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Pharma DA

#### The plan creates a rippling, cross-industry effect that wrecks pharma innovation

Dr. Douglas Holtz-Eakin 21, Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University, “Losing Focus on Antitrust”, American Action Forum – The Daily Dish, 2/11/2021, https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/

The point of antitrust law is to ensure that markets deliver the maximal possible benefits to Americans. Specifically, a prime tenet of competition policy is the consumer welfare standard. Vigorous market competition ensures that no firm is able to exploit consumers. Testing whether a business practice, merger, or acquisition diminishes consumer welfare is the right bottom line for checking on the quality of competition.

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

The current standards focus antitrust on clearly defined markets, the quality of competition in those markets, and the resulting consumer benefits. Losing focus on consumer welfare is tantamount to losing the rudder on a ship; who knows where it ends up?

#### Pharma innovation stops extinction from natural disease and bioweapons

Dr. Piers Millett 17, PhD, Senior Research Fellow at the University of Oxford, Future of Humanity Institute, and Andrew Snyder-Beattie, MS, Director of Research at the University of Oxford, Future of Humanity Institute, “Existential Risk and Cost-Effective Biosecurity”, Health Security, Volume 15, Number 4, 8/1/2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/

Abstract

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios.

Keywords: : Biothreat, Catastrophic risk, Existential risk, Cost-effectiveness, Cost-benefit analysis

How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives.

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world's population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity's favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21

Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of state-run bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27

Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that “we can ensure Gaia's survival only through the extinction of the Humans as a species … we now have the specific technology for doing the job … several different [genetically engineered] viruses could be released”(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32

What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higher-consequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures. We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\*

A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34

The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.† Biological warfare provides examples of events and disasters. These historical examples provide indicative data on likelihood and impact that we can then feed into a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we use multiple datasets to corroborate our numbers, but ultimately the “true rate” of bioweapon attacks is highly uncertain.

Biocrimes and Bioterrorism

Historically, risks of biocrime‡ and bioterrorism§ have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths.

Biological Warfare

Academic overviews of biological warfare†† detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1).

The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare.

We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The second data set came from disease events that were alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000.

For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.‡‡

Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure.

An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an “engineered” pandemic would lead to extinction by 2100.42

The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.§§

Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wild-type influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 × 10–8 and 8 × 10–7.†††

Model 3: Naive Power Law Extrapolation

Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.‡‡‡ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers.

Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bio-attacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 × 10–6).

We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War—constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 × 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks.

Why Uncertainty Is Not Cause for Reassurance

Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 §§§

Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge.

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RICO CP

#### The United States federal government should expand the scope of the Racketeer Influenced and Corrupt Organizations Act to prohibit indirect injury by anticompetitive algorithmic pricing collusion by the private sector.

#### The Federal Trade Commission should train algorithms to identify prices that are unresponsive to costs or tightly clustered across rival firms modelled after those used by the Korea Fair Trade Commission.

#### The CP solves the whole case by prohibiting identical activities, but does so under the scope of RICO rather than antitrust---it’s effectively a mirror statute with all of the same enforcement provisions and stronger potential for private action.

Bao Ngo 21, J.D. Candidate at Rutgers Law School, Law Clerk at the Camden County Superior Court, BA in Business Administration from Farleigh Dickinson University, “Civil RICO: A Promising Claim Against Pharmaceutical Price Gouging”, Rutgers Business Law Journal, 16 Rutgers Bus. L.J. 409, Volume 16, Spring 2021, Lexis

Despite these hurdles, patients unable to access life-saving medicines because of pharmaceutical price gouging deserve, in the least, a closer look at the issue. 46Otherwise, vulnerable people will continue to be subjected to predatorial, capitalistic schemes. This Note focuses on one avenue that has received little scholarly attention in the drug-pricing context but has significant potential: civil RICO.

Civil RICO is worthy of greater attention for several reasons. First, as mentioned above, efforts to regulate pharmaceutical price gouging have been unsuccessful for the most part; therefore, there needs to be a new angle of attack. Civil RICO offers another avenue because of its significant benefits to plaintiffs, especially in certifying class action suits, and most often, price gouging cases are filed as class actions. 47 [FOOTNOTE] 47 Hillyer, supra note 12 (noting that RICO's benefits are also civil RICO's benefits because it is one of the few statutes that specify both a criminal offense and a civil cause of action). See infra note 96. [END FOOTNOTE] Second, civil RICO mandates treble damages, providing greater incentives for plaintiffs to utilize it as a cause of action. 48

Finally, civil RICO has been seen as a threat by pharmaceutical corporations, showing its potential against price gouging. In 2008, McKesson, a pharmaceutical corporation, settled a price gouging suit where civil RICO was a cause of action for $ 350 Million - one of the nation's largest RICO settlements. 49This suit claimed McKesson conspired with a drug publishing company, First DataBank, to fraudulently inflate the widely used Average Wholesale Price ("AWP") figures, which insurance companies, retailers and others use to calculate the purchase price, payments and co-payments of the most common prescription medications. 50In late 2006, First Databank reached a settlement with plaintiffs - McKesson was not a party to this settlement. 51The suit dragged on for two more years until finally, McKesson settled. Final approval of a class settlement with McKesson was granted in July 2009. 52

Despite the hefty settlement price, McKesson denied any conspiracy or wrongdoing on its part, according to CEO John H. Hammergren. 53CEO Hammergren claimed McKesson only settled to stop the continuous pricing claims against it. 54But this does not add up - just because a settlement is reached does not mean other parties will be barred from bringing additional claims against McKesson. Therefore, this landmark case shows that civil RICO is a viable claim against pharmaceutical price gouging because even though it settled, the high price tag suggests that plaintiffs had strong, supportive evidence to back its civil RICO claim.

This note aims to analyze civil RICO's strength as a claim against pharmaceutical price gouging. It proceeds in six parts. Part I will explain why civil RICO is relevant. Part II will provide a brief overview of the civil RICO statute. Part III explores civil RICO's benefits in the context of pharmaceutical price gouging. Then, Part IV will further discuss the landmark case, McKesson. Part V demonstrates the viability of civil RICO by applying it to a real-world situation through McKesson. Finally, Part VI concludes with observations for the future of civil RICO.

I. CIVIL RICO'S RELEVANCE

Civil RICO lawsuits are typically tempting because its treble damages provision provides great incentives and RICO's broad terms allow plaintiffs to sue a variety of defendants. But the courts' liberal interpretations of RICO's language have led to the application of RICO to a myriad of federal cases, 55causing overcrowding in the courts. Further, RICO's broadness can also be exploited by "disgruntled and malicious competitors to harass innocent businessmen." 56Even further, the large number of predicate offenses, coupled with its nebulous terms such as "enterprise" and "pattern of racketeering activity," leaves room for constitutional attack. 57It also has the potential for a controversial extension of federal remedies into areas of state law, such as common business fraud. 58

Regardless of these downsides, RICO's broad application is warranted because of its legislative intent. 59 RICO expressly provides that courts should liberally construe its provisions. 60The Seventh Circuit noted that while "civil sanctions provided under RICO are dramatic and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct . . . such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought." 61Based on this reasoning, the Seventh Circuit denied requests to restrict the application of the statute stating that it did not have the authority. 62

This vagueness leads one to wonder why civil RICO should be used against pharmaceutical price gouging, especially when there are antitrust laws meant to outlaw non-competitive pricing. 63 RICO's relevance lies in its ability to reach areas that other laws simply cannot, or its broadness.

Comparisons between RICO and antitrust laws reveal even greater similarities. 64 To maintain a civil RICO action for damages, plaintiffs must be "injured in his business or property by reason of" a pattern of racketeering activity. 65 The RICO damage provision is actually modeled after Section 4 of the Clayton Act. 66 This close relationship between remedies for RICO and antitrust violations is not coincidental. 67 RICO and antitrust are both concerned with maintaining a fair and efficient economy. 68 Moreover, in practice, an antitrust violation and a RICO violation may be identical - e.g., a company may be able to undercut its competitors' prices because the illegal activities subsidize its operation. 69Using this competitive advantage, the racketeer influence corporation could drive its competitors bankrupt and dominate the market. 70There are also areas of antitrust law that condemn high prices - e.g., firms cannot merge if the merged firms can raise their prices unilaterally. 71But the conventional wisdom in antitrust is that monopoly pricing is not a violation of Section 2 of the Sherman Act. 72The Supreme Court observed that "[A]ntitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices." 73But then again, there is no case holding that a monopolist's conduct in price gouging is lawful under antitrust laws. 74 Even if antitrust laws can combat price gouging, there are two differences that make RICO arguably a better tool for plaintiffs: standing and damages.

In antitrust cases, restrictions placed on standing to sue and on proximately caused damages would prevent injured persons from recovering treble damages under civil RICO. Courts have limited standing in order to prevent the proliferation of suits and the consequent destructive liability that would result from allowing these suits. 75Plaintiffs are tempted to turn antitrust claims into RICO claims, 76but antitrust cases are not "within the spirit of RICO." 77Lost profits resulting from competition are properly not antitrust injuries. 78 RICO, if interpreted liberally, conceivably would allow a plaintiff to recover for profits lost to competitors. 79This difference is due to the indirect emphasis RICO places on competition. 80RICO seeks to eradicate organizations that are racketeer influenced. 81Congress must have contemplated and approved a statutory scheme capable of destroying organizations that violated the RICO provisions. 82This directly conflicts with antitrust law's purpose of keeping competitors in the market.

#### Expanding civil RICO to anticompetitive behavior creates a backstop against pharmaceutical fraud

Ephraim Samuel Geisler 10, J.D. Candidate at the Saint Louis University School of Law, M.A. from the University of Louisiana at Lafayette, B.A. from Florida State University, “A Bridge to Somewhere: How a Bolder Causal Analysis Can Shape Civil RICO Into the Ideal Free Market Safeguard”, St. Louis Law Journal, 54 St. Louis L.J. 609, Winter 2010, Lexis

To understand the need for reassessing the Holmes factors, the Court must assess the civil action landscape of the relevant area of law. Private civil actions are becoming increasingly limited and ineffective at righting consumer wrongs. With the Court asserting constitutional limitations over the quantification of punitive damages, 181 the ability of individual or class plaintiffs to find a remedy from corporate wrongdoing hangs in the balance. In State Farm Mutual Automobile Insurance Co. v. Campbell, the Supreme Court held that an award of $ 145 million in punitive damages on a one million dollar compensatory damage judgment violated due process. 182 Further, the court suggested that limiting punitive damages to a single digit multiplier (of compensatory damages) would sufficiently address a violation of due process rights. 183

On the legislative front, the Class Action Fairness Act of 2005 (CAFA) has had the effect of limiting plaintiffs' remedies by removing state class actions, including large, private consumer fraud actions, to federal courts. 184 CAFA was passed in response to the multiplicity of class actions in state courts before perceived plaintiff-friendly juries. 185 The Act contains provisions limiting the fees available to attorneys pursuing large class actions that combine small individual claims. 186 In general, CAFA expands federal diversity jurisdiction for class action lawsuits by creating, with certain narrow exceptions, federal jurisdiction for class action litigation involving 100 or more class members, an amount in controversy of more than $ 5 million, and minimal diversity where any proposed class member is a citizen of a state different from any defendant. 187

The Federal Judicial Center conducted a study, The Impact of the Class Action Fairness Act of 2005 on the Federal Courts, that examined the number of class action filings and removals in the federal courts from July 1, 2001 through June 30, 2007. 188 The effect of CAFA has been to increase the number of class actions filed in the federal courts based on diversity jurisdiction. 189 CAFA, therefore, appears to be meeting its objective of expanding federal diversity jurisdiction for class action lawsuits, thereby diverting many class actions away from the state courts with perceived plaintiff-friendly juries. 190 If the plaintiffs' bar perceives that class actions are less likely to be decided before such courts, then such attorneys will be less likely to take on class actions for fear of expending resources on dubious claims or claims that are not likely to succeed.

As noted above, the Supreme Court in Wyeth v. Levine found that manufacturers maintain a duty to update their FDA-approved warning labels. 191 The future, however, remains uncertain as to whether consumers can bring claims based on harms arising from manufacturer claims made during the FDA approval process. 192 If the Court finds federal regulatory preemption in this and other areas, individuals will lose an avenue to right wrongs caused by large companies, including pharmaceutical corporations, caused by defective products. The result will be that consumers will become considerably more reliant on federal regulatory bodies for protection, notwithstanding their past mistakes, such as those made evident by the Vioxx litigation. 193

If "tort-reform" measures continue to curtail the ability of potential individual plaintiffs to assert tort claims, then it must follow that corporate entities will be left unto themselves to right the wrongs of corporate wrongdoers. While CAFA limitations set hurdles for plaintiffs' attorneys seeking to establish a victim class, a single business entity may now, under Bridge, bring an action alone in their place. And even if the Court extends Campbell's holding, civil RICO will remain a worthwhile instrument because it provides for treble damages. 194 With legislation and case law inhibiting the individual consumer's ability to right wrongs in the marketplace, and given the imperfections of regulatory oversight, the ability of an injured business to utilize civil RICO to seek justice against dishonest competitors may serve a vital substitute role for consumers and businesses alike.

Bridge struck down the Second Circuit's effort to restrict civil RICO standing. Yet, under closer review, Bridge presents a challenging dilemma. Justice Thomas' intricate statutory construction of RICO aside, it is the Court's evaluation and application of Holmes that proves problematic. In Bridge, the Court emphasizes the instruction set out in Holmes "that proximate cause is generally not amenable to bright-line rules." 195 Despite doing so, the Bridge Court grounds its entire analysis using statutory construction, foregoing an opportunity to contextualize the three Holmes factors in order to determine civil RICO causation. 196 The Court appears to assume the three Holmes factors exist in an atmosphere unchanged since 1992, as though ordinary consumers are granted the same access to consumer protection as existed seventeen years earlier. In reality, this access has retracted.

B. The Holmes Factors Applied

To illustrate, reconsider the hypothetical set out in the beginning of this comment. With Bridge, whether ABC has a viable cause of action against XYZ depends on the Court's analysis of proximate cause, since ABC has met all standing requirements of civil RICO, such as the pattern of XYZ's misrepresentations and the company's use of the mails to perpetrate the fraud. First, while ABC may be able to demonstrate that its loss of market share exists but for XYZ's multiple misrepresentations to the FDA, Holmes, Anza, and Bridge have read "by reason of," the textual representation of RICO causation, to incorporate the Court's proximate causation analysis.

In applying this analysis, consider the directness of the injury. Those most directly injured by XYZ's misrepresentations are the patients who utilized XYZ's product. As Anza warns, the more attenuated the injury, the more difficult it becomes to ascertain the amount of the plaintiff's damages attributed to the company's violation. Assessing damages depends upon the ability of ABC - the only other manufacturer of this type of insulin device - to calculate the loss of sales it incurred. Does the fact the individual patients' claims are preempted by FDA premarket approval solve the Court's problem with attenuation? It would certainly solve any issues with multiple recoveries. Most interestingly, preemption has excised the ability of the "directly injured" victims to "vindicate the law as private attorneys general."

Allowing civil RICO standing in such a case has the potential to produce vast societal benefit, since consumers are better protected when companies report to regulators with honesty, fearing reprisal from industry competition.

C. A Proposal

Both the Sedima and Bridge Courts criticized judicial activism. Indeed, changes to the statutory text of civil RICO lies in the domain of Congress. 197 But the Court cannot shirk its responsibility of interpreting civil RICO in a manner that will ensure justice, equality, and equity in application. Proximate causation offers the Court a flexible solution, which will allow more litigants access to justice. Access to justice exists, as Holmes instructs, as an instrument "to limit a person's responsibility for the consequences of that person's own acts." 198

Justice Thomas' statutory construction provides a thoughtful, nuanced interpretation of civil RICO, but the Court has given little attention to its underlying purpose. As stated earlier, Congress' focus was to provide "new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation." 199 Future decisions must expand to include the legislative intent of civil RICO, in order to further refine the Holmes factors.

Considering the first Holmes factor, it is important to recognize that a wholesale liberalization of the Court's "demand for some direct relation between the injury asserted and the injurious conduct alleged" is unnecessary. 200 This idea, however, should not be given so much weight that other factors are hidden from consideration. Indeed, the Court's concern with directness assists with ascertaining damages. Without some restriction, the degree of attenuation between the fraudulent act and the injured victims will provide courts with the unworkable task of compensating the injured and preventing multiple recoveries. Yet, as Benjamin M. Daniels explains in his thoughtful examination of proximate causation in Anza, "Mathematical difficulties should not interfere with substantive justice." 201 The Court must acknowledge the reality that often the direct victims of fraudulent behavior are unable to seek damages for the aforementioned reasons, including future reform measures and federal regulatory preemption. 202

With "tort reform" measures and federal statutory preemption, consumers are left without remedy. They are left to rely only on the efficacy of regulators, despite the failure of regulators to regulate and provide for protection. The predicament leaves consumers, the "directly injured," unable to "be counted on to vindicate the law as private attorneys general." 203 As a result, consumers have lost the potentially powerful force of the private attorney general as a safeguard for them against the failures of regulatory bodies.

The "directness inquiry" should acknowledge the reality that direct victims cannot always be counted upon to vindicate the wrongs committed against them. Instead, the Court must shape its proximate causation analysis in a way that takes stock of situations like those presented by the Vioxx example and illustrated by the ABC hypothetical. Given the power of the free market, corporations are well situated to fill the void left by the removal of the remedy brought by an individual consumer.

In applying the Holmes factors, courts must acknowledge this predicament. Using intent as a guiding factor, injured companies would be allowed to "vindicate the law as private attorneys general" when they are injured in the marketplace. 204 In doing so, the companies that have fallen victim to corporate misconduct - indeed, society as a whole - will benefit from a broader, more effective paradigm of jurisprudence that mandates corporate accountability. Creating this more effective paradigm does not require expanding causation to include indirect victims.

#### Pharmaceutical fraud crushes vaccine diplomacy

Bailey Oedewaldt 21, Staff Writer at The International Affairs Review at George Washington University, “Vaccine Diplomacy: The Next Wave of Great Power Competition”, 4/20/2021, https://www.iar-gwu.org/blog/77f3uyolxa6y3h7t73s4yj76a7gm63

Pfizer. Moderna. Johnson and Johnson. Sputnik V. Sinovac. AstraZeneca. Covaxin. In the rapidly changing COVID-19 landscape, the development and approval of vaccines have been in and out of the news cycle for months. As the FDA approved the third COVID-19 vaccine for Emergency Authorization Use, the scramble for vaccines intensified both domestically and abroad. While some have said that the new Johnson and Johnson single-dose vaccine will make the shot more accessible to rural communities, that may not be the case, particularly in rural communities overseas. Vaccine-related organized crime appeared shortly after the vaccine rollout began and has hampered efforts to reach developing nations and rural communities. The simultaneous availability of alternate vaccines—such as the three FDA-approved American vaccines, the Russian Sputnik V, and Chinese Sinovac—created a wave of vaccine-related crime and provided a new channel of diplomacy that feels reminiscent of Cold War-era cultural diplomacy. The rise of vaccine-related crime will undoubtedly worsen the search for vaccines by developing nations, giving great powers an opportunity to improve diplomatic relations—and expand their global influence—by providing critically-needed doses of vaccines. The United States must use this opportunity to bolster its alliances with developing nations through vaccine diplomacy or risk losing ground to other international powerhouses.

INTERPOL issued a global alert at the beginning of the vaccine rollout warning against “the falsification, theft and illegal advertising of COVID-19 and flu vaccines” by organized crime networks. Issues with COVID-19 related fake vaccines have emerged across Asia, Africa, and Latin America. The South African Police service raided a warehouse outside Johannesburg and discovered 2,400 fake COVID-19 vaccine doses, as well as a large number of counterfeit N95 face masks. Multiple foreign nationals, including persons from China and Zambia, were detained in relation to the incident. Chinese police broke up a similar ring at a factory, finding 3,000 doses of fake vaccines. The INTERPOL secretary general noted that these incidents were only the beginning of vaccine-related crime.

Vaccine-related crime in Latin America and Mexico raised concerns about supply chain security. Fake vaccines, tests, and websites have already appeared across Latin America. In recent months, Mexican police arrested six men for allegedly trafficking in fake Pfizer vaccines for nearly $2,000 USD per dose. In mid-March, Mexican customs officials seized a shipment of more than 5,700 doses of fake Sputnik V vaccines headed for Honduras; the shipment violated packing and transportation standards for the Sputnik vaccine, and the Russian Ministry of Health agreed to cooperate with Mexican authorities for analysis. Mexican officials are still debating about the veracity of the vaccines days after the seizure. However, Russian officials have already called this incident into question, disparaging it as a “large scale information campaign aimed at creating bias” toward the Russian COVID-19 vaccine by the United States and its allies. A Kremlin spokesperson noted that U.S. efforts to limit Russian influence in the Western Hemisphere included using American health attaches to “persuade Brazil to reject the Russian COVID-19 vaccine” following a report from the U.S. Office of Global Affairs. Vaccine-related crime has opened up another way for great powers to disparage global competitors even as vaccine diplomacy spreads in the same way that cultural diplomacy emerged during the Cold War.

While the United States had just begun distributing vaccines to allied countries such as Canada and Mexico, other international peers have pushed this version of soft power in the previous months. Notably, Russia, China, and India became early players in vaccine diplomacy. Both China and Russia have used their versions of the COVID-19 vaccines to bolster alliances with developing nations. China distributes medical supplies—including COVID-19 related supplies—through its “Health Silk Road,” a part of its ongoing Belt and Road initiative. The Chinese Belt and Road Initiative has already put nations in Asia and Africa into massive debt and into high-risk debt distress categories. The extension of this program through the lens of the coronavirus pandemic could worsen the developing nation’s debt to China. Russia’s outreach to Latin American countries and partnership with nations such as Mexico on countering vaccine fraud leaves the country in a strong position to push its agenda in the Western Hemisphere. Russia’s quick steps to cast blame for the seizure of fraud Sputnik vaccines back onto the United States and its allies adds another layer of concern about soft power and disinformation to the mix. China and Russia’s focus on reaching the markets of developing nations—particularly those in Africa and Latin America, both areas suffering from a spate of vaccine-related crime—comes in sharp contrast to the U.S. strategy of focusing on high-income countries in select regions. As the vaccine rollout continues, the United States must ensure that it prioritizes its allies in developing countries or risk losing footing to Russia and China in this next wave of great power competition.

#### Extinction

Dr. Peter J. Hotez 21, MD, PhD, Dean of the National School of Tropical Medicine and Professor of Pediatrics, Molecular Virology, and Microbiology at Baylor College of Medicine, Codirector of the Texas Children’s Center for Vaccine Development, University Professor of Biology at Baylor University, Faculty Fellow at the Hagler Institute for Advanced Study at Texas A&M University, Fellow in Disease and Poverty at the Baker Institute for Public Policy at Rice University, and Senior Fellow at the Scowcroft Institute of International Affairs at Texas A&M University, “1. A New Post-2015 Urgency,” and “2. A Cold War Legacy”, Preventing the Next Pandemic: Vaccine Diplomacy in a Time of Anti-Science, Johns Hopkins University Press, p. 12–33

Unfortunately, beginning around 2015, we started to see unexpected and fundamental changes leading to a new order in which infectious and tropical diseases either emerged or returned. This book focuses on some of the major twenty-first-century forces responsible for this historic reversal, but here is a brief overview of some of the major determinants now driving up both vaccine-preventable diseases and NTDs.

Political Instability. One of the most potent and unanticipated drivers was political instability. Measles was declared eliminated from the Americas in 2016, but in Venezuela, the collapse of the economy interrupted and disabled its health system, allowing measles to come roaring back. However, measles was not the only infection to reemerge. Malaria also became widespread, as did a host of other NTDs transmitted by insects or snails. The so-called Northern Triangle area of El Salvador, Guatemala, and Honduras also suffered because of escalating drug wars and the resulting economic downturns that affected health systems. In the Old World, wars or Islamic State occupation in Syria, Iraq, and Yemen also promoted the return of vaccine-preventable diseases, including measles and polio, while the simultaneous collapse of insect vector control programs promoted an explosion in the number of cases of cutaneous leishmaniasis, a highly disfiguring disease that produces ulcers and permanent and socially stigmatizing scars. A deadly cholera outbreak, one of the largest ever recorded, swept across Yemen. Throughout war-torn Democratic Republic of Congo (DR Congo), Central African Republic, and South Sudan, measles also returned, as did another form of leishmaniasis known as kala-azar, which causes a leukemia-like illness that killed thousands. Ebola caused a new lethal epidemic in DR Congo in 2019, resulting in over 2,000 deaths, and even more fatalities occurred from measles and cholera. The bottom line was that new twenty-first-century wars, conflict, and political unrest were reversing global gains.

Internal Displacement and Human Migrations. Exacerbating war and political instability were the ensuing human migrations. As people fled conflict and political collapse, thousands of refugees poured into neighboring countries and regions to spread disease. Measles became widespread in Brazil, Colombia, and Ecuador, largely reversing the celebrated 2016 achievement of measles elimination in the Western Hemisphere. Populations also began fleeing the drug wars of the Northern Triangle, although this has not yet translated into measles epidemics. However, the disease did reemerge among displaced people in multiple African nations and in the Middle East. The World Health Organization (WHO) issued a global alert on measles and then followed it with a report revealing that approximately 10 million children in 16 countries were not receiving their routine childhood vaccines for measles, pertussis, and tetanus owing to conflict and human displacement [3]. Similarly, leishmaniasis traveled with the Syrian refugees spilling into Jordan, Lebanon, and Turkey, in some cases establishing a foothold in those countries.

Urbanization. Human migrations from conflict and other factors brought people in large numbers into cities in vast and unprecedented numbers. Thousands crowded into urban slums in Caracas (Venezuela), Aleppo (Syria), and Kinshasa (DR Congo). The urban slums of megacities became a dominant theme of a new world order. As populations outstripped infrastructures, diarrheal diseases, including cholera, emerged in the untreated sewage, while respiratory diseases, including measles and other vaccine-preventable infections, emerged in the crowded conditions. Then the coronavirus disease of 2019 (COVID-19) swept across densely populated urban regions of central China, and next Europe and the United States, ultimately causing a destructive pandemic that may trigger a new economic depression. COVID-19 now represents an imminent threat to vulnerable people living in the crowded urban slums of South Asia, the Middle East, Africa, and Latin America.

Anti-science and Nationalism. An equally worrisome social determinant was the new reality of anti-science. The anti-vaccine or anti-vax movement began to take off in the early 2000s, but by 2015, it had become an ugly monster. It emerged as a media empire, with by some accounts more than 400 misinformation websites actively promoted on social media and e-commerce sites. The anti-vax movement weaponized both Facebook and Amazon in their unique ways. Facebook became the major voice of the anti-vaccine movement, while Amazon turned into the greatest promoter of phony, misinformative books and documentaries. Then the movement acquired a political arm that created political action committees (PACs), each working to enact legislation that made it more and more difficult for children to receive access to vaccines. In 2015, a PAC in Texas arose from the Tea Party, a far-right-wing element of the Republican Party [4]. A similar anti-vaccine initiative steeped in the rhetoric of populism arose in Italy. Somehow the anti-vax movement became tied to a new nationalism arising in the United States and Europe. Nationalism itself became a social determinant of disease.

