to pesticides playing a key role in the loss of bees and their pollination services. Although paleo-diet fanatics won’t mind eating mostly meat when fruit, vegetable, and nut crops are gone, they will not be so happy about having to eat more carbohydrates. Wheat and other grains will still be around, since they are wind-pollinated.

Agricultural chemicals render land lifeless and toxic to beneficial creatures, also killing the food chain above — fish, amphibians, birds, and humans (from cancer, chronic disease, and suicide).

Surely a day is coming when pesticides stop working, resulting in massive famines. But who is there to speak for the grandchildren? And those that do speak for them are mowed down by the logic of libertarian capitalism, which only cares about profits today. Given that a political party is now in power in the U.S. that wants to get rid of the protections the Environmental Protection Agency (EPA) and other agencies provide, may make matters worse if agricultural chemicals are allowed to be more toxic, long-lasting, and released earlier, before being fully tested for health effects.

Meanwhile chemical and genetic engineering companies are making a fortune, because the farmers have to pay full price, since the pests develop resistance long before a product is old enough to be made generically. Except for glyphosate, but weeds have developed resistance. Predictably.

In fact, the inevitability of resistance has been known for nearly seven decades. In 1951, as the world began using synthetic chemicals, Dr. Reginald Painter at Kansas State University published “Insect Resistance in Crop Plants”. He made a case that it would be better to understand how a crop plant fought off insects, since it was inevitable that insects would develop genetic or behavioral resistance. At best, chemicals might be used as an emergency control measure.

Farmers will say that we simply must carry on like this, there’s no other choice. But that’s simply not true.

Consider the corn rootworm, that costs farmers about $2 billion a year in lost crops despite spending hundreds of millions on chemicals and the hundreds of millions of dollars chemical companies spend developing new chemicals.

To lower the chances of corn pests developing resistance, corn crops were rotated with soybeans. Predictably, a few mutated to eat soybeans plus changed their behavior. They used to only lay eggs on nearby corn plants, now they disperse to lay eggs on soybean crops as well. Worse yet, corn is more profitable than soy and many farmers began growing continuous corn. Already the corn rootworm is developing resistance to the latest and greatest chemicals.

But the corn rootworm is not causing devastation in Europe, because farms are smaller and most farmers rotate not just soy, but wheat, alfalfa, sorghum and oats with corn (Nordhaus 2017).

Before planting, farmers try to get rid of pests that survived the winter and apply fumigants to kill fungi and nematodes, and pre-emergent chemicals to reduce weed seeds from emerging. Even farmers practicing no-till farming douse the land with herbicides by using GMO herbicide-resistant crops. Then over the course of crop growth, farmers may apply several rounds of additional pesticides to control different pests. For example, cotton growers apply chemicals from 12 to 30 times before harvest.

Currently, the potential harm is only assessed for 2 to 3 years before a permit is issued, even though the damage might occur up to 20 years later.

Although these chemicals appear to be just like antibiotics, that isn’t entirely true. We develop some immunity to a disease after antibiotics help us recover, but a plant is still vulnerable to the pests and weeds with the genetics or behavior to survive and chemical assault.

Although there are thousands of chemical toxins, what matters is how they kill, their method of action (MOA). For herbicides there are only 29 MOAs, for insecticides, just 28. So if a pest develops resistance to one chemical within an MOA, it will be resistant to all of the thousands of chemicals within that MOA.

The demand for chemicals has also grown due the high level of bioinvasive species. It takes a while to find native pests and make sure they won’t do more harm than good. In the 1950s there were just three main corn pests. By 1978 there were 40, and they vary regionally. For example, California has 30 arthropods and over 14 fungal diseases to cope with.

When I was learning how to grow food organically back in the 90s, I remember how outraged organic farmers were that Monsanto was going to genetically engineer plants to have the Bt bacteria in them. This is because the only insecticide organic farmers can use is Bt bacteria, because it is found in the soil. It’s natural. Organic farmers have been careful to spray only in emergencies so that insects didn’t develop resistance to their only remedy. Since 1996, GMO plants have been engineered to have Bt in them, and predictably, insects have developed resistance. For example, in 2015, 81% of all corn was planted with genetically engineered Bt. But corn earworms have developed resistance, especially in North Carolina and Georgia, setting the stage for damage across the nation. Five other insects have developed resistance to Bt as well.

GMO plants were also going to reduce pesticide use. They did for a while, but not for long. Chemical use has increased 7% to 202,000 tons a year in the past 10 years.

Resistance can come in other ways than mutations. Behavior can change. Cockroach bait is laced with glucose, so cockroaches that developed glucose-aversion now no longer take the bait.

It is worth repeating that chemicals and other practices are ruining the long-term viability of agriculture. Here is how author Dyer explains it:

“Ultimately the practice of modern farming is not sustainable” because “the damage to the soil and natural ecosystems is so great that farming becomes dependent not on the land but on the artificial inputs into the process, such as fertilizers and pesticides. In many ways, our battle against the diverse array of pest species is a battle against the health of the system itself. As we kill pest species, we also kill related species that may be beneficial. We kill predators that could assist our efforts. We reduce the ecosystem’s ability to recover due to reduced diversity, and we interfere with the organisms that affect the biogeochemical processes that maintain the soils in which the plants grow.

Soil is a complex, multifaceted living thing that is far more than the sum of the sand, silt, clay, fungi, microbes, nematodes, and other invertebrates. All biotic components interact as an ecosystem within the soil and at the surface, and in relation to the larger components such as herbivores that move across the land. Organisms grow and dig through the soil, aerate it, reorganize it, and add and subtract organic material. Mature soil is structured and layered and, very importantly, it remains in place. Plowing of the soil turns everything upside down. What was hidden from light is exposed. What was kept at a constant temperature is now varying with the day and night and seasons. What cannot tolerate drying conditions at the surface is likely killed. And very sensitive and delicate structures within the soil are disrupted and destroyed.

Conventional tillage disrupts the entire soil ecosystem. Tractors and farm equipment are large and heavy; they compact the soil, which removes air space and water-holding capacity. Wind and water erosion remove the smallest soil particles, which typically hold most of the micronutrients needed by plants. Synthetic fertilizers are added to supplement the loss of oil nutrients but often are relatively toxic to many soil organisms. And chemicals such as pre-emergents, fumigants, herbicides, insecticides, acaricides, fungicides, and defoliants eventually kill all but the most tolerant or resistant soil organisms. It does not take long to reduce a native, living, dynamic soil to a relatively lifeless collection of inorganic particles with little of the natural structure and function of undisturbed soil”.

When I told my husband all the reasons we use agricultural chemicals and the harm done, my husband got angry and said “Farmers aren’t stupid, that can’t be right!”

I think there are a number of reasons why farmers don’t go back to sustainable organic farming.

First, there is far too much money to be made in the chemical herbicide, pesticide, and insecticide industry to stop this juggernaut. After reading Lessig’s book “Republic, Lost”, one of the best, if not the best book on campaign finance reform, I despair of campaign financing ever happening. So chemical lobbyists will continue to donate enough money to politicians to maintain the status quo. Plus the chemical industry has infiltrated regulatory agencies via the revolving door for decades and is now in a position to assassinate the EPA, with newly appointed Scott Pruitt, who would like to get rid of the EPA.

Second, about half of farmers are hired guns. They don’t own the land and care about passing it on in good health to their children. They rent the land, and their goal, and the owner’s goal is for them to make as much profit as possible.

Third, renters and farmers both would lose money, maybe go out of business in the years it would take to convert an industrial monoculture farm to multiple crops rotated, or an organic farm.

Fourth, it takes time to learn to farm organically properly. So even if the farmer survives financially, mistakes will be made. Hopefully made up for by the higher price of organic food, but as wealth grows increasingly more unevenly distributed, and the risk of another economic crash grows (not to mention lack of reforms, being in more debt now than 2008, etc).

Fifth, industrial farming is what is taught at most universities. There are only a handful of universities that offer programs in organic agriculture.

Sixth, subsidies favor large farmers, who are also the only farmers who have the money to profit from economies of scale, and buy their own giant tractors to farm a thousand acres of monoculture crops. Industrial farming has driven 5 million farmers off the land who couldn’t compete with the profits made by larger farms in the area.

But farmers will have to go organic whether they like it or not

It’s hard to say whether this will happen because we’ve run out of pesticides, whether from resistance or a financial crash reducing new chemical research, or whether peak oil, peak coal, and peak natural gas will cause the decline of chemical farming. Agriculture uses about 15 to 20% of fossil fuel energy, from natural gas fertilizer, oil-based chemicals, farm vehicle and equipment fuel, the agricultural cold chain, distribution, packaging, refrigeration, and cooking to name a few of the uses.

At some point of fossil decline, there won’t be enough fuel or pesticides to continue business as usual.

Farmers will be forced to go organic at some point. Wouldn’t it be easier to start the transition now?

#### Without a transition, ecocide is inevitable---Land conversion is empirically denied

Andrew Kimbrell 03, JD, Executive Director at the Center for Food Safety, “The Myth: Industrial Agriculture Benefits the Environment and Wildlife”, Fatal Harvest: The Tragedy of Industrial Agriculture, 1-4-2003, http://www.keepmainefree.org/myth5.html

Industrial agriculture is the largest single threat to the earth's biodiversity. Fence-row-to-fence-row plowing, planting, and harvesting techniques decimate wildlife habitats, while massive chemical use poisons the soil and water, and kills off countless plant and animal communities. Industrial agriculture’s mythmakers have been so successful in their efforts to shape opinion that they must believe we’ll swallow just about anything. They now assure us that intensive farming methods that rely on chemicals and biotechnology somehow protect the environment. This myth, as illogical as it may sound to an informed reader, is increasingly widespread in America today and is increasingly accepted as valid. What’s worse, agribusiness is saturating the media with misleading reports of the purported ecological risks of organic and other environmentally sustainable agricultural practices. A typical claim of the industrial apologists is that the industrial style of agriculture has prevented some 15 million square miles of wildlands from being plowed under for “low-yield” food production. They continuously assert that the biggest challenge of the 21st century is to increase food yields through modern advances in agricultural science, which include the genetic engineering of commercial food crops. They also claim that if the world does not fully embrace industrial agriculture, hundreds of thousands of wildlife species will be lost to low-yield crops and ranging livestock. There is a plethora of evidence that busts this myth. At the outset, the idea that sustainable agriculture is low-yield and would result in plowing under millions of square miles of wildlands is simply wrong. Relatively smaller farm sizes are much more productive per unit acre — in fact 2 to 10 times more productive — than larger ones, according to numerous government studies. In fact, the smallest farms, those of 27 acres or less, are more than ten times as productive (in terms of dollar output per acre) than large farms (6,000 acres or more), and extremely small farms (4 acres or less) can be over a hundred times as productive. Additionally, in contrast to industrial agriculture, sustainable or alternative agriculture minimizes the environmental impacts of farming on plants and animals, as well as the air, water, and soil, often without added economic costs. The simple use of composted organic manures is a cost-effective alternative to chemical fertilizers, and increases soil microbiology and fertility, decreases erosion, and over the long term helps preserve wildlife habitats. Organic and diversified farming practices increase the prevalence of birds and mammals on farmlands and ensure biological diversity for the planet. In sum, in terms of preserving and augmenting soil productivity and the biodiversity of the planet, small-scale sustainable agriculture is far more beneficial and efficient than its industrial counterpart. Moreover, instead of being a boon to the environment as the myth proclaims, industrial agriculture is currently the largest single threat to the earth's biodiversity. There are two primary reasons for this: the devastation of wild species caused by chemical use, and the destruction of wildlife habitat from industrial agriculture's inefficient fence-row-to-fence-row plowing, planting, and harvesting techniques. Chemicals and the Environment Pesticide use — endemic to industrial agriculture — has been clearly identified as a principal driving force behind the drastic reduction of biodiversity on America's farmlands. According to Tracy Hewitt and Katherine Smith of the Henry Wallace Institute, there are no fewer than 50 scientific studies that have documented adverse environmental effects of pesticide use on bird, mammal, and amphibian populations across the United States and Canada. The Virginia Department of Game and Inland Fisheries, for example, found that at least 6 percent of the breeding population of bald eagles along the James River were killed annually by insecticide poisonings. Professor David Pimentel estimates that 672 million birds are affected by pesticide use on farmlands and 10 percent of these — 67 million — die each year. In Texas, where some 15 million acres of croplands are treated with pesticides, tens of thousands of migratory waterfowl come in direct contact with the treated grains, risking sickness and ultimately death. Between 1977 and 1984, half of all the fish killed off the coast of South Carolina were attributed to pesticide contamination. These are only a few of the many tragic examples of wildlife destruction in the United States alone. Chemical fertilizers — which are also a key component of industrial agriculture — pose an even greater risk to soil and water quality, threatening biodiversity and wildlife populations around the globe. Aquatic and marine life are especially vulnerable to the tons of residues from chemically treated croplands that find their way into our major estuaries each year. In the Chesapeake Bay, native sea grasses, fish, and shellfish populations have declined dramatically in number in the last few decades due to extremely high nitrogen and phosphorous levels caused by the excessive use of chemical fertilizers. According to Kelley R. Tucker of the American Bird Conservancy, use of inorganic fertilizers also tends to reduce overall plant species diversity on farmlands, allowing farm edges to be dominated by only one or a few types of plants. Bird populations suffer as a result because they are highly dependent upon the variety of insects that are supported by diverse, native landscapes. Habitat Destruction In addition to the environmental damage caused by chemical pesticides and fertilizers, the huge monocultured fields characteristic of industrial agriculture have dramatically reduced a number of wildlife populations by transforming habitats, displacing populations of native species, and introducing non-native species. Among countless other wild plants and animals, important game species such as prairie chickens, bobwhite quail, cottontail rabbits, and ring-necked pheasants have been greatly reduced or eliminated in areas of industrial agriculture. Diversified farming techniques, on the other hand, incorporate numerous varieties of plants, flowers, and weeds, and encourage the proliferation of various wildlife, insect, and plant species. No myth can hide the fact that decades of industrial agriculture have been a disaster for the environment. Its chemical poisoning has caused eco-cide among countless species. And it has resulted in irreversible soil loss, reduction in soil and water quality, and the proliferation of non-native species that choke out indigenous varieties. Without question, the tilling, mowing, and harvesting operations of industrial agriculture have affected, and continue to catastrophically destroy, wildlife and soil and water quality. By contrast, sustainable and organic farming methods result in the reduction of land under the plow and the increase of biodiversity and wildlife on farmlands and beyond.

#### Consolidation halts that transition---3 internal links

#### First, Crowd-out---it leads to the replacement of small farms with large farms across industries

Kristen Tam and Olivia Bielskis 21, Researchers for UCLA Law Library, “Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement”, 4-1-21, UCLA Law Library, <https://escholarship.org/uc/item/0m16g2r5>

As defined by the United States Department of Agriculture (USDA), a “farm” is any place from which $1,000 or more of agricultural products were produced or sold during the year.11 This section discusses the historical and current consolidation trends in the agriculture marketplace for farms, meatpacking firms, and many other food corporations. I find that the overall number of farms has decreased while the size of each farm or firm has increased, and the number of farms in higher sales classes have increased along with their subsequent share of farmland.12 Farm numbers have decreased since the onset of the 20th century, however, due to Robert Bork and the Chicago School’s influence that prioritized economic efficiency and consumer prices over small businesses,13 the number of farms in the United States started decreasing at faster rates. In 1975, there were 2.5 million farms across the country,14 which declined by an average of 2.41 percent per year.1516 Comparatively, from 1980 to 1985, the number of farms decreased by an average of 6.15 percent per year,17 alluding to increased rates of consolidation. While farm numbers continue to decrease, output production size and the Gross Cash Farm Income (GCFI) of large farms has increased. From 2012 to 2018, the number of farms decreased from 2.11 to 2.03 million farms, while the average farm size increased from 429 to 443 acres.18 Specifically, the growth in land holdings has increased the greatest in the largest farms. In 1987, 57 percent of the United States cropland was operated by midsize farms with 100 to 999 acres of cropland while only 15 percent was operated by large farms over 2,000 acres.19 In 2012, cropland operated by midsize farms drastically decreased to 36 percent while cropland operated by large farms increased to 36 percent, more than doubling the figure from 1987.20 In addition to holding control of more land and market power, and decreasing competition in the marketplace, these larger farms hold a disproportionate majority of agricultural commodity profits. In 1991, small farms, defined as farms whose income is less than $350,000, took in 46 percent of agricultural profit, while in 2015, small farms took in only 25 percent of agricultural profit.21 Large farms, who make more than $1,000,000 held 31 percent of the GFCI in 1991, while in 2015, their share increased to 51 percent.22 The trend towards, seeing as the number of farms and packaging plants decrease while the number of animals raised per farm increases. From 1987 to 2017, there was a 28.50 percent decrease in the number of cow, pig and chicken farms.23 While the number of farms decreased, the midpoint numbers for the number of livestock per farm increased; where half of the livestock are above, and half are below it. In 1987, the midpoint number of cows for each livestock feeding industry was 80, while in 2012, this increased to 900, an increase of 1,025 percent.24 The number of meatpacking plants, consolidation is also prevalent in the livestock, poultry and meat packing industries where farmers sell their animals to be slaughtered, packaged, and distributed, also decreased which allows meatpackers to run roughshod over farmers by giving them power to pay their desired lower prices, disadvantaging farmers. Consolidation in other food industries is increasing as well, seeing as in 2012 four firms owned 89 percent of the peanut butter industry, a staggering figure which increased to 92 percent in 2017.25 In 2015 the two largest corn seed firms owned 78 percent of the market share,26 in 2017 the four largest jelly firms owned 85 percent of the industry,27 and in 2018, two firms owned 87 percent of the mayonnaise market share, a $1.6 billion dollar industry.28 These figures showing monopolization exemplify the formidable proportions to which the agriculture and food industry is consolidated. These trends underscore how the regulation mechanisms in place to promote competition and prevent monopolization are not working.

#### Second, Tech Lock-In---increasing reliance creates new path dependencies that make a transition to sustainable tech impossible---it’s a linear risk

Jennifer Clapp 20, Canada Research Chair in Global Food Security and Sustainability and a professor in the School of Environment, Resources, and Sustainability at the University of Waterloo, “Precision Technologies for Agriculture: Digital Farming, Gene-Edited Crops, and the Politics of Sustainability,” Global Environment Politics, 20.3, https://direct.mit.edu/glep/article/20/3/49/95048/Precision-Technologies-for-Agriculture-Digital

Technological Lock-In

Key dynamics identified in the broader literature about technological lock-in—whereby technological systems develop along established pathways from which it is difficult and costly to deviate—are reflected in current debates over precision technologies for agriculture. Technological lock-in typically occurs when powerful social forces drive technological development in certain directions. These social forces are often the result of earlier events—technological, political, and psychological—that cement the societal dominance of certain technological systems over others (McKinnon 2019). This temporal nature of the process means that lock-in can become self-reinforcing over time and can ultimately crowd out other potential technological systems that might offer more benefits over the long run (Arthur 1989). In instances of lock-in, the cost of not adopting a new technology that fits into a dominant technological system can often be higher than the benefits of actually using that technology, even if there are better ways to resolve the problem (McKinnon 2019). In such situations, potential adopters typically make decisions about the costs of adopting (or not adopting) novel technologies in the short term, even in cases when the benefits of switching to a different system may be higher over the long term. This dynamic tends to give the momentum in debates regarding novel technology adoption to those voices that reinforce the dominant technological system while weakening the influence of those promoting alternative systems (Vanloqueren and Baret 2009).

The lens of technological lock-in helps shed light on the ways in which the structural context of the dominant agricultural system shapes the political dynamics surrounding current versus possible alternative systems in the debate over precision technologies. The current industrial model rose to dominance through historical patterns of progressive adoption of industrial agricultural technologies that established new path dependencies. The development of hybrid seeds in the 1920 and 1930s and the monoculture planting practices that accompanied them, for example, encouraged monocrop agriculture and the adoption of tractors to replace horses. When monocropping resulted in new vulnerabilities to insects and weeds in crop systems, the response was the adoption of agrochemical sprays to control those pests. Subsequently, agricultural biotechnology emerged as a means by which to address high levels of agrochemical use, by engineering crops to be resistant to pests or resistant to what were thought to be relatively benign herbicides, such as glyphosate (Sassenrath et al. 2008).

Although advocates promote precision technologies as part of a more sustainable trajectory, they are deeply enmeshed with elements of the established industrial agricultural system. Most of the corporate research into gene editing and variable-rate spraying equipment, for example, is focused on the use of these technologies in conjunction with herbicides—specifically glyphosate—which have already been locked into dominant agricultural practices. New precision technologies are also deeply enmeshed in the dominance of digital technology systems in society more broadly. The prevalence of and familiarity with digital technologies in society for nonfarming activities, such as for obtaining news and weather forecasts or social media, work to lock-in digital farming adoption by farmers. As farmers sign on to these new digitally linked farming technologies, their entrenchment in the industrial agriculture system to which most of those technologies are tethered only deepens. And as farmers become increasingly reliant on and skilled in the use of digital technologies to guide their farming decisions, lock-in becomes self-reinforcing, because farmers lose the ability to evaluate trade-offs and make decisions in the absence of digital assistance as well as the ability to repair their own digital equipment and machinery (Carolan 2018; Rotz et al. 2019).