Later in 2017, the leaders of the anti-vax movement began engaging in predatory behaviors to target selected ethnic and religious groups. As vaccination coverage declined among both Somali immigrants in Minnesota and orthodox Jewish communities in New York as a result of specific targeting by the anti-vax movement, terrible measles outbreaks ensued in 2017 and 2019, respectively. Ultimately, measles epidemics became widespread across North America, while Europe suffered a record 80,000 cases in 2018 and 90,000 cases in the first-half of 2019. Despite the great gains from Gavi, measles reestablished a foothold in the United States and Europe. Epidemics also surfaced in Philippines, Samoa, Madagascar, and elsewhere in the developing world, to the point where the WHO declared “vaccine hesitancy” as one of the world’s most pressing global health issues.

Climate Change. The new twenty-first-century determinants of disease also went beyond social ones. Climate change became a dominant force promoting disease. Mosquito-transmitted arbovirus illnesses such as Zika virus infection, chikungunya, and dengue spread across Central and South America and the Caribbean, before entering Texas and Florida in the United States. In southern Europe, West Nile virus infection and other arbovirus illnesses became common; malaria reappeared in Greece and Italy after it had been gone for decades; and schistosomiasis emerged on the island of Corsica. The Middle East experienced unprecedented high temperatures, which often exceeded 50°C, together with periods of severe and prolonged drought, forcing many to abandon their ancient agricultural lands.

However, it was difficult to attribute the appearance or reappearance of these tropical infections unambiguously to climate change. As noted above, in both the Western Hemisphere and southern Europe, human migrations were also widespread, linked to diaspora from Venezuela and the conflict zones of the Middle East and North Africa, respectively. Cities became vast, crowded, and susceptible to infectious disease transmission. If this trend continues, by 2050 the world will be constituted mostly of hot and steamy megacities, each with more than 10 million people. Complicating things further were the sharp economic downturns in many of these cities, especially in Venezuela, Brazil, the Middle East, and parts of southern Europe. COVID-19 furthered these economic declines. In other words, climate change went hand-in-hand with refugee movements, urbanization, and economic collapse. We had no real way to accurately attribute the risk to the individual social and physical determinants that are bringing back global tropical infectious diseases. However, one thing was clear: diseases that we thought we had vanquished through programs of the Millennium Development Goals were now returning.

Science Envoy

My term as US science envoy coincided with the rise in these geopolitical forces and climate change. I focused on evaluating the diseases arising from the conflict zones and then on designing new technologies to prevent these illnesses. As codirector of a nonprofit organization developing vaccines to combat NTDs (Texas Children’s Hospital Center for Vaccine Development), and as someone with expertise in tropical infectious diseases (I am dean of the National School of Tropical Medicine at Baylor College of Medicine), I had a unique perspective on the diseases arising in this part of the world. In time, we redirected some of the activities of our laboratory toward making vaccines to combat some of the leading illnesses. They included vaccines for leishmaniasis, schistosomiasis, and the major coronavirus infections, including Middle East respiratory syndrome (MERS), a highly lethal disease. We were positioned to assist in building capacity for vaccine development and clinical testing across the Middle East. Vaccines are not the only tools needed to fight the emerging and neglected diseases arising out of the conflict zones, but they are perhaps the most efficient and effective at preventing disease. Yet the Middle East and North Africa are highly depleted in terms of vaccine development capacity. At the time I began as US science envoy, these areas possessed few to no vaccine development capabilities. Moreover, the major pharmaceutical vaccine manufacturers had little interest in developing vaccines to combat the neglected and emerging diseases of Syria, Iraq, and Yemen, and at best modest interest in vaccine capacity building. I therefore embarked on a journey in vaccine diplomacy in order to combat the infections arising in the post-2015 new world order, guided by the example of my role model in this endeavor, Dr. Albert Sabin.

2: A Cold War Legacy

I never had the opportunity to meet Dr. Albert Sabin. He passed away in 1993 before I began my association with Sabin Vaccine Institute, a Washington, DC, nonprofit organization that advocates for vaccines and vaccine science. However, for more than 20 years I was connected with the institute. My association began when I was on the Yale faculty (the institute was started by H. R. Shepherd, a businessman based in New Canaan, Connecticut); continued during the 11 years when I was microbiology chair at George Washington University (the institute relocated with me in 2000); and then ended after I had relocated to Houston, Texas.

One of my favorite activities as president of the Sabin Vaccine Institute was visiting Dr. Sabin’s widow, Heloisa. Heloisa lived off New Mexico Avenue in Washington, DC, not far from the campus of American University. She was born in Brazil and worked at Jornal do Brasil, the major newspaper in Rio de Janeiro. By the time Heloisa met Sabin at a reception for him in Brazil, both had been married previously. Shortly after their marriage in 1972, Heloisa moved with him to Israel when he served as president of the renowned Weizmann Institute, before moving to Washington, DC.

Heloisa’s New Mexico Avenue apartment was like a mini-museum to vaccine diplomacy. It featured pictures of Sabin with President Clinton, Pope John Paul II, and Cuba’s Fidel Castro, to name a few. She also had photos of Sabin with Soviet scientists, and on the tables and walls were plaques and remembrances from dozens of countries. Typically, after sitting in her apartment we would go downstairs to have lunch in a restaurant located nearby. We would pass the time talking about Sabin’s life, his fierce determination to vaccinate the world’s children against polio, and the many complexities of working with foreign governments to conduct vaccination campaigns. One story I remember vividly was her account of Sabin’s visit to Brazil in 1980, when he had openly criticized federal and local health officials for their handling of a polio outbreak. Ultimately, his offer to help Brazil mount a national polio campaign was rebuffed, and Sabin returned disappointed to Washington. There were differing accounts of whether the Brazilian officials were too lax or if Sabin was too abrasive; possibly both were true [1]. Sabin was known for his directness, and his unrelenting demand for excellence often made people around him uncomfortable, but Heloisa both adored and revered him. She was petite and beyond charming, and from her pictures I could tell that back in the day, Heloisa and Albert were probably quite the glamorous couple. Heloisa would always refer to him as “my Albert.” On a few occasions, we would visit his gravesite at Arlington National Cemetery, and she would always remind me that one day she would be buried alongside him. Heloisa passed away in 2016 in her late 90s, just before I left the Sabin Vaccine Institute. Currently, the Albert B. Sabin Archives are located at the University of Cincinnati, where he conducted much of his path-breaking work on the oral polio vaccine.

Sabin was a champion of vaccines, but not only because of his important and fundamental research to develop the polio and other vaccines. He was an unofficial polio ambassador, visiting dozens of countries and convincing government leaders at the highest levels about the importance of instituting polio vaccination campaigns. His stature as a vaccine scientist allowed him entry into Cuba during the 1960s and the USSR in the 1950s and 1960s. Those activities in Cuba and the USSR had special meaning for me. Through a program of backchannel diplomacy and scientific collaboration, Sabin worked with Soviet scientists to jointly develop an oral polio vaccine that employed Sabin’s live virus polio strains, which he had first developed at Cincinnati Children’s Hospital. Those virus strains were then produced at an industrial scale in the USSR and tested on millions of Soviet citizens, ultimately leading to the licensure of the vaccine in the early 1960s and the subsequent eradication of polio. These accomplishments are now the gold standard for how scientists of different ideologies can overcome diplomatic tensions or even overt conflict in order to advance science for humanitarian purposes.

Global Health Diplomacy

Each visit with Heloisa reinforced my conviction that vaccine diplomacy could one day hold a special place in modern society. In our post-2015 world, we need vaccine diplomacy more than ever. Global infectious diseases have taken an unexpected turn for the worse. Owing to breakdowns in health infrastructure from war and instability, together with other modern twenty-first-century forces, infectious diseases once thought to be on their way out, or even gone, are now back. The COVID-19 pandemic is testing international relations on an unprecedented level. Solving these and future infectious disease public health crises will require us to integrate the science of tackling global infections with these new social and physical determinants: poverty, war, political instability, human migrations, urbanization, and anti-science. In turn, navigating such troubled waters will require new approaches linking biomedical and social sciences, including political science and foreign policy.

In my two years in the Obama administration as US science envoy, I came to realize that understanding the biomedical science, the vaccinology, was essential but not always sufficient to solve issues related to building vaccine infrastructures across nations. This was especially true in a complicated space like the Middle East, where deep-seated tribal and Sunni-Shia rivalries continuously threw up roadblocks—often in interesting and unexpected ways. It became apparent that building vaccines, expanding vaccine coverage, and tackling NTDs requires integrating new types of knowledge, including skills related to diplomacy. In some ways, this might bear some resemblance to what Sabin achieved in Cuba and the USSR (okay, maybe not Brazil!) in the 1960s, but widening the tent to include both scientists and nonscientists. To achieve this, I suggested a new framework of vaccine diplomacy that connects political science, philosophy, and foreign policy to the most powerful life science technology ever invented—vaccines.

Before describing and defining vaccine diplomacy, I think it is helpful to first provide a broader understanding of how global health in general is linked to international relations and solving disease problems on a large scale [2]. Some might say it began as an early version of quarantine during the 1300s, when laws were implemented to prevent plague originating in Asia Minor from entering Dubrovnik on Croatia’s Adriatic coast—or much later, starting in the 1850s, when international sanitary conferences were held in Europe to prevent cholera, plague, and other pandemic infectious disease threats from spreading [2]. Then, in the early twentieth century, the Office International d’Hygiène Publique was created in Paris, as well as a health organization linked to the League of Nations [3]. In parallel, the nations in the Western Hemisphere also established a Pan American Sanitary Bureau, later named the Pan American Health Organization, which became the regional office of WHO in the Americas. The actual World Health Organization itself was established in the aftermath of World War II, following the formation of the UN. The WHO’s constitution was enacted on April 7, 1948, now designated as World Health Day. Almost twenty years later, the WHO embarked on the eradication of smallpox through a global vaccination campaign.

Global health diplomacy rapidly accelerated after promulgation of the UN’s Millennium Development Goals, first in 2005, with a revised set of International Health Regulations (IHR), and then in 2007, after the ministers of health of seven nations connected global health to foreign policy through an Oslo Ministerial Declaration [2]. IHR, also known as IHR (2005), is an agreement between all WHO member states focused on global health security, especially for the detection and assessment of major public health events and for strengthening disease control efforts at national entry points, such as seaports and airports. A key driver of the IHR (2005) was the 2003 pandemic of severe acute respiratory syndrome (SARS) that resulted in more than 8,000 cases, with roughly 10% mortality [4]. The SARS pandemic also severely affected the economies of Hong Kong and Toronto, Canada, and were a wake-up call for the disruptive power of lethal epidemics. These initiatives were later strengthened in 2019 following the Ebola epidemic in DR Congo and ultimately were called on to respond to COVID-19 the following year. In this context, my former Yale colleague, Ilona Kickbusch, defines global health diplomacy as a system of global governance in health, while Rebecca Katz, a colleague and former student now at Georgetown University, provided an operational definition. She refers to it as a framework to include treaties between nations—such as IHR, or recognized international partnerships with UN international organizations, Gavi, or global partnerships involving the Gates Foundation or other non-state actors [2].

Vaccine Diplomacy

Throughout modern history, vaccines have surpassed all other biotechnologies in terms of their impact on global public health. Because of vaccines, smallpox was eradicated, and polio has been driven to near global elimination, while measles deaths have declined more than 90%, and Haemophilus influenzae type b meningitis is now a disease of the past in the United States and elsewhere.

I define one part of vaccine diplomacy as a subset or specific aspect of global health diplomacy in which large-scale vaccine delivery is employed as a humanitarian intervention, often led by one or more of the UN agencies, most notably Gavi, UNICEF, and WHO, or potentially a nongovernmental development organization [2]. Examples might include emergency cholera or Ebola vaccinations during outbreaks in Africa, measles vaccination campaigns linked to the Venezuelan diaspora in Brazil or Colombia, or polio eradication campaigns in the conflict areas of Afghanistan, Pakistan, or the Middle East. Other aspects of vaccine diplomacy relate to vaccine access during pandemics, such as efforts to ensure equitable delivery of a vaccine to combat influenza, especially during an epidemic or even a pandemic situation.

Another critical element of vaccine diplomacy includes the development or refinement of new vaccines achieved jointly between scientists of at least two nations. Rather than a UN agency or nongovernmental development organization, the actual scientists lead both the vaccine science and diplomacy [2]. It is especially relevant that scientists from nations in opposition or even outright conflict can work in research organizations, or that they are able to work together and engage in collaborations under conditions of political instability or stress. Under this definition, vaccine diplomacy reached its full expression during a 20-year period of the Cold War between the United States and Soviet Union that began around the time of the Sputnik satellite launch and mostly ended in 1977 with the eradication of smallpox [5]. In my role as US science envoy, I worked to resurrect this vaccine science diplomacy while collaborating with scientists from Muslim-majority countries of the Middle East and North Africa [6].

Do vaccines really deserve their own designation for a special type of diplomacy? Yes, I believe so, especially when we consider that between the past century and this one vaccines have saved hundreds of millions of lives [2]. In this sense, the technology of vaccines and their widespread delivery represent our most potent counterforce to war and political instability in modern times. Vaccines represent not only life-saving technologies and unparalleled instruments for reducing human suffering, but they also serve as potent vehicles for promoting international peace and prosperity. They are humankind’s single greatest invention.

### 1NC

T Section 5

#### ‘Scope’ is the extent of the area covered by the core laws

Oxford 22 – Oxford English Dictionary, ‘scope’, https://www.lexico.com/en/definition/scope

1 The extent of the area or subject matter that something deals with or to which it is relevant.

*‘we widened the scope of our investigation’*

#### It’s bounded by exemptions and immunities

Layne E. Kruse 19, Co-Chair, Melissa H. Maxman, Co-Chair, Vittorio Cottafavi, Vice Chair, Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/2019, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ means to make greater, not clarify its current state by applying it differently

Terry J. Hatter 90 Jr., United States District Judge, California Central District, In re Eastport Assoc., 114 B.R. 686, 690, 1990 U.S. Dist. LEXIS 6308, \*10-11 (C.D. Cal. March 20, 1990), 3/20/1990, Lexis

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would *expand* the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### Violation---Section 5 is not an ‘antitrust law’ AND already has unlimited ‘scope’. The plan merely clarifies how it’ll be exercised.

Jon Leibowitz 6, JD from the New York University School of Law, BA in American History from the University of Wisconsin, “Concurring Opinion of Commissioner Jon Leibowitz in the Matter of Rambus, Inc. Docket No. 9302”, August 2006, https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf

It would be equally apt, though, to characterize Rambus’s conduct as an “unfair method of competition” in violation of Section 5 of the FTC Act. Section 5 was intended from its inception to reach conduct that violates not only the antitrust laws1 themselves, but also the policies that those laws were intended to promote. [FOOTNOTE] 1 15 U.S.C. § 12 (a) (2006). The antitrust laws include the Sherman Act and the Clayton Act (as modified by the Robinson-Patman Act). The FTC Act is not an antitrust law. [END FOOTNOTE] At least three of these policies are at issue here. From the FTC’s earliest days, deceitful conduct has fallen within Section 5's province for its effects on competition, as well as on consumers.2 Innovation – clearly at issue in this case – is indisputably a matter of critical antitrust interest.3 In addition, joint standard-setting by rivals has long been an “object[] of antitrust scrutiny” for its anticompetitive uses, notwithstanding its great potential also to yield efficiencies.4 In this case, Rambus’s deceptive conduct distorted joint standard-setting decisions and innovation investments in ways that seriously injured the operations of the competitive market to the detriment of consumers; it thereby transgressed the policies and spirit of the antitrust laws in all three respects. While respondent’s behavior before JEDEC might well have been challenged solely as a pure Section 5 violation, Complaint Counsel did not litigate this theory before the administrative law judge. Thus, I write separately to discuss and reemphasize the broad reach and unique role of Section 5.

I also address the scope of Section 5 because some commentators have misperceived the Commission’s authority to challenge “unfair methods of competition,” incorrectly viewing it as limited, with perhaps a few exceptions, to violations of the Sherman and Clayton Acts.5 Others are unclear just how far Section 5 can reach beyond the antitrust laws.6 Regardless of the reasons for these cramped or confused views, a review of Section 5's legislative history, statutory language, and Supreme Court interpretations reveals a Congressional purpose that is unambiguous and an Agency mandate that is broader than many realize.

The Commission, in my view, should place greater emphasis on developing the full range of its jurisdiction and making it more clear to the bar, the public, the business community, and potential antitrust malefactors what Section 5 embraces and what it does not. Although the Commission has not left fallow its Section 5 jurisdiction to challenge conduct outside the antitrust laws, neither has the Agency fully exercised or explained it. In discussing Section 5 in the context of Rambus, I hope to encourage the Commission (and its staff) to develop further and employ more fully this critical and unique aspect of our statutory mandate. If we do, benefit will accrue both to consumers and to competition.

#### Vote neg:

#### Eliminating exemptions provides a limited and predictable basis for prep and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should:

#### ---increase its prohibitions on anticompetitive algorithmic pricing collusion by the private sector;

#### ---provide relevant artificial intelligence information to inform the federal trade commission.

### 1NC

Capitalism K

#### The investment in competition compels imposition of extractive economic relations which are unsustainable and culminate in existential collapse.

Dr. Hubert Buch-Hansen 13, Professor in the Department of Organization at the Copenhagen Business School, PhD from the Department of Intercultural Communication and Management (ICM) at the Copenhagen Business School (CBS), MA in Public Administration from Roskilde University, MScEcon in European Politics from the Department of International Politics at the University of Wales, BA in Public Administration from Roskilde University, and Dr. Angela Wigger, Professor of International Relations at Radboud University, PhD and MA in Political Sciences from Vrije Universiteit Amsterdam, “Competition, the Global Crisis, and Alternatives to Neoliberal Capitalism: A Critical Engagement with Anarchism”, New Political Science, Volume 35, Issue 4, Taylor & Francis

After three decades of neoliberal economic policies, we are in the midst of a major global economic crisis, which has not yet reached its zenith. Disparities in wealth have increased and living standards of the lower strata of society in many countries have deteriorated, while unemployment, underemployment, and informal work are on the rise.4 The depletion of natural resources and environmental devastation is reaching new heights, indicating that the forms of production and consumption of the developed world are no longer tenable.5 Safeguarding unbridled competition is nonetheless seen as the apex of restoring economic growth and social welfare. Seemingly unconcerned with growing social protests against neoliberal capitalism, policy-makers, business people and academics alike continue to be enthralled by the false promises of “free market” policies and even suggest an intensified neoliberalization as the route to salvation. So far, the chosen course has proven to be a blind alley, aggravating the crisis only further. A new phase of capitalist expansion and economic growth within neoliberalism seems unlikely, and even if it were to take place, it would not tackle today's social and ecological problems successfully.6 Therefore, a transformation of the socio-economic system itself is required—a transformation that takes into account not only the organization of the economic realm but also its relationship with nature. The exaggerated faith in competitive markets as a panacea for economic slump and recession forms however an obstacle to such a transformation. Entangled in the “Third Way” rhetoric of the 1990s, the political center-left in both the US and Europe suffers from internal fragmentation and ideological insecurity and lacks a coherent vision of possible alternatives to the prevailing neoliberal trajectory. It suggests at best mere reformist strategies that aim at rescuing capitalism from its internal contradictions, such as the implementation of “better regulation” or a turn toward some form of post-Keynesianism. The center-left has moreover in large part accepted and internalized the neoliberal pro-competition stance (alongside many other features of neoliberal thinking). Preoccupied with how the respective economies can win (or survive in) the global competitiveness race, it is instead concerned with how the detrimental effects of competition can be cushioned. Likewise, only a few academics and intellectuals have analyzed the downsides of competition, let alone thought about viable alternatives for post-neoliberal societies.7

This article attempts to contribute to fill this void. As stated by Robert W. Cox, an integral part of critical scholarship is not only to explain and criticize structures in the existing social order, but also to formulate coherent visions of alternatives that transcend this order.8 To this end, the article offers first an explanatory critique of capitalist competition from the vantage point of historical materialism and argues that today's crisis is partly rooted in excessive competition, here referred to as ”over-competition.”9 This leads to an analysis of the current economic crisis in the second section, where it is argued that over-competition is one of the root causes of the crisis. The next two sections address alternative forms of organization of economic life and critically engage with anarchist values and principles, culminating in some general ideas for a post-neoliberal competition order. The last section before the conclusion reflects on how this alternative competition order could be achieved. To be sure, the ambition is not to outline a blueprint of a post-neoliberal competition order in rigid and minute detail but rather to sketch out its contours, as well as to discuss what it would take for it to emerge.

Cross-fertilizing historical materialist insights on competition with visions inspired by anarchist thought and praxis might not seem obvious at first glance—given the joint history of fierce antagonism between various strands of Marxism and anarchism.10 There is however also much common ground that deserves to be explored when thinking about alternatives that go beyond narrow-minded conceptions of what is acceptable and feasible. Thus, the purpose of this article is not to (re-)construct orthodox platitudes or to arrive at some sort of synthesis that reconciles what cannot be reconciled, but rather to explore the creative tensions that anarchist thought provides for critical social research and emancipatory practice. Both perspectives, broadly defined, are wholeheartedly anti-capitalist and dedicated to understanding social life and inducing social change. It will be argued that anarchism has much to offer, but by giving ontological primacy to local initiatives for building an alternative economic order, it also suffers from limitations. In particular, the problems created by the destructive competitive logics operating at systemic level require solutions that exceed the local level and that institutionalize higher-order nested governance structures.

Capitalist Competition—An Explanatory Critique

The vogue for competition is not new. Already Adam Smith has claimed that competition is “advantageous to the great body of the people.”11 It drives “every man [sic!] to endeavor to execute his work with a certain degree of exactness.”12 Consequently, “[i]n general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be the more so.”13 Neoclassical economists frequently compare competition to a Darwinist form of market justice in which the uncompetitive, weak, and inefficient perish and the successful and efficient win. Although the zero-sum nature of competition is generally accepted (not everyone who plays can win), competition tends to be confused with success only. In line with neoclassical economic models, it is widely assumed that competitive markets deliver an efficient and just allocation of scarce resources.14 This view ignores, however, that real-world competitive markets are also highly inefficient, for instance by producing so-called negative externalities on a massive scale and “underproducing” public goods.15 Competition and the freedom to compete are moreover frequently associated with broader notions of political freedom and individual self-determination.16 This view is however equally mistaken as competition essentially negates individual freedom. As Karl Marx noted in Grundrisse: “[i]t is not individuals that are set free by free competition; it is, rather, capital which is set free.”17 Competition, he argued, “is nothing more than the way in which many capitalists force the inherent determinants of capital upon one another and upon themselves.”18 In Marx's view, competition represents “the most complete subjugation of individuality under social conditions which assume the form of objective powers […].”19 Rather than being the Smithian invisible hand, competition is an uncompromising fist, which exerts coercive pressures on “every individual capitalist,” irrespective of his “good or ill will.”20 In addition, competition disintegrates more than it unites, which means that in a competitive setting cooperation and mutual aid—the antithesis to competition—are marginalized as organizing principles. Mutual aid refers to altruistic and solidary practices aimed at enhancing the welfare of economic entities without the aid provider directly benefiting from it, while cooperation refers to voluntary arrangements between economic entities that focus on joint projects and reaching common goals. Without doubt, “one certainly can act in a solidaristic and cooperative manner within a competitive market system, but to do so often means having to go against the grain and place oneself at a competitive disadvantage.”21

Historical materialism captures the ineluctable toll of capitalist competition, namely that it exacerbates the intrinsic social contradictions and class antagonisms in the process of capital accumulation. The consumption of labor power and natural resources is seen as the source of real added value that makes capital accumulation possible.22 In other words, capital can only grow through the creation of new surplus value and thereby the further exploitation of labor and nature. As individual capitalists cannot afford to lag behind the price and quality standards set by competitors, defeating contender capitalists becomes essential for the reproduction of capital. In the struggle for economic survival, this means that economic power ultimately gravitates to those capitalists who can keep down the price of labor and other factors of production. Marx noted that “[t]he battle of competition is fought by cheapening of commodities. The cheapness of commodities depends all other circumstances remaining the same, on the productivity of labour […].”23 Employees feel the direct repercussions of competition in the form of labor-saving technologies or increased pressures on productivity, unpaid overtime, and degradation of working conditions, (below) subsistence wages and redundancies. In the presence of what Marx termed the “industrial reserve army,” competition directly or indirectly creates a chronic insecurity about the preservation of employment, leaving many people in dire straits regarding their future careers and living standards. Thus, competition might indeed lower prices, but one should not forget that people need a job first before they can consume. The interests of the wealthy few and the working many in the surplus created in the production process are incompatible from the outset, and competition further exacerbates this antagonism.

The process of the competitive accumulation of capital is thus neither stable nor unproblematic, nor linear nor infinite but pervaded by a range of contradictions. Marx famously suggested that competition is essentially a self-undermining process, which “pushes things so far as to destroy its very self.”24 Ultimately, all capital would be “united in the hands of either a single capitalist or a single capitalist company,” effectively putting an end to competition (and capitalism).25 Clearly we have not reached this stage and doubts about whether we ever will are more than justified.26 Yet, the expansionist and deepening nature of the capital accumulation process conquering ever more dimensions of the non-capitalist realm cannot be disputed. Marx also saw correctly that in order to secure profits and economic survival, many capitalists seek to evade the vicissitudes of competition by seeking synergy effects through mergers and acquisitions.27 Capitalists can also choose to “cooperate” with their competitors by concluding cartels and other collusive arrangements. However, like economic concentration, collusive cooperation aims at raising profits through ever tighter agglomerations of corporate power, which does not solve the pernicious and highly unequal nature of the social relations of capitalist production.

Because of these and other contradictions, capitalist markets depend on various forms of extra-economic stabilization to ensure the continued accumulation of capital.28 State apparatuses provide various forms of regulatory arrangements in the management of such contradictions and rules on competition can be such a stabilizer.29 Competition rules generally seek to enable competition and thereby protect capitalism from the capitalists and, to some extent, the capitalists from each other. In the most abstract sense, such rules usually define the scope of state intervention, corporate freedom, as well as the possibilities for market entry and the level of economic concentration.30 Importantly, competition rules are never a functionalist response to overcoming what neoclassical economists term “market failures,” but result from political struggles among socio-economic groups with different and sometimes opposing ideas on how to organize the economic realm. Competition rules frequently draw on notions of equity and justice. Through law as a fictitious equalizer, corporations are standardized and made comparable; they are unitized into something they are not, namely equal players on a level playing field. Moreover, competition rules can never cure the inherent contradictions in the accumulation of capital but only offer a temporary stabilization. In fact, rules aimed at preserving fierce competition can even buttress such contradictions.

The frailty of capital accumulation becomes particularly apparent in the event of structural crises of over-accumulation, referring to moments when capital owners lack attractive possibilities for reinvesting past profits.31 If expected profits on investments are considered unsatisfactory, capitalists can decide either to hold on to their surplus capital or invest it in another part of the system. An investment slowdown can occur because of a profit squeeze resulting from rising real wages in times of low unemployment levels, strong labor unions, or previous over-investment that has led to overcapacity in a sector.32 Another reason for a profit squeeze can be excessive competition, here referred to as over-competition.33 Once competition reaches a point where capitalists can no longer exploit labor to undercut the prices of competitors (either through technological replacements or by keeping down wages), profits and profit expectations fall, resulting in diminishing levels of investments in real production capacities. Moreover, as fierce competition and its unforgiving logic to reduce prices negatively affect wages and employment, it can backlash in decreasing levels in the consumption of produced goods and services, and slow down investments further. This is even more pertinent in the case of vast waves of mergers and acquisitions, which generally go hand in hand with rationalization processes and the elimination of duplicate job functions. As Marx pointed out, “the competition among capitals” and “their indifference to and independence of one another,” drives the capital-labor relationship “beyond the right proportions.”34 Over-competition can also lead to what Harvey calls a “peculiar combination” of low profits and low wages.35 Surplus capital that is not invested in means of real production and in labor can seek refuge in mergers and acquisitions or speculation with financial assets. Bubble markets created by speculation may temporarily offer new outlets for absorbing liquid capital. In fact, there “are even phases in the life of modern nations when everybody is seized with a sort of craze for making profit without producing. This speculation craze which recurs periodically, lays bare the true character of competition […].”36 Financial transactions may temporarily be disassociated from the real economy and generate high yields by adding ephemeral value through the mere circulation of capital. However, speculative bubbles always burst once the “perpetual accumulation of capital and of wealth” and “the perpetual accumulation and expansion of debt” become too far out of sync.37 It follows that financial crises are deeply anchored in the real economy and intimately related to competition.

To recapitulate, a historical materialist perspective highlights the contradictory and crisis-prone nature of capitalist competition. The next section argues that over-competition is one of the root causes of the crisis of neoliberal capitalism that we are currently witnessing.

The Crisis of Neoliberal Capitalism and Over-Competition

Competition is crucial to the capitalist mode of production, and has been present during all stages in the evolution of the capitalist system. It should therefore not be conflated with a particular form of capitalism. This said, competition for profits has probably never been fiercer than in the era of neoliberalism, which gained growing prominence on a global scale in the 1980s alongside what is commonly called the Reagan Revolution in the United States (US), Thatcherism in the United Kingdom (UK), and the dictatorial regime of Pinochet in Chile. Neoliberalism is generally associated with deregulation, the rollback of welfare states, a monetarist focus on keeping inflation low, reduced taxes, fiscal austerity, wage repression, and processes of financialization. Although neoliberal policies have been imposed throughout the world, neoliberalism nowhere became manifest in a pure fashion. Variations in contestation by social groups, regulatory experimentation, and inherited institutional landscapes account for the differences in the neoliberal organization of markets and levels of regulation.38 Nonetheless, as a common denominator, neoliberal policies generally sustain the disembedding of capital from the great part of the web of social, political, and regulatory constraints and the separation of key market institutions from democratic processes.39 Legitimated by neoclassical economics, uncontained competition came to be advertised as the chief catalyzing force for the most efficient and most profitable allocation of the resources of the world.

Rules safeguarding free competition consequently became neoliberalism's juggernaut.40 The expected theoretical benefits of fierce competition and its regulation served to legitimize the opening of markets worldwide: to compete freely eventually requires unimpaired market access. Enforced by “politically independent” (neoliberal newspeak for “democratically unaccountable”) authorities at national and supranational level in the western world, competition rules had to ensure that corporate practices would not interfere with the alleged equilibrium tendencies of capitalist markets (which happen to exist only in the minds of neoclassical economists and their textbooks). Narrow definitions of price competition subsequently received primacy as a benchmark for assessing anticompetitive conduct, supported by sophisticated econometric modeling and complex micro-economic algorithms, leaving no room for social interest criteria or environmental considerations.41 Premised on the idea that economies of scale and scope would be achieved, through competition more efficient corporations would take business away from less efficient ones by decreasing their marginal production costs, which was believed to benefit consumers in the form of price reductions. The particular emphasis on economies of scale and scope implied that economic concentration was not seen as problematic. Neoliberal competition regulation in the western industrialized world hence facilitated a massive centralization and consolidation of corporate power through mergers and acquisitions in nearly every industry, as well as various forms of strategic alliances and joint ventures. Notably, the merger waves that rolled over the global economy in the 1990s and at the dawn of the new century set new records in terms of number and aggregated volume of the companies involved. Under neoliberal capitalism, the conditions once identified by Adam Smith no longer hold: rather than competition between locally based, small-scale, owner-managed enterprises, oligopolistic rivalry of giant transnational corporations constitutes the order of the day.42 Oligopolistic market structures do not however imply that there is no or little competition. Competition between gigantic transnational corporations can be ruthless, as can competition between larger and smaller companies. Indeed, those able to compete set the standards of competition for others: with comparatively easy access to credit and huge advertising budgets aimed at homogenizing consumer preferences across cultures, such corporations can thwart the existence of weaker competitors, including small-scale enterprises at local level.

Alongside the growth of perverse social inequalities, the competitive race to offset products and services to affluent consumers has increased over the past thirty years. In the contemporary context of transnationalized production and geographically segmented, racialized, and gendered labor markets, harsh competition has become an all-pervasive conditioning dynamic. The exhaustion of natural resources, sweeping pollution, and climate change have toughened competition further, and set in motion a vicious spiral causing irreparable damage to the environment worldwide.43 In other words, under the reign of neoliberalism, competition has become ever more tenacious, spanning the entire globe and demanding ever greater competitiveness from capital and labor alike.

#### The alternative is revolutionary optimism targeted at the working class---it overcomes biases towards growth to unleash class consciousness but requires abandoning competition to succeed.

Collin L. Chambers 21, Department of Geography at Syracuse University, “Historical materialism, social change, and the necessity of revolutionary optimism,” Human Geography, Vol. 14, No. 2, 2021, <https://doi.org/10.1177%2F1942778620977202>

The productive forces necessary for socialism exist in the US and throughout the global north. The conditions to eradicate poverty, homelessness, create non-ablest spaces, and so on exist. It just takes the political will to make this material reality free from its capitalist confines. For working-class activists living in the global north, this needs to be emphasized ad nauseum. As Marx says, the bourgeoisie create their own “gravediggers”: “the advance of industry … replaces the isolation of the workers…with their revolutionary combination, due to association (Marx, 1970: 930 FN). However, and most unfortunately, the simple centralization of workers in one place (like a city or a factory) does not automatically produce revolutionary consciousness amongst the workers themselves. Capitalism and all of its vulgarities still persist; something is blocking the transition. Many point to things such as ideology, bourgeois cultural hegemony, “false consciousness,” “desire,” and “mystification” as reasons for the nonexistence of a working-class revolution in the US. The argument goes: the reason feudalism could be transcended was because in feudalism the division between the time when serfs/peasants were working for their own subsistence and directly for the lords was clear as noonday. Feudal exploitation was achieved through “extra-economic” means as Wood (2017) says. In capitalism, “surplus labour and necessary labour are mingled together” (Marx, 1970: 346). “Mystification” is built into the wage-relation itself (see Burawoy, 2012). There is some deal of truth that workers in capitalism can fall for imperialist-capitalist ideology, but I argue that there are actual real material and structural reasons for the nonexistence of working-class revolutions in the US and global north more broadly

If one actually talks to working people, a lot of them know that things in their world are messed up and don’t necessarily buy into capitalist ideology. Though many do not have revolutionary consciousness yet, they are not simply tricked by imperialist-capitalist ideology. “The everyday” for US workers is in the workplace. Many work multiple jobs just to scrape by. Working people just want to come home from work and enjoy the little free time they have, or they are simply working so much that it is almost impossible to have revolutionary consciousness, or if they do they cannot act upon it because they are just trying to survive, and thus doubt better days are ahead. But, these conditions can be overcome.

Truly revolutionary working-class ideas do not arise spontaneously within the working class itself. Marxism has to be learned by the working masses, and it is indeed a science that working and oppressed people can learn; it just has to be introduced. It must be introduced by a revolutionary vanguard party composed of the most advanced and class-conscious working people. Vanguard parties provide the material and infrastructural foundation for working-class people to join the ranks of the revolutionaries (see Dean, 2016). Workers must be able to understand and explain the class character of all political phenomenon—Marxism provides this. In “What Is to Be Done?” Lenin says that a class-conscious worker cannot be left to work 11 hours a day in a factory if we want the worker to develop clear revolutionary class consciousness. Thus, as he says, the party must make the arrangements necessary to ensure that the worker can have more free time for organizing and developing revolutionary class consciousness. The vanguard party form makes joining the revolution truly accessible to the vast masses of people. To paraphrase Lenin (1987 [1929]), the working class left to organize themselves will fall into trade unionism, which is ingrained in bourgeois ideology and thus cannot transcend the capitalist mode of production. A Marxist (i.e. historical materialist) understanding of society can indeed be understood by the masses of people, which will in turn unleash the power of class consciousness itself as a real material power.

The way Marx explains how the capitalist mode of production develops through time empowers workers and provides revolutionary optimism/hope. As the productive forces develop, more and more proletarians are produced and less and less capitalists exist (due to competition and monopolization, etc.). Out of market competition, “[o]ne capitalist always strikes down many others” (Marx, 1970: 929). The means of labor are transformed into forms “that can only be used in common.” Thus, as the capitalist mode of production develops,

The monopoly of capital becomes a fetter upon the mode of production … The centralization of the means of production and the socialization of labour reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated. (Marx, 1970: 929)

The “immanent laws of capitalist production” itself leads to not only class struggle but also to communist revolution. The laws of competition within the capitalist mode of production have the tendency to constantly revolutionize/ develop the productive forces even in the era of monopoly capitalism. The developed productive forces that are created in capitalism create the foundations from which socialist society can arise (see Phillips and Rozworski, 2019).

In Capital, Marx says it will be easier to move beyond capitalism than it was to move beyond feudalism, for the simple fact that during the transition from feudalism to capitalism “it was a matter of the expropriation of the mass of the people by a few usurpers.” But in the case of transitioning out of capitalism, “we have the expropriation of a few usurpers by the mass of the people[!]” (Marx, 1970: 929–930). Thus, to end capitalist private ownership of the means of production, we only have to usurp a handful of capitalists, which numerically speaking should be easier to do than usurping millions of people as what occurred within the process of primitive accumulation that created the social conditions necessary for the capitalist mode of production.

The inert power working people have exists at all times (even in eras of global working-class defeat and retreat); workers can simply shut production by striking, occupying the workplace, and so on (see Allen and Mitchell, 2003; Glassman, 2003). A nice made-up scenario I like to give students is that no one would really notice if all the bosses/ CEOs did not show up to work for one day, but if all workers did not show up for one day, all of society would simply shut down and reach a standstill. Additionally, and most importantly, the proletariat can use its class power to overthrow and transcend the bourgeois order by seizing political power—that is, the state—and radically transform it to serve the class interests of the working class. This cannot be dismissed as utopian. It has been done in history and it will occur again. This revolutionary takeover allows for the working class to make “despotic inroads on the rights of [bourgeois] property, and on the conditions of bourgeois production” (Marx and Engels, 1978: 490; see also Lenin, 1987 [1932]: 336).

Conclusion

This essay was written with two broad goals in mind: first, to review and reaffirm the central tenants of historical materialism; second, to provide an optimistic and revolutionary outlook for the future using historical materialism. Workers across the capitalist world know that their lives are hard. We do not always need to point out all the evils that capitalism creates. What we need to do is to instill hope and emphasizing how capital provides the material foundations for socialism does just that. Marx “regards communism as something which develops out of capitalism. Instead of scholastically invented, ‘concocted’ definitions and fruitless disputes about words (what is socialism? What is communism?), Marx gives an analysis of what may be called stages in the economic ripeness of communism” (Lenin, 1987 [1932]: 346, emphasis in original). We can say to workers: the material conditions exist to end poverty, there are more empty houses than homeless people, the means exist to end societal degradation, it just takes the political will to do so. Emphasizing this political will is empowering; it says we have the power to change things. We need stop with the talk of how workers and oppressed peoples are chained and have no power. Rather, “[i]t is within the present that the future can emerge,” and we need to force the future upon us (Malott and Ford, 2015: 154).

## Administration ADV

### Administration ADV---1NC

#### Regulation destroys AI control by driving it underground, abroad, or into higher-risk areas

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Rick Increase Factors:

Obfuscation: Regulations may drive research underground where it is harder to monitor, or to ‘flag of convenience’ jurisdictions with lax restrictions, by embedding dangerous technologies within apparently benign cover operations (multipurpose technologies), or by obfuscating the externalized effects of a system, such as in the vehicle emissions scandal (Wikipedia).

Arms race: Recent advances in machine learning such as multimodal abstractions models (aka Transformers, Large Language Models, Foundation Models) such as GPT-3 and DALL-E illustrate that dumping computing resources (and the funds for them) in colossal models seems to be a worthy investment. So far, there is no apparent limit or diminishing return on model size, and so now state and non-state actors are scrambling to produce the largest models feasible in order to access thousands of new capabilities never before possible. An arms race is afoot. Such arms races can lead to rapid and unexpected take-off in terms of AI capability, and the rush can blindside people to risks, especially when the loss of a race can mean an existential threat to a nation or organization.

Perverse incentives: Incentives can be powerful forces within organizations, and financialization, moral panic, or fear of political danger may cause irrational or incorrigible behavior of personnel within organizations.

Postmodern Warfare: Inexpensive Drones and other AI-enabled technologies have tremendous disruptive promise within the realm of warfare, especially given their asynchronous nature. Control of drone swarms must be performed using AI technologies, and this may encourage the entire theatre of war to be increasingly delegating to AI, perhaps including the interpretation of rules of engagement and grand strategy. (Lsusr, 2021)

Cyber Warfare: Hacking of systems is increasingly being augmented with machine intelligence (Cisomag, 2021), through GAN-enabled password crackers (Griffin, 2019) and advanced social engineering tools (Newman, 2021). This is equally the case in the realm of defense, where only machine intelligence may provide the swift execution required to defend systems from attack. A lack of international cyberwar regulations, and poor international policing of organized cybercrimes, may increase the risk of catastrophic risks to societal systems.

Zersetzung: The human mind is becoming a new theatre of war, through personalized generative propaganda, which may even extend to gaslighting attacks on targeted individuals, significantly leading to destabilization of societies (Williams, 2021). Such technologies are also plausibly deniable, being difficult to prove who may be responsible.

Inflexibility: The German Military after WW1 was not allowed to develop their artillery materiel, and so developed powerful rocket technologies instead, as these were not subject to regulation. Similarly, inflexible rules may permit exploitable loopholes. They may also not be sufficiently adaptive to allow for the implementation of new technologies and even improved industry standards.

Limitation of problem spaces: – It may be taboo to allow machine intelligence to work on sensitive issues or to be exposed to controversial (if potentially accurate) datasets. This may limit the ability of AI to make sense of out complex issues, and thereby frustrate finding solutions for crises.

#### That causes catastrophic AI since it’ll be controlled by rogues with no precautions AND without defensive countermeasures

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Attempts to block or “relinquish” [3, 12] molecular manufacturing research will make the world a more, not less, dangerous place [13]. This paradoxical conclusion is founded on two premises. First, attempts to block the research will fail. Second, such attempts will preferentially block or slow the development of defensive measures by responsible groups. One of the clear conclusions reached by Freitas [4] was that effective countermeasures against self-replicating systems should be feasible, but will require significant effort to develop and deploy. (Nanotechnology critic Bill Joy, responding to this author, complained in late 2000 that any nanoshield defense to protect against global ecophagy “appears to be so outlandishly dangerous that I can’t imagine we would attempt to deploy it.” [12]) But blocking the development of defensive systems would simply insure that offensive systems, once deployed, would achieve their intended objective in the absence of effective countermeasures. James Hughes [13] concurs: “The only safe and feasible approach to the dangers of emerging technology is to build the social and scientific infrastructure to monitor, regulate and respond to their threats.”

We can reasonably conclude that blocking the development of defensive systems would be an extraordinarily bad idea. Actively encouraging rapid development of defensive systems by responsible groups while simultaneously slowing or hindering development and deployment by less responsible groups (“nations of concern”) would seem to be a more attractive strategy, and is supported by the Foresight Guidelines [10]. As even nanotechnology critic Bill Joy [14] finally admitted in late 2003: “These technologies won’t stop themselves, so we need to do whatever we can to give the good guys a head start.”

While a 100% effective ban against development might theoretically be effective at avoiding the potential adverse consequences, blocking all groups for all time does not appear to be a feasible goal. The attempt would strip us of defenses against attack, increasing rather than decreasing the risks. In addition, blocking development would insure that the substantial economic, environmental, and medical benefits [15] of this new technology would not be available.

Observes Glenn Reynolds [16]:

To the extent that such efforts [to ban all development] succeed, the cure may be worse than the disease. In 1875, Great Britain, then the world’s sole superpower, was sufficiently concerned about the dangers of the new technology of high explosives that it passed an act barring all private experimentation in explosives and rocketry. The result was that German missiles bombarded London rather than the other way around. Similarly, efforts to control nanotechnology, biotechnology or artificial intelligence are more likely to drive research underground (often under covert government sponsorship, regardless of international agreement) than they are to prevent research entirely. The research would be conducted by unaccountable scientists, often in rogue regimes, and often under inadequate safety precautions. Meanwhile, legitimate research that might cure disease or solve important environmental problems would suffer.

#### AI regulation overshoots, destroying productive applications necessary to prevent existential catastrophes

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Although scientists have calculated the significant positive welfare effects of Artificial Intelligence (AI), fear mongering continues to hinder AI development. If regulations in this sector stifle our active imagination, we risk wasting the true potential of AIs dynamic efficiencies. Not only would Schumpeter dislike us for spoiling creative destruction, but the AI thinkers of the future would also rightfully see our efforts as the ‘dark age’ of human advancement. This article provides a brief philosophical introduction to artificial intelligence; categorizes artificial intelligence to shed light on what we have and know now and what we might expect from the prospective developments; reflects thoughts of worldwide famous thinkers to broaden our horizons; provides information on the attempts to regulate artificial intelligence from a legal perspective; and discusses how the legal approach needs to be to ensure the balance between artificial intelligence development and human control over them, and to ensure friendly artificial intelligence.

Our technology, our machines, is part of our humanity. We created them to extend ourselves, and that is what is unique about human beings. – Ray Kurzweil1

1. Introduction

The Chinese cardboard game “Go” is one of the most complex strategy games humankind invented. Go was considered so important, there are myths indicating that ancient kings played Go between their armies in the battlefield to resolve the conflict in peace. Computers prevailed against humanities best in many zero-sum, perfect-information, partisan, deterministic strategy games2 before, with the exception of Go, which was something to be proud of.

The strategy aspect of Go is very complex and emphasizes the importance of balance on multiple levels and has internal tensions. A game of Go cannot be won by using brute force: calculating every possible move, similar to what IBM®’s then state of the art AI, Deep Blue® used to win over Gary Kasparov. To manoeuvre through the countless possible moves on the Go board and chose the most efficient path, one requires capabilities beyond the conventional computing powers; capabilities only our minds have (or so we thought), such as extremely accurate image and pattern recognition and insight, all of which we thought granted us superiority over the artificial minds we created.

In October 2015, a software called “AlphaGo®” became the first computer to beat a professional human Go player in an un-handicapped game of Go (Silver and Hassabis, 2016). AlphaGo’s victory is probably one of the most significant demonstrations of the capabilities of an AI. Firstly, it shows that AIs are beginning to surpass us at things where success is dependent on strategy as well as calculation. Things we classify as a “game”, from stock exchange to conflicts, from contract negotiations to hostage situations. Second, AlphaGo developed strategies on its own, through playing millions of games against itself. These feats sent the chills down the spines of those who fear that AIs will overpower us in the future.

We humans accelerate the future with our minds. This is a strength and a weakness. Often, our predictions of the future are highly inaccurate. Based on predictions from a book called ‘The World in 2010’, published in 1976, we should have been living above and below the surfaces of three planets as of five years ago. Predictions regarding the future of AI are equally likely to be off base.

To avoid premature regulation over AI, we should be studying and searching for the meaningful point in time when a broader anxiety about AI becomes a genuine concern. The study of a point of ripeness, a ‘threshold ability test,’ asks when AI could really bring about concrete disadvantages that might counter-balance the demonstrated contribution to economic efficiency and welfare.

In the absence of such an objective benchmark marking the point in time when AI becomes a competitor with the human mind, regulators could easily jump the gun in regulating AI, which would lead to irreparable harm in total welfare of human societies.

Most of what we consider AI today is really our own intelligence re-formatted and re-cycled, with the help of computers lacking any skill of learning or consciousness of being. Regulation at this stage would be perverse. The economic efficiency potentials of AI should be set entirely free at this point in time, allowing us to actively and aggressively research appropriate goals for them which would not result in the extinction of humankind.

If you think our future robot overlords will one day thank us for ignoring the risks and under regulating, think again. On the one hand, any issues we may face from AIs will likely result from humanity failure to effectively direct AIs to our needs, not because we switched to a defensive AI regulation regime too early. On the other hand, at some point of time in the not too distant future, natural, human-related or external factors may threaten the fate of the Earth, and we may need AI to save the planet and us. One hopes that society has not pulled the hand brakes on the wheels of AI too early, fearing our own active imagination.

#### AI controls are inevitable, but will be gradual and incrementally ratchet up over time---they’ll start with liability and transparency, then move into specific applications, solving downside risk without imposing premature and ineffective regulation

Chris Reed 18, Professor of Electronic Commerce Law at Queen Mary, University of London, LLM from the University of London, “How Should We Regulate Artificial Intelligence?”, Philosophical Transactions of the Royal Society B, Volume 376, Issue 2128, 9/13/2018, https://royalsocietypublishing.org/doi/10.1098/rsta.2017.0360

Using artificial intelligence (AI) technology to replace human decision-making will inevitably create new risks whose consequences are unforeseeable. This naturally leads to calls for regulation, but I argue that it is too early to attempt a general system of AI regulation. Instead, we should work incrementally within the existing legal and regulatory schemes which allocate responsibility, and therefore liability, to persons. Where AI clearly creates risks which current law and regulation cannot deal with adequately, then new regulation will be needed. But in most cases, the current system can work effectively if the producers of AI technology can provide sufficient transparency in explaining how AI decisions are made. Transparency ex post can often be achieved through retrospective analysis of the technology's operations, and will be sufficient if the main goal is to compensate victims of incorrect decisions. Ex ante transparency is more challenging, and can limit the use of some AI technologies such as neural networks. It should only be demanded by regulation where the AI presents risks to fundamental rights, or where society needs reassuring that the technology can safely be used. Masterly inactivity in regulation is likely to achieve a better long-term solution than a rush to regulate in ignorance.

This article is part of a discussion meeting issue ‘The growing ubiquity of algorithms in society: implications, impacts and innovations'.

1. Introduction

It is hardly surprising that there has been a sudden interest in regulating artificial intelligence (AI). AI technology has moved from the research laboratory to become part of our daily lives with remarkable speed. We have seen the first fatal accident involving an autonomous vehicle [1,2], AI applications are analysing images to detect potentially cancerous cells [3] and numerous other implementations are in place or in the pipeline.

The introduction of AI technologies creates societal risks. Although AI technologies aim to augment or replace human decision-making, leading to fewer wrong decisions, there is no doubt that AI will still get it wrong sometimes. And the ways in which AI gets it wrong are likely to be very different from the ways in which a human would make mistakes. This feels dangerous to society. We want to know the kinds of risks we are running, and purely statistical arguments that AI makes us safer are not convincing to the wider population.

Good regulation would improve our perception of safety, and also our perception that humans remain in control. It could also mitigate any new risks which the use of AI creates. But bad regulation risks stifling the development and implementation of useful AI solutions, perhaps even without improving safety and control. Thus, we need to understand what regulation can and cannot do so that we can shape it appropriately. It is also important that those who produce and use AI technologies are actually able to comply with regulation, and that regulation does not stifle worthwhile advances in the technology. Outside specifically regulated sectors, the general approach of law and regulation is that innovation is freely permitted, but that those responsible must bear the consequences if that innovation causes certain types of harm. If our existing law and regulation can deal with AI innovation in that way, no immediate change is needed. The argument, if one exists, for requiring all those who adopt an AI technology to demonstrate that it achieves a higher standard of performance and reliability than other innovations has not yet been made out.

2. The problem

Fundamentally, the problem which regulation must seek to solve is that of controlling undesirable risks. For any truly useful AI technology, there is likely to be empirical evidence that it is more cost-effective and, ideally, more accurate at making decisions than the human-based solution it replaces. But that evidence will be based on comparison with the human-based solution, whose deficiencies are currently tolerated by society. An AI-based solution will have its own deficiencies, and these will be less acceptable if they produce wrong answers where a human would have decided correctly. Regulation ought therefore to focus on any new risks which the AI solution presents, recognizing that some of these risks will be as yet unknown.

Some commentators are so alarmed by the prospect of unknown risks that they have proposed the establishment of a general regulator for AI [4]. But, there are three strong arguments against introducing new, generally applicable legal and regulatory obligations at this moment.

First, any regulatory body needs a defined field of operation, and a set of overriding principles on the basis of which it will devise and apply regulation. Those principles will be based on mitigating the risks to society which the regulated activity creates. Until the risks of AI are known, at least to some degree, this is not achievable. Regulation cannot control unknown risks, and devising a regulatory mandate on the basis of speculative risks seems unlikely to produce successful results.

Second, lawmakers are generally unsuccessful at prospective regulation, particularly in technology fields. The history of legislating prospectively for the digital technologies is one of almost complete failure [5].

Finally, and most importantly, a regulatory regime which aimed to deal with all uses of AI technology would be impossibly wide in scope. The range of potential applications is far too diverse, and it would be foolish to apply the same regulatory regime to autonomous vehicles as to smart refrigerators which order groceries based on consumption patterns. Probably, there is no plausible, let alone compelling, reason to regulate smart refrigerators at all. A regulatory project of this kind would risk becoming a project to regulate all aspects of human life.

The better strategy is to approach the problem incrementally. Some of the risks likely to be posed by AI technology are already apparent, and legal or regulatory action can be taken now to deal with them. Others will make themselves known as the technology becomes more widely used and can be dealt with in the same way. At some point, it will become apparent whether specific regulation is needed, and if so the scope and focus of that regulation will be possible to devise. But at present, we are some distance away from that point.

#### No extinction from lack of sustainability---humans and the environment adapt

Dr. Robert Brinkmann 20, Professor of Geology, Environment, and Sustainability and Vice Provost for Scholarship and Research and Dean of Graduate Studies at Hofstra University, PhD in Geography from the University of Wisconsin-Madison and MSc in Geology from the University of Wisconsin-Madison, Environmental Sustainability in a Time of Change, p. 11-13

Sustainability tends to be focused on the now and on the future—how can we change what we are doing today to improve the ability of upcoming generations to thrive? We often do not look at the past and always seem to look at the present moment as our starting point for making improvements. On occasion, we point to the industrial revolution as the beginning of when things started to get out of control on the planet, but we rarely assess the sustainability of the past and often consider that times before us were much more simple or easier on the planet than the present. In many ways, this is a fundamental flaw of sustainability—our inability to look at the past creates serious limitations for the discipline. In fact, the field largely emerged out of a single report—The Brundtland Report or Our Common Future from 1987, as was discussed in Chap. 1 (Brundtland 1987). In that report, there were references to the past and unsustainable practices, but it did not systematically assess the past or provide much context beyond referencing relatively recent unsustainable practices of the twentieth century.

This chapter that every living organism has seeks to remedy the lack of substantive historical perspective in the theory and analysis of sustainability by bringing the historic idea front and center. Certainly we know some impact on the planet, but the distribution of the impact varies over time and space. While our impacts can be severe, they are not entirely unique or unexpected based on the places and times when human activity was dominant over other organisms in a region. As we will see, there are surprising and interesting social, economic, and environmental impacts that emerged at different places and times that provide context for our present interpretation of global, regional, and local sustainability. As Stephen King so interestingly notes in his Dark Tower (1982) series, “time moves on.” As it does, it doesn’t fully change human character. As time moves on, we transform the world and it changes us. What allows us to thrive or disappear is our ability to adapt to new conditions—in other words, in order to survive, we need to learn to become more sustainable within our environment.