#### Third, Proprietary Cropping Systems---they increase market power, raise the barrier for new entrants, and divert innovation to only system-based competition

Diana Moss 20, Ph.D., President, American Antitrust Institute, January, “Consolidation And Concentration In Agricultural Biotechnology: Next Generation Competition Issues,” https://www.antitrustinstitute.org/wp-content/uploads/2020/01/CPI-Moss.pdf

The most recent series of agricultural biotechnology mergers have created large, integrated, proprietary cropping systems of traits, GM crop seed, and crop protection. Such systems were evident as early as first-generation technologies, such as Monsanto’s early generation glyphosate herbicide Roundup and Roundup Ready 1 soybeans. Even then, the exclusive nature of systems was evident, as one farmer aptly noted: “[I] can’t mix chemicals with other companies’ products to remedy Roundup resistance.” More recently, Monsanto extended its newer generation RR2 soybean platform to encompass more complex traits and herbicides with its Roundup Ready 2 Xtend dicamba-tolerant integrated cropping system. Dow-DuPont made a similar move with its Enlist 2,4-D tolerant system. Recent merger proposals are motivated, among other reasons, by the drive to build out integrated, proprietary systems that do not interoperate with rivals’ products. This goal was apparently behind Monsanto’s failed bid for Syngenta which “…would [have] enable[d] the combined company to deliver integrated and sustainable solutions across all the major technology-driven platforms of breeding, biotechnology, crop protection, microbials and precision agriculture.”26 Monsanto and Bayer also touted integrated solutions as a major strategic benefit of their proposed merger.27 Integrated, proprietary systems raise a number of troubling issues. First, economic evidence from soybeans and cotton indicates that seed prices under vertical integration tend to be higher than under licensing arrangements across firms. This suggests that vertical integration may increase the exercise of market power and firms’ ability to extract economic benefits from seed dealers and farmers.28 Second, integration enhances both the ability and incentive to bundle proprietary products in proprietary systems that do not interoperate with rival technologies.29 This is likely to raise entry barriers for unintegrated rivals competing at standalone levels such as seeds or crop protection and that cannot enter at multiple levels. Such smaller rivals may be victims of exclusionary conduct, for example, if the Big 3 induce distributors to accept bundled products. A third problem is that proprietary systems of integrated, proprietary technologies shifts the competitive paradigm from competition at the individual levels of traits, GM crop seed, and crop protection to competition between systems. Arguably, a sector dominated by only three large firms will not provide sufficient head-to-head competition between systems to facilitate beneficial market outcomes. This poses significant risks for growers, who could be locked into single proprietary cropping systems at higher prices, with limited flexibility and choice. It would also harm consumers, who could pay higher prices and lose choice in how their food is grown and sourced.

#### Big Ag leads to ecological collapse---it destroys biodiversity, causes gulf hypoxia, and increases emissions

Matthew R. Sanderson and Stan Cox 19, social scientist at Kansas State University, research scholar in ecosphere studies at The Land Institute “Big Agriculture Is Leading to Ecological Collapse,” Foreign Policy, 10-14-2019, <https://foreignpolicy.com/2021/05/17/big-industrialized-agriculture-climate-change-earth-systems-ecological-collapse-policy/>

Today, there is more carbon dioxide in the atmosphere than at any point in the past [3.6 million years](https://research.noaa.gov/article/ArtMID/587/ArticleID/2742/Despite-pandemic-shutdowns-carbon-dioxide-and-methane-surged-in-2020). On April 5, atmospheric carbon dioxide exceeded [420 parts per million](https://www.esrl.noaa.gov/gmd/ccgg/trends/monthly.html)—marking nearly the halfway point toward doubling the carbon dioxide levels measured prior to the Industrial Revolution, a mere [171 years ago](https://www.ipcc.ch/site/assets/uploads/sites/2/2018/12/SR15_FAQ_Low_Res.pdf). Even amid a pandemic-induced economic shutdown—during which global annual emissions dropped [7 percent](https://research.noaa.gov/article/ArtMID/587/ArticleID/2742/Despite-pandemic-shutdowns-carbon-dioxide-and-methane-surged-in-2020)—carbon dioxide and methane levels set records in 2020. The last time Earth held this much carbon dioxide in its atmosphere, sea levels were nearly 80 feet higher and the planet was 7 degrees Fahrenheit warmer. The catch: Homo sapiens did not yet exist.

Change is in the air. U.S. Director of National Intelligence Avril Haines [announced](https://www.nytimes.com/live/2021/04/22/us/biden-earth-day-climate-summit) climate change is “at the center of the country’s national security and foreign policy.” Business-as-usual is no longer a viable strategy as more institutions consider a future that will look and feel much different. In this context, it is striking to read a recent piece in Foreign Policy arguing “[big agriculture is best](https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/).”

“Big agriculture is best” cannot be an argument supported by empirical evidence. By now, it is vitally clear that Earth systems—the atmosphere, oceans, soils, and biosphere—are in [various phases of collapse](https://www.swissre.com/media/news-releases/nr-20200923-biodiversity-and-ecosystems-services.html), putting nearly [one-half of the world’s gross](https://www.swissre.com/media/news-releases/nr-20200923-biodiversity-and-ecosystems-services.html) domestic product at risk and [undermining the planet’s ability to support life](https://ipbes.net/global-assessment). And big, industrialized agriculture—promoted by U.S. foreign and domestic policy—lies at the heart of the multiple connected crises we are confronting as a species.

The litany of industrial agriculture’s toll is long and diverse. Consider the effects of industrial animal agriculture, for example. As of this writing, animal agriculture accounts for [14.5 percent](http://www.fao.org/news/story/en/item/197623/icode/) of total anthropogenic greenhouse gas emissions annually. It is also the source of 60 percent of all nitrous oxide and 50 percent of all methane emissions, which have [36 times and 298 times](https://www.epa.gov/ghgemissions/understanding-global-warming-potentials), respectively, the warming potential of carbon dioxide. As industrial animal agriculture has scaled up, agricultural emissions of methane and nitrous oxide have been going in [one direction only](https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg3-chapter8-1.pdf): up.

Efforts to scale industrial agriculture are undermining the planet’s capacity to support life at more local scales too. Consider Brazil, home to the Amazon Rainforest, which makes up [40 percent](https://www.worldbank.org/en/news/feature/2019/05/22/why-the-amazons-biodiversity-is-critical-for-the-globe) of all remaining rainforest and 25 percent of all terrestrial biodiversity on Earth. Forest loss and species extinctions [have only increased](https://ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf) as industrial agriculture has scaled up in Brazil. Farmers are burning unprecedented amounts of forest to expand their operations in pursuit of an industrial model. In August 2019, [smoke blocked the sun in São Paulo](https://www.weforum.org/agenda/2019/08/amazon-burning-unseen-rate/), Brazil, 2,000 miles away from the fires in the state of Amazonas.

Efforts to scale industrial agriculture are undermining the planet’s capacity to support life.

In India, the pace of agricultural industrialization is hastening as indicated by [rising agricultural production](https://www.ers.usda.gov/mediaImport/1957187/err-203.pdf) and [declining employment in agriculture](https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=IN), which now accounts for less than one-half of India’s workforce. Agriculture has been scaled with all the tools of the Green Revolution: a high-input farming system comprised of genetically modified seeds and accompanying synthetic fertilizers and pesticides. As agriculture has industrialized in India, the use of [pesticides](http://ppqs.gov.in/statistical-database) and [fertilizers](https://pib.gov.in/PressReleseDetailm.aspx?PRID=1640400#:~:text=Production%20and%20Sales%2F%20consumption%20of%20Fertilisers%20comfortable&text=2019%2D20%20record%20high%20urea,previous%20year%20i.e.%202018%2D19.) has risen as well.

Although it has become more difficult to breathe the air in Brazil, it has become harder to find clean freshwater in India, where [pesticide contamination is rising](https://link.springer.com/article/10.1007/s10661-015-4287-y). There, the costs of the industrial agriculture model are plainly ecological and human: Unable to drink the water or pay back the loans they took out to finance their transition to industrial farming, an alarming number of Indian farmers are drinking pesticides instead. Almost a quarter-million Indian farmers have [died by suicide](http://www.isec.ac.in/farmer_suicides_An%20all%20India%20study-09Aug2017-revised.pdf) since 2000, and [10,281 farmers and farm laborers](https://www.nytimes.com/2020/09/08/world/asia/india-coronavirus-farmer-suicides-lockdown.html) killed themselves in 2019 alone. In Punjab, the country’s breadbasket, environmental destruction coexists with a raging opioid epidemic ensnaring nearly[two-thirds of households in the state](https://www.theguardian.com/global-development/2019/jul/01/the-indian-state-where-farmers-sow-the-seeds-of-death).

If the events in Brazil and India sound familiar to U.S. readers, it is because there are analogous stories in the United States—where industrial agriculture is rendering entire landscapes uninhabitable. The U.S. Corn Belt, which spans the region from Ohio to Nebraska, produces 75 percent of the country’s corn, but around [35 percent](https://www.pnas.org/content/118/8/e1922375118) of the region has completely lost its topsoil. Industrial agriculture has been pursued with special zeal in Iowa, where there are 25 million hogs and 3 million people. There, water from the Raccoon River enters the state capital of Des Moines—home to 550,000 people—with nitrates, phosphorus, and bacteria that have [exceeded federal safe water drinking standards](https://apnews.com/article/des-moines-lawsuits-courts-iowa-pollution-23798b7c9dfe04bc84f728ce92eeb4db).

At a larger scale, nutrient runoff from industrial agriculture in the U.S. Midwest has created an annual [dead zone](https://www.noaa.gov/media-release/noaa-forecasts-very-large-dead-zone-for-gulf-of-mexico)—a hypoxic area low in or devoid of oxygen—that is the size of Massachusetts. The ecological consequences of industrial agriculture manifest alongside a growing human toll. Rural communities are experiencing [rising suicide rates](https://www.washingtonpost.com/news/wonk/wp/2018/05/24/mapping-the-rising-tide-of-suicide-deaths-across-the-united-states/), especially [among young](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4551430/) people, along with increases in “[deaths of despair](https://www.nytimes.com/2020/01/09/opinion/sunday/deaths-despair-poverty.html)” from alcohol and drugs—an expanding human dead zone.

From suffering U.S. farmers to the pain inflicted on the developing world, everything about U.S. agriculture policy is dysfunctional. The next administration can do better.

Although tragic, these outcomes are neither inevitable nor natural. They are outcomes of U.S. policy choices. Industrialized agriculture has been a hallmark of U.S. foreign policy in the post-World War II era. Under the guise of [development for all](https://avalon.law.yale.edu/20th_century/truman.asp) and the mantra of “[feed the world](https://share.america.gov/u-s-farmers-feed-world/),” the United States has used policy to [dump surplus grain](https://www.cambridge.org/core/journals/renewable-agriculture-and-food-systems/article/true-costs-of-us-agricultural-dumping/ABDB3E76865636EF025C72D94FEECD32) in low-income countries—undermining markets for smallholder farmers—and cultivate foreign markets as importers of high-input, industrial agriculture technologies to scale agriculture. At home, federal policy since the 1970s has explicitly promoted scaling industrial agriculture through the “[get big or get out](https://grist.org/article/the-butz-stops-here/)” imperative.

Society did not arrive at this precipice because agriculture was too small or because industrialized agriculture respected the laws of physics. Instead, we are peering into an abyss of systemic socioecological collapse because every effort has been made to use industrialization to break through all known ecological and human limitations to scaling agriculture.

Industrial agriculture simplifies ecosystems, rendering us more vulnerable to threats. Transformative policies will be required to pull us back from the edge. As a start, the United States could set an example for the Global North with a [50-year farm bill](https://www.nytimes.com/2009/01/05/opinion/05berry.html).

Industrial agriculture simplifies ecosystems, rendering us more vulnerable to threats.

The bill would promote ecosystem diversification and increased resilience by reducing acreage of annual grain crops from 70 percent to 10 percent or less of all cropland while scaling up [perennial crops](https://science.sciencemag.org/content/328/5986/1638) to 80 percent of farmland. The remaining 10 percent would be allocated to other crops, including a diverse array of locally produced vegetables and fruits. Soil and water-conserving perennial varieties of rice, wheat, legumes, and other food-grain crops—which are [now being developed](https://www.cambridge.org/core/journals/global-sustainability/article/is-the-future-of-agriculture-perennial-imperatives-and-opportunities-to-reinvent-agriculture-by-shifting-from-annual-monocultures-to-perennial-polycultures/0F69B1DBF3493462B4D46EB8F0F541EE)—could serve as components of diverse, perennial, multispecies communities of food crops that replicate how nature functions. The bill would promote a transition to smaller, more diverse farm operations as agricultural diversification will work most effectively not on vast, uniform acreages but as mosaics made up of many modest-sized farms.

The bill would be an important step toward returning home as a species that once again lives within context—within limits, [perennially](https://www.resilience.org/stories/2020-12-08/transforming-life-on-our-home-planet-perennially/). Our collective pursuit of “big is best” led us out of context to our peril.

In the face of multiple cascading socioecological crises, Candide, published by the French writer Voltaire in 1759, shows us a way forward. Candide, the book’s protagonist, is mentored by Pangloss, a professor who holds a [Leibnizian optimism](https://plato.stanford.edu/entries/leibniz/) about the world that justifies the status quo as being “all for the best” in the “best of all possible worlds.”

#### Collapse of biodiversity causes extinction

Dr. Luiz Marques 20, PhD in Entomology, Associate Professor of Environmental History in the Department of History at the University of Campinas, Capitalism and Environmental Collapse, p. 247-248

Numerous scholars from various fields of science today are concerned with the ongoing collapse of biodiversity. The first Global Assessment of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),1 published in 2019, estimates that:

The rate of global change in nature during the past 50 years is unprecedented in human history (…) Human actions threaten more species with global extinction now than ever before. (…) An average of around 25% of species in assessed animal and plant groups are threatened, suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss.

Societies’ very survival depends on their ability to avert the impending threat of biological annihilation via the ongoing sixth mass extinction of species, triggered or intensified by the globalization of capitalism over the last 50 years. Sir Robert Watson, Chair of IPBES (2016), doesn’t mince his words to say what is at stake: “We are eroding the very foundations of our economies, livelihoods, food security, health and quality of life worldwide.” There is no hyperbole in the claim that the collapse of biodiversity and the acceleration of global warming, two processes that interact in synergy, entail an increasing risk of extinction for the Homo sapiens. As pointed out by Cristiana Paşca Palmer, Executive Secretary of the Convention on Biodiversity (2018), “I hope we aren’t the first species to document our own extinction.” Julia Marton-Lefèvre, former Director General of the International Union for Conservation of Nature (IUCN), reiterates this warning for the umpteenth time in a statement to delegations meeting at Rio+20 in 2012:

Sustainability is a matter of life and death for people on the planet. A sustainable future cannot be achieved without conserving biological diversity—animal and plant species, their habitats and their genes—not only for nature itself, but also for all 7 billion people who depend on it.

10.1 Defaunation and Biological Annihilation

Rodolfo Dirzo, Mauro Galetti, Ben Collen, and other co-authors of a review titled “Defaunation in the Anthropocene” (2014) conceptualize one of the central aspects of the current sixth mass extinction of species: the term defaunation is used to denote the loss of both species and populations of wildlife, as well as local declines in abundance of individuals. The defaunation process is in full swing:

In the past 500 years, humans have triggered a wave of extinction, threat, and local population declines that may be comparable in both rate and magnitude with the five previous mass extinctions of Earth’s history. Similar to other mass extinction events, the effects of this “sixth extinction wave” extend across taxonomic groups, but they are also selective, with some taxonomic groups and regions being particularly affected. (…) So profound is this problem that we have applied the term “defaunation” to describe it.

In a 2017 article, Gerardo Ceballos, Paul Ehrlich, and, again, Rodolfo Dirzo warn about the false impression that the threat of biological annihilation is not imminent:

The strong focus on species extinctions, a critical aspect of the contemporary pulse of biological extinction, leads to a common misimpression that Earth’s biota is not immediately threatened, just slowly entering an episode of major biodiversity loss. This view overlooks the current trends of population declines and extinctions. Using a sample of 27,600 terrestrial vertebrate species, and a more detailed analysis of 177 mammal species, we show the extremely high degree of population decay in vertebrates, even in common “species of low concern.” Dwindling population sizes and range shrinkages amount to a massive anthropogenic erosion of biodiversity and of the ecosystem services essential to civilization. This “biological annihilation” underlines the seriousness for humanity of Earth’s ongoing sixth mass extinction event.

#### Gulf hypoxia is growing because of ag runoff---it’ll collapse whole oceans---extinction

Hendy 17 – Dr. Ian Hendy, PhD in Trophic Marine Biology, Research and Communication Officer and Senior Scientific Researcher in Marine Ecology at the University of Portsmouth, Institute of Marine Sciences Laboratories, “Gulf of Mexico 'Dead Zone' Is Already A Disaster – But It Could Get Worse”, Phys Org, 8-14, https://phys.org/news/2017-08-gulf-mexico-dead-zone-disaster.html

Each summer, a large part of the Gulf of Mexico "dies". This year, the Gulf's "dead zone" is the largest on record, stretching from the mouth of the Mississippi, along the coast of Louisiana to waters off Texas, hundreds of miles away. Around 8,776 square miles of ocean, an area the size of New Jersey or Wales, is almost lifeless.

John Muir, the famed naturalist and early conservation campaigner, once said that: "When we try to pick out anything by itself, we find it hitched to everything else in the Universe." His point was that everything in nature is connected, and that no part of our ecosystem exists entirely independently from any other.

It is perhaps no surprise then that ultimate cause of the Gulf of Mexico's dead zone can be found many miles inland. Fertilisers used by farmers then wash into the Mississippi River and eventually into the sea, where nutrients such as nitrogen and phosphorus stimulate an explosion in microscopic algae, creating huge "algal blooms". The algae then die and sink to the bottom, where they decompose. But the same bacteria which decompose the algae also use the sea's oxygen during the process, leaving an "anoxic" ocean.

Fish and other mobile sea creatures are able to escape the suffocating dead zone. Less lucky however are the sponges, corals, sea squirts and other animals who live their lives fixed in one place on the sea bed. Low oxygen levels place them under great stress and we have seen huge mortalities. Such losses will of course ripple up the food web, creating a negative chain reaction of increasing mortality rates in larger and larger animals.

The "dead zone" has grown this year due to increased rainfall in America's Midwest washing ever greater amounts of nutrients into the Mississippi, which ultimately end up in the Gulf. Not only is this a huge conservation issue – the Gulf contains key nursery habitats such as mangrove forests, sea grass beds and coral reefs that benefit adjacent fisheries – but it also has huge consequences for the local fishing economy, particularly the shrimp industry.

Steps are under way to slow down the ecological disaster. Some farmers in the Mississippi basin are using large grassy zones along waterways in order to soak up the agricultural fertilisers and filter out many of the nutrients before they make their way down the Mississippi to pollute the Gulf. However, it remains to be seen whether such measures are effective – and US farmers certainly need to greatly reduce the nitrogen and phosphates they use.

In the century since Muir's death, things have sped up. A larger population demands more food which means more deforestation, more farmland and more fertiliser. The increase demand placed on our land is ultimately affecting the marine environment.

These losses are unsustainable. The marine environment is integral for all life on earth, from an ecological and economic point of view. If we keep losing ecosystem services such as coastal nursery habitats and spawning grounds at this current rate, it will not just be an area the size of a state that is a dead zone, but the whole Gulf, or even whole oceans.

#### Industrial ag causes antibiotic resistant pandemics---extinction

Pamlin 15 – Dennis Pamlin, Entrepreneur and Founder of 21st Century Frontiers, Senior Associate at Chinese Academy of Social Sciences, Visiting Research Fellow at the Research Center of Journalism and Social Development at Renmin University, Advisor to Centre for Sustainable Development at Confederation of Indian Industries, Stuart Armstrong, DPhil from Oxford University, James Martin Research Fellow at the Future of Humanity Institute at Oxford University, “Global Challenges, 12 Risks That Threaten Human Civilization: The Case for a New Risk Category”, Global Challenges Foundation, February, https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

3.1.4.1 Expected impact disaggregation

3.1.4.2 Probability

Influenza subtypes266

Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261

These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic.

Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267

There are other grounds for suspecting that such a high impact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme.

Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275

Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade).

Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics).

Five important factors in estimating the probabilities and impacts of the challenge:

1. What the true probability distribution for pandemics is, especially at the tail.

2. The capacity of modern international health systems to deal with an extreme pandemic.

3. How fast medical research can proceed in an emergency.

4. How mobility of goods and people, as well as population density, will affect pandemic transmission.

5. Whether humans can develop novel and effective anti-pandemic solutions.

1. Extensive medical research will be key to preventing and combatting large scale pandemics. The drawbacks are the possibility of accidental release of dangerous pathogens from laboratories and of bioterrorism.

2. As so much is known about pandemic risks compared with other risks, there are more possibilities for specific prepandemic contingency plans.

3. The effectiveness of healthcare systems will be important, especially in less developed nations where the pandemic may overwhelm the system, and then transmit from there to other nations.

4. Global coordination in detection, analysis and treatment are vital for stopping a pandemic in its early stages, and for implementing measures such as quarantines and more advanced countermeasures.

5. Poverty will affect the quality of national healthcare systems, population density and sanitation quality, the movement of local goods and people, and the effectiveness of the political response.

6. Bioterrorists may unleash a pathogen held in storage, such as smallpox.

7. Laboratory security at the top labs is insufficient for the danger at hand, and accidental release is a nonnegligible possibility.

8. Pandemics are one of the risks where there is a possibility for a very large number of direct casualties, depending on the severity of the pathogen.

9. Mass casualties and finger-pointing could destabilise the world political and economic systems.

10. If the pathogen is transmissible to farm animals, this could affect the world food supply.

11. It is unlikely the pathogen would be a recurrent, long-term risk, but variants of it could continue to affect people and animals for many years, dependent on its transmissibility and life cycle.