The study of history shows us that there are many examples of cultural rise and fall. Indeed, we tend to focus on the spectacular events in history that cause sudden shifts. The rise and fall of the Roman Empire is perhaps the most cited example (1782), but the fall of the great monarchies of Europe (Davison 2018) and Asia (Frankopan 2017) are also examples. Yet what is sometimes lost in the telling of these histories is that while there are sudden jolts to human society, there is also great steadiness. The monarchy of the ancient Egyptians, for example, lasted thousands of years until the conquest of Rome. Some would even argue that the Roman Empire lived on in the monarchies of Europe and the Middle East and in the democracies of the Americas. Regardless, the point is that while there are sudden shifts, there are also important adaptations as societies react to changing social values, technologies, and environments. For indeed, regardless of time, humans do change their environments. As early hunters and gatherers, we subtly changed ecosystems as we drove some large animals to extinction (Burney and Flannery 2005). We also preferenced some plants and gradually developed agriculture (Qin et al. 2017). Once established, our farming practices significantly transformed the distribution of plants and animals and changed environments. As we developed settlements and cities, we built buildings, developed trade and transportation networks, and created complex economies and social structures (Earle 2011). Our modern impacts are large, but we have always been transforming the planet. The question is really how quickly can we adapt to the changes and whether or not the changes we make will lead to the region’s ability to support its human population.

This chapter takes a look at three distinct locations to discuss the way we can view sustainability through an historical lens. While Jared Diamond took a similar approach in his book, Collapse: How Societies Choose to Fail or Succeed (2011), my approach is much more positive. Diamond focused on examples where societies made decisions that resulted in significant ecological and social collapse. Perhaps the most cited example is from Easter Island where Diamond notes that the indigenous people of the island cut down all of the trees to make transportation devices to move the spectacular large head carvings that grace the slopes of the island. While it is a fascinating example, I contend that it does not represent the bulk of human society. We certainly do make mistakes, but we also are able to persevere. The presence of nearly 8 billion people is evidence of our success as a population, and not of our collapse and failure. The three examples presented here are all from North America and are significant because they show how societies adapted to social and environmental change over time. Some may question the use of three examples from one part of the world in a book that seeks to address sustainability at a global scale. In reality, one can find examples like this anywhere in the world. These are my examples. I urge readers to find their own historical examples from their own regions where people in the past were challenged by sustainability issues in the realms of social justice, environmental degradation, or economic growth or decline.

The first example is from prehistoric Wisconsin where a local indigenous group was confronted with another colonizing indigenous group. While there is no historical record of the meeting, archaeologists have puzzled out a fascinating interaction from the archaeological record that allow one to consider the issues of social justice within the realm of sustainability from a prehistoric perspective. As will be seen, there was considerable social change in the area that had long-term impacts for the environment and the local population. The second example comes to us from the early nineteenth-century California, where Russian colonists came to the present-day coastal Sonoma County in Northern California to establish a seal-hunting operation. They brought with them native Alaskans and interacted with native Californians, Spanish colonists from California, and Americans who found their way to the western coast of North America. The Russians found themselves in a difficult ecosystem and tried to adapt to the new region. They also caused profound environmental change. Eventually, they, and the people they impacted, had to react to the environmental change by making key decisions that had profound impacts on not only the environment, but the history of the United States and Russia. The final example comes from Michigan State University where archaeologists have been reconstructing the history of the campus through a campus archaeology program. Throughout its history, the university has been making business decisions regarding its operations that can be seen in the archaeological record. The choices that were made by administrators, faculty, and students allow one to consider how practical day-to-day management and economic decision-making can lead to complex sustainability challenges.

Some may consider that the three examples may not represent the challenges we are facing today. I would argue that they actually represent a more realistic way of approaching sustainability than that portrayed by Jared Diamond. I would also argue that while we are facing unprecedented sustainability problems that call into question the future of our society, each example references existential issues for their times. To the people that lived through the events, the issues were just as significant as our modern challenges associated with climate change or water scarcity. The first two examples are from a class of sustainability issues I call suffering sustainability. They reflect on moments of time where there are existential threats to continuation of society. The third example is from a class of sustainability issues I call surfing sustainability. There is no existential threat, just a desire to create a better and more sustainable life. There will be more in upcoming chapters about surfing and suffering sustainability. For now, it is just worth noting that while our times are unique due to the global challenges we face, the actual historical dilemmas individuals faced were similar to our own: how can we and our offspring survive into the future?

## Smart Pricing ADV

### Smart Pricing ADV---1NC

#### Ideological judges will gut the plan

John Newman 19, Professor of Law at the University of Miami School of Law and Former Attorney with the U.S. Department of Justice Antitrust Division, JD from the University of Iowa College of Law, BA from the Iowa State University of Science & Technology, “What Democratic Contenders Are Missing in the Race to Revive Antitrust”, The Atlantic, 4/1/2019, https://www.theatlantic.com/ideas/archive/2019/04/what-2020-democratic-candidates-miss-about-antitrust/586135/

But the federal courts represent a massive stumbling block for any progressive antitrust movement. Reformers have identified two paths forward; both lead eventually to the court system. The first is relatively moderate: appoint regulators who will actually enforce the laws already on the books. Warren’s plan rests in part on this straightforward idea. The second, more audacious path requires congressional action to amend and strengthen our current laws. Warren’s call for a new ban on technology companies’ buying and selling via their own platforms falls into this category. Klobuchar has also proposed new antitrust legislation that would make it easier to block harmful mergers and acquisitions.

But no matter its content, enforcing a law requires persuading a judge. When it comes to U.S. antitrust laws, federal judges—not Congress, and not regulatory agencies—are the ultimate arbiters. The Department of Justice Antitrust Division, one of our two public enforcement agencies, files all its cases in federal courts. And although the Federal Trade Commission (the other) can decide cases internally, the inevitable appeals eventually end up in court as well.

No matter how strongly worded a law may be, ideologically driven judges can usually find a way around enforcing it. The cyclical history of U.S. antitrust law is proof that judges wield nearly limitless institutional power in this area.

Soon after Congress passed the Sherman Act in 1890, a conservative Supreme Court began to chip away at its effectiveness. Congress reacted in 1914 with the Clayton Act, which sought to ban anticompetitive mergers. In 1936, at the height of the New Deal era, Congress passed the Robinson-Patman Act, which prohibits price discrimination (charging different prices to different buyers for the same product). These laws were actively enforced for decades.

But starting in the late 1970s, conservative judges began to erode the Clayton Act. Today, megamergers among competitors such as Bayer and Monsanto barely raise eyebrows. So-called vertical mergers, which combine suppliers and their customers, are now all but immune from antitrust enforcement—see the DOJ’s failed challenge to AT&T and Time Warner’s recent tie-up.

Under the business-friendly Roberts Court, the Robinson-Patman Act has similarly been eviscerated. By the 2000s, the ideas of the conservative Chicago School had become mainstream in antitrust circles. Robinson-Patman, a law intended to protect small businesses, was an easy target for Chicago School critics narrowly focused on efficiency and low consumer prices. Their attacks found a receptive audience in the federal judiciary. Among insiders, Robinson-Patman is now known as “zombie law.” It remains on the books, but regulators no longer bother trying to enforce it.

If Democrats want to change antitrust law, they will first and foremost need to change the judges who apply it. Yet none of the 2020 contenders championing antitrust reform have even mentioned the possibility of appointing progressive antitrust thinkers to the bench.

Conservatives, on the other hand, have long recognized the centrality of antitrust to broader questions about the apportionment of power in society. In his seminal work, The Antitrust Paradox, Robert Bork called antitrust a “microcosm in which larger movements of our society are reflected.” Battles fought in this arena, Bork wrote, “are likely to affect the outcome of parallel struggles in others.” Strong antitrust enforcement keeps powerful monopolies in check. Toothless antitrust allows the unlimited accumulation of corporate power.

Recognizing the high stakes, the Republican Party has gone to great lengths to appoint conservative antitrust experts to the federal judiciary. Bork was an antitrust professor at Yale Law School before becoming an appellate judge in 1982.\* Frank Easterbrook practiced and taught antitrust before donning the black robe in 1985. Douglas Ginsburg served as the head of the Justice Department’s Antitrust Division before he became a federal judge in 1986. None of the three managed to join the Supreme Court, but not for lack of trying. Reagan nominated both Bork and Ginsburg to serve as justices, though Ginsburg withdrew and Bork was famously rejected after a contentious Senate hearing.

And whom did the GOP select as its very first U.S. Supreme Court nominee during the Trump Administration? None other than Neil Gorsuch, who practiced antitrust law for more than a decade before joining the Tenth Circuit. Even as a judge, Gorsuch continued to teach a law-school course on antitrust until his confirmation to the Supreme Court in 2017.

Once upon a time, progressives demonstrated similar concern about judicial treatment of antitrust laws. Justice Stephen Breyer, for example, served as special assistant to the head of the DOJ Antitrust Division before his judicial appointment by President Jimmy Carter. Earlier still, Justice John Paul Stevens was an antitrust lawyer, scholar, and professor before his appointment to the bench.

Today’s Democratic 2020 hopefuls seem to have forgotten the lessons of history. Their antitrust proposals focus exclusively on appointing the right regulators and amending our current statutes. These are right-minded ideas, but they overlook the central role judges play in our political system.

There is an old saying in the legal community: “Hard cases make bad law.” That may be true, but it is just as often the case that bad judges make bad law. Real antitrust reform will require more than regulatory and legislative tweaks; it will require the right judges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Grid’s resilient---no collapse

Jim Avila 12, Senior National Correspondent at ABC News, “A U.S. Blackout as Large as India’s? ‘Very Unlikely’”, http://abcnews.go.com/blogs/headlines/2012/07/a-u-s-blackout-as-large-as-indias-very-unlikely/

As India recovers from a blackout that left the world’s second-largest country — and more than 600 million residents — in the dark, a ripple of uncertainty moved through the Federal Regulatory Commission’s command center today in the U.S. The Indian crisis had some people asking about the vulnerability of America’s grid. “What people really want to know today is, can something like India happen here? So if there is an outage or some problem in the Northeast, can it actually spread all the way to California,” John Wellinghoff, the commission’s chairman, told ABC News. “It’s very, very unlikely that ultimately would happen.” Wellinghoff said that first, the grid was divided in the middle of the nation. Engineers said that it also was monitored more closely than ever. The grid is checked for line surges 30 times a second. Since the Northeast blackout in 2003 — the largest in the U.S., which affected 55 million — 16,000 miles of new transmission lines have been added to the grid. And even though some lines in the Northeast are more than 70 years old, Wellinghoff said that the chances of a blackout like India’s were very low.

#### Grid strong now

Krysti Shallenberger 17, Utility Dive associate editor, 1-5-2017, "Predictions 2017: 8 sector insiders on what's next for power markets and regulation," Utility Dive, http://www.utilitydive.com/news/predictions-2017-8-sector-insiders-on-whats-next-for-power-markets-and-re/433358/

The traditional drivers of infrastructure additions were load growth and connecting distant generation sources to population centers. However, that has changed. Load growth is negligible in many areas. (At PJM we forecast peak load growth of less than half of one percent per year.) At the same time, more efficient technology, specifically energy efficiency and new natural gas combined cycle generation closer to load centers, has changed power flow patterns, which reduces the need for additional large-scale transmission expansion projects. The reduction in larger scale projects has allowed focus to be shifted to resolving aging infrastructure concerns on lower-voltage facilities. More efficient technologies, the capacity performance construct and upgrades to the system have made the grid increasingly robust and resilient. Last summer, for example, was the first time PJM met a peak demand of more than 150,000 megawatts without invoking emergency procedures and while net exporting power.

#### Solar flares don’t wreck grid

**Lovett 12**—quoting Tom Bogdan, Ph.D. in Physics from UChicago, Director of the National Oceanic and Atmospheric Administration’s Space Environment Center – AND – Rodney Viereck, Leader of the Data and Instrumentation Group Research Division NOAA Space Environment Center (Richard, National Geographic News, March 8, 2012, <http://news.nationalgeographic.com/news/2012/03/120308-solar-flare-storm-sun-space-weather-science-aurora/>, ZBurdette)

Even now, the center's Bogdan said, the most damaging emissions from big storms travel slowly enough to be detected by sun-watching satellites **well before** the particles strike Earth. "That gives us [about] 20 hours to determine what actions we need to take," Viereck said. (Related pictures: "Multicolored Auroras Sparked by Double Sun Blast" [August 2011].) In a pinch, power companies could protect valuable transformers by taking them offline before the storm strikes. That would produce local blackouts, but they wouldn't last for long. "The good news is that these storms tend to pass after a couple of hours," Bogdan added. Meanwhile, scientists are scrambling to learn everything they can about the sun in an effort to produce even longer-range forecasts.

#### No blackouts

Selena Larson 18, Cyber Threat Intelligence Analyst at Dragos, Inc., “Threats to Electric Grid are Real; Widespread Blackouts are Not”, 8/6/2018, https://dragos.com/blog/industry-news/threats-to-electric-grid-are-real-widespread-blackouts-are-not/

The US electric grid is not about to go down. Though it’s understandable if someone believed that. Over the last few weeks, numerous media reports suggest state-backed hackers have infiltrated the US electric grid and are capable of manipulating the flow of electricity on a grand scale and cause chaos. Threats against industrial sectors including electric utilities, oil and gas, and manufacturing are growing, and it’s reasonable for people to be concerned. But to say hackers have invaded the US electric grid and are prepared to cause blackouts is false. The initial reporting stemmed from a public Department of Homeland Security (DHS) presentation in July on Russian hacking activity targeting US electric utilities. This presentation contained previously-reported information on a group known as Dragonfly by Symantec and which Dragos associates to activity labeled DYMALLOY and ALLANITE. These groups focus on information gathering from industrial control system (ICS) networks and have not demonstrated disruptive or damaging capabilities. While some news reports cite 2015 and 2016 blackouts in Ukraine as evidence of hackers’ disruptive capabilities, DYMALLOY nor ALLANITE were involved in those incidents and it is inaccurate to suggest the DHS’s public presentation and those destructive behaviors are linked. Adversaries have not placed “cyber implants” into the electric grid to cause blackouts; but they are infiltrating business networks – and in some cases, ICS networks – in an effort to steal information and intelligence to potentially gain access to operational systems. Overall, the activity is concerning and represents the prerequisites towards a potential future disruptive event – but evidence to date does not support the claim that such an attack is imminent. The US electric grid is resilient and segmented, and although it makes an interesting plot to an action movie, one or two strains of malware targeting operational networks would not cause widespread blackouts. A destructive incident at one site would require highly-tailored tools and operations and would not effectively scale. Essentially, localized impacts are possible, and asset owners and operators should work to defend their networks from intrusions such as those described by DHS. But scaling up from isolated events to widespread impacts is highly unlikely.

#### The US is irrelevant.

Christopher Fettweis 17. Associate Professor of Political Science at Tulane University. “Unipolarity, Hegemony, and the New Peace,” Security Studies, 26:3, 423-451, 5-8-2017, http://dx.doi.org/10.1080/09636412.2017.1306394

Conflict and Hegemony by Region Even the most ardent supporters of the hegemonic-stability explanation do not contend that US influence extends equally to all corners of the globe. The United States has concentrated its policing in what George Kennan used to call “strong points,” or the most important parts of the world: Western Europe, the Pacific Rim, and Persian Gulf.64 By doing so, Washington may well have contributed more to great power peace than the overall global decline in warfare. If the former phenomenon contributed to the latter, by essentially providing a behavioral model for weaker states to emulate, then perhaps this lends some support to the hegemonic-stability case.65 During the Cold War, the United States played referee to a few intra-West squabbles, especially between Greece and Turkey, and provided Hobbesian reassurance to Germany’s nervous neighbors. Other, equally plausible explanations exist for stability in the first world, including the presence of a common enemy, democracy, economic interdependence, general war aversion, etc. The looming presence of the leviathan is certainly among these plausible explanations, but only inside the US sphere of influence. Bipolarity was bad for the nonaligned world, where Soviet and Western intervention routinely exacerbated local conflicts. Unipolarity has generally been much better, but whether or not this was due to US action is again unclear. Overall US interest in the affairs of the Global South has dropped markedly since the end of the Cold War, as has the level of violence in almost all regions. There is less US intervention in the political and military affairs of Latin America compared to any time in the twentieth century, for instance, and also less conflict. Warfare in Africa is at an all-time low, as is relative US interest outside of counterterrorism and security assistance.66 Regional peace and stability exist where there is US active intervention, as well as where there is not. No direct relationship seems to exist across regions. If intervention can be considered a function of direct and indirect activity, of both political and military action, a regional picture might look like what is outlined in Table 1. These assessments of conflict are by necessity relative, because there has not been a “high” level of conflict in any region outside the Middle East during the period of the New Peace. Putting aside for the moment that important caveat, some points become clear. The great powers of the world are clustered in the upper right quadrant, where US intervention has been high, but conflict levels low. US intervention is imperfectly correlated with stability, however. Indeed, it is conceivable that the relatively high level of US interest and activity has made the security situation in the Persian Gulf and broader Middle East worse. In recent years, substantial hard power investments (Somalia, Afghanistan, Iraq), moderate intervention (Libya), and reliance on diplomacy (Syria) have been equally ineffective in stabilizing states torn by conflict. While it is possible that the region is essentially unpacifiable and no amount of police work would bring peace to its people, it remains hard to make the case that the US presence has improved matters. In this “strong point,” at least, US hegemony has failed to bring peace. In much of the rest of the world, the United States has not been especially eager to enforce any particular rules. Even rather incontrovertible evidence of genocide has not been enough to inspire action. Washington’s intervention choices have at best been erratic; Libya and Kosovo brought about action, but much more blood flowed uninterrupted in Rwanda, Darfur, Congo, Sri Lanka, and Syria. The US record of peacemaking is not exactly a long uninterrupted string of successes. During the turn-of-the-century conventional war between Ethiopia and Eritrea, a highlevel US delegation containing former and future National Security Advisors (Anthony Lake and Susan Rice) made a half-dozen trips to the region, but was unable to prevent either the outbreak or recurrence of the conflict. Lake and his team shuttled back and forth between the capitals with some frequency, and President Clinton made repeated phone calls to the leaders of the respective countries, offering to hold peace talks in the United States, all to no avail.67 The war ended in late 2000 when Ethiopia essentially won, and it controls the disputed territory to this day. The Horn of Africa is hardly the only region where states are free to fight one another today without fear of serious US involvement. Since they are choosing not to do so with increasing frequency, something else is probably affecting their calculations. Stability exists even in those places where the potential for intervention by the sheriff is minimal. Hegemonic stability can only take credit for influencing those decisions that would have ended in war without the presence, whether physical or psychological, of the United States. It seems hard to make the case that the relative peace that has descended on so many regions is primarily due to the kind of heavy hand of the neoconservative leviathan, or its lighter, more liberal cousin. Something else appears to be at work.

#### Economic decline doesn’t cause war

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

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

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

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

# 2NC

## Admin ADV

### Shift---Offshoring---2NC

#### Offshoring’s quick, easy, and guaranteed by overwhelming economic incentives---it zeros solvency

Matthew U. Scherer 16, Senior Policy Counsel for Worker Privacy at the Center for Democracy & Technology, J.D. from Georgetown University Law Center, Former Editor-in-Chief of The Georgetown Journal of Legal Ethics, M.S. in Educational Policy from the University of Pennsylvania’s Graduate School of Education, Attorney at Buchanan Angeli Altschul & Sullivan LLP, “Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies”, Harvard Journal of Law and Technology, 29 Harv. J. Law & Tec 353, Volume 29, Number 2, Spring 2016, Lexis

The sources of public risk that characterized the twentieth century -- such as nuclear technology, mass-produced consumer goods, industrial-scale pollution, and the production of large quantities of toxic substances -- required substantial infrastructure investments. This simplified the regulatory process. The high cost of building the necessary facilities, purchasing the necessary equipment, and hiring the necessary labor meant that large corporations were the only non-governmental entities capable of generating most sources of public risk. Moreover, the individuals responsible for installing, operating, and maintaining the infrastructure typically had to be at the physical site where the infrastructure was located. The physical visibility of the infrastructure -- and of the people needed to operate it -- made it extremely unlikely that public risks could be generated clandestinely. 61 Regulators thus had little difficulty determining the "who" and "where" of potential sources of public risk.

By contrast, AI research and development can be performed relatively discreetly, a feature that AI shares with many other Information Age technologies. In 2009, Professor John McGinnis wrote that "[a]rtificial intelligence research is done by institutions no richer than colleges and perhaps would require even less substantial resources." 62 This actually overstated the resources necessary to participate in AI development, particularly with the rise of open-source programming. Simply put, a person does not need the resources and facilities of a large corporation to write computer code. Anyone with a reasonably modern personal computer (or even a smartphone) and an Internet connection can now contribute to AI-related projects. Individuals thus can participate in AI development from a garage, a dorm room, or the lobby of a train station. This potential for discreetness provides the most jarring difference between AI and earlier sources of public risk.

The participants in an AI-related venture may also be remarkably diffuse by public risk standards. Participants in an AI-related project need not be part of the same organization -- or, indeed, any organization at all. Already, there are a number of open-source machine-learning libraries; widely dispersed individuals can make dozens of modifications to such libraries on a daily basis. 63 Those modifications may even be made anonymously, in the sense that the identity in the physical world of individuals making the modifications is not readily discernible. 64

The AI program itself may have software components taken from multiple such libraries, each of which is built and developed discretely from the others. 65 An individual who participates in the building of an open-source library often has no way of knowing beforehand what other individuals or entities might use the library in the future. Components taken from such libraries can then be incorporated into the programming of an AI system that is being developed by an entity that did not participate in assembling the underlying machine-learning library.

These characteristics are not limited to open-source projects or freely available material. Many modern computer systems use commercial off-the-shelf ("COTS") hardware and software components, most of which are proprietary. 66 The ease with which such components can be acquired makes it tempting to maximize use of COTS components to control costs, despite the potential security issues associated with using software components developed wholly outside the system developer's control. 67 Modern AI programming is no exception; few, if any, AI systems are built from the ground up, using components and code that are wholly the creation of the AI developers themselves. Moreover, if past is prologue, the physical components of an AI system will be manufactured by yet other entities separate from those that developed the AI system's programming. While separately developed components are present in all complex machinery to a certain extent, the level of discreteness and the scale of interactivity between software and hardware components in modern computer systems already rivals or exceeds that of prior technologies, and that complexity seems likely to increase further with the development of stronger forms of AI. 68

In all likelihood, there will be considerable variation in the discreteness of the components of AI projects. Some AI systems likely will be built primarily with COTS or freely available hardware and software components, while others will mostly utilize programming and physical components designed and developed specifically for the AI project in question. Because of the cost advantages inherent in maximizing the use of COTS and freely available components, however, it seems all but certain that some AI systems will operate using a mishmash of hardware and software components harvested from many different companies. The interaction between numerous components and the disparate geographic locations of the companies involved will greatly complicate any regime designed to manage the risks associated with AI. 69

Finally, the inner workings of and the interactions between the components of an AI system may be far more opaque than with earlier technologies. COTS software components may be easy to acquire, but their coding often is proprietary. Critical features underlying an AI system's operation thus may not be immediately apparent or readily susceptible to reverse engineering. Contrast this with automobiles -- one of the twentieth century's great sources of public risk. Automobiles consist of approximately 30,000 individual physical parts, 70 but the ways in which those physical components interact is well understood -- not only by the designers and manufacturers of the vehicle itself, but also by the makers of parts for the vehicle and mechanics responsible for repairing the vehicles after they reach consumers. It seems unlikely that AI systems will demonstrate similar transparency if their development follows now-prevailing trends in information technology. Defects in the design of a complex AI system might be undetectable not only to consumers, but also to downstream manufacturers and distributors. 71

Taken together, these characteristics confront regulators with fundamental logistical difficulties that were not present in earlier sources of public risk. Participants in AI projects may be located in multiple countries and have no legal or formal contractual relationship with one another. Attempts by any one country to regulate their citizens' participation in such projects may not greatly impact the projects' development. Even for projects involving large firms, the relatively low cost of infrastructure and the small physical footprint required for AI development means that firms could simply move AI development work offshore if regulations in their country of origin prove too intrusive. Many would likely do so given the competitive advantages that accompany advances in AI. 72 [FOOTNOTE] 72 See, e.g., Vernor Vinge, The Coming Technological Singularity: How to Survive in the Post-Human Era, 10129 NASA CONF. PUBLICATION 11, 15 (1992), http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940022855.pdf [https://perma.cc/J2SU-UK5E] ("In fact, the competitive advantage . . . of every advance in automation is so compelling that passing laws, or having customs, that forbid [human-level AI] merely assures that someone else will get them first."). [END FOOTNOTE]

#### They’ll move to havens with lax standards to dodge regulation

Dr. Amanda Askell 19, Research Scientist on the Policy Team at OpenAI, PhD in Philosophy from New York University, Dr. Miles Brundage, AI Policy Research Fellow with the Centre for the Governance of AI at Future of Humanity Institute, PhD in Human and Social Dimensions of Science and Technology from Arizona State University, and Gillian Hadfield, Schwartz Reisman Chair in Technology and Society, Professor of Law, and Professor of Strategic Management at the University of Toronto, PhD in Economics from Stanford University, “The Role of Cooperation in Responsible AI Development”, Computers and Society, https://arxiv.org/abs/1907.04534

1.4.4 The difficulty of constructing effective AI regulation

There is currently little in the way of AI-targeted regulation, including government regulation, industry self-regulation, international standards, and clarity on how existing laws will be applied to AI (see note 13). Well-designed regulatory mechanisms can incentivize companies to invest appropriate resources in safety, security, and impact evaluation when market failures or coordination failures have weakened the other incentives to do so. Poorly-designed regulation can be harmful rather than helpful, however. Such regulation can discourage innovation (Heyes, 2009) and even increase risks to the public (Latin, 1988).

AI regulation seems particularly tricky to get right, as it would require a detailed understanding of the technology on the part of regulators.21 The fact that private AI companies can generally relocate easily also means that any attempt to regulate AI nationally could result in international regulatory competition rather than an increase in responsible development.22 Regulation that is reactive and slow may also be insufficient to deal with the challenges raised by AI systems. AI systems can operate much faster than humans, which can lead to what Johnson et al. (2013) call ‘ultrafast extreme events’ (UEEs) such as flash crashes caused by algorithmic trading.23

### Shift---Offshoring---Impact---Turns Bad AI

#### Offshoring worsens AI danger---it’ll be constrained by U.S. social norms, but not if it moves abroad

John O. McGinnis 17, George C. Dix Professor in Constitutional Law at Northwestern University and a Contributing Editor at Law & Liberty, Graduate of Harvard College, Balliol College, Oxford, and Harvard Law School, “Accelerate Rather than Regulate Artificial Intelligence”, Law & Liberty, 7/19/2017, <https://lawliberty.org/accelerate-rather-than-regulate-artificial-intelligence/> [language modified]

But trying to slow down or have the government direct and restrict AI (which is much the same thing) in the United States would only allow other nations to advance AI faster. And since AI is at the heart of modern military operations, the United States would lose its essential military advantage. If the United States remains the best hope for freedom for [hu]mankind, certainly as compared to China, our greatest competitor in AI, that is a disastrous geopolitical policy.

Indeed, even without regulation my great fear is that the United States will fall behind China in developing AI. Given that data is what trains modern AI, China’s sheer size gives it an advantage because it generates more data. And even beyond its potentially larger pool of researchers, its universities are more geared to the sciences than are ours. Of course the United States does have advantages, such as finer top universities and a more attractive, more free society. Thus, what the United States can best do to accelerate AI here is to give after an appropriate security vetting a green card to any Ph.D from a bona fide university or to any student who has been accepted here to a doctorate program in computer science. And as I have suggested, it should also accelerate government grants to encourage the development of a friendly AI–one that is not dangerous to humans.

These policies would not only help maintain the security of the United States, but would give us the best chance of forestalling malevolent AI. That kind of AI is more likely to be developed in less free societies, because the social norms of those society will subject researchers to less criticism for such development. Moreover, accelerating the development of friendlier AI would create better machine intelligence to help forestall the less friendly kind.

Ever stronger AI is on the horizon. The only question is where it will be developed most quickly. The world will be better off if that place is the United States.

### Shift---Countermeasures---2NC

#### Even the strictest possible regs won’t stop determined scientists and even one is enough---the only check is quickly deployable defensive tech BUT that’s wrecked by regulation

Ray Kurzweil 18, Received 21 Honorary Doctorates, Received the 1999 National Medal of Technology and Innovation, American Inventor and Futurist, Member of the National Academy of Engineering, BS in Computer Science from MIT, “The Deeply Intertwined Promise and Peril of GNR”, Artificial Intelligence Safety and Security, Ed. Yampolskiy, p. 31

Insights from the brain-reverse-engineering effort, overall research in developing AI algorithms, and ongoing exponential gains in computing platforms make strong AI (AI at human levels and beyond) inevitable. Once AI achieves human levels, it will necessarily soar past it because it will combine the strengths of human intelligence with the speed, memory capacity, and knowledge sharing that nonbiological intelligence already exhibits. Unlike biological intelligence, nonbiological intelligence will also benefit from ongoing exponential gains in scale, capacity, and price-performance.

Totalitarian relinquishment. The only conceivable way that the accelerating pace of advancement on all of these fronts could be stopped would be through a worldwide totalitarian system that relinquishes the very idea of progress. Even this specter would be likely to fail in averting the dangers of GNR because the resulting underground activity would tend to favor the more destructive applications. This is because the responsible practitioners that we rely on to quickly develop defensive technologies would not have easy access to the needed tools. Fortunately, such a totalitarian outcome is unlikely because the increasing decentralization of knowledge is inherently a democratizing force.

### Shift---Superweapons---2NC

#### They’ll move to DEWs, heliobeams, or gravity weapons---those destroy the universe!

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Second, there could be so many different species and civilizations in the future that determining who exactly perpetrated an attack could pose an impossibly complicated forensic challenge. This too could undercut the threat of retaliation.

And third, so could the weapons available to technologically advanced future civilizations. For example, the US military is already experimenting with “direct-energy weapons” (DEWs) like laser and particle-beam weapons that can attack a target at or nearly at the speed of light. Since nothing travels faster than light — not even a message saying, “Help us, we were just attacked!” — the use of powerful DEWs by a Kardashev type II civilization, for example, could eliminate the threat of a counterstrike.

This differs from the Cold War situation in which each side could detect nuclear missiles traveling through the air with enough time to consult the relevant decision-making bodies and determine whether or not to strike back. Civilizations couldn’t possibly see a deadly laser beam that destroys crucial infrastructure coming; the damage would occur before a warning message from allies could ever reach them.

There are also biological and nanotech agents that civilizations could launch across the galaxy at each other, martial von Newman probes that are aided by metamaterial invisibility cloaks, “heliobeams” that concentrate large amounts of solar radiation on targets, and maybe even “gravity weapons” that use gravitational waves to create black holes (a speculative idea that appears to fall within the realm of physical possibility). Even more, the universe is teaming with asteroids and comets that could be catapulted toward planets or spaceships, with more destructive consequences than a swarm of hydrogen bombs. Some have called these “planetoid bombs,” since asteroids and comets are “planetoids.”

We also shouldn’t overlook the possibility that future civilizations devise entirely novel “weapons of total destruction” (WTDs). Just as our Paleolithic ancestors would be dumbstruck by the extraordinary mechanisms of mass death available to modern humans, so too might we be horrified by the weapons that our spacefaring children invent — say, WTDs that move at close to lightspeed and wreak galactic- or cosmic-scale hazards.

The cherry on the cake is that even a perfectly peaceable civilization might have strong incentives to obliterate its neighbors. For example, imagine two civilizations with radically different political, cultural, and religious traditions. They can’t even communicate very well because they speak entirely different languages and have evolved, through natural selection and cyborgization, divergent emotional repertoires and mental categories. They have different internal models of the world, distinct perceptual and phenomenological experiences, and incompatible “normative” worldviews.

Consequently, neither is able to trust the other. The result is that it would be rational for each to annihilate the other merely to ensure that the other doesn’t annihilate one first. Worse, if a civilization X believes that a civilization Y is rational, then X will believe that Y believes that it should annihilate X so that X doesn’t annihilate Y, since X annihilating Y would be the rational thing to do. (Whew!) This line of reasoning provides X an even stronger reason to annihilate Y, and therefore Y an even stronger reason to annihilate X — thus yielding a “spiral” of escalating tensions that ultimately culminates in war, despite both X and Y wishing for peace. Scholars know this as the “Hobbesian trap.”

But civilizations may have an equally strong incentive to destroy their neighbors even if they believe that those neighbors are irrational (rather than rational). For example, consider a civilization A that is full of irresponsible particle physicists. Civilization A has no bad intentions, yet it conducts physics experiments that could inadvertently end the universe. Another civilization B might try to reason with A not to conduct these experiments, but let’s imagine that A ultimately resists. In order to save A from annihilating the universe by accident, B may thus opt to launch a preemptive attack against A to avert a cosmic disaster.

Generalizing this case, since any given civilization will have some probability of accidentally destroying the universe, it would be in every civilization’s self-interest to destroy everyone else merely to obviate accidental cosmic calamities. This may be especially true if evolutionary adaptive radiation produces numerous species unable to fully grasp each others’ intentions, cognitive abilities, or moral values. The possibilities for miscommunication here are immense — and this should worry rather than reassure us.

### Good AI---Link---2NC

#### It’s impossible to only regulate ‘bad’ AI without stifling the ‘good’. Tech is too far off and unpredictable AND humans have no current baseline for understanding, let alone assessing or guiding, productive means. Premature regulation drives straight to extinction.

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3. Protecting human dominance through regulation or setting tailored goals to maintain human existence

Having a timeless and robust definition of AI is of paramount importance when thinking of regulating AI. One cannot regulate a certain subject without establishing a robust definition of what it regulates. The ambiguity of the definition of AI is mainly due to the “I”, “intelligence” of the AI. Concepts like “intelligence”, “consciousness”, “free will” and “soul” accompanying it are yet to have deterministic definitions although the greatest minds of our planet have tackled them for thousands of years (Burkeman, 2015).21

Neither any of the foregoing definitions of AI, nor many other definitions in the academia presents adequate definitions that can be satisfactory when regulation techniques are considered. In addition, the lack of definition is only one of the problems regulators will face; they will need to tackle liability gaps, control and transparency problems (Danaher, 2015).

In light of the foregoing, our primary statement stands firm: it is very early to begin thinking about regulating AIs or AI studies, particularly if such regulations may hinder developments that could prove essential for human existence. The turning point in AI development will probably be the development of ANIs, which should be encouraged through regulation, not restricted. However, if humanity fails in establishing adequate safe guards for ANIs, science fiction may turn into reality. Goertzel and Pitt (2012) call this the ‘AGI Sputnik moment’.

3.1. The great AI hype of 2015

Elon Musk’s and Stephen Hawking’s fears, Bill Gates’ cautious approach, Kurzweil’s optimistic take and Bostrom’s realistic analysis on the future that will probably be painted by AIs point to a single fundamental and existential dilemma: Are we going to be extinct because of AIs or will we maintain our existence with the help of AIs?

The cycle of extinction and rise of species may be the greatest success of evolution: ensuring the continuity of life. Over 90% of all species that ever existed on Earth went extinct and humanity’s fate will be no different, unless we come up with methods to achieve transcendence over evolution.22 Urban (2015) also treats this concept with a less theatrical manner and stresses two major outcomes for a possible ‘ASI Sputnik moment’. He states that either the introduction of ASIs will make immortality possible for our species or it will drive the human race into extinction.

Evolution has granted us our strongest instinct: survival. Instinctively we are in a never-ending war with nature, aiming to prolong our existence. In the abstract, the field of medicine solely exists for this purpose. Therefore, instinctively we will either try to eliminate the existential threat that ASIs might pose against us when we face the threat itself or try to eliminate a potential threat prematurely and in so doing cause our own extinction.

3.2. Reshaping perception on law

We may be living in the dawn of the age of artificial intelligence today. Consequently, the legal landscape surrounding our lives will require rethinking, as the case was with every big leap in technology. The industrial revolution brought conveyor belts and mechanical manufacturing processes operated by workers for longer and longer hours, which ended in myriad clashes between proletariat and employers. Hence, we developed labour laws, bringing a humanitarian minimum standard for the workers that were suffering from extreme working conditions. Similar legislative efforts followed each time when technologies required us to adapt new paradigms they introduced, technologies such as electricity, telegraph, telephone, railroad, automotive, television, and computers and so on. . . Below we will seek answers to some exemplary questions as to how AI might reshape our thinking, in terms of certain matters of current and prospective law.

3.2.1. Liability on damages

There are very few laws or regulations that address the challenges raised by AIs, and no courts appear to have developed standards so far, addressing who is legally responsible if an AI causes harm. The diversity and richness of individuals and firms that participate in the creation of an AI will make it difficult to identify the persons under liability. Certain technologies used in the development of an AI may date back to years before such AI is developed. Further, the developers of such technology may never have thought that one day, someone might incorporate their creation into any AI system. In such circumstances, it would be unfair to hold the developer of such technology responsible for a possible tort.

National and international laws do not recognize AI as a legal person. Therefore, current legal systems cannot hold them liable for the damages they might cause. However, what if an AI was fully autonomous and aware of its actions, causing harm knowingly and willingly?

This brings us back to the debate on consciousness. A conscious AI should naturally be liable for its actions. However, how can that be possible if we keep refraining from coming up with an adequate definition of what an AI is as far as legal ‘beings’ are considered? Should we ascribe legal personhood to them? (Paulius et al., 2015).

3.2.2. Intellectual property

IP law and its application places human initiative at its core. Berne Convention of 188623 requires an ‘author’ and an ‘artistic work’ to begin talking about intellectual property. While there is no limitation as to what form a ‘work’ can assume as long as humans can perceive it, an author must be a ‘human’. A San Francisco court applied and materialized this concept in 2015 by deciding in a lawsuit by PETA, the renowned organization defending animal rights, against David John Slater, a professional photographer, that a macaque money cannot own copyright to a selfie it took using the photographer’s camera (Kravets, 2016). What about AIs though? Can they own copyrights to the artistic works they create? Should law consider them as ‘individuals’?

3.2.3. Copyright and AI

Currently, a handful of AI applications are capable of producing works that resemble ‘art’, such as Deep Dream and the Cybernetic Poet.

Google’s® researchers developed DeepDream® to create a human-like image recognition software to identify certain things through mimicking human cognitive abilities. DeepDream uses Google’s artificial neural networks protocol to discern and process images of things to learn what they look like, such as a cat.

Google’s developers taught DeepDream what a cat looks like by showing millions of images of cats. Then they put DeepDream’s learning and identifying abilities to test by asking it to identify cats in pictures with cats and if found amplify them, introducing a feedback loop to work on. Then the developers introduced a random image to DeepDream and asked it to enhance the image in such a way as to elicit a particular interpretation. This method enabled the developers to understand whether DeepDream understood the essence of the things it learns. As a result, DeepDream searched in the images provided for all the things the developers trained it to recognize and when it found the tiniest bit of reference, it enhanced the relevant reference to make it look like the thing it found similar. The resulting images were surprisingly close to works of art. Few predicted this phenomenon, including DeepDream’s developers.24

Ray Kurzweil developed a poem software in mid-80s, a computer-implemented method of generating a poet personality that reads poems and generates analysis models to build its personality, and ultimately writes poems; the ‘Cybernetic Poet’. Cybernetic Poet is “provided with an input file of poems written by a human author or authors. It analyses these poems and creates a word-sequence model based on the poems it has just read. It then writes original stanzas of poetry using the model it has created.” (Bridy, 2012)

Now, who owns the copyrights of the artistic works created by these AIs?

As explained, current law cannot vest ownership of the copyrights to an AI, as it is not ‘human’. However, the laws of the United Kingdom make express provision for copyright in computer-generated works and introduce the following definition: ‘works generated by a computer in circumstances such that there is no human author’.25 The copyright in such works under UK law vests in ‘the person by whom the arrangements necessary for the creation of the work are undertaken’. Concordantly, Irish Law adopts the same principles.26 However, the UK and Irish approaches to the issue surrounding copyright ownership of computer-generated works and not the works of an AI. Therefore, they overlook the possibility of ‘non-human’ copyright ownership, ruling out the possibility of an AI that develops its own creative abilities. Who will have the ownership then?

3.3. Regulate and dominate?

A regulatory oversight and governmental intervention is a need when the development of AI is considered.27 It is not common to hear a Silicon Valley entrepreneur who operates on the frontiers technological advancement, urge governments to directly intervene with a developing technology in the hope of preventing humanity to do ‘something stupid’. When such thing happened in October 2014, it created a ripple effect and caused ‘The Great AI Panic of 2015’ (Sofke, 2015), which eventually led an institution called ‘Future of Life Institute® (FLI)’ to issue an open letter signed by Elon Musk, Stephen Hawking, hundreds of AI researchers in addition to many individuals representing U.S. government (Russel et al., 2015). FLI urged expanded research on how to contain AI systems within the walls of human benefit, including premature regulation. However, FLI used statements such as ‘AI systems must do what we want them to do’, ‘We should identify research directions that can maximize societal benefits’ and ‘AI super-intelligence will not act with human wishes and will threaten humanity’ while providing a research roadmap for AI researchers.

While the ‘we’ hints at a desired ownership over a technology under development (i.e. AI) and the ‘we’ implies superiority over ‘others’ in determining how a technology will be socially beneficial for humanity. It also begs the questions, ‘Who are you to claim that you have the capacity to force your desires over the entire human race, and who are you to claim that you can decide what is socially beneficial for us?’ Stating that an ASI will definitely be against the humanity’s welfare is an unexpectedly ignorant claim, allegedly coming from some of the greatest minds on Earth.

We experienced this line of thought when the Internet reached the masses, disrupting the status quo by lifting the boundaries of communication and information exchange and blurring the sense of control over disseminated information and access to such. The idea of an open interconnected network of networks that is not in anyone’s control or under any jurisdiction challenged lawmakers, policy makers and judiciary bodies and it still does. We have still been unable to set out universal rules on Internet (except DNS policies, where all stakeholders over Internet govern these policies through ICANN, a non-governmental organization) for almost 60 years. It would be very naïve to think that we can regulate AI policies, while AI is still in its infancy.

There is almost a consensus within the scientific AI community that definitive predictions on the future of ASI are impossible at this stage, simply because we are so far from creating an ASI, let alone understanding its implications.

3.3.1. Current and prospective regulatory efforts

Trying to anticipate ASI’s desires from where we stand now in terms of AI development is very similar to a chimpanzee trying to anticipate our motives when we crush an onion to remove its skin. Therefore, aiming to establish regulations to prevent ASIs from obliterating us is a hopeless endeavour. However, this line of thought may eventually lead regulators to prevent AI research from developing an AGI, fearing that it will break free from the chains of our capacity and become an ASI by itself. For example, John FrankWeaver, an attorney working in the field of AI law, praised the regulators at California when they intervened with Google’s self-driving cars and required test drivers to be present in these cars. He even claimed that this as a ‘wonderfully swift governmental response to autonomous technology and artificial intelligence’ while further supporting four states (Mississippi, Florida, Nevada and California) for passing restrictive regulation on autonomous cars that are not even on the market yet (Weaver, 2014).

3.3.1.1. Legislative efforts for autonomous vehicles. Nevada is the first U.S. state to enact a legislation authorizing the operation of autonomous vehicles in 2011 and was then followed by six other states, with many other states in still pending status with reference to their respective autonomous vehicle legislations. Tennessee among those who did enact such legislations stands out with its enabling and refreshing legislation wherein it prohibits local governments from banning the use of motor vehicles equipped with autonomous technology (Legislatures, 2016).

Throughout the world, legislators are working to incorporate autonomous (driverless) vehicles into their legislations to allow this thriving technology bloom and develop further, which brings hope.

The Convention on Road Traffic,28 of the United Nations, ratified by 73 countries, is in the process of amendment to allow automated vehicles on roads in many countries. European Road Transport Research Advisory Council published the roadmap for automated driving for Europe.29 German Federal Highway Research Institute published a report on the status of German legal landscape pertaining to vehicle automation technologies, indicating the areas of improvement on research, legislation and involvement of government agencies.30 Netherlands, Sweden, Japan and many other developed countries are actively working on improving the conditions of economic and legislative environment to enable swift development and consequently to reap the benefits of being involved in the forefront of innovative technologies.

While governments are honing in on preparing the legislative grounds for the operation of autonomous vehicles, academia adopts a wider approach and handles the concept in a wider manner, and works on determining the adequate policies for robotics and AI.

3.3.1.2. The RoboLaw project. The main objective of the RoboLaw project (“Regulating Emerging Robotic Technologies in Europe: Robotics facing Law and Ethics”) is to understand the legal and ethical implications of emerging robotic technologies and to uncover whether existing legal frameworks are sufficient in light of the rapid expansion of robotics technologies.31

The project was launched in March 2012 and funded by the European Commission (Paulius et al., 2015). The project produced the “Guidelines on Regulating Robotics”, which was then presented to the European Commission, to create the legal framework surrounding the development of robotic technologies in Europe.

The RoboLaw Project considered industrial robots, domestic robots, care robots, medical and surgery robots, autonomous vehicles, and humanoids/animaloids.The report discussed five essential legal areas for robotics: (i) health, safety, consumer, and environmental regulations; (ii) liabilities; (iii) intellectual property rights; (iv) privacy; and data protection and (v) capacity for legal transactions (Anon, 2015).

3.3.1.2.1. Health, Safety, Consumer and Environmental Regulation. The report identifies that common usage of robotics in hospitals, homes, commercial areas and our daily lives will require a new wave of legislations to cope with the prospective health and safety matters.

3.3.1.2.2. Liability. The report argues that imposing substantial liability on manufacturers, owners or users of robots for damages caused to third parties may increase safety while inducing wider social acceptance of robots. However, the report also argues that such approach on a liability regime may result in the displeasure of tech industry, consumers and, in the end, the general public, and may slow down the development of AI and robotics technologies. Therefore suggests a balanced approach between the interests of manufacturers, users, and third parties, and between risk regulation and stimulation of innovation, to encourage research, innovation and experimentation on these technologies, for increasing welfare in health, transport, commerce and other areas of business.

3.3.1.2.3. Intellectual Property Rights. RoboLaw Project indicates the lack of legal provisions that specifically apply to robotics. RoboLaw Project states that further research would be beneficial to determine whether the current application of intellectual property rights sufficiently meets the needs of the robotic industry and society.

3.3.1.2.4. Privacy and Data Protection. The RoboLaw Project suggests implementation of legal requirements into the robot’s software and interface through the ‘privacy by design’ approach, such as data security through data encryption and data access control in order to comply with the data protection requirements.

3.3.1.2.5. Capacity for Legal Transactions. The report stresses the lack of legal personality of robots and indicates that robots are seen as ‘mere tools’ to carry out commands that can, directly or indirectly, be attributed to human beings. Consequently, this approach requires the legal responsibility for robot actions to rest with their human ‘masters’.

It is possible to attribute legal personality to robots through legislative effort. Non-humans such as corporations, associations, and foundations gain their legal personalities through registration. The registration principle could be extended to robots and AIs (including requirements how robots can prove their registered identity); the capability of owning property is less easy to create, although legal constructions could be devised to accommodate this.

The report concludes with indicating that if these issues concerning legal personality are resolved at a certain point in time, more practical requirements and rules pertaining to legal acts will come into play, such as implementing legal conditions into the machines to make it possible for them to enter into a contract.

Lawmakers need to familiarize themselves with the potential benefits of AIs. Strict rules may prevent humans from the possible damages of AIs. However, these rules will also dampen possible improvements. Therefore, lawmakers should consider the balance between protection of humanity and development in technology.

4. Conclusion

When aiming to regulate currently non-existent technologies, we must avoid this approach at all costs. Putting restrictions on developing technologies based on our personal presumptions might indeed help us to avoid extinction at the hands of ‘evil robots’, but it might also cause our extinction due to natural reasons, such as evolution by making it harder for the human race to use technology to adapt.

Based on the statements of Elon Musk, SteveWozniak, Bill Gates, Bill Joy, Stephen Hawking and FLI’s open letter, it is clear that what they all fear is an ‘unfriendly AI’ and what they all want is a ‘friendly AI’ in the abstract.

The terms ‘friendly’ and ‘unfriendly’ do not refer to a personal trait of an AI system. These terms refer to whether the actions of an AI will have a positive or a negative impact on humanity (Urban, 2015). This is because AIs are computers and they do not have human values. We tend to anthropomorphize32 AI and attribute them with our moral values such as ‘good and evil’, ‘moral and immoral’ that are formed by our consciousness. These attributes developed only after thousands of years of social interaction. AIs will not share these human traits unless we specifically create them to do so. They operate on a task and goal oriented manner. To illustrate this point, for instance, there is an AGI, whose main task is to ensure that trees in a certain pine tree plantation are under protection from alien spores to keep the tree DNA as pure as possible. We should not be surprised when such an AGI takes drastic measures as far as obliterating the entire flying bug population in the area. One who is unaware of the goals of this AGI might easily label it as ‘evil’ and a ‘danger to humanity’ as he/she has no preconception on what the AGI’s motives or goals were. Similarly, a chimpanzee fearing that the crushing of an onion is a sign of aggression might attack us. Ironically, this view is very similar to the perspective of those who propose premature regulation of AIs.

#### 3. Regs block innovative start-ups AND make advanced neural nets infeasible

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HOW POLICIES BASED ON THE PRECAUTIONARY PRINCIPLE IMPACT AI

Policies based on the precautionary principle can impact AI in several ways. They can make it more expensive to develop AI, limit the testing and use of AI, and even ban certain applications. Clearly nations have the right to impose any regulations they chose (assuming they do not violate World Trade Organization rules or other global treaty obligations). But they should not delude themselves into believing that regulatory regimes based on the precautionary principle will not limit increased productivity, competitiveness, and innovation.

To provide a more detailed discussion of the negative effects policies based on the precautionary principle can have on AI, the following section analyzes the effects of policies discussed earlier in this report. In many cases, these policies have multiple negative effects on AI.

1. Slower and More Expensive AI Development

Policies based on the precautionary principle both slow and make the development of AI more expensive. For example, if all fifty U.S. states had laws such as New York’s, which requires autonomous vehicle firms to perform road testing under the paid supervision of police, testing such vehicles would be more expensive. Moreover, proposals to require even non-medical algorithms to undergo pre-market trials would hurt the development of AI because such trials are time-consuming and expensive. Such proposals may also make AI systems that use machine learning, and thus may change frequently and need more testing, significantly less viable because such systems could constantly need to go through a new approval process.96 Finally, policies that increase the cost of developing AI would likely discourage innovation in AI by creating a substantial barrier to entry for startups that lack sufficient funding to cover the cost of proving their AI system is safe. For example, the GDPR has dampened investment in European technology startups and led to a 30 percent decrease in the market share of small online advertising firms that lack the resources to easily comply with the regulation.97

Restrictions on one AI technology can also limit ways to develop another AI technology. For example, researchers in Germany are using drones hovering hundreds of meters above highways to record the movements of vehicles. This data can help develop simulations to test autonomous vehicles; such simulations are important tools for improving the safety of autonomous vehicles because otherwise they would need to travel billions of miles for safety validation.98 While this novel method of collecting data to validate the safety of autonomous vehicles may or may not prove valuable, implementing it in the United States would be would be difficult to do at scale until the FAA implements its new rules that allow out-of-sight drone flights and flights over people.99

2. Less Innovation

AI will spur innovation so policies that limit the development of AI will limit innovation.100 For example, proposals to ban or limit the introduction of autonomous vehicles would also limit the generation of new businesses, business models, and ways to do deliver services through the “passenger economy.” The passenger economy, a term coined by Intel and research firm Strategy Analytics, “is the economic and societal value that will be generated by fully autonomous…pilotless vehicles.”101 The firms envision a world where a significant portion of vehicle ownership is replaced by fleets of autonomous vehicles that provide on-demand transportation. Productivity would also increase as autonomous vehicles free employees to work during their commutes and autonomous trucks to operate more efficiently. The firms estimate the value of this economy could be $7 trillion by 2050.102 Nations that ban autonomous vehicles will not experience the benefits of such an economy.

3. Lower-Quality AI

There is often a negative correlation between making an AI system more explainable and its accuracy.103 As a result, any policies that require AI to be explainable could lead to less accurate AI. For example, researchers at Mount Sinai Hospital in New York developed an AI system called Deep Patient that can predict whether a patient is contracting any of a wide variety of diseases.104 The researchers trained Deep Patient on the health data from 700,000 patients, using hundreds of variables, such as test results, which allow it to predict diseases such as schizophrenia—which doctors struggle to predict—extremely well.105 Even though its operators can verify its accuracy by measuring outcomes, such as if a person is developing a disease, it is difficult for its own developers to know why it made a particular decision.106

Many sophisticated forms of AI pose a similar problem. Developing an AI system capable of explaining itself or justifying its decisions is an incredibly challenging technical feat, so much so that the U.S. Defense Advanced Research Projects Agency (DARPA) devoted $75 million in 2017 to research how AI could achieve it.107 Some groups are skeptical that requiring explainability would chill innovation. They cite DeepMind, a British company owned by Google parent-company Alphabet, developing an AI system in 2018 that can analyze eye scans to predict diseases while also providing doctors a map of the features of disease it sees, such as hemorrhages.108 However, the fact that one of the world’s leading AI companies could achieve a form of explainability in a system it worked on for nearly two years is not evidence that all other operators should or would be able to achieve explainability for their AI easily.109 To be clear, it is legitimate for companies, such as IBM, to create internal requirements for AI explainability.110 Requiring all firms to meet such a standard, however, would create a barrier to adopting AI, because not all AI systems are alike and not all businesses have a similar level of expertise.

Nonetheless, it is important for AI operators to continually assess their AI system’s accuracy to ensure it is generating or predicting the correct outcomes. The other option is to allow only AI applications that operators can explain; this would lead to AI systems that consider fewer variables and that use simpler algorithms to make decisions. In turn, this would reduce the effectiveness of AI that can generate significant impacts such as identifying a terminal illness before a doctor can.

#### 4. It nukes R&D at the small business and individual levels---they’re key

Dr. Jeremy Straub 21, PhD, Assistant Professor in the North Dakota State University Department of Computer Science and NDSU Challey Institute Faculty Fellow, “Would Regulation Prevent AI From Becoming an Evil Overlord?”, Dakota Digital Review, 10/1/2021, https://dda.ndus.edu/ddreview/would-regulation-prevent-ai-from-becoming-an-evil-overlord/

WHO DOES REGULATION REALLY PROTECT?

Achieving most of these benefits will require a lot more research and development. Regulations that make it more expensive to develop AIs or prevent certain uses might delay or forestall those efforts. This is particularly true for small businesses and individuals—key drivers of new technologies—who are not as well equipped to deal with regulation compliance as larger companies.

In fact, the biggest beneficiary of AI regulation may be large companies that are used to dealing with it, because startups will have a harder time competing in a regulated environment. Even ambiguity regarding regulation and what aspects of AI are regulated may be problematic, as it may cause people to avoid innovation to avoid risking inadvertent ensnarement by vague regulations and potential penalties.