12. Small pandemic scares could improve global coordination on the issue.

13. Increased population density causes increased transmissibility of the pathogen, especially in urban slums.

14. Some pathogens, such as bird flu, depend on regular contact between humans and “reservoir species” in order to evolve into periodically dangerous strains.

15. If antibiotic resistance develops, humanity could see the resurgence of bacteria-based pandemics.

16. The increased movement of people and products increases the speed and spread of pandemic transmission.

17. Sanitation or its lack will strongly affect the spread of certain pathogens in key areas.

18. The efficiency of global reaction to a new pandemic will be strongly determined by the speed of research on the pathogen during the pandemic.

19. A great risk will arise if a pathogen combines the different dangerous features of current viruses or bacteria.

20. The improvements to surveillance and sensing technologies (including indirect detection via web queries or social media) open the possibility of smarter interventions (such as microquarantines) and faster understanding of the pathogen’s transmissibility.

21. Post-pandemic politics will be important for preventing a civilisation collapse or enabling reconstruction.

22. Many pathogens incubate in species close to humans, before leaping the species barrier.

23. Monoculture food systems make it easier to transmit any pathogen infecting human food animals.

24. The mode of transmission of the pathogen will be critical to its ultimate reach and impact.

25. Various countermeasures are available in terms of detection, virus analysis, treatment, and quarantining. Future research, technological and political developments may open up new methods of fighting the pathogen.

26. Many of the current factors determining pathogen transmission are unprecedented, such as movements of goods and people, the quality of healthcare systems, and the existence of a centralised political response. This means that data from past pandemics will not be as reliable for computing probability distributions.

27. The pandemic risk lies in the “tails” – the extreme events – and these tails must be estimated from few data points, making them tricky and uncertain.

3.1 Current risks during 2013

3.1.4.3 Main events

10-Jun-13: Pandemic Influenza Risk Management: WHO Interim Guidance 278 – Policy

This is an updated document that replaces the 2009 Pandemic Influenza Preparedness and Response: a WHO guidance document.279 It updates its recommendations based on lessons from the influenza A(H1N1) 2009 pandemic (swine flu),280 the adoption by the Sixty-fourth World Health Assembly of the Pandemic Influenza Preparedness Framework281 (for the sharing of influenza viruses and access to vaccines and other benefits), and the States Parties’ obligations on capacity strengthening contained in the International Health Regulations of 2005.282

Of significance was the Report of the Review Committee on the Functioning of the International Health Regulations (2005) on the A(H1N1) 2009 pandemic,283 which concluded: “We were lucky this time, but as the report concludes, the world is ill-prepared to respond to a severe influenza pandemic or to any similarly global, sustained and threatening public-health emergency.” This is reinforced by the fact that the 2009 pandemic is alleged to have infected 24% of the population.284

The main lesson the WHO drew from that epidemic was that member states generally had communication issues (between ministries of health and decision,makers, and with the public), and were prepared for a pandemic of high severity and appeared unable to adapt their national and subnational responses adequately to a more moderate event.

The guidance paper indicates simultaneously the weaknesses of pandemic preparations, the improvements in these preparations, and the continued role of the WHO as global directing and coordinating authority.

24-Jul-13: Bacteria become resistant to some of the last remaining antibiotics 285 – Event

Bacterial infections, such as the Black Death, 286 syphilis, 287 and tuberculosis, 288 have been responsible for millions of deaths, over the thousands of years they have co-existed with humanity. Though these diseases have not been eradicated – overall, a third of the world is currently infected with the tuberculosis bacillus289 – they have been controlled since the introduction of antibiotics, and prognostics have improved tremendously. But recently a rising number of bacteria have developed antibiotic resistance, due mainly to antibiotic over-prescription290 and use in livestock feed.291 This Nature report highlights the worrying way in which Enterobacteriaceae (bacteria with a 50% mortality rate) have become resistant to carbapenems, one of the last remaining antibiotics that had been effective against them.

#### Small farms are key to the implementation of regenerative ag practices---the market power of large farms prevents status quo investment

Kristen Tam and Olivia Bielskis 21, Researchers for UCLA Law Library, “Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement”, 4-1-21, <https://escholarship.org/uc/item/0m16g2r5>

Food Security, a Critical Practice to create a Climate Resilient Future The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.33 Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,34 farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals. Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and pesticide use, and eliminating tillage practices.35 Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.36 This practice ultimately increases the long term productivity and stability of food production because it doesn’t rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.37 II. Small Farms are More Likely to Implement Regenerative Fertilization Practices One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,38 organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,39 and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.40 For these figures, manure and organic fertilizers are categorized as “regenerative fertilizers” because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients. Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.41 Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.42 This demonstrates that smaller farms are more willing and better suited to implement regenerative practices. Industrial agriculture firms, on the other hand, highly prioritize efficiencies and maximizing profit, thus, are less likely to invest the time and money into learning about and switching to regenerative fertilization practices. While small farms are making the most rapid transition to regenerative fertilization practices that would benefit the market and planet in the long run, the increased market and resource dominance of the largest farms, which have the slowest rates of transition to regenerative fertilization practices, is ultimately hindering the growth of regenerative agriculture in the United States.

Consolidation Negatively Affects Farmers This disproportionate market power gained by a few agriculture conglomerates allows them to reduce prices in order to drive out competition.43 While large farms lack the will to invest in more regenerative farming techniques, small farms that do not employ regenerative practices are primarily hindered by their lack of economic means to do so. As previously stated, individual farmers make less than 15 cents per dollar and, according to a study conducted by the USDA in 2001, 71 percent of poultry growers live below the poverty line.44 Such subpar circumstances are not conducive to having the freedom to invest time and money into switching practices to plant cover crops, not till, and use animal fertilizer. E. Consolidation Negatively Affects Consumers In addition to harming farmers, agricultural consolidation has also resulted in increased food prices for consumers, largely disproving the claims of Bork’s “consumer welfare standard.” In 2014, economist John Kwoka published a book Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy where he analyzed 200 mergers from 1976 to 2006 and found that post-merger prices on average increased by 4.3 percent.45 In addition, evidence has shown that market self-correction has not occurred as a result of antitrust underenforcement.4

#### The plan solves---it allows small farms to compete by resolving unequal distribution of market power

Hannah Kass 19, Master’s degree candidate in environmental studies at the University of Pennsylvania, “Breaking Up Big Ag Requires Reasonable Antitrust Enforcement”, 12/26/19, The Regulatory Review, https://www.theregreview.org/2019/12/26/kass-breaking-up-big-ag-antitrust-enforcement/

In 2007, food sovereignty activists from around the world convened in Sélingué, Mali to write the [Declaration of Nyéléni](https://nyeleni.org/spip.php?article290). That declaration asserts that activists should seek to democratize the flows of power, wealth, and resources that have moved predominantly toward the core industrialized countries and multinational corporate agribusinesses, and away from farmers all over the world.

The declaration aims to ensure that the food system protects those who produce and consume the world’s food supply: farmers and people, rather than corporate agribusinesses. Yet in the United States and elsewhere, the food system has a long way to go toward meeting the needs of both farmers and consumers.

Farmers are increasingly driven out of agriculture by the unequal distribution of market power. To ensure fair competition in the agri-food marketplace, it is imperative that the federal government provide the proper enforcement of antitrust regulations. Currently, corporate agribusinesses [hold](https://www.iatp.org/sites/default/files/451_2_89014.pdf) a disproportionate amount of market power in the agri-food economy. Farmers, on the other hand, are under economic pressure to compete in a growing global market, and often must [rely](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) on contracting with just a few processing companies to sell their products.

Many of these contracts contain [conditions](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) which force farmers to buy seeds and equipment from a small handful of input companies. Often, the big food companies are vertically integrated—that is, the same companies operate at various levels of the supply chain. At the end of the day, farmers only [receive](https://1yd7z7koz052nb8r33cfxyw5-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/042718-FarmerShare-1.pdf) 14.8 cents per every dollar consumers spend on food—yet the costs of production amount to 80 cents per dollar. The majority of the revenue is realized by corporate agribusiness executives and shareholders.

In 2015, the four largest beef firms [controlled](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) 85% of the beef market. The four largest U.S. corn seed firms [controlled](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) 85% of the corn seed market, and the four largest U.S. soybean seed firms [controlled](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) 76% of that market. In 2017, after the Bayer–Monsanto and Dow–Dupont mergers, the four largest global herbicide and pesticide firms now [own](https://openmarketsinstitute.org/wp-content/uploads/2019/04/190322_MonopolyFoodReport-v7.pdf) 84% of the market share.

The [Federal Trade Commission](https://www.ftc.gov/) (FTC) and [Antitrust Division of the Department of Justice](https://www.justice.gov/atr) interpret and implement antitrust statutes. The [Sherman Antitrust Act of 1890](https://www.ourdocuments.gov/doc.php?flash=false&doc=51&page=transcript) renders price-fixing, restraint of trade, and excessive market monopolization illegal, and the [Clayton Antitrust Act](http://euro.ecom.cmu.edu/program/law/08-732/Antitrust/ClaytonAct.pdf) asserts that it is unlawful for any business to merge with or acquire any part of its industry in a manner that significantly damages that industry. Despite these laws, corporate agribusiness’ monopolization of the agricultural market continues to persist at the expense of farmers in the United States.

Over the past 40 years, corporate agribusinesses have benefited from the FTC and Antitrust Division’s lax interpretations of antitrust statutes. These agencies have [permitted](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1065&context=gblr) large corporate agribusinesses to merge and monopolize the market excessively, despite the fact that antitrust statutes were created explicitly to regulate monopolies and ensure fair market competition.

Admittedly, given that the Sherman Act makes it illegal to restrain trade, it might be said that only by allowing agribusinesses to merge, acquire other businesses, and monopolize the market is trade able to continue unrestrained. But that trade is unrestrained only for the big firms. Small farmers are unable to [compete](https://foodfirst.org/wp-content/uploads/2013/12/BK7_4-Fall-2001-Vol-7-4-Freedom-to-Trade.pdf) in the marketplace when the concentration of big firms continues unrestrained, particularly when mergers and acquisitions promote the monopolization of the market.

Consider how small farmers have fared under the consolidation of the meat packing industry. According to the [Packers and Stockyards Act of 1921](https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/42/STATUTE-42-Pg159b.pdf), price-fixing was supposedly rendered illegal, but even with this protection the plight of small farmers has been profound.

In 2004, for example, cattle farmer Henry Lee Pickett [sued](https://caselaw.findlaw.com/us-11th-circuit/1492709.html) meat packer Tyson Foods when he noticed that Tyson was lowering prices in its marketing agreements with farmers. Pickett preferred to charge the cash market price to avoid being paid an unfair price. Even if farmers did not sell their products through marketing agreements like Tyson’s, often they still needed to lower their prices on the open market. Pickett was unable to provide evidence that Tyson’s market agreements were producing unfair competition practices, so he lost his case.

Separately, pork producers also unsuccessfully [fought](https://law.justia.com/cases/federal/district-courts/FSupp2/183/824/2285063/) meat packer Smithfield Foods, citing illegal price-fixing under the Packers and Stockyards Act. The marketing agreements were seen by the judiciary as reasonable business practices because they cut costs to the agribusiness contractors.

In both of these cases, Tyson and Smithfield were protected by the “freedom of contract” principle, which declares that everyone is free to participate in, or opt out of, any contractual agreement. However, the share of this “freedom” in terms of food sovereignty is certainly asymmetrical. When the market price is controlled by an artificially low price created by a marketing agreement, farmers are not free from poverty. When marketing agreements are adopted by the majority of processors, and there are not alternative agreements offered, farmers are not free from opting out of unfair contracts. In effect, farmers are locked into receiving an unfair price for their product.

The [Agricultural Adjustment Act of 1933](http://nationalaglawcenter.org/wp-content/uploads/assets/farmbills/1933.pdf) contained an important policy for agrarian viability: parity pricing, or a price support that covers producers’ costs of production in setting commodity prices. But that policy [lapsed](https://onlinelibrary.wiley.com/doi/abs/10.1526/0036011042722750) in 1973 and has never returned as part of federal agricultural law. Reinstating a parity price for farm products would ensure that consolidated corporate agribusinesses would not be able to fix prices below the costs of production. Farmers would have to be paid a fair price for their products under the law.

Another important solution will be for farmers and food sovereignty advocates to seek judicial review of mergers and acquisitions approved by the FTC and DOJ. When firms are too big, they accumulate too large a share of power, land, and wealth. This inequality inherently renders farmers dispossessed of their ability to compete in the marketplace.

Instilling food sovereignty into our food governance requires prioritizing our farmers’ needs. The law must guarantee a fair price for the food they grow to feed all of us. The judiciary must consider the “restraint of trade” that their previous merger approvals have imposed on farmers, and enforce antitrust laws in favor of farmers going forward.

# 2AC

## Food Security

#### Consolidation makes prices high now BUT the plan solves

C. Scott Hemphill 18, NYU law professor, “COMMENT: Mergers that Harm Sellers,” May, 127 Yale L.J. 2078, lexis

In 1990, Weiss collected more than 121 studies that examined in various ways the difference in prices based on levels of concentration. His conclusion was that "our evidence that concentration is correlated with price is overwhelming." 133 Other studies also find evidence of a positive relationship between price and concentration. 134 The price effect of concentration exists regardless of the level of profitability of the firms in the concentrated market. Such firms are likely, inter alia, [\*809] to expend resources to protect and entrench a market position. 135 Essentially, once a firm faces a unique demand situation (monopolistic competition) or is part of a relatively tight oligopoly with mutual interests, economic logic dictates that such a firm should invest in preserving and protecting its competitive advantage regardless of whether the investment enhances efficiency or innovation. 136 Indeed, such firms logically would resist efficiency improvements or innovations that reduced the barriers to entry or otherwise encouraged more competition. These incentives explain in part why mergers creating such market structures are inherently likely to have anticompetitive consequences. Hovenkamp and Shapiro in 2017 reviewed the economic literature and concluded that it showed that "concentrated industries tended to perform poorly in serving consumers, as they displayed higher prices, higher price/cost margins, and higher profits than less concentrated industries." 137 Thus they concluded that "first and foremost, economic theory and a wide range of economic evidence support the conclusion that horizontal mergers that significantly increase market concentration are likely to lessen competition and harm consumers." 138 Thus, increased concentration has a strong relationship with higher prices as well as facilitating other harms to competition, and it lacks a consistent connection to reported profits. 139 Hence, any merger that substantially increases concentration of even a moderately concentrated market or significantly further entrenches a concentrated market is sufficiently likely to cause a "substantial lessening of competition" or tend "to create a monopoly" that it should be presumed illegal. 140 Thus, apparent redundancy in fact contributes directly to enhanced competitiveness. How strong that presumption should be and what might rebut it arguably depends on whether there are good reasons to believe that such mergers, despite the competitive harms that they seem likely to engender, make some other useful contribution to the [\*810] economy. The next two subsections address the claims that concentration can stimulate innovation or ensure greater efficiency.

#### Sustainable ag increases yields

Morris 16 – Katlyn S. Morris, PhD Candidate in the Department of Plant & Soil Science at the University of Vermont, and Gabriela Bucini, PhD student at the Natural. Resource Ecology Laboratory (NREL) of Colorado State University, “California’s Drought as Opportunity: Redesigning U.S. Agriculture for a Changing Climate”, Elementa Science, https://www.elementascience.org/articles/10.12952/journal.elementa.000142/

Yields and productivity

In addition, contrary to the long-held assumption that organic or agroecological farms are less productive than large-scale conventional farms, diverse agroecosystems can produce higher yields per unit of land than monocultures. Research has shown that organic agriculture produces yields sufficient to ‘feed the world’ at present and for a growing population, without the need for agricultural expansion (Badgley et al., 2007). Various trials and meta-analyses have concluded that yields are comparable for organic and conventional fields (Ponisio et al., 2015, Pimentel et al., 2005), while others have shown a great deal of variability in yields depending on the crop, climatic and geographic conditions, and specific management practices (DePonti et al., 2012; Seufert et al., 2012). Productivity in terms of harvestable products per unit area is higher in polycultures than monocultures with the same level of management (Altieri, 1999). Yield advantages can range from 20–60% depending on crops, climate, and management factors. These yield advantages are attributable to more efficient use of water, light, and nutrients in polycultures and the maximization of vertical space of different crops (Altieri and Toledo, 2011).

Many of the principles of agroecology and other sustainable agriculture approaches can be applied to different geographies and crop or livestock systems to improve yields without reliance on agrochemicals and irrigation. For example, in Mexico one hectare planted with a mixture of maize, squash and beans can produce as much as 1.73 ha of a maize monoculture. In Brazil, intercropped maize and beans exhibited a yield advantage of 28 percent over maize monocultures. In the Brazilian Amazon, Kayapo yields are 200% higher in agroecological systems than they are in systems that use agrochemicals (Altieri and Toledo, 2011). In the United States, the Rodale Institute long-term trial of corn and soybeans managed conventionally versus organically showed that organic crops (fertilized with manure and intercropped with legumes) had significantly higher yields than conventional in 4 out of 5 of the drought years between 1988 and 1999 (Lotter et al., 2003). Manure and legume treatments improved soil water-holding capacity, water infiltration rate, and water capture efficiency, leading to higher yields in periods of water-stress (Lotter et al., 2003). A long-term, large scale trial in Iowa demonstrated

#### Best and most recent studies show avoids an array of ecological degradation---extinction

DeLonge 16 – Marcia S. DeLonge, Scientist in the Food and Environment Program at the Union of Concerned Scientists and PhD in Environmental Science from the University of Virginia, Albie Miles, Assistant Professor of Sustainable Community Food Systems at the University of Hawai'i, Ph.D. in Environmental Science, Policy and Management from UC Berkeley, and Liz Carlisle, Lecturer in the School of Earth, Energy, and Environmental Sciences at Stanford University and Ph.D. in Geography from UC Berkeley, “Investing in the Transition to Sustainable Agriculture”, Environmental Science & Policy, Volume 55, Part 1, January, p. 266-267

1. Introduction

While industrial agriculture has proven highly productive, it has simultaneously generated environmental and social impacts of global concern (Kremen and Miles, 2012). Agriculture affects everything from greenhouse gas emissions to biological diversity, water quality, soil erosion, pollination services, carbon sequestration, human health, livelihoods and food security (Zhang et al., 2007; Perfecto and Vandermeer, 2010; Tilman et al., 2011; Hayes et al., 2011; Tscharntke et al., 2012). At present, industrial agricultural practices are contributing to the degradation of key ecological processes that underpin life on Earth, driving climate change, loss of biosphere integrity, destructive land system changes, and the eutrophication of oceans from phosphorus and nitrogen fertilizers (Liebman & Schulte, 2015; Steffen et al., 2015; Tilman et al., 2001; West et al., 2014).

Agroecological farming systems, including biologically diversified systems, have been found to be capable of meeting global food needs sustainably and efficiently (Gliessman, 2014). Recent quantitative syntheses and meta-analyses demonstrate that these systems can outperform chemically managed monocultures across a wide range of globally important ecosystem services while producing sufficient yields and reducing environmental externalities (Kremen and Miles, 2012; Lundgren and Fausti, 2015). Indeed, in some instances, agroecological farming systems can produce equivalent or higher yields than conventional and monoculture agriculture while enhancing ecosystem services and profitability (Davis et al., 2012; Kremen and Miles, 2012; Seufert et al., 2012; Skinner et al., 2014; Ponisio et al., 2015; Prieto et al., 2015).

Despite its promise, research and development related to agroecology has been thought to command less than two percent of public agricultural research funding in the United States and less than one percent globally (Carlisle and Miles, 2013; Niggli et al., 2014; Lipson, 1997). Thus, farms and ranches based on agroecology – the application of ecological principles to the design and management of agricultural ecosystems – have achieved high levels of environmental performance and productivity, even with minimal funding, offering an impressive return on public investment. Therefore, when combined with significant policy and organizational support, more robust agroecological research programs appear to offer the most pragmatic approach for successfully fulfilling the human right to food while restoring environmental quality in the face of global climate change and rapid environmental degradation (Dalgaard et al., 2003; Altieri and Nicholls, 2008; Reganold et al., 2011; Fernandez et al., 2013; Gliessman, 2000; MEA, 2005; De Schutter, 2014; IPCC, 2014; Bommarco et al., 2013).

## Sustainable Ag

#### good faith implementation is key to AFF ground.

Crane 21—(Professor of Law, University of Michigan). Daniel A. Crane. 2021. “Antitrust Antitextualism”. 96 Notre Dame Law Rev. 1205. <https://scholarship.law.nd.edu/ndlr/vol96/iss3/7>. Accessed 9/12/21.

CONCLUSION

It turns out that the pervasive rhetoric that the antitrust laws are a delegation of common-law powers to the courts is a bit of a fig leaf covering the courts’ declination to enforce the antitrust statutes as written. But something more than judicial insubordination to the will of Congress is happening. The pattern of engagement between the courts and Congress over American antitrust law’s 130-year history suggests an implicit division of responsibility for the management of competing political impulses for industrial smallness and bigness. Congress expresses an idealistic preference for smallness, the courts balance that impulse against pragmatic recognition that larger scale can bring material benefits, and both institutions implicitly accept the other’s role.

That it has been this way since the beginning does not mean that it must continue to be this way forever. At this moment of growing political and social interest in antitrust and revival of antimonopoly sentiment, the balance could tip decisively in favor of Brandeisianism and against the “Curse of Bigness.” Judges could be trained (or retrained) to begin taking the antitrust statutes seriously as statutory texts and begin applying them faithfully using the (contested) methodologies they use as to other statutes. But if judges began taking the texts of antitrust statutes seriously, query whether Congress would continue to write such broad statutes, or whether hydraulic pressures would induce a more sparing approach to antitrust legislation.

## OFF

### T Mergers---2AC

#### We meet---shifting structural presumption increases investigation into ongoing practices AND the plan applies to multiple mergers.

#### Counter-interp---Anticompetitive practices are horizontal and vertical restraints on competition---mergers fall under the former.

OECD 90, Organisation for Economic Co-operation and Development, “GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW,” OECD, 1990, https://www.concurrences.com/IMG/pdf/oecd\_-\_glossary\_of\_industrial\_organisation\_economics\_and\_competition\_law.pdf?39924/e9f9a49f59fa42b7de2397532968788aa2855447

ANTICOMPETITIVE PRACTICES

INSTITUTION DEFINITION

Refers to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality. The essence of competition entails attempts by firm(s) to gain advantage over rivals. However, the boundary of acceptable business practices may be crossed if firms contrive to artificially limit competition by not building so much on their advantages but on exploiting their market position to the disadvantage or detriment of competitors, customers and suppliers such that higher prices, reduced output, less consumer choice, loss of economic efficiency and misallocation of resources (or combinations thereof) are likely to result.

Which types of business practices are likely to be construed as being anticompetitive and, if that, as violating competition law, will vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason. Resale price maintenance, for example, is viewed in most jurisdictions as being per se illegal whereas exclusive dealing may be subject to rule of reason. The standards for determining whether or not a business practice is illegal may also differ. In the United States, price fixing agreements are per se illegal whereas in Canada the agreement must cover a substantial part of the market. With these caveats in mind, competition laws in a large number of countries examine and generally seek to prevent a wide range of business practices which restrict competition.

These practices are broadly classified into two groups: horizontal and vertical restraints on competition. The first group includes specific practices such as cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price fixing

agreements. The second group includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling. Generally speaking, horizontal restraints on competition primarily entail other competitors in the market whereas vertical restraints entail supplier-distributor relationships.

However, it should be noted that the distinction between horizontal and vertical restraints on competition is not always clear cut and practices of one type may impact on the other. For example, firms may adopt strategic behaviour to foreclose competition. They may attempt to do so by pre-empting facilities through acquisition of important sources of raw material supply or distribution channels, enter into long term contracts to purchase available inputs or capacity and engage in exclusive dealing and other practices. These practices may raise barriers to entry and entrench the market position of existing firms and/or facilitate anticompetitive arrangements.

#### Prefer it:

#### Aff Ground---breaking up mergers is core to the topic---they arbitrarily exclude the Clayton Act and merger guidelines---stalls research and argument innovation.

#### Education---their topic eliminates debate on specific anticompetitive practices and how antitrust resolves them---decks real world education.

#### PICs are unbeatable---they’ll end one instance of conduct that solves the aff.

#### No offense---they get core topic DAs and CPs based on any restraints on competition, literature checks.

### T Subsets---2AC

#### 1. We meet---the plan affects every facet of antitrust AND the economy.

#### 2. Counter-interp:

#### The ‘core’ antitrust laws are Sherman, Clayton, and FTC

Michael A. Rataj 21, PC, Law Degree from the Detroit College of Law, “Consequences for Breaking Antitrust Laws”, 5/12/2021, https://www.michaelrataj.com/blog/2021/05/consequences-for-breaking-antitrust-laws/

The core antitrust laws are…

The three core antitrust laws are the Sherman Act, the Federal Trade Commission Act and the Clayton Act. The Sherman Act primarily prohibits unreasonable restraint of trade and monopolization. Those who are in violation of the Sherman Act may face hefty fines, up to $100 million, and up to 10 years behind bars.

The FTC Act prohibits unfair practices or acts and unfair approaches to harming competition. Only the FTC can file cases under this act. The Clayton Act is a catch-all that covers every practice not covered by the Sherman and FTC Acts. Then consequences for violations of both of these acts are usually civil in nature.

#### 3. Prefer it:

#### AFF ground---their topic over-limits---discourages research and stale debates which eliminate critical thinking and innovation.

#### PICs---they’ll expand except in one sector---that’s unbeatable.

#### Academic debate---peer reviewed journals discuss details of antitrust, not just yes/no---their topic is just random hacks.

#### Predictability---the core of the controversy is specific sectors, NOT wholesale antitrust.

#### No offense---strong functional limits like amazing DAs, CPs, and limited antitrust key warrants---only big AFFs are viable and literature checks.

#### 4. Reasonability---their interp creates a race to the bottom.

#### 5. Not a voter---retroactively universalizing the AFF is a better remedy.

### Vagueness---2AC

#### No ev about the plan and a solvency advocate describing the action takes it out.

#### No circumvention:

#### The standard’s easy to administer---companies proving their practice means less burden on the courts

#### Fiat solves---it’s durable and mandates the whole USFG.

#### Prefer reasonability---competing interpretations causes a race to the bottom and substance crowd-out.

### Section 5---2AC

#### Congress blow ups the FTC in response

Sandeep Vaheesan 17, Regulations Counsel at the Consumer Financial Protections Bureau, “Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission”, University of Pennsylvania Journal of Business Law, 19 U. Pa. J. Bus. L. 645, Spring 2017, Lexis

C. Recognizing the Threat of Adverse Congressional Action Does Not Compel Continued Adherence to the Antitrust Status Quo

Among those sympathetic to an expansive Section 5, some are likely to express reservations about its political feasibility. History certainly lends support to this concern. Congress has been hostile to an activist FTC in the past and could be expected to move to rein in any activism. In the 1970s, the FTC zealously pursued its antitrust and consumer protection missions. 251 This period of aggressive enforcement and rulemaking triggered a powerful backlash from corporate America. 252 The Washington Post condemned the Commission as the "National Nanny" in a stinging editorial. 253 This period of zeal ended poorly for the FTC. Congress [\*694] asserted new power over the agency and imposed additional procedural conditions on the use of its consumer protection authority. 254

This fear of a political backlash from business and Congress may be the strongest line of criticism of an expansive Section 5. Corporations pour money into Congressional campaigns to ensure that their interests are represented and advanced. Although the FTC has been averse to policy activism or innovation for decades, the House has tried to limit the FTC's authority to challenge mergers under Section 5, in the name of creating harmony between the FTC and the DOJ. 255

The recent experience of another federal agency is instructive. Congressional Republicans, with the support of some Democrats, have been trying to hobble the Consumer Financial Protection Bureau ("CFPB"). 256 The CFPB is seen as aggressively pursuing its statutory mission, bringing a wide range of enforcement actions and writing a number of rules to regulate consumer finance markets. 257 In light of its vigor, the opposition from Congress does not come as a surprise. Even under more favorable political circumstances, an FTC that seeks to breathe life into Section 5 is certain to invite comparable Congressional opposition.

The probable reaction from many ideologically or financially captured members of Congress

should not be underestimated, let alone ignored. Corporate interests and their Congressional allies would seek to curtail any Section 5 expansions. The FTC is a creation of Congress and so must answer to Congress. Congress can undertake a range of actions to limit the FTC's day-to-day ability to function and its statutory power. At an extreme, Congress could repeal the FTC Act and shut down the FTC entirely. The risks to the FTC's future would include various existential threats and should not be brushed aside. Undertaking a reinterpretation of Section 5 without an awareness of political dynamics on Capitol Hill would [\*695] be a grave mistake.

#### Perm---do both. It solves the net-benefit: FTC looks independent because it’s simultaneous.

#### Courts strike it down. There will be no deference.

John O. McGinnis 21, George C. Dix Professor in Constitutional Law at Northwestern University and Contributing Editor at Law & Liberty, “Abandoning the Consumer Welfare Standard”, Law & Liberty, 8/26/2021, https://lawliberty.org/abandoning-the-consumer-welfare-standard/

The Prospects

The Executive Order, however ill-conceived the specifics are, will do the most damage if it changes antitrust law fundamentally. And here the Biden administration happily faces problems. We have had forty years of bipartisan competition policy focused generally on consumer welfare. The President does not have a political eraser to wipe that away.

One possibility is for the Biden administration to persuade Congress to enact major changes in antitrust law. The House Judiciary Committee has passed a few bills that would make is harder for tech companies to merge with other companies. But these measures are not yet going anywhere on the House floor, and it will be difficult, if not impossible, to get any substantial changes in antitrust law through the evenly divided Senate.

Thus, the administration has pinned its strategy on transformation through administrative fiat. To that end, it appointed Lina Khan, a 32-year-old associate law professor to become Chairman of the FTC. Khan may be the single most radical appointment in the Biden administration. She opposed Amazon’s acquisition of Whole Foods, although Amazon and Whole Foods together constitute a very small part of the grocery market, and no other company in the history of the United States has been more innovative than Amazon.

Khan has begun by voting along with her Democratic colleagues on the commission to revoke a policy of the FTC supported by both Democratic and Republican administrations that essentially defined “unfair method of competition” by reference to methods that undermined consumer welfare. The idea no doubt is to write a regulation that would provide a more open-ended approach, perhaps taking into account other values like democracy and decentralization, even if these are at the expense of consumer welfare.

But it is not at all clear Khan can succeed. On such a central question as the definition of competition, courts may not give her agency much deference now that the Roberts Court appears to have stopped applying Chevron—the quintessential modern case for agency deference—to major questions raised by a statute. The meaning of competition is obviously the major question for competition law, and courts are likely to determine that for themselves, influenced by decades of their own consumer welfare jurisprudence.

Beyond that technical obstacle, Khan may be a poor choice for overhauling antitrust law because of her lack of practical experience in litigation or administration. She has already alienated her agency staff by refusing to let them speak at professional panels, as they have for years. That is a rookie mistake. Moreover, she has been so strident in her attacks as an activist against companies like Google and Amazon that the courts are likely to look at her enforcement actions with suspicion, even if the companies do not get her recused for her past opinions.

Even if the Biden administration is unlikely to succeed in the near term in transforming antitrust, it has put on the table a new vision, however amorphous, that may well influence the approach of Democratic administrations and legislators for years to come. We are moving from an era of bipartisan consensus around a constrained and economically focused antitrust law to an era of fundamental partisan disagreement. In that sense, antitrust law will become—like many other areas of our law—a reflection of polarization and a source of instability. But here the folly and instability will make us poorer.

#### PICs are a VI---steals the aff, killing ground, and diverts from topic-specific education

#### Perm---do the plan and have the FTC act on other antitrust---it tests the germaneness of the net-benefit

#### Perm---do the CP

#### The plan is the FTC---that’s Carstenson.

#### ‘Scope’ is defined by enforcement

Frank G. Clement 16 Jr, Judge on the Tennessee Court of Appeals, “Hamer v. Southeast Res. Group, Inc.”, Court of Appeals of Tennessee, At Nashville, 2016 Tenn. App. LEXIS 176, 3/3/2016, Lexis

Under Southeast's interpretation, Plaintiff agreed to disclose and make available every business opportunity "to be marketed to credit union members." Such a broad definition appears to encompass every product or service imaginable, whether they have anything to do with Action or not. Under this interpretation, Plaintiff would be required to disclose an opportunity to sell cars to credit union members even though Action's business is not related to cars at all. The inconvenience, hardship, or absurdity that would result are weighty evidence that the parties did not intend for "scope and purpose" to have this meaning, especially when interpreting the agreement based on the ordinary meaning of "scope" avoids these difficulties. See Branscombe, 76 So. 3d at 948 HN9 ("The inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties.").

HN10 The ordinary meaning of words is found in the dictionary and is the most commonly understood meaning in relation to the subject matter of the parties' agreement. See Siegle, 788 So.2d at 360; Beans, 740 So. 2d at 67; J.N. Laliotis, 558 So. 2d at 68. According to one dictionary, "scope" means "1. The range of one's perceptions, thoughts, or actions. 2. Breath or opportunity to function. 3. The area covered by a given activity or subject." The American Heritage College Dictionary 1222 (3d ed. 1997). The operating agreement is concerned with the relationship of Action's members to each other and to Action, and the subject matter of section 6.6 is the duty to make certain business opportunities available to Action in order to avoid competition between Action and its members. [\*18] Based on the dictionary and the subject matter of the parties' agreement, "scope"

most naturally refers to the range or breadth of the business that Action is engaged in at the relevant time.

#### It causes uncertainty AND delay

Alexander Paul Okuliar 21, Morrison & Foerster LLP, "FTC Lays Groundwork For Rulemakings: Are New Substantive Competition Rules Coming?", Mondaq, 3/25/2021, https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1067906/ftc-lays-groundwork-for-rulemakings-are-new-substantive-competition-rules-coming

The FTC's foray into rulemaking could lead to a period of uncertainty and legal challenges in those areas touched by a new agency rule. There is likely to be significant debate over the scope of the FTC's authority, the particulars of the rulemaking process, the substance of any proposed rules, and, when tested in court, the extent of Chevron deference to which the agency is entitled. Substantive FTC competition rules could also create potential divergence in enforcement policy

or activity between the DOJ and FTC brought about by the new rules.

### States CP---2AC

#### Can’t solve---leaves federal courts untouched meaning national companies survive.

#### The CP gets stuck down via the DCC

Chris Erchull 14, Staff Attorney for GLAD and former litigation associate at Bulkley, Richardson and Gelinas LLP, 2014, THE DORMANT COMMERCE CLAUSE—A CONSTITUTIONAL BARRIER TO SUSTAINABLE AGRICULTURE AND THE LOCAL FOOD MOVEMENT, Western New England Law Review, Vol. 36, Issue 3, p. 371-405

II. DORMANT COMMERCE CLAUSE

Courts recognize an implied negative aspect to the Commerce Clause of the Constitution,75 and under this doctrine, states are prohibited from enacting legislation that interferes with interstate commerce.76 Because the federal government has taken a prominent role in the regulation of the agriculture industry,77 state laws in this industry are especially vulnerable to challenge under the dormant Commerce Clause.78

Critics say that courts apply the dormant Commerce Clause with unpredictable results.79 The unpredictable application of the dormant Commerce Clause has a chilling effect on potentially revolutionary state legislation.80 The Constitution has long been interpreted to impose restrictions on what states can do to promote local agriculture.81 But the standards used by courts in deciding cases in the context of some industries not related to the production of food are arguably more relaxed from the doctrine as applied to agriculture.82

A. Application of Dormant Commerce Clause to Agriculture

1. Agriculture in the Supreme Court

Since Wickard v. Filburn, the Supreme Court has consistently held that the federal government has primary regulatory authority over the agriculture industry.83 A series of Supreme Court cases thwarted attempts by states to favor local agricultural production, processing, and distribution, relying on the dormant Commerce Clause.84 In particular, the Court’s decisions in Bacchus Imports, Ltd. v. Dias and West Lynn Creamery, Inc. v. Healy come the nearest to addressing the issue of whether it is constitutional for a state to favor local foods.85

At issue in Bacchus was a tax applied to all sales of alcohol in Hawai'i,86 with the exceptions of an alcoholic beverage made from a root native to Hawai'i, known as 'okolehao, in addition to pineapple wine and other non-grape fruit wine.87 The tax was primarily intended to benefit the burgeoning pineapple wine industry in Hawai'i.88 The Court flatly dismissed the state’s argument that the 'okolehao and pineapple wine industries were separate and distinct from the industry of other alcoholic beverages, and that there was no direct competition among the industries.89 While the tax exemption did not discriminate against out of-state interests on its face, the Court found discriminatory intent and effect.90 By determining that the markets were the same and the tax discriminatory, the Court made it clear that states attempting to favor local agricultural production through discriminatory taxes, at least in the production of alcoholic beverages, would be susceptible to constitutional challenges.91 This threat looms over the sustainable agriculture movement today.

The Court reached a similar holding in West Lynn Creamery, where a Massachusetts pricing order required the collection of an assessment on all milk sales.92 The proceeds were then distributed only to in-state dairy farmers.93 The assessment at issue did not facially discriminate against out-of-state interests because it applied equally to all dairy retailers.94 However, the fact that all of the proceeds were distributed to local dairy farmers95 resulted in a discriminatory impact.96 The Court reasoned that the assessment “not only assists local farmers, but burdens interstate commerce. The pricing order thus violates the cardinal principle that a State may not ‘benefit in-state economic interests by burdening out-of-state competitors.’”97 By invalidating legislation based on the benefits provided to local agricultural enterprises, the decision in West Lynn casts a foreboding shadow over prospective legislation that might seek to advance the Local Food movement.

2. Anti-Corporate Farming Initiatives

Laws that limit the corporate ownership of farmland have been enacted in at least fourteen states.98 Some of the explanations that are offered in support of anti-corporate farming initiatives include circumventing the limited liability of corporations, controlling the economic structure of food production and distribution, the lack of investment in local interests by out-of-state corporations, opening land for use by new farmers, and the negative socioeconomic impact of agribusiness on rural communities.99

A landmark 2003 case struck down an amendment to the South Dakota State Constitution outlawing corporate ownership of in-state farmland.100 The Eighth Circuit decision in South Dakota Farm Bureau, Inc. v. Hazeltine “is viewed as critical to the future viability of anticorporate farming restrictions in other states and, more generally, to the ability of state legislatures to shape the structure of agriculture within their borders.”101 The opinion signaled the death of a constitutional amendment that was supported by a majority of voters in South Dakota in 1998.102

#### And, the fed is key

#### a lack of federal enforcement gives corporations the freedom to lobby and tank state legislation---that’s Ikerd. State fiat doesn’t solve broad corporate ag---the CP can’t address interstate markets, and if it does it gets struck down.

#### Resources---Only the fed has the resources and political clout to enforce national monopoly actions.

Stephen Calkins 03, Professor of Law at Wayne State University, “Perspectives on State and Federal Antitrust Enforcement”, Duke Law Journal, 53 Duke L.J. 673, November 2003, Lexis

E. State Antitrust Enforcement in Perspective

The above review makes clear that state antitrust enforcement is based overwhelmingly on the states' comparative advantages. The vast majority of cases involve local or regional markets and competitive effects. State enforcers almost never bring national monopolization cases.

This conclusion is consistent with the expressed views of state enforcers. According to the chair of the Multistate Antitrust Task Force, a state antitrust enforcement issue can be identified by asking, among other things, whether the matter has "a local or regional impact upon the state's consumers or economy," whether "state or local governmental agencies [are] impacted," and whether consumers can "directly or indirectly benefit from state enforcement."

Of course, not every state antitrust case is consistent with states' comparative advantages. For instance, in 2001, Utah sought to enjoin GS Industries' acquisition of Nucor Corporation's Utah-based manufacturing assets because GS Industries planned to move the business to Chile. Utah's action might have had more to do with an interest in employment than in competition. Similarly, in 1999, Indiana sought to enjoin the merger of B.F. Goodrich and Coltec Industries out of concern about the global market for integrated aircraft landing systems and 1100 South Bend jobs. Likewise, in 1993, Pennsylvania sought to enjoin the merger of Russell Stover Candies and Whitman Chocolates, with the attorney general saying that, although the case would be argued solely on antitrust grounds, he "could not, "as a responsible official, ignore the fact that this merger will put 600 people in the Philadelphia area out of work.'"

[\*695] Even when a state is operating in an area of its comparative advantage, it may take action in tension with what many might consider sound competition policy. For instance, last year, the Puerto Rico district court was so outraged at what it saw as the Puerto Rico Secretary of Justice's attempt to use antitrust laws to promote unrelated social policies that it enjoined her from attempting to block a grocery store merger. Even state efforts to pursue antitrust policies may engender controversy. For instance, states have made something of a specialty of pursuing vertical restraints cases, an area of considerable antitrust disagreement. Most fundamentally, the states' increasing success in winning large monetary recoveries has triggered a debate about appropriate levels of deterrence. Discomfort is particularly acute with respect to indirect purchasers: If treble damages based on an entire overcharge can be recovered by a [\*696] direct purchaser, is it fair or proper for indirect purchasers to recover treble damages based on passed-on injuries?

Nonetheless, states overwhelmingly pursue cases within their comparative advantages and based on antitrust doctrines within the mainstream. Monetary remedies, even if substantial, do not change the structure of industry or mandate a change in business operations. Microsoft really is the exception.

II. Federal Antitrust Agencies

While state antitrust enforcers enjoy only three primary comparative advantages, federal enforcers enjoy boundless advantages. The two federal antitrust enforcement agencies, the FTC and the Antitrust Division, enjoy comparatively massive resources, sweeping criminal enforcement powers, an elaborate merger notification system, and traditional respect from Congress and the courts. In short, the FTC and the Antitrust Division enjoy too many advantages to make a comparison meaningful.

#### Conditionality is a VI for deterrence---skews 2AC time and strategy with shotgun 1NCs and undermines research and advocacy from incoherent positions---distorts strategy and truth which hurts education---C/I: dispo solves.

#### Perm---do both. It’s perceived as follow-on.

#### Fiating ongoing consensus and perfect uniformity is a voter – distorts debate from the literature and makes generating deficits impossible. The NEG gets uniform laws, NOT uniform compliance.

#### Perm---do the CP. It’s an example of the plan.

### ADV CP----2AC

#### Perm---do both. It shields the NB.

#### Perm---do the CP. It’s an example of the plan.

#### Can’t solve the AFF:

#### Links to the NB---<<INSERT>>.

#### Say No---other countries don’t follow the US’s lead

#### Subsides make large farms larger and drive small farmers out of business

NSAC 17, National Sustainable Agriculture Coalition, 12/21/17, HOW FARM SUBSIDIES ENCOURAGE THE BIG TO GET BIGGER, https://sustainableagriculture.net/blog/farm-subsidies-encourage-big-get-bigger/

A recent pair of reports from the Economic Research Service (ERS) confirms that federal subsidies to farms are increasingly going to larger and larger farms, thus supporting the cycle of the big getting bigger. Fewer and bigger farms mean less money circulating in local economies, fewer farm jobs in rural areas, and fewer opportunities for beginning and young farmers to get into the business.