Humanity faced a similar set of issues in the early days of the internet. But the United States actively avoided regulating the internet to avoid stunting its early growth.[39] Elon Musk’s PayPal and numerous other businesses helped build the modern online world while subject only to regular human-scale rules, like those preventing theft and fraud. Similarly, no special rules were rolled out to govern early software businesses, such as Microsoft, in their burgeoning years, that have gone on to become industry titans.

### Gradualism---2NC

#### Users will naturally demand sufficient transparency to allow stepwise controls under the existing legal structure---that completely caps existential risk without jumping the gun on broad regulation

Chris Reed 18, Professor of Electronic Commerce Law at Queen Mary, University of London, LLM from the University of London, “How Should We Regulate Artificial Intelligence?”, Philosophical Transactions of the Royal Society B, Volume 376, Issue 2128, 9/13/2018, https://royalsocietypublishing.org/doi/10.1098/rsta.2017.0360

9. Masterly inactivity?

The analysis in this paper suggests that some form of regulation will be needed for some uses of AI. But does that mean that we need to regulate now?

I argue that the answer is a qualified ‘No’. Responsibility for autonomous vehicles is clearly problematic, and the uncertainty about the current application of the law is likely to inhibit their adoption unless the position is clarified, as the UK and other lawmakers are currently doing. The use of technology in medicine is already regulated by the profession, and that regulation will certainly be adapted piecemeal as new AI technologies come into use. There are probably other high-risk uses of AI which will demand some level of legal and regulatory change. But, all these areas are likely to be regulated already, as is the case for road vehicles and medicine, so the existence of current regulation might provide a useful guideline about where to focus the immediate regulatory effort.

So far as regulating the rest of life is concerned, I have attempted to show that transparency will be enough to allow the current legal and regulatory regime to produce at least adequate answers. Because that regime also provides sufficient incentives for users to demand and producers to develop transparency of AI decision-making, there is no need to panic. A ‘wait and see’ approach is likely to produce better long-term results than hurried regulation based on, at best, a very partial understanding of what needs to be regulated.

#### Iterative legal development is inevitable---at each step, AI will be matched with tailored controls

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Most notable in this regard is the scathing social criticism of the prolific techno-skeptic Evgeny Morozov, who goes so far as to argue that the very term “the Internet” is a meaningless construct.20 He engages in a sort of radical deconstructivism that suggests we are all somehow being fooled into thinking the Internet is as important or meaningful as most of us, quite rationally, believe it is. Morozov also rails against what he regards as the irrational exuberance of digital innovators, who supposedly believe technology can solve all the world’s hard problems. He refers to this as “solutionism” and castigates all those who would engage in a “mindless pursuit of this silicon Eden” or “romantic and revolutionary” thinking about how new technology might improve our lives.21 The critiques set forth by the latest crop of critics have become even more specialized, zeroing in on emerging technologies such as robotics,22 artificial intelligence,23 sensors,24 and the Internet of Things.25 Again, the concerns range from social (e.g., privacy, safety, and security) to personal (e.g., impact on learning and concentration) to economic (e.g., fears about automation and job dislocation). And it is not unusual to also hear a fair share of end-of-world dystopian scenarios thrown around in many of their books and essays, including Terminator-inspired tales of killer robots destroying humanity.26

The critics often fail to devise a coherent political or regulatory agenda for countering what they see as an overreliance on technology. However, when they do come clean about their policy intentions, they are usually calling for quite radical policy interventions, often aimed at imposing sweeping political control over the future course of technological innovation.27

B. ANSWERING THE TECH CRITICS: THE CASE FOR “RATIONAL OPTIMISM”

The problem with all these critics’ arguments is that they overestimate the dangers of new innovations while ignoring, or at least greatly underplaying, the importance of technological innovation for economic and social progress.28 And perhaps the most important shortcoming of these techno-critics, as I’ll discuss in greater length in chapter IV, is that they consistently fail to appreciate how well humans adapt to technological change. In fact, they almost universally ignore how quickly we learn to cope with changes that—while challenging in the short term—ultimately come to be an accepted, and usually enriching, part of our lives.29 Although they are rarely as direct about saying it as Morozov is, the work of some tech critics implies that all this modern innovation isn’t necessary, or at least that there’s just too much irrational exuberance about its potential.

It’s easy for some modern technological critics to dismiss the wild-eyed enthusiasm of some creators because, at times, those innovators or others can overstate the potential of any given invention. When Pollyanna-ish pundits make sweeping claims about how any particular new technology will “change everything” or seemingly solve all the world’s problems, the critics are right to call them out for such statements.

But that criticism can go too far and ignore the fact that, as James Surowiecki observes, “[i]n the delusions of entrepreneurs are the seeds of technological progress.”30 It is hard to believe, for example, that the world would really be a better place if it was completely devoid of the “romantic and revolutionary” thinking that Morozov and other critics deride. We need not always support the bullish enthusiasm of all modern entrepreneurs to nonetheless appreciate how their ongoing efforts to find solutions to hard problems can often yield very beneficial results—or even just powerful lessons following their failures.

This more practical disposition toward technological experimentation and change is what author Matt Ridley calls “rational optimism.”31 At a macro level, the rational optimist is generally bullish about the future and the prospects for humanity but is not naive about the challenges associated with technological change. At the micro level, the rational optimist seeks practical solutions to intractable problems through ongoing trial-and-error experimentation, but is not wedded to any one process or particular technology to get the job done.

This is the approach seen in the works of Herman Kahn,32 Julian Simon,33 F. A. Hayek,34 Ithiel de Sola Pool,35 and especially Aaron Wildavsky and Virginia Postrel, whose work was discussed earlier. These “dynamist” thinkers express optimism about the role technology plays in advancing social and economic progress, but their optimism is always rooted in empiricism and rational inquiry, not blind faith in any particular viewpoint or ideology. Rational optimists don’t hold an unthinking allegiance to technology as an autonomous force or savior to all of civilization’s woes. Indeed, the blueprint that rational optimists offer is not utopian but anti-utopian: precisely because difficult problems defy easy solutions, we should look to devise a plurality of strategies to tackle them. New technological innovations might be among those strategies, but they are not the only ones we should rely on. Ongoing experimentation is the key to unlocking knowledge and prosperity.36

Importantly, rational optimists would never discourage the entrepreneurial dreaming and daring that so many modern tech critics deride. While Morozov and other critics might lambast those “romantic and revolutionary problem solvers,” the truth is that the world is a better place because such people exist. Much of their entrepreneurial activity will yield socially beneficial results. Equally as important, however, is the fact that it will also produce many failures, but society will then learn from those mistakes and improve future experiments accordingly.

The goal is not to “save everything” with “the folly of technological solutionism,” as Morozov worries. Rather, it is to seek to solve‑some‑problems through the application of practical knowledge to social and economic challenges through incessant experimentation with the new and different approaches to those problems.37 But rational optimists will not shy away from the fundamental truth that a symbiotic relationship exists between technological innovation and human flourishing. That connection, as noted next, is why the critics’ complaints must be met with a full-throated response.

C. THE CONNECTION BETWEEN INNOVATION, ECONOMIC GROWTH, AND HUMAN FLOURISHING

Before we consider the profound benefits associated with innovation, we should try to define the term. Of course, defining “innovation” is notoriously difficult,38 almost as challenging as settling on a good definition of “technology” itself.39 The Organisation for Economic Co-operation and Development (OECD) rather dryly defines innovation as “the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organizational method in business practices, workplace organisation or external relations.”40 But, as is often the case with other attempted definitions of the term, the OECD caveats its definition by noting how “[t]his broad definition of an innovation encompasses a wide range of possible innovations” and that narrower and more nuanced definitions are available.41

W. Brian Arthur, author of The Nature of Technology, argues that the problem with trying to explore the concept of innovation directly is that “the idea is too diffuse, too nebulous, for that to be useful.”42 Despite that warning, he continues on to explain how

[i]nnovation has two main themes. One is [a] constant finding or putting together of new solutions out of existing toolboxes of pieces and practices. The other is industries constantly combining their practices and processes with functionalities drawn from newly arriving toolboxes— new domains. . . . The result is new processes and arrangements, new ways of doing things, not just in one area of application but all across the economy.43

More concisely, in their book Innovation Economics, Robert‑D. Atkinson and Stephen J. Ezell define innovation as “the development and widespread adoption of new kinds of products, production processes, services, and business and organizational models.”44 What these and most other definitions of innovation share in common, then, is a focus on new and better ways of doing things and, in particular, new ways of satisfying human wants and needs. Thus, even if its precise definition proves elusive, what is most crucial about the process of innovation is that it serves as a means to an end: it helps drive progress and human flourishing. “Innovation is more than the latest technology,” notes Sofia Ranchordás, a resident fellow at Yale Law School, “it is a phenomenon that can result in the improvement of living conditions of people and strengthening of communities. Innovation can be technological and social, and the former might assist the latter to empower groups in ways we once thought unimaginable,” she observes.45

The endless search for new and better ways of doing things drives human learning and, ultimately, prosperity in every sense— economic, social, and cultural. The pessimistic critics of technological progress and permissionless innovation have many laments, but they typically fail to consult the historical record to determine how much better off we are than our ancestors.46 And that record is unambiguous, as Robert Bryce explains in his recent book, Smaller Faster Lighter Denser Cheaper: How Innovation Keeps Proving the Catastrophists Wrong:

The pessimistic worldview ignores an undeniable truth: more people are living longer, healthier, freer, more peaceful, lives than at any time in human history… [T]he plain reality is that things are getting better, a lot better, for tens of millions of people around the world. Dozens of factors can be cited for the improving conditions of humankind. But the simplest explanation is that innovation is allowing us to do more with less.47

“Doing more with less” drives greater economic efficiency, expands the range of goods and services available, and generally lowers prices.48 This raises our overall standard of living over the long term.49

Indeed, there exists widespread consensus among economic historians and scholars that, as the Cato Institute’s Brink Lindsey asserts, “the long-term future of economic growth hinges ultimately on innovation.”50 Countless economic studies and historical surveys have documented the positive relationship between technological progress and economic growth. A 2010 white paper from the US Department of Commerce revealed that “[t]echnological innovation is linked to three-quarters of the Nation’s post-WW II growth rate” and continued on to note that,

[a]s it fuels economic growth, innovation also produces high-paying jobs. Recent studies by the Federal Reserve show that innovation in capital goods is the primary driver of increases in real wages. Without innovation, wages would be much lower.‑Additionally, across countries, 75% of differences in income can be explained by innovation-driven productivity differentials.51

These findings are reflected in many other major economic studies on the factors that drive economic growth. For example, two major economic surveys from 2003 and 2006 found that technological progress accounts for 30–34 percent of growth in Western countries.52 And economists estimate that differences in technological adoption patterns account for 80 percent of the difference between rich and poor nations.53

Of course, just because the historical evidence linking innovation and long-term growth reveals an unambiguous and undeniable relationship, the short-term disruptions caused by technological change won’t be any easier to swallow for some individuals, businesses, or public policymakers.

This is why attitudes toward innovation and entrepreneurship are so important. Progress-oriented policy requires a general openness to constant change and the “creative destruction” that Austrian-born economist Joseph Schumpeter famously spoke of in the 1940s, when he explained how cascading waves of continuous change, or what he described as the “perennial gales of creative destruction,” were what spurred innovation and propelled an economy forward.54 As my Mercatus Center colleague Jerry Ellig has explained it, in the Schumpeterian paradigm, “firms compete not on the margins of price and output, but by offering new products, new technologies, new sources of supply, and new forms of organization.”55

The Schumpeterian paradigm and other “dynamic competition” models best capture the nature of competition and innovation in today’s digital world.56 The Schumpeterian model explains why some tech companies can gain scale so rapidly only to stumble and fall with equal velocity.57 Digital Davids are constantly displacing cyber-Goliaths.58 Social and economic risk takers and innovators are constantly shaking things up in the digital economy and bringing about equally seismic disruptions throughout our culture.59

New disruptions flow from many unexpected quarters as innovators launch groundbreaking products and services while also devising new ways to construct cheaper and more efficient versions of existing technologies. The more this cycle repeats, the more likely economic growth becomes. But the Schumpeterian model also explains why technological innovation can be so gut-wrenching and generate so much opposition in the short term.

Indeed, it’s amazing to think about all the once-mighty tech titans that ruled their respective sectors, only to be rapidly displaced by smaller start-ups a short time later.60 For some, the velocity of their downfall was precipitous and fatal. Other times their decline and fall was gradual and incomplete as the shells of the old companies remain in existence even as their cores have been hollowed out. Consider a few examples:

* IBM: “Big Blue” was once synonymous with computing itself. IBM dominated the mainframe computer marketplace and kept antitrust officials in a 13-year tizzy. But both‑IBM and the government weren’t paying attention to the personal computing revolution, which abruptly kicked IBM off its perch and utterly decimated its business and shareholder value throughout the 1980s. While it reinvented itself later and rebounded, it is a shadow of the company that once ruled the computing marketplace.
* Kodak: The postwar generation had “Kodak moments” and the film and camera giant’s importance was significant enough that even singer Paul Simon begged, “Mama, don’t take my Kodachrome away.” But the combination of digital photography, online photo storage, and home printing would eventually wipe out Kodak’s market dominance, even though the firm had seen much of the change coming. Its failure to adapt led the firm into bankruptcy in 2012.61
* Sony: For those coming of age in the early and mid- 1980s, “Walkman” was synonymous with any portable music device. Sony had created a product that everyone wanted and all its competitors were forced to copy. A generation later, the device had lost much of its appeal— and whatever market dominance Sony once gained from it. By the late 1990s, digitized music and the rise of MP3 players meant that Apple and others would rapidly eat away at Sony’s once-dominant position. Although the company rebounded and remains a major player in video games and other consumer electronics sectors, it is not the feared juggernaut it once was.
* Atari: For the first generation of video gamers, Atari was the name of the game. It dominated the home console market in the late 1970s. A few years later, it was “game over” for the company, primarily because of Nintendo’s growing dominance of the console market in the late 1980s. While Nintendo would last longer and indeed is still with us, the firm faces vigorous competition from other platforms, including the unexpected rise of smartphones as a major gaming platform.
* MySpace: While Facebook dominates discussions about social networking today, it’s already easy to forget that just a few years ago almost everyone expected MySpace to rule social networking for a long time to come. That concern over MySpace’s hegemony peaked shortly after Rupert Murdoch and News Corp. bought the company in 2005 and led critics like Victor Keegan of the United Kingdom’s Guardian newspaper to ask, “Will MySpace Ever Lose Its Monopoly?”62 A short time later, however, MySpace lost its early lead and became a major liability for Murdoch—he paid $580 million for the company in 2005, but sold it for only $35 million in June 2011.63
* Mobile phones: The mobile phone handset and operating system (OS) marketplace has undergone continuous change over the past 15 years and is still evolving rapidly. When cellular telephone service first started taking off in the mid-1990s, handsets and mobile operating systems were essentially one in the same, and Nokia and Motorola dominated the sector with fairly rudimentary devices. The era of personal digital assistants—more commonly known as PDAs—dawned during this period, but mostly saw a series of overhyped devices, such as Apple’s “Newton,” that failed to catch on. In the early 2000s, however, a host of new companies and devices entered the market, many of which are still major players today, including LG, Sony, Samsung, Siemens, and HTC. Importantly, the sector began dividing into handsets versus OS. Leading mobile OS makers have included Microsoft, Palm, Symbian, BlackBerry (RIM), Apple, and Android (Google).

The sector continues to undergo constant change. Palm smartphones were wildly popular for a brief time and brought many innovations to the marketplace.64 Palm underwent many ownership and management changes, however, and rapidly faded from the scene.65 Similarly, RIM’s BlackBerry was the dominant smartphone device for a time, but it has recently been decimated.66 BlackBerry’s roller-coaster ride has left it “trying to avoid the hall of fallen giants,” in the words of an early 2012 New York Times headline.67 Although the company once accounted for more than half of the American smartphone market, today its share has slipped into the single digits.68 Microsoft also had a huge lead in licensing its Windows Mobile OS to high-end smartphone handset makers until Apple and Android disrupted its business. It is hard to believe now, but just a few years ago the idea of Apple or Google being serious contenders in the smartphone business was greeted with derision, even scorn.

Famously, many commentators denigrated Apple’s entry into the smartphone business because many industry analysts believed the market was mature.69 Just a few years later, Nokia’s profits and market share plummeted,70 and Google purchased the struggling Motorola. Meanwhile, Palm is dead and Microsoft is struggling to win back market share lost to Apple and Google. “The violence with which new platforms have displaced incumbent mobile vendor fortunes continues to surprise,” says wireless industry analyst Horace Dediu.71

In each of these cases, Schumpeterian change has brought us many new goods and services that have improved our overall standard of living. But precisely because disruption of this sort unsettles so many traditional businesses, sectors, and professions, the shortterm opposition to change will always be vociferous.

Nonetheless, the vital lesson here is perfectly summarized by Daron Acemoglu and James A. Robinson, authors of Why Nations Fail, when they conclude: “Sustained economic growth requires innovation, and innovation cannot be decoupled from creative destruction, which replaces the old with the new in the economic realm and also destabilizes established power relations in politics.”72 When public policy discourages risk-taking and actively regulates to disallow permissionless innovation, the result is less entrepreneurialism, diminished competition, fewer consumer choices, and stagnated economic growth.73 The following case study of Europe’s declining global competitiveness in the digital marketplace over the past 20 years makes that abundantly clear.

D. THE REAL-WORLD IMPACT OF PERMISSIONLESS INNOVATION

Let’s get even more concrete about how creative destruction plays out in the real world and how permissionless innovation affects the standard of living for different populations.74 To do so, consider this question posed by James B. Stewart in a summer 2015‑New York Times‑column: “Why hasn’t Europe fostered the kind of innovation that has spawned hugely successful technology companies?”75 That‑question helps frame the importance of the debate between permissionless innovation and the precautionary principle.

Since the rise of the commercial Internet in the mid-1990s, the United States and the European Union have adopted starkly different visions toward the digital economy and innovation policy more generally.76 This is particularly true as it relates to online advertising and the data collection practices that have powered digital commerce over the past two decades.77 Beginning in 1995 with the adoption of its “Data Protection Directive,” the European Union has instituted highly restrictive policies governing online data collection and use.78 The EU’s approach has been shaped by precautionary principle thinking at every turn, based largely on concerns about privacy and data security. Combined with “a deeply ingrained fear of failure that is a bigger impediment to entrepreneurship on the Continent than in other regions,”79 this general aversion to change has greatly discouraged innovation in Europe.80 Indeed, attitudes toward risk and failure account for the significant differences in US and EU policy and help unlock the mystery of why American tech firms have grown so much faster and bigger than European firms.81 German economist Petra Moser notes that Europeans are “trying to recreate Silicon Valley in places like Munich, so far with little success,” because “[t]he institutional and cultural differences are still too great” and “[i]n Europe, stability is prized” above all else, she says.82 In his recent Times essay on this transatlantic clash of visions, Stewart noted that [o]ften overlooked in the success of American startups is the even greater number of failures. “Fail fast, fail often” is a Silicon Valley mantra, and the freedom to innovate is inextricably linked to the freedom to fail. In Europe, failure carries a much greater stigma than it does in the United States.83

Moreover, he notes, “Europeans are also much less receptive to the kind of truly disruptive innovation represented by a Google or a Facebook.”84 What European regulators fail to appreciate is, as Daniel Castro and Alan McQuinn of the Information Technology and Innovation Foundation observe, that “[i]nnovation is about risk, and if innovators fear they will be punished for every mistake . . . then they will be much less assertive in trying to develop the next new thing.”85 Meanwhile, the United States adopted a very different disposition that favored risk-taking and tolerated business failures and cultural disruptions. Disruptive technologies were embraced (or at least permitted) in the United States, resulting in the explosive growth of the Internet and America’s information technology sectors (computing, software, Internet services, etc.) over the past two decades. Those sectors have ushered in a generation of innovations and innovators that are now household names across the world, including in Europe.

The result of the general freedom to experiment in this arena was not only an outpouring of innovation that was unprecedented in recent times but also a boost for US competitive advantage overall.86 For example, a recent Booz & Company report on the world’s most innovative companies revealed that nine of the top 10 are based in the United States and that most of them are involved in computing.87 Another recent survey revealed that the world’s 15 most valuable Internet companies (based on market capitalizations) have a combined market value of nearly $2.5 trillion, but none of them are European while 11 of them are US firms.88 Meanwhile, the information technology market on either side of the Atlantic illustrates how investor money overwhelmingly flocks to US shores. The market capitalizations for America’s major tech companies overwhelm European tech firms.89

The data on the overall size of the respective tech markets on either side of the Atlantic provide an even more dramatic contrast. As of 2015, the market value of Apple, Google, and Facebook each exceeded the entire value of the European market for tech “unicorns,” or firms with a market value of over $1 billion. Airbnb’s market value alone exceeds the value of all of Germany’s billion-dollar technology companies combined.

Many European officials and business leaders are waking up to this grim reality and are wondering how to reverse this situation. Danish economist Jacob Kirkegaard of the Peterson Institute for International Economics notes that Europeans “all want a Silicon Valley. . . . But none of them can match the scale and focus on the new and truly innovative technologies you have in the United States. Europe and the rest of the world are playing catch-up, to the great frustration of policy makers there.”90

Unsurprisingly, European officials are unhappy that American innovators enjoy competitive advantages in many digital sectors. As a result, some European policymakers are increasingly looking to force their more restrictive policies on US-based digital innovators. 91 The easier way to “level the playing field” between digital rivals on either side of the Atlantic would be for Europe to relax its restrictive, risk-averse policies, to give their innovators a better chance of learning from marketplace experimentation.92 Of course, that would mean that European policymakers would need to be willing to embrace the possibility that many of those firms would fail, or to the extent they succeeded, that restrictive data collection policies and other regulations might need to be reformed.

Thus far, European officials have shown little willingness to embrace that option and are instead stepping up their efforts to regulate technology companies, especially US-based firms.93 In fact, within the so-called sharing economy, European governments have moved aggressively to limit or shut down ride-sharing provider Uber.94 Following a major strike by French taxi drivers during summer 2015, France went so far as to arrest two Uber executives.95 (Ironically, downloads of Uber’s mobile app increased following the arrests.96) There’s even talk in Europe of creating an EU-wide super-regulator, mostly to address concerns about US-based tech companies.97

Such moves are motivated by a fear of disruption and change.

Whether it is economic or social norms, failure is often not an option in some European countries; public policies will protect industries, organizations, professions, or even just cultural norms that are threatened by technological change. The irony, however, is that the more aggressively European officials seek to avoid the possibility of various short-term failures, the more prone the continent is to potentially far more dangerous and systemic failures in the long term.98 “The trouble with Europe’s broad attack on U.S. tech companies is that it hurts Europe above all,” observes Mike Elgan of eWeek. “Europe will never be able to regulate its way to tech competitiveness. It has to come from industry, not government.” Elgan correctly argues that Europe’s problems with America’s tech innovators “should be solved by European startups, innovation, [and] entrepreneurship not meddling EU commissions, politicians and judges.”99

Whether European officials are willing to take steps to reverse this predicament remains to be seen. Regardless, the lesson for US policymakers should be clear: if they want to continue to produce world-leading technology innovators, they must avoid Europe’s overly precautionary and highly risk-averse approach to policy. Permissionless innovation remains the better default policy position toward new entrepreneurs and technologies, no matter how disruptive they may be in the short term.

E. GLOBAL INNOVATION ARBITRAGE

As the preceding discussion indicates, when and where public policies or political attitudes are stacked against entrepreneurial opportunities, then innovation will be disincentivized and innovators will look to do business elsewhere. Thus, there’s an even more practical reason why policymakers should take seriously the importance of permissionless innovation as a policy disposition: we increasingly live in a world where “global innovation arbitrage” 100 or “regulatory arbitrage for permissionless innovation” is a reality.101 Just as capital now fluidly moves around the globe seeking out more hospitable regulatory treatment, the same is increasingly true for innovations. Innovators can, and increasingly will, move to those countries and continents that provide a legal and regulatory environment more hospitable to entrepreneurial activity.102

As noted, the United States essentially won the first round of the “Web Wars” and took a commanding lead in the battle for global digital supremacy in terms of Internet-enabled innovation. Again, this occurred because the United States got policy right. Unfortunately, America’s digital technology supremacy may be reversing itself with some new technological innovations. “As I watch our government go slow in promulgating rules holding back American innovation,” noted Sen. Cory Booker (D-NJ) at a US Senate Commerce Committee hearing in early 2015, we are “seeing technology exported from America and going other places.”103

Consider what’s been happening in such diverse fields as commercial drones, driverless cars, genetic testing, and the sharing economy as the global competition to attract innovation and investment on these fronts intensifies. In particular, consider how the United Kingdom has been taking steps on these fronts to attract innovators who are being shunned by US policymakers:

* Drones: US-based tech innovators such as Amazon and Google had been threatening to move their drone research offshore before the Federal Aviation Administration (FAA) finally started taking steps to liberalize its rules and open the skies for aerial innovation.104 Amazon even sent the FAA a letter warning stating, “Without the ability to test outdoors in the United States soon, we will have no choice but to divert even more of our [drone] research and development resources abroad.”105 Meanwhile, other countries have been opening their skies to drone innovation.106 Both the United Kingdom and Australia have been more welcoming to drone innovators.107
* Driverless cars: The United Kingdom is opening its doors— or roads, as the case may be—to autonomous vehicles, or “driverless car” technology.108 The New York Times noted recently that “the country is positioning itself as a giant test track for global automakers,” and that “[a] recent review of Britain’s transport laws provided a green light for testing driverless cars on public roads—something often not allowed on the streets of other European countries. The country’s policy makers also are completing industry guidelines to sidestep other potential roadblocks, like liability and insurance issues, that could still hamper carmakers’ plans for autonomous cars.”109
* Genetic testing: One of the more vivid recent examples of‑global innovation arbitrage involves 23andMe, which‑sells mail-order DNA-testing kits to allow people to learn more about their genetic history and their potential predisposition to various diseases.‑Unfortunately, the FDA is actively thwarting innovation on this front after ordering the company to halt sales in the United States.110 The agency has recently taken steps to loosen regulation of 23andMe, although only for narrowly defined purposes.111 On the other side of the Atlantic, UK officials seem to be welcoming the firm with open arms as the UK’s Medicines and Healthcare Products Regulatory Agency said the company’s test can be used there, albeit with caution.112
* Sharing economy: Sharing economy innovators are potentially at risk in the United States because of incessant bureaucratic meddling at the state and especially the local level.113‑If policymakers don’t take steps to liberalize the layers of red tape that encumber new sharing economy start-ups, it is possible that some of these companies will start to look for opportunities offshore. The United Kingdom’s Department for Business, Innovation & Skills recently published a white paper titled “Unlocking the Sharing Economy,” which discusses how the British government intends to embrace the many innovations that could flow from this space.114 The preface to the report opens with a telling passage from Matthew Hancock, a member of the UK Parliament and the Minister of State for Business, Enterprise, and Energy, in which he notes, “The UK is embracing new, disruptive business models and challenger businesses that increase competition and offer new products and experiences for consumers. Where other countries and cities are closing down consumer choice, and limiting people’s freedom to make better use of their possessions, we are embracing it.”115

That last line from Minister Hancock makes it clear that if other countries, including the United States, fail to create a more hospitable environment for innovation, then the United Kingdom and other countries will be all too happy to invite those companies to come set up operations there. The offshoring option is just as real in countless other sectors of the modern tech economy. Similar opportunities for such “global innovation arbitrage” exist for the Internet of Things and wearable tech, robotics, Bitcoin, and other advanced technologies. Moreover, this sort of jurisdictional competition for innovation can happen at multiple levels of government— cities, counties, states, countries, and continents.116

This reiterates why policy incentives matter so much. “America right now is the net exporter of technology and innovation in the globe, and we can’t lose that advantage,” notes Senator Booker. “[W]e should continue to be the global innovators on these areas.”117 But that will happen only if American policymakers are willing to embrace permissionless innovation for these new technologies.

INNOVATION OPPORTUNITY: Private Drones

Unmanned aircraft systems (UASs), or drones, are poised to become far more ubiquitous in coming decades.118 Many hobbyists already use drones for a remarkable range of applications. As New York Times tech columnist Farhad Manjoo has noted, drone enthusiasts “see almost limitless potential for flying robots” and they see drones as “a platform—a new class of generalpurpose computer, as important as the PC or the smartphone, that may be put to use in a wide variety of ways.”119 Drones could also have many important news-gathering uses for both professional media organizations and average citizens.120

The commercial benefits could also be profound. As Sen. Cory Booker (D-NJ) has argued, “[T]he potential possibilities for drone technology to alleviate burdens on our infrastructure, to empower commerce, innovation, jobs . . . to really open up unlimited opportunities in this country is pretty incredible to me.”121 A 2013 study from the Association for Unmanned Vehicle Systems International, which represents the industry, predicted $82.1 billion in economic impact between 2015 and 2025 from the integration of UASs into the nation’s airspace.122

Drones are already positively transforming many sectors, including agricultural and weather monitoring, disaster response management, law enforcement (especially missing persons searches), and entertainment services (such as movie production). Major tech innovators, such as Google,123 Amazon,124 and Facebook,125 are already actively experimenting with drone technologies to provide services to the public, but many smaller drone innovators exist (such as DJI, Parrot, and 3D Robotics). These manufacturers of commercial drones had revenue exceeding $600 million in 2014.126

Those numbers would likely be much larger if not for endless foot-dragging by federal regulators. Congress ordered the FAA to come up with a plan to integrate drones into domestic airspace by September 2015, but the agency missed the deadline and has continued to delay progress.127 This is partially due to the fact that private drones have already raised many safety and privacy concerns.128 The FAA invited comments in a proceeding about drone privacy,129 and legislation limiting private or commercial drone use has already been introduced at the federal level130 and in many states.131 In early 2015, the White House issued a memorandum addressing such concerns and creating a multistakeholder process to develop best practices for drone privacy.132

Some drone regulation is likely inevitable, but preemptive controls could curtail many of the benefits that could flow from relatively unrestrictive experimentation with UASs.133 Restrictions on news-gathering uses of private drones could also raise serious First Amendment concerns.134

It may be the case that existing laws and policies—property rights, nuisance laws, torts, “Peeping Tom” laws, etc.—could cover the most concerning privacy- infringing scenarios.135 For safety issues, UAS operators could simply be held liable in court for damages that they cause, much as automobile drivers can be held liable for their damages. New legal standards for UAS-related controversies will evolve gradually through a body of common-law cases, as they have for many other technologies.136

Generally speaking, however, permissionless innovation should guide policy decisions for the nation’s airspace.137 New rules must leave ample space for future innovation opportunities so that, like the Internet, airspace can become a platform for commercial and social innovation.138 Unfortunately, some companies have been exporting development of these technologies abroad owing to the uncertainty of the regulatory environment here in the United States.139

CHAPTER IV

HOW WE ADAPT TO TECHNOLOGICAL CHANGE

In this chapter, we consider why the worst fears about new technologies usually do not come to pass. The reason is simple: humans have the uncanny ability to adapt to changes in their environment, bounce back from adversity, and learn to become wiser and more resilient over time.

This has important ramifications for the policy debate between the precautionary principle mindset and the notion of permissionless innovation. If adaptation is not just possible but even extremely likely, then there is even less reason to preemptively restrict social and economic experimentation with new technologies and technological processes.

A. FROM PANIC TO EVENTUAL ADAPTATION

As chapter III noted, when new inventions first come on the scene, the initial reaction from philosophers, scientists, and pundits is often fear and loathing about the potential ramifications of technological change for both the culture and the economy. “Armageddon has a long and distinguished history,” Garreau notes. “Theories of progress are mirrored by theories of collapse.”1

In his magisterial history of apocalyptic theories, The Idea of Decline in Western History, Arthur Herman documented how such “declinist” thinking—or what Garreau referred to as “hell” scenarios—have been a pervasive, reoccurring feature of most past academic writing and social commentary. The irony of much of this pessimistic declinist thinking, however, is that, “[i]n effect, the very things modern society does best—providing increasing economic affluence, equality of opportunity, and social and geographic mobility—are systematically deprecated and vilified by its direct beneficiaries,” Herman says. “None of this is new or even remarkable.”2

Indeed, despite the fact that the general real-world trend has been in the direction of steady improvements in human health, welfare, and convenience, the skeptics persist in thinking that impending doom lies just around the corner. Even if the sky didn’t fall before as predicted, critics will always insist that this time it’s different! And many people believe them.

Chapter II offered some explanations for this strange phenomenon. In a nutshell, this behavior is rooted in our innate tendency to be pessimistic as well as a desire for greater certainty about what the future holds.3 By taking advantage of these tendencies, “the gloom-mongers have it easy,” notes Dan Gardner in his book, Future Babble: Why Expert Predictions Are Next to Worthless, and You Can Do Better, because their predictions “feel right to us. And that conclusion is bolstered by our attraction to certainty.”4

But just because those pessimistic predictions feel right, it doesn’t mean they are right. Again, the historical record is unambiguous: ongoing technological innovation has done more to improve the human condition that any other factor.

Yet, not only do the techno-critics consistently fail to appreciate what the historical record has to say about innovation fueling progress and prosperity, those critics also pay little attention to just how effectively humans adapt to ongoing technological change. “The good news is that end-of-the-world predictions have been around for a very long time, and none of them has yet borne fruit,” Garreau reminds us.5 Why not? Let’s return to his framework for the answer. After discussing the “Heaven” (optimistic) and “Hell” (skeptical or pessimistic) scenarios cast about by countless tech writers throughout history, Garreau outlines a third, and more pragmatic, “Prevail” option, which views history “as a remarkably effective paean to the power of humans to muddle through extraordinary circumstances.”6

The “Prevail” or “muddling through” scenario offers the best explanation for how we learn to cope with technological disruption and prosper in the process. As Garreau explains it, under the Prevail scenario, “humans shape and adapt [technology] in entirely new directions.”7 He rightly notes, “Just because the problems are increasing doesn’t mean solutions might not also be increasing to match them.”8 As John Seely Brown and Paul Duguid noted in their 2001 essay responding to “doom-and-gloom technofuturists”:

[T]echnological and social systems shape each other. The same is true on a larger scale. . . . Technology and society are constantly forming and reforming new dynamic equilibriums with far-reaching implications. The challenge . . . is to see beyond the hype and past the oversimplifications to the full import of these new sociotechnical formations.9

It is this process of “constantly forming and reforming new dynamic equilibriums” that is typically overlooked by technology critics. Or, to the extent the critics are willing to engage in a discussion on this matter at all, they often change the topic and instead stress the disruptions that happened along the way—i.e., the social or economic norms that were challenged by technological change.10

That technological change disrupts is, of course, a truism by its very nature.11 Something is lost in the process. In terms of economics, it may be a job or a business that is lost, or perhaps even an entire profession or sector that disappears. It terms of culture, it may be a particular art form or medium of expression. And in terms of society more generally, technological change might fundamentally alter the ways we interact with each other and the world around us.

All this is undoubtedly true, but what of it? What can we learn from this? What were the mechanics of that adaptive process? As social norms, personal habits, and human relationships were disrupted, what helped us muddle through and find a way of coping with new technologies? Likewise, as existing markets and business models were disrupted, how were new ones formulated in response to the given technological disruption? Finally, how did legal norms and institutions adjust to those same changes?

Individual and societal acclimation to technological change is worthy of serious investigation if for no other reason than it has continuously happened! And what is most remarkable about this process is that we humans have again and again figured out how to assimilate new technologies into our lives despite how much those technologies disrupted our personal, social, economic, cultural, and legal norms.12 We prevailed and prospered.

#### That’ll incrementally fit AI into existing frameworks, solving downside risk, while letting regulatory expertise develop to avoid stifling innovation

Dr. Ahmed Badran 21, Associate Professor of Public Policy at Department of International Affairs, College of Arts and Sciences, Qatar University, PhD in Public Policy from the University of Exeter, “Thoughts and Reflections on the Case of Qatar: Should Artificial Intelligence Be Regulated?”, in Artificial Intelligence in the Gulf Challenges and Opportunities, Ed. Azar and Haddad, p. 69-71

1 Introduction

Technological advances can be regarded as a double-edged weapon. On the one hand, many befits can be reaped from the utilization of new technologies to improve the quality of life for human beings in different areas. On the other hand, the recent technological developments, particularly in the area of computing and robotics, raised a fundamental question about the possibility of the newly developed AI innovations to act independently from human control and to make their own decisions, which may harm humanity. In this context, different scholars and technology experts have echoed their concerns about the potential threats that AI may pose in the absence of government oversight and regulations (Reed, 2018). From an economic point of view, many economists share the fear that AI applications and machines alongside the advances in computing and robotics may result in economic disruptions and higher rates of unemployment especially among low skilled workers (AI Forum of New Zealand, 2018). As such, AI applications are expected to result in job losses in all areas, including blue collars, white collars, and professional services (Russell & Norvig, 1994). At the same time, many activists and intellectuals are opposing the idea that governments should develop autonomous weapons and autonomous killing machines that work independently from human intervention and may select and destroy their own targets as this may result in significant security risks (Etzioni & Etzioni, 2017).

The ubiquity of AI in modern societies means that people, as well as governments, will be muddling through its legal and ethical ramifications for quite some time. The fast increase in AI applications raises fundamental questions about the potential impact of machines on the everyday lives of humans. As put by Scherer, ‘with each passing month, AI gains footholds in new industries and becomes more enmeshed in our day-to-day lives, and that trend seems likely to continue for the foreseeable future’ (Scherer, 2016). In this context, a valid inquiry would be whether AI applications will result in a better life and more efficient use of available resources, or they will pose threats, which might end humankind (Kohli, 2015). In general, AI cannot be seen as all good or all bad. It is a reality, it affects our lives in different shapes and forms, it provides opportunities, and it poses threats (Erdelyi & Goldsmith, 2018). The question now becomes, how could we deal with the AI threats in order to maximize the benefits and mitigate or minimize the risks? Addressing all the risks associated with AI goes beyond the scope of this chapter. Therefore, the chapter will focus on one aspect that is the policy and legal vacuum created by the AI revolution.

There are calls from scholars, AI practitioners, and technology leaders for a form of government regulation on AI activities and research in order to protect the public interest are gaining more attention. The founder of Tesler, Elon Musk, for instance, has regarded AI as being even more dangerous than nuclear weapons. In this regard, he wrote on Twitter, ‘I’m increasingly inclined to think there should be some regulatory oversight [of AI], maybe at the national and international level’. In the same vein, regulatory and legal scholars, including Matthew Scherer, have called for the development of an overall legal and regulatory framework, which guarantees the safety of AI innovations through government intervention. The idea of developing policies and guidelines to regulate AI programs is not an alien even for the AI communities and industries. The Association for the Advancement of Acritical Intelligence has looked into this issue; however, the AI researchers have concluded that there is no need to develop such guidelines as the threats and risks associated with AI are not certain (Reed, 2018). Scherer has commented on the growing calls for regulating AI by stating that ‘fear of technological change and calls for the government to regulate new technologies are not new phenomena. What is striking about AI, however, is that leaders of the tech industry are voicing many of the concerns’ (Scherer, 2016).

Despite this growing agreement among several AI community members on the importance of government regulation and intervention, the question is still how much intervention is needed. In innovation and technology-driven sectors such as AI, too much government intervention and heavy-handed regulations might hamper the innovation and progress of these sectors (Finale & Kortz, 2017). Moreover, restrictive government regulations may result in less efficient AI systems, forced design choices, and suboptimal outcomes (Beishon, 2018). Hence, the regulation of AI will not be an easy task given the different meanings of AI in different areas and the risks the diverse forms of AI pose at different levels.

In this context, the chapter argues that recent developments in AI call for regulatory intervention from governments in order to strike a balance between potential benefits and the expected threats and risks. Nonetheless, any attempt to regulate AI is bound by the meaning we associate with this concept as AI means different things to different people and poses diverse types of risks in different policy domains. Moreover, the chapter emphasizes that we should not rush at present to restrictively regulate AI in ignorance. Instead, an incremental and gradual approach for regulating AI is needed wherein a distinction can be made between AI products and innovations that can be regulated within the existing legal and regulatory framework and those required new regulations. To follow up on this argument, the chapter will be divided into two main sections. Section one sets the stage for the discussion of AI regulation and the regulatory challenges posed by this novel construct. In this regard, AI and the other related concepts are discussed alongside the different positions taken on regulating AI from the leading AI entities. Section two is devoted to the discussion of a proposed regulatory framework to regulate AI in Qatar. The last chapter concludes with some policy recommendations on how to regulate AI without hampering innovation in such a promising and fast-growing sector.

### Regulation Fails---2NC

#### 1. Skills deficit---regulators lack expertise to evaluate AI and apply the rule

Dr. Julia Black 19, Professor of Law and Strategic Director of Innovation at the London School of Economics, DPhil from Oxford University, and Andrew Murray, Professor of Law at the London School of Economics, LLB from Edinburgh University, “Regulating AI and Machine Learning: Setting the Regulatory Agenda”, European Journal of Law and Technology, Volume 10, Number 3, https://ejlt.org/index.php/ejlt/article/view/722/978

5. The Regulatory Action

It is too late for us to put AI and ML back into a box. It may be that in areas which are already heavily regulated, such as medical products and applications, then the use of AI or ML will require prior regulatory approvals. But even if they are caught in an existing regulatory net, there is little evidence that regulators have the necessary capacity properly to evaluate all the actual and potential uses of AI in their regulatory domains. Asymmetries of knowledge and skills are amplified in the highly technical area of AI. And we can see from current debates in multiple areas that existing regulatory systems simply do not capture the use of AI and ML, allowing them to operate on the edges of existing regulatory perimeters or escape them entirely. The current domination by corporate players means that AI is likely to be developed and marketed in a similar fashion to internet products and online services. There will be both a consumer market and a commercial market for products and services and in all likelihood they will be regulated, if at all, in piecemeal fashion. But as noted, AI is also being rapidly used by governments themselves to deliver welfare provision (education, healthcare) [67] and exercise core functions of government (policing, justice) and indeed in the function of regulation itself. [68] Furthermore, we know from the long histories of regulation in other areas that companies, government bodies, NGOs and others will seek to reassure governments and consumers that formal regulation is not required; that they can and will act ethically and adopt such devices as codes and ethics boards to demonstrate that commitment. However, we also know from history that a commitment to ethics is important, indeed essential, for effective regulation, but is rarely sufficient on its own in the absence of very specific conditions which rarely exist in a highly competitive market.

#### 2. Evasion---dedicated developers easily hide

Dr. Michael Guihot 17, Senior Lecturer at the Commercial and Property Law Research Centre at Queensland University Technology Faculty of Law, Dr. Anne F. Matthew, Lecturer at the Commercial and Property Law Research Centre, Queensland University of Technology Faculty of Law, and Nicolas P. Suzor, Associate Professor at the Queensland University of Technology Faculty of Law and Recipient of an Australian Research Council DECRA Fellowship, “Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence”, Vanderbilt Journal of Entertainment and Technology Law, 20 Vand. J. Ent. & Tech. L. 385, Volume 20, Issue 2, Winter 2017, Lexis

7. Limited Enforcement Mechanisms and Jurisdiction Shopping

Added to the complexities outlined above, the major players in the development of AI - such as Google, Facebook, Microsoft, and Apple - are some of the biggest, most complex, and powerful corporations the world has seen. 203 They own and control what Marx might have described as the means of production in this field - that is, the vast array of superpowerful computers and the phalanx of the world's best and brightest mathematicians and engineers required to churn the algorithms necessary to create AI. 204 The power disparity between these players and government regulators, who often struggle to secure sufficient resources to operate, highlights the difficulties that might be faced by a regulator in trying to regulate these companies. 205

The fact that the technology is relatively opaque 206 also makes it easier for firms to hide wrongdoing and evade regulation. Volkswagen, for example, was able to create specific code to identify the tests used by regulators to measure emissions and make its car engines appear to run more cleanly than when in normal use. 207 Similarly, recent reports suggest that Uber created a version of its app specifically designed to identify users likely to be regulators and prevent them from accessing the system to investigate concerns or collect evidence. 208

#### 3. Timing---it’s reactive, adopted only when already obsolete

Harriet Moynihan 21, Acting Director of the International Law Programme at Chatham House, MA with Honors from the Trinity Hall, University of Cambridge, and Marjorie Buchser, Executive Director of the Digital Society Initiative, MA in Comparative and International Studies from the Swiss Federal Institute of Technology in Zurich (ETHZ), MA in Political and Social Sciences from the Université of Lausanne, “Can Global Technology Governance Anticipate the Future?”, Chatham House Expert Comment, 4/27/2021, https://www.chathamhouse.org/2021/04/can-global-technology-governance-anticipate-future

Technology governance is beset by the challenges of how regulation can keep pace with rapid digital transformation, how governments can regulate in a context of deep knowledge asymmetry, and how policymakers can address the transnational nature of technology.

Keeping pace with, much less understanding, the implications of digital platforms and artificial intelligence for societies is increasingly challenging as technology becomes more sophisticated and yet more ubiquitous.

To overcome these obstacles, there is an urgent need to move towards a more anticipatory and inclusive model of technology governance. There are some signs of this in recent proposals by the European Union (EU) and the UK on the regulation of online harms.

Regulation failing to keep up

The speed of the digital revolution, further accelerated by the pandemic, has largely outstripped policymakers’ ability to provide appropriate frameworks to regulate and direct technology transformations.

Governments around the world face a ‘pacing problem’, a phenomenon described by Gary Marchant in 2011 as ‘the growing gap between the pace of science and technology and the lagging responsiveness of legal and ethical oversight that society relies on to govern emerging technologies’.

This ever-growing rift, Marchant argues, has been exacerbated by the increasing public appetite for and adoption of new technologies, as well as political inertia. As a result, legislation on emerging technologies risks being ineffective or out-of-date by the time it is implemented.

Effective regulation requires a thorough understanding of both the underlying technology design, processes and business model, and how current or new policy tools can be used to promote principles of good governance.

Artificial intelligence, for example, is penetrating all sectors of society and spanning multiple regulatory regimes without any regard for jurisdictional boundaries. As technology is increasingly developed and applied by the private sector rather than the state, officials often lack the technical expertise to adequately comprehend and act on emerging issues. This increases the risk of superficial regulation which fails to address the underlying structural causes of societal harms.

#### 4. Capture

Dr. Michael Guihot 17, Senior Lecturer at the Commercial and Property Law Research Centre at Queensland University Technology Faculty of Law, Dr. Anne F. Matthew, Lecturer at the Commercial and Property Law Research Centre, Queensland University of Technology Faculty of Law, and Nicolas P. Suzor, Associate Professor at the Queensland University of Technology Faculty of Law and Recipient of an Australian Research Council DECRA Fellowship, “Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence”, Vanderbilt Journal of Entertainment and Technology Law, 20 Vand. J. Ent. & Tech. L. 385, Volume 20, Issue 2, Winter 2017, Lexis

6. Agency Capture

Regulatory failure due to agency capture occurs where regulators become sympathetic towards the industry they are regulating. This can be the result of any number of factors, such as a high frequency of interaction between industry and regulators, industry representatives "buying off" regulators with gifts like free lunches or sponsorship to attend conferences, or a "revolving door" for employees between regulatory agencies and industry. 201 While each of these problems is relatively common throughout innovating industries, the AI industry is particularly susceptible to the revolving door issue. 202 The information asymmetry issue where AI companies hold all the relevant information about the technology makes the knowledge and expertise acquired by employees of AI developers particularly valuable to regulators, which are likely to be interested in employing former AI developers when (and if) they can.

## Smart Pricing ADV

### Grid D---2NC

#### EMP is stupid

Jeffrey Lewis 13, Director of the East Asia Nonproliferation Program for the James Martin Center for Nonproliferation Studies at the Middlebury Institute of International Studies at Monterey, “The EMPire Strikes Back”, Foreign Policy, 5/24/2013, https://foreignpolicy.com/2013/05/24/the-empire-strikes-back/

Jim Woolsey, a former director of central intelligence and noted Oklahoma City conspiracy theorist, and Peter Pry had an op-ed in the Wall Street Journal on Tuesday warning that North Korea might attack United States with a nuclear weapon. But instead of vaporizing Washington, Woolsey and Pry warn that North Korea would use just one bomb to create a massive electromagnetic pulse (EMP) that would fry our iPhones and end "modern civilization."

It will be like The Hunger Games meets Red Dawn!

If you aren’t familiar with the crowd of cranks and threat inflators banging the EMP drum, this scenario might seem a little far-fetched. It does seem like the sort of overcomplicated plot dreamed up by a Bond villain, one that only works in the movies. Bad movies.

Well, bad movies and terrible books — like Newt Gingrich and William Forstchen’s potboiler One Second After, about life in the United States after an EMP attack. Yes, that’s right. Newt Gingrich wrote dime-store pulp fiction about the aftermath of an EMP attack. I am just going to give you a minute here to compose yourself.

All better? Okay, as I said, Newt Gingrich wrote a book about EMP. EMP advocates get a little cranky when you make fun of it. An indignant Peter Pry once responded to mockery of the book by comparing One Second After to Uncle Tom’s Cabin. Really.

That’s because the EMP crowd is about raising "awareness." The Heritage Foundation even promotes "EMP Awareness Day." And Congress empanelled a Commission to Assess the Threat to the United States from Electromagnetic Pulse Attack in 2001 (and reauthorized it in 2006) and even has an "EMP Caucus." No, I don’t know if they wear little tinfoil hats at their caucus meetings. Why would you ask something like that?

The possibility of an electromagnetic pulse wiping out Western civilization — or at least our local varietal — is a hardy perennial of a particular worldview espoused by types like the John Birch Society. EMP "awareness" basically occupies the space vacated by activism in the 1950s for civil defense. For a flavor of the old civil defense paranoia, I recommend a slim volume from 1968 entitled "Who Speaks for Civil Defense?" — particularly a chapter by the late Steuart Pittman that perfectly captures the paranoia of the movement.

Sharon Weinberger, author of the excellent Imaginary Weapons, has already written a readable account of the craziness of this view in these very electronic pages ("The Boogeyman Bomb"), which elicited a letter from Pry that took itself very, very seriously. The humorlessness of the EMP movement is not surprising. This is about scaring people. Any mirth is entirely unintentional.

For such a dry, serious subject, the amount of actual data on the threat from electromagnetic pulse attack is pretty thin. Electromagnetic pulse is, of course, a real phenomenon produced by a nuclear explosion. The EMP Commission likes to point to its "years" of research based on "decades" of data on the effects of nuclear weapons. But at the end of the day, even if we understand the physics of electromagnetism, there is no credible way to model the mass effect of a pulse on a complex system like our power grid or our communications infrastructure.

The United States and the Soviet Union did engage in high-altitude nuclear testing before realizing this might not be the greatest idea, eventually banning tests in the atmosphere and outer space. The most famous event was called Starfish Prime — a 1.4 megaton nuclear explosion conducted by the United States in the Pacific in July 1962. By contrast, North Korea’s 2013 nuclear test — its largest and most successful — was on the order of 10 kilotons, or more than a hundred-times smaller.

EMP threat-mongers sometimes dramatically exaggerate the effects of Starfish Prime. For example, Lowell Wood, later a member of the EMP Commission, described the impact of Starfish Prime to Congress in plainly apocalyptic terms. Starfish Prime, he said, "very unexpectedly turned off the lights over a few million square miles in the mid-Pacific. This EMP also shut down radio stations, turned off cars, burned out telephone systems, and wreaked other mischief throughout the Hawaiian Islands, nearly 1,000 miles distant from ground zero."

All of which was terrible — or would have been, had it happened. It did not.

Starfish Prime was bad, but it was not nearly so dramatic as Wood claimed. In fact, lots of people turned out to watch the explosion from hotels and beaches in Hawaii, including reporters sent to cover it.

Take a gander at the coverage in Life Magazine, which has some really beautiful images of the event. My favorite account comes from Dick Stolley. He’s famous, by the way. He would later buy the Zapruder film. Stolley reported on Starfish Prime from the beach at Waikiki:

There were coeds in muumuus, college boys in swimsuits, tourists in newly purchased resort wear, sleepy kids…. [The blast was] white and hot, like the flash of a breaking electrical circuit. It turned almost instantly to a bright bilious green, a color so unexpected that watchers gasped.

Tough assignment, huh? Life doesn’t mention what Stolley did next, but given his fond recollection of the drinks cart after putting an issue of Life to bed, I like to think he slipped back to the Royal Hawaiian for a Mai Tai and to interview any coeds in muumuus who happened to be around.

Now, as I say, Starfish Prime did do some damage, even if Waikiki’s luau schedule was uninterrupted. The electromagnetic pulse and other effects probably killed off two or three satellites in orbit, which was bad enough. The explosion may also have damaged some telephone equipment, but there were no telephone outages. (Military communications and test instrumentation all worked fine.) Some street lights on Ferdinand Street in Manoa and Kawainui Street in Kailua also went out. Of course, street lights and telephone systems experience everyday failures, too. You’d be surprised at how hard it is to demonstrate that street light failures are the result of an electromagnetic pulse rather than, say, faulty fuses. (Apparently, the answer turns on fascinating questions like "How many clear plastic washers were in transformer cutouts that failed?") Contemporary reports mention continuous radio coverage of the event with no outages.

So let’s be clear: Starfish Prime did not “turn off the lights over a few million square miles in the mid-Pacific." It did not shut down any radio stations or cars or burn out the telephone system. The biggest problem that Dick Stolley and other reporters had filing their stories the next day was probably a hangover.

Even if we understand how an electromagnetic pulse works and have data about the vulnerability of equipment, a modern system like a power grid or communications network presents just too complex a set of resiliencies and vulnerabilities.

The solution of the EMP Commission was simply to collect more data, essentially creating laundry lists of things that might go wrong. For example, the EMP Commission exposed 37 cars and 18 trucks to EMP effects in a laboratory environment. While EMP advocates claim the results of an EMP attack would be "planes falling from the sky, cars stalling on the roadways, electrical networks failing, food rotting," the actual results were much more modest. Of the 55 vehicles exposed to EMP, six at the highest levels of exposure needed to be restarted. A few more showed "nuisance" damage to electronics, such as blinking dashboard displays.

This kind of experiment is better than nothing, of course, but it doesn’t model the effect of an EMP event on urban transportation networks. Would the result be massive pile-ups on expressways? Carmaggedon? Friday afternoon on the Beltway? The experiment raises as many questions as it answers, including, "How did they get enough money to purchase 55 vehicles?" I can’t help but wonder if they just rented them one by one. "How was your car, Mr. Graham?" "Oh, yeah, uh, the dash display is blinking." "We’re sorry to hear that, we hope it wasn’t an inconvenience." "What? Oh, well, never mind. All’s well that end’s well, that’s what I say."

The bottom line is that there simply isn’t enough evidence to support the wild claim that a single nuclear weapon, or even a few, detonated at high altitudes would pose an "existential threat" to "modern civilization," as Woolsey and Pry claim. It would be a nuisance, but preferable to having the bomb detonate in a major city.