Since 1991, the household income threshold for farms receiving half of all commodity program payments more than doubled from about $60,000 to over $146,000. For crop insurance indemnities we see a similar shift. In 1997, half of crop insurance indemnities went to farms with incomes of over $63,000; today that number is $143,000.

This is all concerning, but with crop insurance we see an even more worrisome trend when you look at farms with over $1 million in Gross Cash Farm Income (GCFI) income, which includes large and very large farms according to ERS definitions. These largest farms saw their share of indemnities increase from 12 percent to nearly 33 percent of the total. This dramatic change – combined with the recently revealed data showing that the top one percent of farms-by-sales receive 20 percent of subsides – raises questions about how crop insurance benefits are distributed. Logically, even as large and very large farms become more common, the proportion of indemnities among different sized farms should stay the same. This seems to indicate that as crop insurance has expanded, it has provided disproportionately favorable incentives to the largest farms, including unlimited crop insurance subsidies.

Since 1991, taxpayer subsidies for crop insurance have greatly increased from $300 million to $6.1 billion. While total acreage in the program has increased significantly, the number of policyholders has stayed relatively steady meaning more acres covered by the same number of farms, also indicative of consolidation.

This is all overlaid on the fact that during this same period the number of farms in America fell by around 70,000 [1] and the percent of land owned by actual farmers declined, with nearly 40 percent of land now being rented or leased and 80 percent of rented or leased land being owned by non-farmers.

This raises the question: is the crop insurance program, under its current subsidy structure, doing a good job keeping people in farming, or is it contributing to the consolidation of farms and pushing people out of farming?

In addition to shedding light on the impacts of the current subsidy structure, these reports also shed light on the problem of access to crop insurance. Of farms with GCFI between $150,000 and $350,000, less than half have crop insurance, which is concerning especially when you consider that farms with a GCFI of under $350,000 account for 50 percent of all farmland. ERS indicates that at the $350,000-$999,000 GCFI level, participation jumps to 65-69 percent; and that when GFCI exceeds $1 million, participation in crop insurance tops out at 71.2 percent. NSAC has several recommendations for increasing access to crop insurance, including for small farms and beginning farmers.

According to ERS Large family farms, those over $1 million of GCFI only represent 13 percent of crop insurance program participants, but operate 34 percent of cropland in the program and receive 34 percent of indemnities. Small farms, those with a GFCI of less than $350,000 operate over half of farm acreage but receive only 16 percent of indemnities. This indicates that farms of substantial size, but by no means the largest, have more limited access to crop insurance than the largest farms.

Negative Impacts of Subsidies on Mid-Scale, Beginning and Young farmers

As the ERS report rightly points out, government subsidies don’t always directly translate into support for the farmers being targeted. This is because subsidy payments increase the net return on farmland, and in the case of conservation payments, can increase costs.

As has been firmly established, government subsidy programs increase land prices and rents since landowners try to capture some the increased net return

that results from subsidy payments. Government subsides of all types to farms totaled $16.9 billion in 2015.

Increased land prices and rents resulting from government subsidies have detrimental impacts on mid-scale, beginning, and young farmers. When government payments of all types increase, they make land more expensive to rent and buy, thus making it more expensive for those farmers just starting out. The payments also have the perverse effect of helping the largest farms (which receive the largest portion of the payments and indemnities) get bigger by allowing them to capitalize subsides in order to bid higher for land or pay higher rents thus perpetuating the cycle. This was laid to bare in a recent Wall Street Journal article, where a farmer with over 10,000 acres in Kansas acknowledged the difficulty any young or new farmer would have in trying to outbid him for land.

### Section 5---FTC Cred DA---2AC

#### The FTC is hosed

Henry Burke 21, and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### BUT plan solves---shifting the structural presumption means they regain resources---that’s Carstenson.

#### No spillover to overall FTC cred---one action isn’t make-or-break.

#### Structure, not policy. Other countries model the FTC Act, not each policy.

#### It's not key to the overall liberal order. Major powers like Russia and China won’t care AND competition is tiny and irrelevant.

#### No impact:

#### ‘Liberal peace’ is mostly interdependence---so the case turns it.

#### The LIO is resilient

Bilahari Kausikan 20, Chair of the Middle East Institute at the National University of Singapore and Former Permanent Secretary of the Ministry of Foreign Affairs, Singapore, “Reports of the Death of Liberal International Order are Exaggerated”, Straits Times, 4/6/2020, <https://www.straitstimes.com/opinion/reports-of-the-death-of-liberal-international-order-are-exaggerated> [abbreviation in brackets]

But history has time and again shown that America is resilient and capable of immense efforts once roused. Despite Mr Trump, the US is gradually mobilising. It will eventually contain the virus in its own way.

Delayed responses by China and the US (and Europe) have increased the economic costs of the pandemic. But all of us will have to pay the bill.

This does not inspire great confidence in any of them.

CHINA'S 'MASK DIPLOMACY'

Beijing is now capitalising on its ability to contain the fire it allowed to spread in the first place. Its propaganda apparatus is in overdrive, touting China's success.

Beijing offers aid and advice, and contrasts its efforts with the West's fumbling responses, in the hope that its own culpability be overlooked.

Give credit where due: By considerable sacrifice, China did contain the fire relatively quickly. It would otherwise have been worse for everybody.

But I doubt that China's "mask diplomacy" will have more than a temporary effect.

Even before the pandemic, the trade war, Hong Kong, Beijing's bullying tactics, and mistreatment of Uighurs in Xinjiang, among other issues, were wearing some of the gloss off the China story. The liabilities as well as the benefits of Chinese BRI (Belt and Road Initiative) investments were already becoming clearer.

No country will ever shun China. But "mask diplomacy" will not totally reverse the greater caution and scepticism that were already manifest in many countries' dealings with China. The simple reason being that Beijing's approach to the issues that led to this change of attitude will not substantially change.

Over-eager efforts to change the narrative of China's role seem to have begun to back-fire. Triumphalism grates; there have been complaints about the reliability of Chinese masks and test kits rushed to Europe that are reminiscent of complaints about the quality of some BRI projects. The Chinese government may not be involved. But that is beside the point: China wants credit, China takes responsibility.

There are already signs of pushback against too crass Covid-triumphalism. There could also be more invidious lingering effects.

Mr Trump calling Sars-CoV-2, the coronavirus that causes Covid-19, the "Chinese virus" is racist and unacceptable.

The phrase and all it insinuates may nevertheless stick in people's minds even if they dare not voice the politically incorrect thought. After all, more than a century later, we still call the 1918 pandemic "Spanish flu". The long-term reputational effects of calling the virus "Chinese" could be invidious.

Kindergarten-like behaviour - the trading of insults and conspiracy theories - has paused. Both sides have said they will cooperate against the disease. That's all to the good.

But I will be surprised if the civility lasts. For both countries, their own interests defined in terms of domestic politics are the paramount considerations.

DOMESTIC INTERESTS FIRST

For all the talk of global cooperation, what this pandemic has shown is that in a crunch, all countries look to themselves first. This has always been the harsh reality, now thrown into stark relief.

A recent Gallup poll had 49 per cent approving of Mr Trump's handling of the Covid-19 crisis. A Pew survey gave him 50 per cent. Republican support was much higher. Will Mr Trump eschew racial labels or will he resurface them if he sees advantage for the presidential election?

The Chinese people do not seem to have entirely absolved the CCP of responsibility for its initial bungling. If it feels insecure, will the party hesitate to resurrect absurd conspiracy theories to distract the public and bolster the nationalism that legitimates its authority?

In the meantime, the already bad atmosphere of US-China relations has been further poisoned, making life difficult for all other countries.

In so far as mistrust of both has been enhanced, few countries anywhere, except the irredeemably compromised, are going to place all their bets on one side or the other. Most countries will try to simultaneously hedge and balance, seeking maximum strategic autonomy, while trying to maintain the best relationship possible with both the US and China.

What was already emerging before the pandemic was a fluid and dynamic system of asymmetrical multipolarity.

The US will still be at the top in most dimensions of power. China will occupy the second tier and continue to move towards a less unequal equilibrium with the US.

Shifting combinations of middle powers and smaller regional actors will continually arrange and rearrange themselves along the central axis of US-China relations, sometimes tilting one way, sometimes another, as their interests and circumstances dictate.

Navigating this system is not easy. It may get more complicated. But that was essentially where we already were before the pandemic.

ECONOMIC IMPACT

The serious economic impact could, however, lead to structural changes in the international order. However, I would still be cautious about drawing definitive conclusions.

Some tentative observations can be made: The pandemic has exposed the vulnerabilities of over-reliance on Chinese supply chains. Some corporations were already hedging their China risks because of rising costs and US-China trade tensions. A significant reorientation of supply chains could have profound implications for globalisation and the liberal international order.

What has already occurred may strengthen the hand of those who advocate "decoupling" and perhaps even facilitate separation of certain domains. But Japan's decades-long search for a viable "plus one" for a "China plus one" strategy suggests that it will not be straightforward to diversify out of China in a major way.

What is therefore at present unclear is the extent to which countries can reduce dependence on China, although some diversification will almost certainly occur.

Interdependence - which has been underscored by the speed with which the virus spread from China to the US and Europe - makes across-the-board systemic decoupling still highly improbable, unless the pandemic drags on for years or the virus mutates into a more lethal form that causes even greater panic.

It was much simpler for the CCP to command a halt to production, than for it to decree that production resume. What is needed to jump-start the economy and save businesses, increases systemic risks of debt.

Chinese economic policymaking is not autonomous. Chinese policymakers must juggle contradictory considerations to operate in the context of a global economy in which external demand will have a major impact. Sequential and mutually reinforcing contractions in China, the US and Europe will probably cause a global recession.

There will be domestic political consequences for all countries. Their exact nature cannot now be predicted, but they are unlikely to be pretty, and a turn inwards seems likely in many countries. Still, I would not be too hasty in proclaiming an end to the [LIO] liberal international order.

The period when that order was unchallenged was historically exceptional and short, only about two decades from 1989 when the Berlin Wall came down, to the global financial crisis. For half of the 20th century and almost all of the period since the second decade of the 21st century, international order was divided and contested. The pandemic may well catalyse a return to such a more historically normal order. That is a serious enough situation but not the same thing as a collapse of the existing order.

Over-dramatic predictions can become self-fulfilling.

#### There’s no terminal impact to any scenario.

#### The FTC is cracking down on advertising.

Mary Kohler 11-9, Founder & Principal of Kohler Health Law P.C., J.D. from the University of Pittsburgh, “Social Media Endorsements Can’t Escape FTC’s Watch,” Bloomberg Law, 11-09-2021, https://news.bloomberglaw.com/tech-and-telecom-law/social-media-endorsements-cant-escape-ftcs-watch

The Federal Trade Commission recently sent a letter to 700 leading brands, retailers, and advertising agencies. The communication arrived by Fed Ex. It came by surprise. And it cautioned recipients about interactions with those who endorse their products, especially social media influencers. Despite making no allegations, these communications unmistakably signal future enforcement.

FTC’s Message to Advertisers

The FTC’s letter focuses on endorsements and testimonials, saying it considers positive customer reviews to be endorsements. It points recipients to the FTC’s published resources, including What People are Asking and Endorsement Guides and warns that endorsements that are “fake” or fail to disclose an endorser’s connection with a brand can result in civil penalties of $43,792 per violation.

The FTC’s letter also includes a Notice of Penalty Offenses listing seven things it considers deceptive or unfair based on nine cases dating back to the 1940s. These boil down to ensuring endorsements are truthful and adequately disclose material financial connections between the endorser and the brand.

What Is a Notice of Penalty Offenses?

The FTC’s primary enforcement method is through administrative courts. Section 5 of the FTC Act, however, enables the agency to bypass this step for known violations of an FTC ruling. This is called standalone authority.

A Notice of Penalty Offenses serves as a “condemnation notice” of practices found violative in prior FTC cases. Under due process principles, a company receiving a notice is considered to have actual knowledge of prior FTC determinations. This knowledge would allow the FTC to use its standalone Section 5 authority to file a federal court action and seek money damages.

FTC’s Concern

The FTC is concerned that consumers can be misled if corporate funding sways an influencer’s opinions, or sponsorship isn’t disclosed. It considers this unfair competition.

For example, six years ago, Lord & Taylor (now defunct) gave 50 influencers a dress, and paid them each $1,000 to $4,000 to post pictures of themselves wearing it. Their posts, which reached 11.4 million Instagram users, made no mention of the payment or free goods. The dress sold out in two days. The FTC got a consent order.

Why Now?

The FTC’s enforcement authority has been long-disputed. In 2015, the commissioners issued a Statement of Enforcement Principles restricting the FTC’s ability to use its standalone Section 5 authority in unfair competition cases.

After this, the agency began pursuing money damages through another avenue, Section 13 of the FTC Act. The agency used Section 13 to obtain $1.27 billion in restitution and disgorgement for deceptive payday loan practices.

The defendants, however, appealed and argued Section 13 only contemplates injunctive relief. Earlier this year, the U.S. Supreme Court confirmed in AMG Capital v. FTC, that despite a desirable outcome, Section 13 did not permit the court-ordered monetary relief the FTC obtained. The FTC asked Congress for a statutory fix.

Meanwhile, FTC Commissioner Rohit Chopra and FTC attorney, Samuel Levine, published an article in October 2020 arguing that the FTC could use its Notice of Penalty Offenses Authority “as part of a broader strategy to resurrect the FTC as a vigorous check against corporate malfeasance.” After AMG Capital, the agency began acting on the plan outlined in the article.

FTC Is Ramping Up

In mid-June, President Biden appointed Lina Khan, a strong consumer protection advocate and Big Tech critic as FTC Chair. By July 1, she led the commissioners in rescinding the 2015 statement to restore the agency’s standalone Section 5 authority.

In September, Khan appointed Levine director of the Bureau of Consumer Protection and outlined her priorities in an internal memo. On Oct. 6, the FTC issued notices to 70 for-profit educational institutions. The notices to advertisers went out the following week.

What Does FTC Want?

According to the FTC’s press release, “[t]he rise of social media has blurred the line between authentic content and advertising, leading to an explosion in deceptive endorsements across the marketplace.”

Chopra and Levine’s article appears to be the playbook, suggesting the FTC wants:

Seller accountability: So far, the FTC has focused on influencer transparency. The authors, however, characterize some activity as “laundering” advertisements.

Market-wide compliance: The authors argue the FTC can use the broad notices to correct practices market-wide.

Deterrence: The authors state Section 5 violations can mount quickly, suggesting the agency may seek large penalties.

Bottom Line for Companies

Whether circulating a bulletpoint list of condemned practices gleaned from decades-old cases can resurrect the FTC’s enforcement power is not a fait accompli. Challenges may ensue. Nevertheless, the FTC has fired a shot across the bow. Enforcement appears likely.

As this unfolds, companies can review current compliance efforts. Good hygiene principles include:

Be clear with influencers: If you provide content, train influencers about what they can—and cannot—say. Make sure they understand their disclosure obligations and point them to the FTC’s resources.

Be clear with your own employees: Have a social media policy for staff and educate them on interacting with influencers. Be clear about which materials they can share.

Consider reasonable monitoring: Although a rogue blogger is unlikely to trigger enforcement, the FTC expects companies to take reasonable steps to monitor influencers. Watch them periodically and act when they misstep.

Review your policies and procedures: Make sure they’re consistent with FTC guidance.

Watch this space: As this unfolds, the FTC’s expectations may evolve.

### Infrastructure DA [Reconciliation]---2AC

#### BBB Fails – can’t stop Chinese GDP goals or Russian emissions

Thomas Duesterberg 1-4, a senior fellow at Hudson Institute, “First Foreign Policy Setback For Biden: The Problem Of Europe”, 1-4-2021, https://www.forbes.com/sites/thomasduesterberg/2021/01/04/first-foreign-policy-challenge-for-biden-the-problem-of-europe/?sh=3a53d8c5245c

The Biden program also includes an aggressive commitment to address climate change, which encompasses support for a green industrial sector. To succeed it will require regulatory support and financial incentives to displace a carbon-based economy. Europe is already committed to this path and some of its companies are leaders in wind and solar technologies. The United States has only one of the top ten global firms in each these industries. It remains to be seen if the Biden team will double down on its “Build Back Better” program to subsidize companies in the green sector, which would likely antagonize the Europeans because they do have a major presence already in green wind and solar. Europe, for its part, is considering actions like a border carbon tax to block imports of products like U.S.-origin liquified natural gas because of high methane emissions from production, while at the same time moving ahead to import more Russian natural gas. China emits more than three times the methane of the United States and Russia about ten percent more despite its much smaller economy.

Biden and his climate czar, John Kerry, are **committed to building coalitions** to bolster the global Paris climate accord. The biggest outlier in carbon emissions of course is China, whose CO2 footprint is already almost twice that of the United States. China has verbally committed only to “peak emissions” by around 2030. If the Middle Kingdom is to **achieve** its own goals of doubling or tripling per capita GDP by 2035, it is likely to increase its CO2 emissions by 50 to 100 percent by this time, even assuming ambitious progress in increasing the efficiency of its industry in terms of fossil fuel inputs. The question for the Biden team is: **will Europe cooperate** in challenging major climate outliers like China and Russia if it **continues to build trade** and **economic cooperation** with them?

President-elect **Biden’s emphasis** on the need for more concerted **global action to address** major **economic** and **climate change** issues is well founded. China has become a major global economic power and the United States alone cannot convince it to change its economic model, as the Trump administration found. Europe is a key to any alliance strong enough to **take on China**, reform the WTO and build more support to address climate change. **The old continent’s** propensity for regulating global technology companies and building its domestic economy through industrial policy, along with its **growing reliance on cooperation** with **China** and **Russia** for **energy** and **export markets**, make any progress on the Biden alliance program a difficult task.

#### Case turns warming---pesticide usage causes methane levels to rise at unprecedented rates---that’s Sanderson and Cox

#### Won’t pass---the bills are tied, far off, unfinished, and Biden can’t assuage progressives

Jonathan Weisman 10/28, Congressional correspondent and Domestic Policy Editor for The New York Times, B.S. in Journalism and History from Northwestern University; Jim Tankersley, Tax and economics reporter for The New York Times, B.A. in Political Science from Stanford University; Emily Cochrane, Congressional reporter at The New York Times, B.S. in Journalism from the University of Florida, “Crucial Elements of Spending Plan Remain in Flux After Biden’s Appeal to Democrats,” The New York Times, 10/28/21, https://www.nytimes.com/live/2021/10/28/us/biden-bill-plan

President Biden pleaded with House Democrats on Thursday to embrace his “framework” for a $1.85 trillion economic and environmental bill, saying its fate would help determine that of his presidency and his party’s hold on Congress, and its success would restore the nation’s standing on the world stage.

But the president’s appeal appeared to have failed to break the logjam among Democrats. Crucial details of the legislation remained in flux, and progressives declared they would not bow to pressure to quickly throw their support behind a separate $1 trillion bipartisan infrastructure package that has already passed the Senate.

By Thursday night, House leaders had scrapped plans for a vote on the public works measure, and the chamber approved a short-term extension of transportation programs through early December, a sign that passage of both the infrastructure bill and the domestic policy plan may be far off.

It was a setback after an audacious gamble by Mr. Biden, who had delayed his departure for a trip to Europe to try to nail down an accord on his domestic agenda. He used a morning meeting at the Capitol to attempt to rally House Democrats around the emerging deal.

“We have a framework that will get 50 votes in the United States Senate,” Mr. Biden told the group, according to a person familiar with his private remarks. “I don’t think it’s hyperbole to say that the House and Senate majorities and my presidency will be determined by what happens in the next week.”

Later, in public remarks at the White House, Mr. Biden hailed the plan as “historic.”

“No one got everything they wanted, including me,” he said in the East Room before departing on a trip to Rome. “But that’s what compromise is. That’s consensus. And that’s what I ran on.”

House leaders hoped the framework would be enough to persuade the chamber’s most liberal members that Congress was on the verge of passing a truly progressive package — and that those liberals, in turn, would join more moderate and conservative Democrats to send the infrastructure bill to the president for his signature.

“We badly need a vote on both of these measures,” Mr. Biden privately told lawmakers on Thursday morning, according to the person familiar with his remarks.

But liberals were still unsatisfied with a plan that was clearly unfinished — and that omitted many of their cherished priorities.

“What I would say is you have the outline of a very significant piece of legislation — I want us to make it better,” said Senator Bernie Sanders, the Vermont independent and Budget Committee chairman.

The change of course on holding an infrastructure vote on Thursday was a sign that the last-minute visit by Mr. Biden had not been enough to assuage progressives worried about the fate of the economic and environmental bill.

“Members of our caucus will not vote for the infrastructure bill without the Build Back Better Act,” Representative Pramila Jayapal, Democrat of Washington and the chairwoman of the Congressional Progressive Caucus, said in a statement that endorsed the president’s outline. “We will work immediately to finalize and pass both pieces of legislation through the House

together.”

Two crucial holdouts, Senators Joe Manchin III of West Virginia and Kyrsten Sinema of Arizona, had yet to publicly commit to voting for the social policy legislation.

#### Biden’s agenda is dead in the water.

Jonathan Easley 3-20, Reporter for The Hill, "New challenges emerge for Biden after strong start," The Hill, 03/20/2021, https://thehill.com/homenews/administration/544125-new-challenges-emerge-for-biden-after-strong-start?rl=1.

President Biden is facing serious challenges as he grapples with the border crisis and confronts racial turmoil and domestic extremism in a country that has been torn apart by cultural differences.

The headwinds are all the more stark coming on the heels of recent political victories.

Biden has recently felt the wind at his back after exceeding his interim goal for vaccine distribution and signing into law a hugely popular COVID-19 relief bill that appears primed to jump-start the economy following a yearlong shutdown.

That’s given optimism to congressional Democrats, who are now bullish about their chances to buck history in the 2022 elections as they seek to maintain ultra-slim majorities in the House and Senate. While the president’s party is typically in line for a thrashing in the first midterms, Democrats believe they have an opportunity to potentially gain seats if they can stay the course on the coronavirus pandemic and sell a message of economic optimism to voters.

At the same time, Biden is under attack from both the left and the right for his administration’s handling of the growing humanitarian crisis at the southern border.

And his visit to Atlanta on Friday, where he spoke about the shooting deaths of six Asian women, underscored the pressure he faces to address extremism and anti-Asian violence.

Those new challenges come as Biden also faces demands for racial justice, a reckoning on sexual assault and harassment that has ensnared New York Gov. Andrew Cuomo (D), and high-stakes debates over censorship, misinformation and the outsized influence of social media and Big Tech that have contributed to the nation’s worsening polarization.

“It’s a weird political moment and everything seems to be moving so quickly,” said former Sen. Dennis DeConcini (D-Ariz.), who served in the Senate with Biden for nearly two decades.

“I think Biden is off to a great start, although he hasn’t been able to secure bipartisan support in the Senate. He faces a huge challenge with the extreme partisanship that no president has faced at this level in a long time. It’s difficult when you only have a VP-majority in the Senate, and the president usually loses seats, so he’s got to do all he can in his first two years,” he said.

Almost 60 days into his first term, Biden has been enjoying an extended honeymoon due largely to his handling of the coronavirus pandemic and the relief package that is sending money directly into the bank accounts of tens of millions of Americans.

Biden’s average job approval rating sits at 54 percent in the RealClearPolitics average, essentially unchanged from his first day in office.

But according to historical data from Gallup, that level of popularity might not be enough for Democrats to keep their majorities in Congress next year.

Gallup figures show that the president’s party loses an average of 14 congressional seats in the first midterm even if that president’s approval rating is above 50 percent. If the president’s approval rating is below 50 percent, the party loses an average of 37 seats.

Democrats can only afford to lose five seats to maintain their majority in the House, and they can’t lose any in the 50-50 Senate.

"We are going to be selling the Biden-Democratic agenda,” said Danielle Butterfield, the executive director for Priorities USA, the largest super PAC supporting the Biden presidency. “We know how people perceive these accomplishments is going to have a tremendous impact on whether they show up to vote in 2022."

But there are plenty of pitfalls ahead that could slow or even reverse Biden’s political momentum.

His response to racial strife and the growing concern about domestic terror following the Jan. 6 siege on Capitol Hill and the killing of eight people, including six Asian women, is being closely watched by an activist base that has centered much of its political worldview around race and identity.

Those dynamics were driven home on Friday in Atlanta, where Biden addressed residents mourning the Atlanta shootings that has drawn new attention to the violence and rhetoric targeting racial minorities.

Cornell Brooks, former president of the NAACP, told The Hill that while Biden, 78, might not be fluid in the shifting language of racial politics, his ability to connect with people emotionally would leave him well-equipped to sidestep potential landmines in the fast-changing culture wars around race and identity.

“Biden grew up in the era of busing and the Brown decision when race in public schools was the big issue and there was a whole different language and vocabulary,” said Brooks, who is director of the William Monroe Trotter Collaborative for Social Justice at Harvard University.

“Now he arrives at the White House at a moment of racial tumult. Is he fluent in the language and events of the times? Maybe in his own way. There’s a different vocabulary around anti-racism and racial equity than there was in the 1970s when he first came to the Senate, but he’s fluent in the language of compassion, and that means he can be persuasive on issues of race and identity,” he said.

The influx of migrants at the border, however, presents a different challenge entirely.

The U.S. is in custody of 14,000 unaccompanied minors. In seeking to implement a more “humane” immigration policy than Trump, Biden has allowed for young people to stay in the U.S. while their immigration status is adjudicated.

The government is struggling to deal with the swell of migrant children, and thousands are being kept in Customs and Border Protection facilities for days longer than is legally allowed.

There are no easy fixes for an issue that has vexed numerous administrations, and no signs of the border surge subsiding anytime soon.

“The situation at the border is a humanitarian crisis and could become a political crisis, depending on how they handle it,” said DeConcini.

And while Biden has had some success legislating out of the gate, the congressional battles will only grow more difficult as the midterm elections draw closer.

Biden has promised to work with Republicans in an effort to unite the country, but there are no indications of a budding relationship.

On the other side of the aisle, many Democrats are eager to eliminate the filibuster and take full advantage of their control in Washington. Those aspirations are being restrained by a handful of centrist Democrats who are pumping the brakes, to the frustration of progressives.

“There are some battles down the road that will be very tough,” said Mark Longabaugh, a veteran Democratic strategist. “[Biden’s] in a situation where there will have to be a battle over the filibuster if he really wants to pass the big pieces of his agenda. That will be a real dilemma for the White House and Senate Democrats.”

#### Winners win

Paul Waldman 20, Columnist covering politics, “You’re darn right Biden has a mandate. Now he has to act like it.,” 11/9/20, https://www.washingtonpost.com/opinions/2020/11/09/youre-darn-right-biden-has-mandate-now-he-has-act-like-it/

Now that Joe Biden is the president-elect, the skeptical questions have already begun. How is he going to reach out to Republicans? Doesn’t the fact that Democrats lost some seats in the House show how closely divided the country is? Does he really have a mandate?

The answer is this: You bet he does. And he needs to act like it.

In recent years, whenever Senate Majority Leader Mitch McConnell (R-Ky.) was questioned about some extraordinary move he and Republicans were taking, such as rushing Amy Coney Barrett’s confirmation through the process fast enough to create a sonic boom, his usual reply was to smirk and say, “Elections have consequences.” We won, in other words, so we can exercise our power in any way we see fit.

This is what we have come to expect not just from McConnell but also from all Republicans, regardless of the circumstances of their victory. But when it’s Democrats’ turn, we expect them to be tentative and apologetic about using their power, always worried about whether a sternly worded editorial will chastise them for not incorporating enough Republican ideas into their plans.

So let’s take stock of just where Biden and the Democrats stand.

As of this writing, Biden has tallied 4.4 million more votes than President Trump, a number that will keep growing as more results come in. By the time the counting is over, he will likely have bested Trump by 6 million votes or more.

Given the current state of party polarization, that is a positively overwhelming victory; the days when Ronald Reagan could win reelection by 18 points or Lyndon Johnson could win by 23 points are long behind us.

Let’s also not forget that Biden won this emphatic victory despite the extraordinary voter suppression effort that Republicans have assembled in recent years and that accelerated in the past few months as they tried madly to keep as many Democrats from voting as possible. Voter purges, closing of polling places, restrictions on early voting, ID laws, the attack on the Postal Service — they even went after drop boxes, as though allowing people to safely and conveniently drop off ballots was some kind of anti-Trump conspiracy.

Yet despite all the hurdles Republicans put in front of people who were more likely to vote Democratic, Biden still beat Trump soundly.

Furthermore, Democrats control the House and, if they win both seats in the Georgia runoffs, will control the Senate as well. Even though the upper chamber would be divided 50-50, the Democrats there would represent 41 million more Americans than the Republicans do, as Ian Millhiser noted.

It’s not just that Democrats have won more elections (including the popular vote in seven of the last eight presidential contests) and represent more people. Their policy agenda — the substance of any mandate — is overwhelmingly popular as well.

In fact, it’s hard to find a controversial issue on which the Democratic position doesn’t enjoy the support of a majority of the public, sometimes an overwhelming majority. A $15-an-hour minimum wage, universal background checks for gun purchases, strong action on climate change, protecting reproductive rights, a path to citizenship for undocumented immigrants and legal status for “dreamers,” higher taxes for the wealthy and corporations, a public health insurance option — all are hugely popular.

You know who understands that perfectly well? Republicans.

Which is why the campaigns they run are so often about things like who loves America more or which candidate is “weak” and which one is “strong.” But more importantly, they know that if you act like you have a mandate, then you do.

You might recall that when Trump took office in 2017 despite losing the popular vote by 3 million votes, neither he nor any other Republican took it as a reason to trim his sails in any way. They did not say, “We shouldn’t go too far in cutting taxes for the wealthy or gutting environmental regulations or restricting reproductive rights — this is a closely divided country, and we should try to govern in a cooperative way.”

Quite the contrary, in fact; it’s hard to recall a modern president more contemptuous not just of the opposition party but also of the majority of Americans who didn’t support him.

Nor was this anything new. Like Trump, George W. Bush took office after losing the popular vote, and he didn’t moderate his agenda either (even if he was better-mannered). What they understood is that mandates are, in the end, a kind of collective fiction. They exist only to the extent we decide they do.

On Friday, before news organizations declared him the victor, Biden said that the voters had “given us a mandate for action on covid, the economy, climate change, systemic racism. They made it clear they want the country to come together, not continue to pull apart.” Those two ideas are in tension, because acting on the mandate he received will not bring the country together.

It will make Republicans angry. They will say that they are the victims of oppression and tyranny, that when a duly elected Democrat enacts his agenda it is unfair and illegitimate. They will do everything in their power not only to make Biden fail but also to exacerbate the resentment, anger and division that they see as their path back to power.

There is not a single thing Biden can do to change that. What he can do, however, is act as though his mandate is well-earned and of the highest urgency. He can do what he promised, undeterred by Republican whining. If he does that, the public will get what it voted for. And isn’t that the point of having an election?

#### DA’s not intrinsic---it is easy to solve both the DA and the plan by passing both, means it is a fake opportunity cost.

#### New publisher merger crackdowns symbolize broad enforcement for years to come.

Alden Atkins & Lindsey Vaala 11-9, Partner at Vinson & Elkins LLP, J.D. from the University of Virginia School of Law; Antitrust Counsel at Vinson & Elkins LLP, J.D. from the College of William & Mary School of Law, “DOJ Suit to Block Book Publishers’ Merger Indicative of New Antitrust Enforcement Regime’s Priorities,” JD Supra, 11-09-2021, https://www.jdsupra.com/legalnews/doj-suit-to-block-book-publishers-3317239

On November 2, 2021, the United States Department of Justice (“DOJ”) filed a complaint in the U.S. District Court for the District of Columbia to block the planned $2.175 billion merger between powerhouse publishing companies Penguin Random House, LLC and Simon & Schuster, Inc. This step is an early example of the antitrust landscape ushered in by the Biden administration’s new antitrust enforcers; a landscape in which effects on labor markets are front and center and alleged anticompetitive effects are not necessarily measured by an effect on prices. Our Antitrust team is closely monitoring the evolving antitrust enforcement frontier and offer the following observations as to how this case illustrates the enforcement authorities’ changing priorities.

Background on the Proposed Deal

Penguin Random House and Simon & Schuster are two of the biggest publishers of commercial literature in the United States. In late November 2020, the two companies announced that they planned to merge in the biggest deal in the history of the publishing industry. The two companies are part of the so-called “Big Five,” the group of the five largest publishers in the United States which include other giants such as HarperCollins, Hachette Book Group, and Macmillan Publishing Group. Under the deal, Penguin Random House’s parent company, Bertelsmann SE & Co., would acquire Simon & Schuster from its parent company, ViacomCBS Inc., for $2.175 billion.

DOJ’s Objections to the Proposed Deal

The complaint alleges that the merger would likely lessen competition substantially in violation of Section 7 of the Clayton Act1 and thus should be blocked. To support this claim, DOJ contends that the merger would “eliminate a major competitor to Penguin Random House, already the market leader, and create a firm that controls a substantial share of the relevant markets.”2 The complaint further asserts that the merger harms competition in the following ways:

The merger would “result in authors earning less for their books” and “fewer and less diverse books being published.”3 The alleged harm here is two-fold. Authors, who often pit competing publishers against one another to obtain significant book advances, would have less leverage to do so post-merger. Less compensation for authors might then lead to fewer books being published, leading to less choice for consumers.

The merger would “reduce competition by facilitating coordination between the remaining major publishers.”4 The complaint identifies the book publishing industry as already highly concentrated and rejects any countervailing factors as justification, claiming that high barriers to entry and a lack of transaction-related efficiencies add to the factors condemning the transaction.

As we have reported, a touchstone of the Biden administration antitrust enforcement agenda is to combat what it sees as excessive consolidation in many industries that harms competition. For example, the July 9 Executive Order on Promoting Competition in the American Economy (the “Executive Order”) lambasts consolidation as a source of pervasive harm — from making it harder for American workers to bargain for higher wages from powerful corporate employers, to making it too hard for small family farms to survive against agriculture conglomerates, to driving up the costs of healthcare, pharmaceuticals, and communication services like cable and internet. By filing suit to block the Penguin Random House/Simon & Schuster deal, DOJ’s actions are consistent with the Executive Order’s directive to “act now to reverse the[] dangerous trend[]” of consolidation.5

Focus on Labor

Effects on labor markets is one of the Biden administration’s top priorities in competition enforcement, continuing a trend from other recent administrations. In the Executive Order, President Biden identified, among other major themes, a focus on “the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets.” DOJ’s complaint predicts that, if Penguin Random House is allowed to acquire its largest competitor, the post-merger entity will have unrivaled power to set the prices at which book authors will be paid, thus creating a monopsony and making it more difficult for authors to bargain for better compensation for their books, which might, in turn, drive authors out of the profession and reduce the variety of books being written and published.

The complaint explains the process by which authors are compensated through advances and royalties, with advances being an up-front payment that usually constitutes the entire compensation an author receives. The complaint alleges specific examples of Penguin Random House and Simon & Schuster competing aggressively with one another, and with a handful of other publishing houses, to bid on individual author contracts and deals. Under the DOJ’s theory, Penguin Random House and Simon & Schuster often end up as the two most powerful bidders, and that competition to pay larger advances would be lost by the merger.6

Moving Away from Price Effects

DOJ’s complaint also continues the Biden administration’s recent trend of moving merger review analysis away from a focus on price effects as the measure of competitive injury. The consumer welfare standard focuses on whether a proposed merger would harm consumers through higher prices or reduced output. Under that standard, experts create econometric models predicting whether quality-adjusted prices would rise after the merger. DOJ challenges to prior mergers have faltered when its economists could not confidently predict that prices would increase post-merger.7 Jonathan Kanter (President Biden’s nominee to be Assistant Attorney General for DOJ’s Antitrust Division, who has not yet been confirmed) and the other new antitrust enforcers have advocated for years that antitrust enforcement should not be limited to studying the price effects of a merger or competitors’ conduct.

DOJ’s complaint does not allege that the merger would have any effects on the prices paid by consumers. Instead, the complaint alleges that the decrease in author pay that would result from the merger would “lead to a reduction in the quantity and variety of books published”8 and that the merger would “likely reduce quality, service, choice, and innovation,” in the commercial literature market.9 Quality, variety, and innovation are all measures of output, but they are difficult to quantify. These types of concerns are exactly what the new enforcers have said should be the focus of antitrust. Indeed, new FTC chair Lina Khan has argued in the past that consolidation of the publishing industry combined with the power of online platforms like Amazon have reduced the “diversity and vibrancy of ideas in the book market.”10

Compliance Pointer: The Complaint’s Allegations are Aided by the Defendants’ Own Documents

As is often the case, DOJ’s complaint emphasizes the parties’ internal documents. While antitrust and economic theory can help predict the merger’s effects on competition, such debates can be dry and not always persuasive. Courts often find that the best way to assess real world competitive effects is through the eyes of the actors themselves. At the very least, contemporaneous documents can bolster the antitrust theory, as DOJ has done here. The complaint cites numerous statements by executives at both companies indicating that they understood that the merger would allow them to control author wages, win substantially more bids, and was not likely to be viewed favorably by DOJ. Purportedly quoting directly from company documents, the complaint states, for example, that Simon & Schuster’s CEO wrote to a best-selling author “I’m pretty sure that the Department of Justice wouldn’t allow Penguin Random House to buy us, but that’s assuming we still have a Department of Justice.”11 And the Chairman of Penguin Random House’s parent company reportedly wrote that Penguin Random House posed greater “antitrust risks” than any other potential buyer.12 We regularly counsel clients on antitrust compliance issues, including the importance of careful attention to internal documents created in the ordinary course of business.

Looking Forward

DOJ’s lawsuit signals an early step in the Biden administration’s new antitrust enforcement agenda that has shifted the focus of competition from prices consumers pay to now include other considerations such as impact on labor and qualitative effects on the competitive process. As the Executive Order makes clear and this complaint confirms, effects on labor and other non-price concerns will no longer be overlooked in merger considerations and can provide ammunition for enforcers to block transactions.

#### 8. Alt causes---fracking, emissions, other countries, etc.

#### Warming won’t be catastrophic

Dr. Benjamin Zycher 21, Senior Fellow at the American Enterprise Institute, Doctorate in Economics from UCLA, Master in Public Policy from the University of California, Berkeley, and Bachelor of Arts in Political Science from UCLA, Former Senior Economist at the RAND Corporation, Former Adjunct Professor of Economics at the University of California, Los Angeles (UCLA) and at the California State University Channel Islands, and Former Senior Economist at the Jet Propulsion Laboratory, California Institute of Technology, “The Case for Climate Change Realism”, 6/21/2021, https://www.aei.org/articles/the-case-for-climate-change-realism/

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases

in greenhouse-gas concentrations. The IPCC’s 2014 Fifth Assessment Report, for example, uses four alternative “representative concentration pathways” to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC’s Special Report on Global Warming of 1.5°C and the U.S. government’s Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as “borderline impossible.”

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

# 1AR

## Food Security

#### Small farms key to genetic diversity---try or die

**Boyce 4** (James K., Professor of Economics – Political Economy Research Institute and Ph.D. – Oxford University, “A Future for Small Farms? Biodiversity and Sustainable Agriculture”, July, http://www.peri.umass.edu/fileadmin/pdf/working\_papers/working\_papers\_51-100/WP86.pdf)

There is a future for small farms. Or, to be more precise, there can be and should be a future for them. Given the dependence of ‘modern’ low-diversity agriculture on ‘traditional’ high-diversity agriculture, the long-term food security of humankind will depend on small farms and their continued provision of the environmental service of in situ conservation of crop genetic diversity. Policies to support small farms can be advocated, therefore, not merely as a matter of sympathy, or nostalgia, or equity. Such policies are also a matter of human survival. The diversity that underpins the sustainability of world agriculture did not fall from the sky. It was bequeathed to us by the 400 generations of farmers who have carried on the process of artificial selection since plants were first domesticated. Until recently, we took this diversity for granted. The ancient reservoirs of crop genetic diversity, plant geneticist Jack Harlan (1975, p. 619) wrote three decades ago, ‘seemed to most people as inexhaustible as oil in Arabia.’ Yet, Harlan warned, ‘the speed which enormous crop diversity can be essentially wiped out is astonishing.’ The central thesis of this essay is that efforts to conserve in situ diversity must go hand-in-hand with efforts to support the small farmers around the world who sustain this diversity. Economists and environmentalists alike by and large have neglected this issue. In thrall to a myopic notion of efficiency, many economists fail to appreciate that diversity is the sine qua non of resilience and sustainability. In thrall to a romantic notion of ‘wilderness,’ many environmentalists fail to appreciate that agricultural biodiversity is just as valuable – indeed, arguably more valuable from the standpoint of human well-being – as the diversity found in tropical rainforests or the spotted owls found in the ancient forests of the northwestern United States.

## CP

#### The new Court will not allow it

T.J. York 10-22, Reporter at Broadband Breakfast, Degree in Political Science from the University of Southern California, “Federal Trade Commission Will Likely Not Be Able to Implement Competition Rules, Panelists Say”, Broadband Breakfast, 10/22/2021, https://broadbandbreakfast.com/2021/10/federal-trade-commission-will-likely-not-be-able-to-implement-competition-rules-panelists-say/

The Federal Trade Commission’s attempts to use rulemaking authority to issue antitrust policy governing technology companies will be struck down in federal courts, said panelists participating in a TechFreedom event on Thursday.

Recently formed conservative majorities on the Supreme Court and other panels have expressed opposition to the idea that the FTC possesses such rulemaking authority, these panelists said.

Hence, unlike past supreme courts, they current bench is likely to strike down FTC-issued binding rules.

Panelists highlighted former President Donald Trump appointees Brett Kavanaugh and Neil Gorsuch as justices who have opposed legal reasoning often used to permit FTC rulemaking.

Indeed, some panelists said early 20th Century legislation governing the FTC makes the case that the agency was created as an investigative body rather than a regulatory one.

Peter Wallison, senior fellow emeritus at the American Enterprise Institute, said that between five and six Supreme Court justices would ultimately vote to weaken precedents that allow for FTC rulemaking.

The Judiciary Committee of the House of Representatives recently advanced six antitrust bills that attempt to regulate the tech industry and foster greater competition, including the Ending Platform Monopolies Act and the Platform Competition and Opportunity Act.

FTC rules have taken on increased importance in terms of economic regulation due to the frequent inability of Congress to pass major legislation due to partisan gridlock. The FTC has proposed new procedures to ensure competition since Lina Khan was appointed as chair.

#### Courts will nerf it

Daniel A. Crane 10, Frederick Paul Furth Sr. Professor of Law at the University of Michigan, JD from the University of Chicago School of Law, BA from Wheaton College, “Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel”, The CPI Antitrust Journal, Volume 2, February 2010, https://repository.law.umich.edu/articles/1370/

In recent years, the Commission has frequently tied itself to the Sherman Act.11 Why would it choose to accept that baggage? Of late, the FTC has been shell-shocked by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions to enjoin behavior that would not violate the Sherman Act. The courts have frequently quashed the FTC’s efforts to develop an independent Section 5, even while paying lip service to the independence principle.12 As Bill Kovacic remarked during his opening comments at the FTC’s October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission’s nearly hundred-year history.13

The reason is institutional. Courts tend to be jealous of their jurisdiction. To cite a venerable precedent to which we will return at end, courts are loathe to abandon their prerogative “to say what the law is.”14 In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a Marbury v. Madison thematic to the FTC: “The words ‘unfair competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include.”15 Courts are wary of agency assertions that the agency should be accorded independent space to develop legal norms. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is “untenable.”16

So this is where we are today: Legal doctrine theoretically allows space for an independent Section 5 and there are good policy reasons for some movement away from the constraints of the Sherman Act, but great care needs to be taken in the formulation of a “separation strategy.” It simply will not do for the FTC to declare independence from the Sherman Act and then proceed to formulate its own antitrust policy.17 As Commissioner Rosch recognizes in his statement dissenting from the Commission’s decision to bring an independent Sherman Act Section 2 “tag-along” action, the Commission must not merely assert independence from the Sherman Act, but explain the principles that justify departure from Sherman Act norms in each relevant case.18 A “just trust us, we’re the FTC,” strategy has no chance of success in the courts.

#### Section 5 will be nuked in court---they won’t get Chevron

Dr. Darren Bush 16, PhD in Economics from the University of Utah, JD from the University of Utah, BA in Economics from California State University, San Bernadino, Leonard B. Rosenberg College Professor of Law at the University of Houston Law Center, “Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency”, Williamette Law Review, 53 Willamette L. Rev. 33, Fall 2016, Lexis

B. FTC Receives Little Deference in Court

The FTC receives almost no deference with respect to cases it brings under the "unfair methods of competition" prong of the Federal Trade Commission Act. In contrast, the FTC usually receives Chevron deference 57 when it acts under the "unfair or deceptive trade [\*48] acts or practices" prong of section 5 of the FTC Act. Theories abound as to why this is so.

The most obvious theory is that the dual enforcement scheme clouds the ability of the courts to offer the FTC any deference. Unlike with the FTC's "unfair methods of competition" actions, the courts do not face a non-agency duplicate that appears in the bulk of cases before the courts regarding "unfair or deceptive trade acts or practices." 58 The FTC and DOJ both enforce the Clayton Act, and while the Sherman Act is exclusively within the confines of the DOJ, the FTC cases, to the courts, are parallel actions. 59 With an "ugly stepsister" in the midst, it is difficult for the FTC to make a claim of deference successfully. 60 [FOOTNOTE] 60 See Justin Hurwitz, Chevron and the Limits of Administrative Antitrust, 76 U. Pitt. L. Rev. 209, 212 (2014) ("Indeed, there is widespread consensus within the antitrust bar that Chevron does not apply to FTC interpretations of Section 5."). [END FOOTNOTE]

One way around this issue would be for the FTC to engage in rulemaking. 61 [FOOTNOTE] 61 Id. at 252-53 (while the FTC does have rulemaking authority, it avoids using that authority on the competition side of its authority); see also SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). [END FOOTNOTE] However, there are serious risks to rulemaking, as will be discussed later. Moreover, such an action would cause the FTC to run squarely into a second theory of why it is not afforded deference; namely, that it is engaged in the creation of a pseudo "common law" that is extracted away from Article III courts. 62 At the very least, it would be "high stakes rulemaking" that would likely trigger additional scrutiny from the courts. 63

[\*49] Suffice to say for the moment that it is unlikely that even a promulgated rule would survive in courts that typically view the antitrust laws as strongly within their own domain. 64 [FOOTNOTE] 64 Daniel A. Crane, Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel 4, (Univ. of Mich. Law Sch. Empirical Legal Studies Ctr., Working Paper No. 181, 2010), http://www.law.umich.edu/centersandprograms/lawandeconomics/ abstracts/ 2010/Documents/10-001crane.pdf (describing the FTC as "shell-shocked by its treatment in the courts when it has invoked an independent Section 5."); see also Daniel A. Crane, Technocracy and Antitrust,86 Tex. L. Rev. 1159, 1199 (2008) ("Like the Antitrust Division, the FTC has little power to create antitrust norms but merely enforces the norms created by the generalist Article III courts that review FTC decisions."). [END FOOTNOTE] A second way to eliminate the issue is to place the antitrust laws in the exclusive jurisdiction of the FTC. This may eliminate the redundancy, but, unfortunately, undermines the will of Congress to have multiple antitrust enforcers to serve as checks against the courts and the DOJ. The proposal discussed later seeks a middle position by establishing the FTC as the sole federal enforcement agency, excluding criminal enforcement.

#### Empirics---it’s been tried repeatedly and always failed

Alison Jones 20, and William E. Kovacic. Alison Jones, King’s College London, London, United Kingdom. William E. Kovacic, King’s College London, George Washington University, and United Kingdom Competition and Markets Authority, "Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy". SAGE Journals. 3/20/2020. https://journals.sagepub.com/doi/10.1177/0003603X20912884

One possible solution to rigidities that have developed in Sherman Act jurisprudence is for the FTC to rely more heavily on the prosecution, through its own administrative process, of cases based on Section 5 of the FTC Act and its prohibition of “unfair methods of competition.”93 This section allows the FTC94 to tackle not only anticompetitive practices prohibited by the other antitrust statutes but also conduct constituting incipient violations of those statutes or behavior that exceeds their reach. The latter is possible where the conduct does not infringe the letter of the antitrust laws but contradicts their basic spirit or public policy.95

There is no doubt therefore that Section 5 was designed as an expansion joint in the U.S. antitrust system. It seems unlikely to us, nonetheless, that a majority of FTC’s current members will be minded to use it in this way. Further, even if they were to be, the reality is that such an application may encounter difficulties. Since its creation in 1914, the FTC has never prevailed before the Supreme Court in any case challenging dominant firm misconduct, whether premised on Section 2 of the Sherman Act or purely on Section 5 of the FTC Act.96 The last FTC success in federal court in a case predicated solely on Section 5 occurred in the late 1960s.97

The FTC’s record of limited success with Section 5 has not been for want of trying. In the 1970s, the FTC undertook an ambitious program to make the enforcement of claims predicated on the distinctive reach of Section 5, a foundation to develop “competition policy in its broadest sense.”98 The agency’s Section 5 agenda yielded some successes,99 but also a large number of litigation failures involving cases to address subtle forms of coordination in oligopolies, to impose new obligations on dominant firms, and to dissolve shared monopolies.100 The agency’s program elicited powerful legislative backlash from a Congress that once supported FTC’s trailblazing initiatives but turned against it as the Commission’s efforts to obtain dramatic structural remedies unfolded.101

#### It’ll be ignored OR delayed

Bill Baer 20, Visiting Fellow in Governance Studies, Former Assistant Attorney General for Antitrust at the U.S. Department of Justice and Director of the Bureau of Competition at the Federal Trade Commission, J.D. from Stanford University, Testimony Before the United States House of Representatives, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online”, 10/1/2020, <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-10.1.20-Testimony-to-House-Antitrust-Subcommittee.pdf>

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents, and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC Horizontal Merger Guidelines have, as I noted earlier, over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines—indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

#### Industry will demand Congress preempt it

Lisa Schultz Bressman 7, Professor of Law and Co-Director of the Regulatory Program at Vanderbilt University Law School, “Article: Procedures As Politics In Administrative Law”, Columbia Law Review, December 2007, 107 Colum. L. Rev. 1749, Lexis

It is possible to think that agencies do have incentive to conduct an open and iterative process as a result of the reasoned decisionmaking [\*1781] requirement. Agencies must produce an explanation that is likely to survive judicial review. To do so, they must anticipate potential weaknesses in the record. Perhaps the best way to anticipate such weaknesses is to consult the likely challengers, sharing information with them in order to gain information from them. n173 Those challengers, once armed with information, may alert members of Congress to intervene before the agency issues a final decision.

Even if agencies do not share information until they issue a final decision, the reasoned decisionmaking requirement may still facilitate fire-alarm oversight in a certain sense. Congress may still have time to influence the decision before the agency changes the regulatory landscape. For example, a rule may not have taken effect. Under the APA, rules generally may not take effect until thirty days after publication. n174 Armed with information, Congress may pressure the agency to extend the effective date of a rule or reopen the rulemaking for reconsideration. Such oversight is close to "police-patrol" oversight, which occurs after the agency has rendered a final decision, rather than before. n175 The difference is that, unlike committee hearings and the like, the intervention [\*1782] may occur a bit earlier and a bit easier. Congress may have time to influence agency policy while it is still in flux.

#### It links to politics

Bloomberg 11 – “Backlash Against ‘Guidance as Rulemaking' Leads to Actions in Federal Court, Congress”, 7/15/2011, http://www.bna.com/backlash-against-guidance-n12884902458/

The decision comes as the Obama administration faces a backlash from industry, Republicans in Congress, and state regulators over what they say is its pursuit of policy initiatives through guidance in lieu of rulemaking. Critics are challenging a practice—particularly on the part of EPA and to a lesser degree the Interior Department—they see as establishing new mandates without proper notice and comment.

The Clean Air Act document aside, EPA in the past 14 months has issued guidance to curb the impact of surface coal mining on water quality, to clarify which waters merit protection under the Clean Water Act, and to outline the best available technologies to curb greenhouse gases.

Interior, meanwhile, issued two guidance documents in June 2010 in the wake of the explosion at the Deepwater Horizon drilling rig in the Gulf of Mexico that required oil and gas companies to implement safety and environmental measures for drilling operations.

‘Poster Child' for Regulatory Overreach

EPA's actions have drawn the wrath of House Republicans. Appropriations Committee Chairman Hal Rogers (R-Ky.), speaking at a July 6 markup of the EPA appropriations bill for fiscal year 2012, said the agency has been “running roughshod” over every sector of the U.S. economy.

“This agency is the poster child for this Administration's widespread regulatory overreach, having vastly overstepped the authority granted by this Congress,” Rogers said.

Guidance, as defined by the Administrative Procedure Act, is a document that clarifies how an agency and its delegated state permitting agencies will interpret a law, such as the Clean Water Act or the Surface Mining Control and Reclamation Act, or it conveys administrative procedures to its various offices. A rule, unlike guidance, is a legally binding document that is subject to notice and comment.

#### It guarantees political blowback

Royce Zeisler 14, J.D. Candidate 2014, Columbia Law School; B.S., B.A. 2012, University of British Columbia, “Chevron Deference and The FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement”, Columbia Business Law Review, 2014 COLUM. BUS. L. REV. 266, Lexis

Two final concerns should also be flagged to be addressed as they develop. First, it is possible that a successful section 5 expansion could come at the expense of creating Sherman Act precedent. Going forward, the FTC will need to balance the goal of expanding section 5 with a push to expand the Sherman Act. Second, rulemaking, and indeed any new FTC method of enforcement, will generate wider political repercussions. This may be beneficial in bringing constructive political attention to a controversial issue, but there is also no certainty that political attention will benefit the FTC's regulation efforts.

#### That causes the CP and future Section 5 action to get rolled back

Justin (Gus) Hurwitz 14, Assistant Professor of Law at the University of Nebraska College of Law, “Chevron and The Limits of Administrative Antitrust”, University of Pittsburgh Law Review, 76 U. Pitt. L. Rev. 209, Winter 2014, Lexis

2. Substantive Legislative Changes: Change the Limits of the FTC's Power

The only true path to constraining the FTC's Section 5 power is for Congress to revise the FTCA to define the boundaries of Section 5. Alternatively, Congress could define boundaries for how that power can be constructed by the agency.

Likely the easiest--and arguably the best--approach for Congress to take is to expressly state that the FTC's Section 5 authority over unfair methods of competition is concurrent with and circumscribed by the Sherman and Clayton Acts as construed by the courts. This has been the longstanding practical understanding of Section 5, and it is how the agency has long used Section 5. 270 Today, moreover, antitrust law is far more rigorous and based on sounder theory than it was at the time of the FTC's creation and over the course of much of the agency's history. 271 The problems that Section 5 was designed to meet are now equally well-addressed by established antitrust law. 272 If there are other issues that need to be addressed--for instance, regulation of business practices in high-tech or other rapidly developing industries 273 --they are better subject to congressional attention and response.

Alternatively, Congress could clarify some of the ambiguity latent in Section 5's unfair methods of competition authority, as it has done to better control the [\*273] agency's authority over unfair or deceptive acts and practices. For instance, Congress could apply Section 5(n) to unfair methods of competition or specify to whom unfairness applies (that is, answer the question "unfair to whom?").

Congress could also respond to concerns over the breadth of Section 5 by limiting the FTC's power to construe the boundaries of that authority by reducing or taking away judicial deference to the agency. This could be done completely by enacting law providing that the FTC's construction of "unfair methods of competition" is not entitled to judicial deference (and perhaps specifying that a reviewing court can or cannot take into consideration factors such as those used in Skidmore deference, e.g., the seriousness of the agency's consideration). Or, Congress could take a more limited approach. Recognizing that the greatest concerns over FTC construction of Section 5 are likely to arise in the context of adjudicatory proceedings--especially those that go through the administrative hearing process before getting to court--Congress could strip the agency of deference in adjudicated matters. The agency would still receive deference for constructions developed through rulemaking proceedings. Either of these approaches would reduce the burden of uncertainty on private parties and both follow a sounder jurisprudential approach to statutory construction--especially as compared to the FTC's current approach of extracting settlements through private proceedings under the threat of lengthy and costly litigation.

#### It's likely based on empirics AND the FTC thinks it’s true, so they’ll be restrained with no spillover

Amy Marshak 11, J.D. from the New York University School of Law and B.S. from Cornell University, “The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5”, New York University Law Review, 86 N.Y.U.L. Rev. 1121, Lexis

2. Congressional Oversight

In addition to the threat of courts invalidating the Commission's decisions, the FTC is cognizant of political pressures that may confine the reach of its authority under section 5. As an independent regulatory agency, the Commission is relatively isolated from presidential control. 72 It is not immune, however, from congressional intervention. 73 If the FTC oversteps its understood statutory authority, Congress can cut back on the Commission's power through explicit contractions of the FTC's statutory authority, budget reductions that limit the ability of the Commission to carry out its mandate, or calling commissioners to task at oversight hearings. 74

Although Congress gave the FTC a long leash in its broad statutory mandate, Congress has not hesitated to rein in the Commission when it thinks that the FTC has gone too far. 75 Indeed, Congress has severely rebuked the Commission on three occasions in the agency's [\*1136] history. The first occurred very early in the Commission's history in 1919 after it issued a report on collusion and exclusionary tactics employed in the meatpacking industry. The study caused meatpackers to erupt in opposition, and they lobbied Congress to pass the Packers and Stockyards Act of 1921. 76 This statute stripped the FTC of jurisdiction over the meatpacking and related industries and vested exclusive authority in the Department of Agriculture. 77 Similarly, in the early 1950s, Congress reined in the FTC in response to the Commission's victory in FTC v. Cement Institute, in which the Supreme Court accepted the Commission's determination that industry-wide pricing practices violated section 5. 78 Congress drafted legislation that would have overturned the decision, and even though the bill never became law, the controversy ushered in greater congressional scrutiny of FTC litigation strategy. 79

In the late 1970s, the Commission became the object of congressional ire after the FTC conducted rulemaking on the advertising of sweet foods to children under its consumer protection 'authority. 80 Congress and the public at large perceived the Commission as "co-opted by the counter-culture," "out of control," and "suspicious of the private sector." 81 In retaliation, Congress refused to pass the 1978 FTC Amendments, which would have expanded the Commission's enforcement powers. 82 Congress then passed the Federal Trade Commission Improvements Act of 1980, which severely constricted the Commission's previously granted consumer protection powers. 83

[\*1137] Although the consumer protection power of the Commission is not the focus of this Note, the 1970s episode is informative by way of illustrating Congress's wrath in response to the FTC's expansive use of its statutory power. As Chairman Leibowitz has noted, "the Agency does not enforce Section 5 in a vacuum." 84 Uncertainty about the length of the FTC's leash may cause the Commission to think twice before extending section 5 enforcement beyond what Congress might approve.

#### It causes years of protracted litigation AND gets struck down

Nicolás Rivero 21, Tech Reporter at Quartz, BA in Journalism from Northwestern University, “Biden’s Antitrust Crusaders Can’t Crusade Without Congress”, Quartz, 3/11/2021, https://qz.com/1982437/lina-khan-and-tim-wu-need-congress-to-push-their-antitrust-agenda/

The FTC could also decide to dust off its rarely used rule-making power and declare certain anticompetitive business practices illegal. But any new rule would almost certainly trigger legal challenges, which would spark a long, expensive court battle in front of judges who aren’t likely to be sympathetic. Kovacic estimates the process could take four or five years—and in the end, judges might just strike the rule down.

#### It creates different laws depending on the litigant---that’s nonsense!

Rebecca Haw Allensworth 15, Associate Professor of Law at the Vanderbilt Law School, J.D. from Harvard Law School, M.Phil from the University of Cambridge, B.A. from Yale University, “The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust”, Iowa Law Review, 100 Iowa L. Rev. 1919, July 2015, Lexis

The FTC is also limited in its ability to create norms. The Sherman Act, unlike most modern regulatory statutes, does not delegate rulemaking to any agency, but section 5 of the FTC Act gives the FTC the power to create rules pertaining to competition. 48 One colorable interpretation of section 5 is that the FTC has the power to create competition law whole-cloth without regard to the Sherman Act and how the Court has interpreted it. But since this interpretation would create two parallel sets of laws depending on who is the litigant (section 5 of the FTC Act for the FTC and the Sherman Act for private parties and the DOJ), the interpretation has understandably gone by the wayside. 49 Today, such an aggressive interpretation of section 5 would simply have no traction in the courts. 50 [FOOTNOTE] 50 See Richard A. Posner, The Federal Trade Commission: A Retrospective, 72 Antitrust L.J. 761, 766 (2005) ("It used to be thought that "unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts … but [this point] is no longer tenable."). [END FOOTNOTE]

Even the idea that the FTC could "invoke[] an independent section 5" to add to or supplement the laws under the Sherman Act has been met with resistance from the courts. 51 In Schering-Plough Corp. v. FTC, the U.S. Court of Appeals for the Eleventh Circuit overturned an FTC decision holding that under section 5, reverse-settlement payments over $ 2 million are presumptively anticompetitive. 52 The 2005 case hearkened back to an early decision made shortly after the creation of the FTC Act in which the Supreme Court observed: "The words "unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include." 53 [\*1929] Professor Daniel Crane has cited this and other examples of the Court's jurisdiction jealousy as a reason for the FTC's timid use of its section 5 norm-creation powers. 54

#### The CP is confusing and unclear

Elizabeth B. Deutsch 15, JD Candidate at Yale Law School, MSc from the London School of Economics, MPhil from the University of Cambridge, BA from Yale University, “Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate”, Yale Law Journal, 124 Yale L.J. 2470, May 2015, Lexis

The Department of Justice (DOJ) and the FTC have issued a statement about their antitrust oversight of post-ACA integration. While the statement makes clear that oversight will continue, it suggests that "clinical integration" is the magic phrase that healthcare entities must utter in order to pass muster. Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, Fed. Trade Commission & Dep't Just. (Oct. 2011), http://www.justice.gov/atr/public/health\_care/276458.pdf [http://perma.cc/6LB8-3BEN]. In its publication Clinical Integration, the American Hospital Association states that for their purposes:

Antitrust guidance is narrowly and technically drafted without any binding effect; as a result, caregivers can neither readily understand the guidance nor completely rely on it. The AHA has advocated for the antitrust agencies - the Department of Justice's Antitrust Division and the Federal Trade Commission - to issue more comprehensive, user-friendly guidance clearly explaining what issues must be resolved to ensure that clinical integration programs comply with antitrust law.

#### Rehighlight

**Khan ‘20**

et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “Unfair Methods of Competition” Rulemaking”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - <https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf>

A key feature of antitrust today is that the law is developed entirely through adjudication. Evidence suggests that this exclusive reliance on adjudication has failed to deliver a predictable, efficient, or participatory **antitrust**regime. Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies. But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules. It is difficult to quantify this harm.

This Essay argues that rulemaking under **§ 5** of the Federal Trade Commission Act should supplement antitrust adjudication, and that **this** institutional **shift** would lower enforcement costs, reduce ambiguity, and facilitate greater democratic participation. We build on existing scholarship to debunk the view that the Federal Trade Commission (FTC) does not have competition rulemaking authority pursuant to the Administrative Procedure Act conferring Chevron deference, and trace legislative history to underscore how Congress designed the FTC to play a unique institutional role.

#### Rehighlight

**Khan ‘20**

et al; At the time of this writing, Lina Khan was an Academic Fellow, Columbia Law School; Counsel, Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary; and former Legal Fellow, Federal Trade Commission. Now, Lina Khan serves as the head of the FTC. The co-author for this piece is Rohit Chopra, who was previously The Assistant Director of the Consumer Financial Protection Bureau and currently sits on the FTC. “The Case for “**Unfair Methods of Competition” Rulemaking**”, 87 U. CHI. L. REV. 357, 359-63 - #E&F – 2020 - <https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf>

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

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

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

The current approach to antitrust also makes enforcement **highly costly** and **protracted.** In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business.

Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

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

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

## DA

#### The U.S. isn’t modeled

Anu Bradford 19, Henry L. Moses Professor of Law and International Organization at Columbia Law School, Adam Chilton, Professor of Law and Walter Mander Research Scholar at the University of Chicago Law School, Katerina Linos, Professor of Law and Faculty Co-Director in the Miller Institute for Global Challenges and the Law at the University of California, Berkeley School of Law, Alexander Weaver, Associate at Linklaters LLP, J.D. from Columbia Law School, “The Global Dominance of European Competition Law Over American Antitrust Law”, Journal of Empirical Legal Studies, Volume 16, 2019, https://scholarship.law.columbia.edu/faculty\_scholarship/2513

The Europeanization, rather the Americanization, of global competition law is notable because the US has a considerably longer history of using competition law. Indeed, the United States the Sherman Act long before the EU and its competition laws were conceived. The US has also been an influential leader in competition economics and law alike, spearheading early efforts to adopt competition law regimes in many parts of the world—including in the EU. However, after the EU adopted its own competition law, it eventually eclipsed the US as the leader in providing the template for the global expansion of competition laws, marginalizing the US’s global influence in the decades that followed. In other fields, such as corporate law, thousands of articles have been devoted to debating whether there’s a race to the top or the bottom, what mechanisms drive the race, whether shareholders or managers benefit, and more (e.g., Romano 1987; Roe 2003).11 However, because the literature on the world’s competition regimes is in its infancy, a key contribution of this article is to document that there exists a global regulatory race in the area of competition law, and that the EU is clearly winning it.

We also advance a set of explanations for why the European model has come to predominate. First, a set of “push factors” explains the EU’s ability to effectively externalize its laws. The EU’s competition law dominance can be partially traced to the EU’s conscious efforts to expand its regulations through a myriad of trade, association, and other political agreements. The EU has required many countries seeking greater market access or closer political association to adopt competition laws. In addition, as Bradford (2012) outlines in “The Brussels Effect,” the EU has the greatest ability to shape foreign jurisdictions’ laws given that the companies often apply the most stringent regulatory standard—typically the EU standard—across their global operations to capture the benefits of uniform production while maintaining compliance worldwide. Second, the EU competition law model also spreads due to strong “pull factors.” In many countries, domestic politics are more conducive to EU-style competition laws, which accommodate more diverse policy goals and defer less to markets and more to governments’ ability to correct market failures. Another major pull factor is the EU’s tendency to promulgate more precise and detailed rules, making them easier to copy in the absence of technical expertise in the adopting country.

Our findings have several implications. First, our results offer evidence of the EU’s outsized influence in regulating global markets. This narrative stands in contrast to many critics who have declared the end of the EU’s influence and ability to shape outcomes globally as its relative economic and political power wanes. Second, our results suggest that, although the law and economics movement may have had a large influence on the development of America’s antitrust law and policy, it may have had a more modest influence on the development of competition policy in the rest of the world (Bradford et al. 2020). Third, and more generally, our analysis illustrates the ability of a single jurisdiction to attract countries with starkly different characteristics into its orbit, vesting it with a sizable regulatory influence that spans economic, linguistic, and political boundaries. Out of this dynamic, a new form of globalization of norms emerges—globalization emerging as a result of EU’s unilateralism as opposed to multilateralism. Finally, beyond illuminating the regulatory influence in the competition law context, our results speak more broadly to the literature on regulatory competition, diffusion of norms, and legal transplants. Competition between the European and US regulatory schemes has been prominent in many areas, ranging from privacy (Schwartz 2013; Schwartz and Peifer 2017), to chemicals (Scott 2009), to finance (Gadinis 2010), to discrimination law (Linos 2010), to name but a few. Documenting the specific pathways through which the EU has succeeded in externalizing its models thus contributes to a broad range of fields and advances the diffusion literature, which to date has primarily focused on countries receiving foreign models and not on the entities promoting them.

#### Court losses are inevitable---trashes independence

David McLaughlin 21, Reporter for Bloomberg News, “Antitrust Crusader Lina Khan Faces a Big Obstacle: The Courts”, Bloomberg, 6/23/2021, https://www.bloomberg.com/news/articles/2021-06-23/tech-antitrust-lina-khan-faces-courts-as-challenge-to-ftc-s-progressive-agenda

Instead, hours after the Senate confirmed her, Biden put the 32-year-old Khan—one of the most prominent antagonists of big business—in charge of the agency, where she’ll be responsible for challenging mergers and taking on companies when they use their market muscle to snuff out competition.

Now comes the hard part: putting her agenda into action. The biggest hurdle, say antitrust experts, is a judiciary that has made it very difficult for competition watchdogs to win ambitious cases. And to make any change of consequence, whether breaking up a monopoly or stopping a takeover, enforcers must prevail in court.

“None of that is easy, and it’s particularly not easy when courts are very conservative, as they are today,” says Stephen Calkins, a law professor at Wayne State University and a former general counsel at the FTC. “She’s certainly talked about breaking up companies but, my golly, that’s incredibly hard to do.”

Khan made her mark in 2017, with a law review article she wrote while still a student at Yale Law School. Titled “Amazon’s Antitrust Paradox,” it traced how the online retailer came to control key infrastructure of the digital economy and how traditional antitrust analysis fails to consider the danger to competition the company poses. The paper was widely talked about in antitrust circles and was read by senior enforcement officials.

U.S. tech titans are at the center of the antitrust debate in Washington. They are ever more powerful, with Apple Inc., Amazon.com Inc., Alphabet Inc., and Facebook Inc. among the top 10 largest companies in the world, by market value. A House of Representatives investigation last year accused the companies of abusing their dominance to thwart competition, and lawmakers are considering a raft of bills to impose new rules on how the companies operate. Federal antitrust enforcers and state attorneys general have sued Google and Facebook for what authorities say are monopoly abuses.

Khan, who was counsel to the House antitrust committee during its probe, was one of the main authors of the House report. It recommended a series of reforms to antitrust laws that she and anti-monopoly activists have long championed, like restricting which markets the companies can operate in and requiring them to treat other businesses on their platforms fairly and without favoritism.

Khan’s work helped revolutionize competition-policy debates and shift support for a more forceful approach that abandoned the playbook inspired decades ago by Robert Bork, the conservative legal scholar and judge. That framework came to be known as the consumer welfare standard and relies on price effects as the measure of competitive harm. Khan argued in her paper for a new approach, focused on the competitive process and the structure of markets, that she said would more fully capture harms that the consumer welfare standard misses.

Once considered on the fringes of antitrust thinking, Khan and her acolytes—often dubbed the New Brandeis School, after Supreme Court Justice Louis Brandeis—are now firmly mainstream with Khan’s appointment as FTC chairwoman.

The FTC has suffered some stinging defeats recently. Last year, the agency lost a major monopoly case filed against chipmaker Qualcomm. In April, a unanimous Supreme Court eliminated a tool used by the FTC to recover money for defrauded consumers. Later this month, a federal judge in Washington is expected to rule on whether the agency’s monopoly lawsuit against Facebook can proceed.

Still, there’s widespread agreement that the status quo is no longer tenable. Over the last two decades, concentration has risen in industries across the economy. Some economists say dominant companies can use their market power to suppress wages, for example, exacerbating inequality. The worries are bipartisan. Republicans and Democrats alike are pushing for antitrust reforms to rein in the biggest tech platforms, and Khan was confirmed by the Senate with significant Republican support.

Big losses in the courts would eventually hurt Khan’s authority and demoralize her staff, says William Kovacic, a former FTC chairman who now teaches at George Washington University Law School. “You become like a sports team that is known to its opponents as unable to win,” he says. But defeats also could provide the foundation for the kind of sweeping antitrust legislation that Khan and her supporters want.

#### No resources AND thumpers

Michael Kades 21, Director of Markets and Competition Policy, Former Attorney at the Federal Trade Commission; Equitable Growth Foundation, “Competitive Edge: Congress Needs to Restore the Federal Trade Commission’s Authority to Seek Monetary Remedies When Companies Break The Law”, 7/28/2021, https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.)

Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor [Andy Gavil discusses a potential silver lining](https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/) in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws.

I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct.

Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision.

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.

#### FTC overwhelmed now and uncredible now

Tara Lachapelle 21, Staff Writer at Bloomberg, “Wall Street Is Ready to Put Lina Khan’s FTC to the Test,” Bloomberg, 8-25-2021, https://www.bloomberg.com/opinion/articles/2021-08-25/wall-street-is-ready-to-put-lina-khan-s-ftc-to-the-test

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

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

Chart, bar chart, histogram

Description automatically generated

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

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

Merger reviews traditionally involve some give and take. Companies will often give regulators more time if they think it will increase the odds of winning approval. If that cooperative attitude is being tossed out the window, though, dealmakers are ready to reassess and embrace a more adversarial process.

For M&A lawyers, it’s a disturbance to an equilibrium that existed under other administrations, and they fear a reversion to the merger-hostile environment of the 1960s. Of course, folks in Khan’s camp would say it wasn’t an equilibrium at all, but rather an often overly cozy relationship between regulators and companies that were given too much leeway in recent years.

In any case, businesses are understandably frustrated by what would seem to be an unreasonable ask. Waiting indefinitely to close a deal is costly and full of risks. At least one acquirer isn’t having it. Last week, Illumina Inc. finalized an $8 billion purchase of cancer-testing startup Grail even though U.S. and European authorities haven’t completed their probes. Even as the FTC began this week its attempt to unwind the deal, other dealmakers may decide they like their chances, too.

The FTC “better be ready to litigate,” said David Wales, a partner in the antitrust and competition group at law firm Skadden, Arps, Slate, Meagher & Flom LLP and former acting director of the agency’s Bureau of Competition. “I’ve seen first-hand the resource constraints at the FTC,” he said. “They can’t sue everybody. They can’t block every deal. They will have to be strategic about it.”

Already, regulators have two major cases sucking up resources. The FTC last week refiled its monopoly lawsuit against Facebook Inc., alleging its takeovers of Instagram and WhatsApp violated antitrust laws. (Its deal last year for Giphy also employed a sneaky maneuver to avoid showing up on regulators’ radars, and now they’re looking to close that loophole.) The Justice Department is pursuing its own case against Google. And what was initially seen as a narrow effort to reel in dominant technology companies has since expanded to other industries in light of a sweeping executive order from President Biden. Even more obscure areas such as ocean shipping are facing new scrutiny.

M&A reviews had already become more of a slog in recent years. Dechert LLP’s Antitrust Merger Investigation Timing Tracker — aptly nicknamed the DAMITT report — shows how investigations that once took an average of eight months now stretch into a year or longer:

Graphical user interface, chart

Description automatically generated

Just because the FTC threatens a drawn-out legal process doesn’t mean a court will take its side in the end. Even as some politicians and antitrust officials look to toughen up M&A laws, judges still rely on precedent, which can be favorable to merging companies (it was for AT&T Inc. in its giant takeover of Time Warner, for instance). An ambitious agenda without the financial resources to match it will also be of less service to consumers than if regulators pick their battles.

As it stands now, Khan’s FTC looks like it’s biting off more than it can chew, and its threats aren’t having the intended effect.

#### It’s resilient and adaptable

Jake Sullivan 18, Senior Fellow at the Carnegie Endowment for International Peace, Former National Security Adviser to Vice President Joe Biden and Director of Policy Planning at the U.S. Department of State, J.D. from Yale Law School, “The World After Trump: How the System Can Endure”, March/April 2018, https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump

But the existing order is more resilient than this assessment suggests. There is no doubt that Trump represents a meaningful threat to the health of both American democracy and the international system. And there is a nonnegligible risk that he could drag the country into a constitutional crisis, or the world into a crippling trade war or even an all-out nuclear war. Yet despite these risks, rumors of the international order’s demise have been greatly exaggerated. The system is built to last through significant shifts in global politics and economics and strong enough to survive a term of President Trump.

This more optimistic view is offered not as comfort but as a call to action. The present moment demands resolve and affirmative thinking from the foreign policy community about how to sustain and reinforce the international order, not just lamentations about Trump’s destructiveness or resignation about the order’s fate. No one knows for certain how things will turn out. But fatalism will become a self-fulfilling prophecy.

The order can endure only if its defenders step up. It may be durable, but it also needs an update to account for new realities and new challenges. Between fatalism and complacency lies urgency. Champions of the order must start working now to protect its key elements, to build a new consensus at home and abroad about needed adjustments, and to set the stage for a better approach, before it’s too late.

A RESILIENT ORDER

In a world where the major trends seem to spell chaos, it is fair to place the burden of proof on those who claim that the current order can continue. Yet well before Trump, it had already demonstrated its capacity to adapt to changes in the nature and distribution of power. Three basic factors account for such resilience—and demonstrate why the emphasis now should be on protecting and improving the order rather than planning for the aftermath of its demise.

First, most of the world remains invested in major aspects of the order and still counts on the United States to operate at its center. The passing of U.S. dominance need not mean the end of U.S. leadership. That is, the United States may not be able to direct outcomes from a position of preeminent economic, political, and military influence, but it can still mobilize cooperation on shared challenges and shape consensus on key rules. In the years ahead, although Washington will not be the only destination for countries seeking capital, resources, or influence, it will remain the most important agenda-setter.

Some context is important. The U.S.-led order was built at a unique moment, at the end of World War II. Europe’s and Asia’s erstwhile great powers were reduced to rubble, and a combination of dominance abroad and shared economic prosperity at home allowed the United States to serve as the architect and guarantor of a new order fashioned in its own image. It had not just the material power to shape rules and drive outcomes but also a model many other countries wanted to emulate. It used the opportunity to build an order that benefited itself as well as others, with clear advantages for populations at home and abroad. As the international relations scholar G. John Ikenberry has put it in this magazine, the resulting system was “hard to overturn and easy to join.” The end of the Cold War and the fall of the Soviet Union served to reinforce and extend American preeminence.

This precise state of affairs was never going to last forever. Other powers would eventually rise, and the basic bargain would one day need to be revisited. That day has arrived, and the question now is, do other countries want a fundamentally different bargain or simply some adjustments? A comprehensive 2016 rand analysis found that few powers display an appetite for dismantling the international order or transforming it into something unrecognizable. And while Trump’s election has forced countries to contemplate a world without a central role for the United States, many still view the president as an aberration and not a new American normal, especially given that the United States has bounced back before.

Even China has concluded that it largely benefits from the order’s continued operation. Around the time of Trump’s inauguration, breathless reports interpreted Chinese President Xi Jinping’s comments on an open international economy and climate change as indicators that China planned to somehow take over for the United States. But what Xi was really signaling was that China does not want near-term radical change in the global system, even as it seeks to gain more influence by taking advantage of the vacuum left by Trump. And to the extent that Beijing has set out to construct its own parallel institutions, particularly when it comes to trade and investment, thus far these institutions largely supplement the existing order rather than threatening to supplant it.

#### It structurally fails and doesn’t promote democracy or prevent war

Dr. Paul Staniland 18, Associate Professor of Political Science and Chair of the Committee on International Relations at the University of Chicago, “Misreading the ‘Liberal Order:’ Why We Need New Thinking in American Foreign Policy”, Lawfare, 7/29/2018, <https://www.lawfareblog.com/misreading-liberal-order-why-we-need-new-thinking-american-foreign-policy>

Pushing back against Trump’s foreign policy is an important goal. But moving forward requires a more serious analysis than claiming that the “liberal international order” was the centerpiece of past U.S. foreign-policy successes, and thus should be again. Both claims are flawed. We need to understand the limits of the liberal international order, where it previously failed to deliver benefits, and why it offers little guidance for many contemporary questions. First, advocates of the order tend to skim past the policies pursued under the liberal order that have not worked. These mistakes need to be directly confronted to do better in the future. Proponents of the order, however, often present a narrow and highly selective reading of history that ignores much of the coercion, violence, and instability that accompanied post-war history. Problematic outcomes are treated as either aberrant exceptions or as not truly characterizing the order. One recent defense of the liberal order by prominent liberal institutionalists Daniel Deudney and G. John Ikenberry, for instance, does not mention Iraq, Afghanistan, Vietnam, or Libya. Professors Stephen Chaudoin, Helen Milner, and Dustin Tingley herald the order’s “support for freedom, democracy, human rights, a free press.” Kori Schake writes that Western democracies’ wars are “about enlarging the perimeter of security and prosperity, expanding and consolidating the liberal order.” Historian Hal Brands argues that the order has advocated “political liberalism in the form of representative government and human rights; and other liberal concepts, such as nonaggression, self-determination, and the peaceful settlement of disputes.” Other analysts have persuasively argued that these accounts create an “imagined” picture of post-World War II history. Patrick Porter outlines in detail how coercive, violent, and hypocritical U.S. foreign policy has often been. To the extent an international liberal order ever actually existed beyond a small cluster of countries, writes Nick Danforth, it was recent and short-lived. Thomas Meaney and Stephen Wertheim further argue that “critics exaggerate Mr. Trump’s abnormality,” situating him within a long history of the pursuit of American self-interest. Graham Allison—no bomb-throwing radical—has recently written that the order was a “myth” and that credit for the lack of great power war should instead go to nuclear deterrence. Coercion and disregard for both allies and political liberalism have been entirely compatible with the “liberal” order. The last two decades have been a bumpy ride for U.S. foreign policy. Since 9/11, we have seen the disintegration of Syria, Yemen, and Libya, a war without end in Afghanistan, the collapse of the Arab Spring, the rise and resurgence of the Islamic State, and the distinctly mixed success of strategies aimed at managing China’s rise. At home, the growth of a national-security state has placed remarkable power in the hands of Donald Trump. Simply returning to the old order is no guarantee of good results. Grappling openly with failure and self-inflicted wounds—while also acknowledging clear benefits of the order—is essential for moving beyond self-congratulatory platitudes. Second, the liberal order in its idealized form had very limited reach into what are now pivotal areas of U.S. security policy: Asia, the Middle East, and the “developing world” more broadly. The core of the liberal order remains transatlantic, but Asia is now growing dramatically in wealth and military power. What is the record of the order in the region? There was certainly some democracy promotion when authoritarian regimes began to totter, but there was also deep, sustained cooperation with dictators like Suharto and Ferdinand Marcos; while there are some regional institutions (such as ASEAN), they are comparatively weak; while there are some rules, they have been deeply contested. Close U.S. allies like Japan, Taiwan, and South Korea (the latter two experiencing long bouts of U.S.-allied autocracy) were not integrated into a broad alliance pact like NATO. India and Pakistan were never part of the core order, and China was only very partially integrated (primarily into the economic pillar of the order, and through ad hoc security cooperation from the 1970s). Southeast Asia has been a site of warfare and authoritarianism for much of its post-1945 history. The United States has long considered the Middle East vital to its security, but the extent to which the United States should invest its own blood and treasure in protecting the area was always up for debate. It was only in the 1970s that the United States decided it was prepared to use force to defend the region; “dual containment” in the 1990s was always controversial, while the invasion of Iraq and its chaotic aftermath revealed deep fissures over how much presence was enough. Meanwhile, liberalism, democracy, human rights, and international institutions have not made much of a mark in the region. Jake Sullivan, in a rather odd defense of the order, suggests that “Middle Eastern instability has been a feature, not a bug, of the system.” This is not reassuring about the order’s ability to structure politics in the area. The same can be said about the order’s history in Africa, with deep Western involvement in civil wars, support for authoritarian regimes, and often-counterproductive demands for economic liberalization contributing to ongoing instability. The legacy of the “liberal order” is both far more complex and shallower outside of the north Atlantic core than within it. Invocations of the order are seen with greater cynicism and suspicion in these areas than in Washington or Berlin. Yet they are precisely the regions that are increasingly the focus of U.S. security policy. Finally, and as the preceding already suggests, the idea of “liberal order” is itself frequently too vague a concept, and was too incomplete a phenomenon, to offer guidance on a number of key contemporary questions. Allison goes so far as to call it “conceptual Jell-o.” The extremely abstract principles that experts use to define the order are confronted with a reality of extreme historical variation. This amorphousness undermines its usefulness as an actual guide to future foreign policy. U.S. alliances in Western Europe since World War II looked dramatically different than those in East Asia. Both have achieved their basic goals, so which should be the model for the future? The United States often applied pressure to coerce its allies into adopting economic and security policies conducive to U.S. interests—going so far as to threaten abandonment of close European allies—even as it simultaneously built key elements of the liberal order. The core of the liberal order was a more tenuous and contested political space than we often remember. This inconsistency applies to involvement in the domestic politics of other states. The United States has regularly embraced authoritarian leaders (and distanced itself from democratic regimes), while at other times it has helped to push these leaders out in the face of domestic mobilization. Advocates of the order tend to stress the latter and dismiss the former as aberrant, but both strategies contributed to the ultimate victory of the liberal order over the Soviet bloc. The order’s history offers support for aggressively promoting democracy, accepting democratization when it emerges, and strongly supporting friendly dictators. This makes it unhelpful for grappling with the question of whether and how to promote democracy. The same is true of military interventions and covert operations abroad. U.S. leaders invested heavily in Cold War proxy wars and the overthrow of foreign regimes, while at other times and places they avoided such interventions. This history carries important implications for addressing today’s policy challenges. Simply appealing to the order does not, for instance, tell us much about how to deal with a rising China: Since the liberal order included highly institutionalized alliances, loose “hub-and-spoke” arrangements, and coalitions of the willing, and was characterized by both preventive wars and containment, it is extremely unclear what the order suggests for America’s China strategy. While “rules-based” order is a term in vogue, it doesn’t tell us what the rules should actually be, or how they should be decided. Nor does appealing to the liberal order help us understand whether the United States needs to be deeply involved or largely absent from the Middle East, or somewhere in between. Under the order, democracy promotion and assertive liberal intervention sometimes occurred, but so too did restraint and an acceptance of autocracy. There are no answers in the liberal international order for navigating the enormously difficult terrain of the contemporary Middle East.