#### It’s fine---resiliency and redundancy check

Rick Geiger 16, Executive Director Utilities and Smart Grid at Cisco, “Power Grid Security: Separating Reality from Hype”, http://blogs.cisco.com/energy/power-grid-security-separating-reality-from-hype

We’ve all seen the news reports on power grid vulnerabilities and the possibility of an impending terror attack. Recently, Ted Koppel’s book, “[Lights Out](http://www.amazon.com/Lights-Out-Cyberattack-Unprepared-Surviving/dp/055341996X),” caused a wave of press around the issue. Similar spikes in press occurred in the year after the PG&E [Metcalf substation sabotage](http://www.nbcbayarea.com/news/local/PGE-Makes-Security-Upgrades-at-Metcalf-Substation-297045201.html) and around the National Geographic special in October 2013, “[American Blackout.](http://channel.nationalgeographic.com/american-blackout/)” There are both good points and some amount of exaggeration in the reporting on grid vulnerabilities, so I’ll be debunking a couple of [power grid security](http://www.cisco.com/c/en/us/solutions/industries/energy/external-utilities-smart-grid/security.html) myths. The [Associated Press](http://bigstory.ap.org/article/c8d531ec05e0403a90e9d3ec0b8f83c2/ap-investigation-us-power-grid-vulnerable-foreign-hacks) credits anonymous top experts for revealing about a dozen times in the last decade, “…sophisticated foreign hackers have gained enough remote access to control the operations networks that keep the lights on…” Rather than anonymous “top experts” you can find the results of an authoritative investigation, with attribution, in the 2007 report, “[Top 10 vulnerabilities of control systems and their associated mitigations](http://www.nerc.com/comm/CIPC/Related%20Files%20DL/2007_Top_10_Final_Approved_by_CIPC.pdf),” from the North American Electric Reliability Corporation (NERC) Control Systems Security Working Group. Headlines about the cyberattack on the Ukraine power grid greeted us at the start of 2016. [Ars Technica](http://arstechnica.com/security/2016/01/first-known-hacker-caused-power-outage-signals-troubling-escalation/) reported, “Highly destructive malware creates ‘destructive events’ at 3 Ukrainian substations.” Utilities Telecom Council Security offered a slightly different perspective in the Risk and Compliance Digest from January 6, 2016: “Some news media have speculated that the attacks were launched by or for Russia, in retaliation for Ukrainian activists’ attacks on the power supply to Crimea. That linkage will likely be impossible to prove or disprove. At present there is not enough evidence to positively conclude that this was a cyberattack or who is responsible. Regardless, the outage is fact. The discovered malware includes updated versions of known tools such as KillDisk, which is not in itself malware, and BlackEnergy. However there is no smoking gun – no piece of malicious code that definitively caused the outage. Researchers have yet to rule out the possibility of insider collaboration in the attack, possibly working in tandem with the malware.” Instead of panicking, let’s fact check some claims. Myth #1: Our power system is aging and outdated. The [Associated Press](http://bigstory.ap.org/article/c8d531ec05e0403a90e9d3ec0b8f83c2/ap-investigation-us-power-grid-vulnerable-foreign-hacks) warns that “Many of the substations and equipment that move power across the U.S. are decrepit and were never built with network security in mind…” It certainly is the case that many of the capital assets that comprise the United States grid infrastructure are used beyond their intended useful life of 25 years or longer. The initial operations certificates for nuclear power plants were 40 years. Of course they were never built with network security in mind because 40 years ago networks, if they existed at all, were local and limited (DECNet, Token Ring, etc.) For reference: The Hoover Dam was constructed in 1935. The San Onofre Nuclear Generating Station (SONGS) Unit 1 started operation in 1968. Cisco was founded in December of 1984. Despite their age, utilities every year spend billions of dollars maintaining and upgrading electric power infrastructure systems to maintain the level of reliability we’ve come to expect. For a closer look, watch this video of helicopter maintenance on an energized 765K Volt Line. Myth #2: We are unprepared if the grid goes down. Ted Koppel’s book primarily focuses on the potential consequences of an extended power outage, echoing the National Geographic special from 2 years earlier. Ted states that, “The Department of Homeland Security has no plans beyond those designed to deal with the aftermath of natural disasters.” And that “We are unprepared…” Both Ted Koppel and National Geographic start with the assumption that the grid has been disabled for months to establish the assumed starting conditions against which the story of preparedness for months of no power is told. The North American utility industry would disagree with the impression created by these writings that nothing has been done. They have spent billions implementing ever more stringent versions of NERC-CIP and other grid reliability measures. In addition to NERC-CIP, they have taken the following actions: Developed the NIST Interagency Report 7628, Guidelines for Smart Grid Cybersecurity Conducted GridEx, GridEx II, and GridEx III to exercise crisis response and recovery Complied with Presidential Order 13636 from February 2013 on Critical Infrastructure Security Applied recommendations from SuperStorm Sandy reports for grid resilience and response actions. Followed the Critical Infrastructure Security provisions in the 2016 budget bill just passed by the House. Is it enough? Can we relax? As the famous quote goes, “Eternal vigilance is the price of liberty” and in this case, Eternal Vigilance is the price of security of our critical infrastructure. Despite what has been done to secure the grid, the industry remains too smug about the disconnected nature of many critical systems. In doing so, they overlook the fact that some of the most successful and devastating cyberattacks have been carried out against systems that were not connected to the internet, the most prominent example being Stuxnet and the damage to the Iranian centrifuge capability. Despite having rifle bullets shot into the high voltage transformers in the Metcalf substation, not a single PG&E customer lost power. That’s a result of protections and redundancy that are an integral part of the design of the grid. Experiences with wide area outages and cascade failures have led to constant improvements in control systems and design redundancy. Is it perfect? Certainly not. Can it be improved? Definitely. We continue to learn from each large outage or natural disaster. The analysis of the 2011 Southwest Blackout jointly issued by NERC & FERC is one example. Lessons learned from Superstorm Sandy are another. The Bottom Line While vulnerabilities in the grid remain, considerable investment, study, and effort are being expended to identify vulnerabilities and secure the grid from cyber and physical attacks. Events like Superstorm Sandy and the sabotage of the Metcalf substation have caused Federal, State, and Local governments and regulators to rethink critical power requirements and develop plans that are tested during crisis exercises.

### Econ D---2NC

#### Nationalism from economic crises doesn’t escalate.

Eric Taylor Woods & Robert Schertzer 20, Senior Lecturer in Sociology at the University of East London, Ph.D. from the London School of Economics and Political Science; Associate Professor of Political Science at the University of Toronto, Ph.D. in Government from the London School of Economics and Political Science, “COVID-19, nationalism, and the politics of crisis: A scholarly exchange,” Nations and Nationalism, Vol. 26, No. 4, October 2020, https://doi.org/10.1111/nana.12644

In our view, this account gives too much power to nationalism as the key driver of conflict. We know many of the conditions and logics that drive interstate warfare, and COVID-19 does not necessarily lead us down these pathways. As others have argued, the pandemic has created significant logistical issues for mass troop mobilization, it has shaken the confidence of states and leaders and there is no necessary link between economic downturns and warfare—recessions are a bad predictor of interstate conflict (Posen, 2020; Walt, 2020). While nationalism can shape decisions and introduce irrationality, it does not necessarily have the structuring power to overcome the current barriers to interstate warfare. The view that increasing nationalist sentiment will inevitably lead to violent conflict also oversimplifies nationalism. This logic assumes that nationalism is always dangerous and illiberal, which in our view is an outmoded that builds on a normative distinction between bad (ethnic) and good (civic) forms of identity.

#### Decline increases cooperation.

Christina L. **Davis &** Krzysztof J. **Pelc 17**, Christina L. Davis is a Professor of Politics and International Affairs at Princeton; Krzysztof J. Pelc is an Associate Professor of Political Science at McGill University, “Cooperation in Hard Times: Self-restraint of Trade Protection,” Journal of Conflict Resolution, 61(2): 398-429

Conclusion Political economy theory would lead us to expect rising trade protection during hard times. Yet empirical evidence on this count has been mixed. Some studies find a correlation between poor macroeconomic conditions and protection, but the worst recession since the Great Depression has generated surprisingly moderate levels of protection. We explain this apparent contradiction. Our statistical findings show that under conditions of pervasive economic crisis at the international level, states exercise more restraint than they would when facing crisis alone. These results throw light on behavior not only during the crisis, but throughout the WTO period, from 1995 to the present. One concern may be that the restraint we observe during widespread crises is actually the result of a decrease in aggregate demand and that domestic pressure for import relief is lessened by the decline of world trade. By controlling for product-level imports, we show that the restraint on remedy use is not a byproduct of declining imports. We also take into account the ability of some countries to manipulate their currency and demonstrate that the relationship between crisis and trade protection holds independent of exchange rate policies. Government decisions to impose costs on their trade partners by taking advantage of their legal right to use flexibility measures are driven not only by the domestic situation but also by circumstances abroad. This can give rise to an individual incentive for strategic self-restraint toward trade partners in similar economic trouble. Under conditions of widespread crisis, government leaders fear the repercussions that their own use of trade protection may have on the behavior of trade partners at a time when they cannot afford the economic cost of a trade war. Institutions provide monitoring and a venue for leader interaction that facilitates coordination among states. Here the key function is to reinforce expectations that any move to protect industries will trigger similar moves in other countries. Such coordination often draws on shared historical analogies, such as the Smoot–Hawley lesson, which form a focal point to shape beliefs about appropriate state behavior. Much of the literature has focused on the more visible action of legal enforcement through dispute settlement, but this only captures part of the story. Our research suggests that tools of informal governance such as leader pledges, guidance from the Director General, trade policy reviews, and plenary meetings play a real role within the trade regime. In the absence of sufficiently stringent rules over flexibility measures, compliance alone is insufficient during a global economic crisis. These circumstances trigger informal mechanisms that complement legal rules to support cooperation. During widespread crisis, legal enforcement would be inadequate, and informal governance helps to bolster the system. Informal coordination is by nature difficult to observe, and we are unable to directly measure this process. Instead, we examine the variation in responses across crises of varying severity, within the context of the same formal setting of the WTO. Yet by focusing on discretionary tools of protection—trade remedies and tariff hikes within the bound rate—we can offer conclusions about how systemic crises shape country restraint independent of formal institutional constraints. Insofar as institutions are generating such restraint, we offer that it is by facilitating informal coordination, since all these instruments of trade protection fall within the letter of the law. Future research should explore trade policy at the micro level to identify which pathway is the most important for coordination. Research at a more macro-historical scope could compare how countries respond to crises under fundamentally different institutional contexts. In sum, the determinants of protection include economic downturns not only at home but also abroad. Rather than reinforcing pressure for protection, pervasive crisis in the global economy is shown to generate countervailing pressure for restraint in response to domestic crisis. In some cases, hard times bring more, not less, international cooperation.

#### Stats prove

Daniel Drezner 14, IR prof at Tufts, The System Worked: Global Economic Governance during the Great Recession, World Politics, Volume 66. Number 1, January 2014, pp. 123-164

The final significant outcome addresses a dog that hasn't barked: the effect of the Great Recession on cross-border conflict and violence. During the initial stages of the crisis, multiple analysts asserted that the financial crisis would lead states to increase their use of force as a tool for staying in power.42 They voiced genuine concern that the global economic downturn would lead to an increase in conflict—whether through greater internal repression, diversionary wars, arms races, or a ratcheting up of great power conflict. Violence in the Middle East, border disputes in the South China Sea, and even the disruptions of the Occupy movement fueled impressions of a surge in global public disorder. The aggregate data suggest otherwise, however. The Institute for Economics and Peace has concluded that "the average level of peacefulness in 2012 is approximately the same as it was in 2007."43 Interstate violence in particular has declined since the start of the financial crisis, as have military expenditures in most sampled countries. Other studies confirm that the Great Recession has not triggered any increase in violent conflict, as Lotta Themner and Peter Wallensteen conclude: "[T]he pattern is one of relative stability when we consider the trend for the past five years."44 The secular decline in violence that started with the end of the Cold War has not been reversed. Rogers Brubaker observes that "the crisis has not to date generated the surge in protectionist nationalism or ethnic exclusion that might have been expected."43

#### Growth is strong

Dr. Daniel Bachman 3-17, Senior Manager with Deloitte Services LP, B.A. from Johns Hopkins and Ph.D. from Brown University, “United States Economic Forecast”, Deloitte, 3/17/2022, https://www2.deloitte.com/us/en/insights/economy/us-economic-forecast/united-states-outlook-analysis.html

The Russia-Ukraine war won’t derail the recovery

The US economy’s performance in the past few months has been better than most people expected—or even realized. While Omicron took infection rates to a new high, little trace appeared in economic data. Inflation and related problems, such as tangled supply chains, may continue to challenge business leaders and policymakers, but the US economy is performing well by most measures:

* The unemployment rate is already back to the full employment level.
* The labor force participation rate has started to pick up, as some of the folks who left the labor force are coming back to work.
* Corporate profits are more than satisfactory. Profits in Q3 2021 were 21% above the prepandemic level. That’s much better than many businesses had reason to expect when the pandemic first hit in March 2020.
* Strong profits have supported business investment. The pandemic shifted investment away from buildings and toward equipment and information products.1 But the willingness to invest suggests that businesses are surprisingly optimistic
* about the future.
* The pandemic drove the adoption of technology and—as a consequence—appears to have accelerated labor productivity growth. Previous Deloitte forecasts assumed trend productivity was less than 1%. But productivity growth has remained surprisingly strong during the recovery from the pandemic, about 2% over the four quarters to December 2021. If productivity growth remains high, many of the long-term issues facing the US economy—such as financing social security—will likely become considerably easier to solve.

But just as Omicron’s potential to impact the economy waned, geopolitical tensions increased. The Russian invasion of Ukraine is not likely to derail the US recovery, but it will push up inflation in the short run.

The US economy is likely to feel the impact of a continuing Ukraine crisis through two main channels.

Most importantly, the price of oil is likely to remain higher than it would have otherwise—although how much higher is an open question. Russia produces about 12% of global crude oil supplies. Sanctions may remove some of this oil supply, as the United States (and possibly some European countries) reduce or end purchases of Russian oil.

However, oil is a global, fungible commodity and Russia can still sell oil to non-boycotting nations. That would release other oil for shipment to boycotting countries without affecting the global price of oil. Of course, payments may be more difficult, and Russia may need to sell its oil at a discount. But the size of the supply shock may be more limited than that 12% figure suggests.

Europe’s heavy dependence on Russian natural gas suggests that the EU’s economy will experience slower growth—or, in the extreme case, a recession. The EU is a major trading partner of the United States, accounting for more than 15% of US exports. On top of a direct decline in demand, dollar appreciation reflecting the relative safety of the United States will make US goods less competitive. Both would reduce the contribution of exports to US GDP growth.

The combined impact is not large enough to generate a recession in the United States. But growth could slow down. And inflation would pick up, at least in the short term. Our baseline forecast assumes a US$15 per barrel rise in the price of oil, which leads to an extra half a percentage point rise in the consumer price index (CPI) in 2022 (with most of the rise occurring in the second quarter). That’s not huge, but during a period when the Fed is struggling to control inflation, it presents policymakers with a big problem.

# 1NR

## T Section 5

### Overview---1NR

#### Federal courts have decided 4,278 rule of reason cases.

--WestLaw search for “adv: antitrust & (Rule +2 Reason)”

--this is the search used by Carrier 9 to capture all rule of reason cases, but without the date limiter because Carrier was updating an older article with post-1999 data

--FYI

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

I. METHODOLOGY

This survey is based on a Westlaw search of all federal cases decided between February 2, 1999, and May 5, 2009. I located the cases by searching broadly for all rule of reason cases: “DA(aft 2/2/1999) & antitrust & (Rule +2 Reason).”

Such a search is designed to pick up every instance in which a court applied rule of reason analysis. I assumed that any court conducting such analysis would at least mention the phrase “rule of reason.” This would appear to be a reasonable assumption given the importance of labels in antitrust. A court applying rule of reason analysis—as opposed to, say, per-se or quick-look analysis—should naturally refer to the concept. And I include “antitrust” as one of my search terms to restrict the universe of cases to antitrust cases, a helpful limitation given the prevalence of the phrase “rule of reason” in other settings such as environmental, patent, and criminal law.9

#### Defendants won 95% of those.

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, Vol. 19, Iss. 3, pp 645-699

In adopting the rule of reason, the FTC practically guaranteed that it would be able to bring few, if any, Section 5 cases. The statistics demonstrate, in practice, that the rule of reason means that the plaintiff almost always loses. A leading study found that, between 2000 and 2009, defendants received a favorable court ruling in more than ninety-five percent of antitrust cases implicating the rule of reason.146

#### Nearly all of those are dismissed based on a substantive finding of ‘no anticompetitive effect’---reversing any one of those would be T! Insert this chart.

Michael A. Carrier 9, Professor at Rutgers University School of Law-Camden, “The Rule of Reason: An Empirical Update for the 21st Century,” George Mason Law Review, Vol. 16, Iss. 4, pp 827-837

Table

Description automatically generated

#### Legally, the phrase ‘by at least expanding the scope’ must be given independent meaning---it cannot be rendered mere surplusage

Patrick J. Hanna 18, Magistrate Judge on the United States District Court, Louisiana Western, “Batiste v. Quality Constr. & Prod. LLC”, 327 F. Supp. 3d 972, 978, 2018 U.S. Dist. LEXIS 115075, 7/9/2018, Lexis

Any other interpretation of indemnity provision would require the words "the vessel, its owners, operators" to be ignored. Doing so would violate a cardinal rule of contract interpretation, which requires that all terms used in the contract should be given meaning and, consistently, that no terms used in the contract should be rendered superfluous. The only way to read the indemnity provision without ignoring the words "the vessel, its owners, operators, master, and crew," is to find that Arena owes indemnity to Alliance because it was both the owner and operator of the vessel at the time of the plaintiff's alleged injury.

### AT: We Meet---AT: ‘Scope of Antitrust Law’

#### 1. Court decisions are unanimous AND it’s express in statute. Their ev is colloquial misuse.

Teresa T. Bonder 18, Partner at Alston & Bird, “Defendants’ Opposition to Federal Trade Commission’s Motion for Permission to Serve Nine Trial Subpoenas”, Federal Trade Commission v. Actavis Inc., et al., US District Court for the Northern District of Georgia, April 2009, Lexis

The statute the FTC cites, 15 U.S.C. § 23, authorizes nationwide service of process only for claims “arising under the antitrust laws.” Id. “[A]ntitrust laws” is a defined term for purposes of the statute. And, as the FTC admits (Mot. at 6), that definition in 15 U.S.C. § 12(a) does not list the FTC Act—the basis for all of the FTC’s claims in this case. Thus, the nationwide service of process statute does not, by its plain language, apply to this case. That is the end of the matter. None of the FTC’s arguments for ignoring the statutory definition is convincing.

First, the FTC notes this case has been colloquially referred to as an “antitrust case” by the parties and the courts in a variety of contexts. But such colloquial references cannot trump the express definition of the term “antitrust laws” in the statute. The Supreme Court has specifically instructed that whether a statute “may be colloquially described as an antitrust [law]” is “of no moment” when interpreting Section 12. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958). Instead, as the notes to 15 U.S.C. § 23 explain, “[t]he antitrust laws, referred to in text, are defined in section 12 of this title.” 15 U.S.C. § 23 note, attached as Ex. A. The Supreme Court has also said that the list in Section 12 “is exclusive.” Nashville Milk Co., 355 U.S. at 376. For this reason, courts maintain that “[t]he FTC Act is not an ‘antitrust law’ within the meaning of the Clayton Act, 15 U.S.C. § 12(a).” Fed. Trade Comm’n v. Onkyo U.S.A. Corp., 1995 WL 579811, at \*4 n.2 (D.D.C. Aug. 21, 1995).

#### ‘Antitrust laws’ are specific and enumerated and do not include Section 5

Justin P. Raphael 16, Litigation Partner in the San Francisco Office of Munger, Tolles & Olson, “Motion to Dismiss and Memorandum in Support Filed by Defendant”, Thompson, et al. v. 1-800 Contracts, Inc., et al., US District Court for the District of Utah, November 2016, Lexis

The FTC administrative action was not brought “to prevent, restrain, or punish violations of any of the antitrust laws.” Rather, it was brought under Section 5 of the FTC Act, 15 U.S.C. § 45. The term “antitrust laws” is defined in the Clayton Act to encompass a specific list of federal antitrust statutes, 15 U.S.C. § 12(a), which the Supreme Court has held is exclusive. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958) (“[T]he definition contained in § 1 of the Clayton Act is exclusive. Therefore it is of no moment that [a statute not listed therein] may be colloquially described as an ‘antitrust’ statute.”). That definition does not include Section 5 of the FTC Act, and multiple courts have acknowledged that the FTC Act is not an “antitrust law.” See Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1031 n.4 (9th Cir. 2001) (analyzing “prima facie” weight provision of Clayton Act, 15 U.S.C. § 16(a), and noting that “prima facie weight is given only to violations of the ‘antitrust laws’ as defined by the Clayton Act,” which “does not include violations of the FTC Act”); Yamaha Motor Co. v. FTC, 657 F.2d 971, 982 (8th Cir. 1981) (noting that Section 5 of the FTC Act is not “one of the ‘antitrust laws’ within the meaning of Sections [16(a) and 16(i)] of the Clayton Act”).

#### 2. The DOJ agrees

DOJ 7 – Department of Justice, “Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report”, 4/3/2007, https://www.justice.gov/archive/atr/public/press\_releases/2007/222344.htm

The AMC has made many specific recommendations in its report, and the Division is in the process of reviewing all of them. The Division commends the AMC for its three primary conclusions:

* Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.
* The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and appropriately safeguard the competitiveness of the U.S. economy.
* New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. Unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement. One of the great benefits of the Sherman and Clayton Acts is their adaptability to new economic conditions without sacrificing their ability to protect competition.

#### 3. Even if ‘antitrust’, Section 5 isn’t a ‘core’ law

Carl Felsenfeld 93, Professor of Law, Fordham University School of Law, “The Bank Holding Company Act: Has It Lived Its Life,” 38 Vill. L. Rev. 1, <https://core.ac.uk/download/pdf/144229861.pdf>

E. The Antitrust Laws

1. Core Laws

It is well established that, despite the "extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition," 480 the United States' core antitrust statutes (the Sherman and Clayton Acts) apply to banks. 48 1 There is respectable opinion that "existing antitrust laws are fully adequate to guard against anticompetitive mergers or acquisitions, or other anticompetitive activity, in the banking industry." 482 A proposal to remove the BHCA, however, is not a suggestion that only the Sherman and Clayton Acts would impose antitrust limitations on banks. The other bank laws and regulations would continue in effect.483

Whether the antitrust laws are sufficient to curb bank abuse that is otherwise dealt with by the BHCA has been disputed. One relatively early opinion suggested that illicit bank behavior is "almost impossible to detect and prove in a court of law" and, consequently, explicit legislation, like the BHCA, which foreclosed banks from other fields was desirable.48 4 In contrast, a former Deputy Assistant Attorney General for Antitrust later opined that bank antitrust problems within the BHCA sphere are simply traditional antitrust issues that can be dealt with by those laws.485 He was countered by a then current Attorney General for Antitrust who believed the BHCA was essential to keep banks separate from commerce.486 Because these last two views were expressed in 1969 and 1970, one must assess current antitrust laws to analyze what view is valid today.4 7

There is a high degree of flexibility in the antitrust laws. One of the functions of the antitrust laws is to adapt their application to the particular industry under consideration and to the particular markets within which the industry operates. 488 The general approach of the antitrust laws towards a merger or consolidation of the sort that currently requires preapproval under the BHCA is to accept the industry in its existing form as the norm and then to establish the effects of the merger or acquisition in terms of its effects on that norm. The net effect is the antitrust laws' disposition in favor of the existing structure.

The Justice Department has the power under existing law to challenge banking mergers and acquisitions for violation of the antitrust laws even when the Fed has first found the BHCA's antitrust tests satisfied. 48 9 For example, in December 1990, the Justice Department challenged the acquisition of First Interstate of Hawaii, Inc. by First Hawaiian, Inc. under the BHCA even though the Fed had approved the transaction. The suit was settled by the agreement of the parties to a divestiture plan proposed by the Justice Department.490 InJuly 1991, theJustice Department challenged an acquisition by Fleet/Norstar of assets from the FDIC after the transaction was approved by the Fed under the Bank Merger Act.49 1 As these two cases show, the Justice Department has sufficient regulatory authority to police the antitrust aspects of bank acquisitions effectively without the BHCA statutory protections.

2. Federal Trade Commission Act

Secondary to the core antitrust laws, and of more potential than experiential significance in regulating bank holding company behavior in the absence of the BHCA, is the Federal Trade Commission Act (FTC Act). 49 2 In its broad scope the FTC Act is inapplicable to banks. 493 The FTC, however, may require banks to produce documentary evidence required during agency investigations. 494 The FTC Act's basic function is the prevention of precisely the type of activity that banks and their nonbank affiliates were accused of in the initial drafting of and amendments to the BHCA49 5-the perpetration of "unfair methods of competition. "496

### AT: C/I

#### Our evidence is from the ABA Antitrust Section’s Committee on Exemptions and Immunities, which literally wrote an authoritative text called “Handbook on the Scope of Antitrust!” It’s the T evidence gold standard.

Layne E. Kruse 19, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

I. Current State of Exemptions and Immunities Committee

Even though we are a relatively small Committee, we address important policy issues that might not otherwise be addressed by the Antitrust Section. While we often work on issues alongside the Legislation Committee, our scope reaches judicial, as well as statutory exemptions. Our Committee is the one place within the Section that focuses on the concerns that may lead Congress or the courts to carve out certain conduct from traditional antitrust proscriptions.

In the 2017-2018 program year, we drafted and submitted four in-depth Section Comments at the request of the Council; produced six committee programs; published three newsletters; completed one ABA Handbook and are well underway on a second one; cosponsored two Spring Meeting Programs; co-sponsored one podcast; and participated in a Women in Leadership videoconference.

In the 2018-19 program year, we will chair an approved Spring Meeting Program; are cosponsoring a second approved Program; and we have been asked to revisit one of the Comments that we produced in the previous year. We are also working on committee programs, podcasts, and publications.

Perhaps most importantly, we are proud of our diversity achievements. In 2017-18, one of the E&I Co-Chairs was a woman for the first time, and our Young Lawyer Representative was LGBTQ for the first time. This year, we continue with a woman Co-Chair, a woman YLR, and we have added the first Vice Chair from the state of South Carolina on any Section Committee.

A. Scope of Charter: What is Role of Committee?

The Exemptions and Immunities Committee is chartered to address judicially created immunities from the antitrust laws, such as the Noerr-Pennington doctrine, state action, implied immunities, and filed rate doctrines, as well as statutory exemptions, including, among others, the McCarran-Ferguson and Capper-Volstead Acts. The Committee also addresses international issues, such as the Foreign Trade Antitrust Improvements Act (“FTAIA”), and other doctrines, such as antitrust preemption and primary jurisdiction, that affect the application and extent of the antitrust laws. The Committee strives to be the first and best resource for information on the fundamental question of defining the scope of the antitrust laws.

However, another key function of this Committee is an administrative role, rather than as a programming committee. This Committee serves as the de facto institutional memory before legislators and agencies for the Section's position on exemptions and immunities. The Section needs to have one place to look for what it has said in the past on exemption proposals, as well as commentary on DOJ or FTC attempts to narrow or expand exemptions. We believe this Committee has already served in that role and should serve in that role in the future. We want to improve on this function for the Section. We should have a Vice Chair designated as the point person to track prior comments and catalog the specific issues that have been raised. At the same time, we could develop a more standardized response. A related project would be a retrospective study of exemptions and their impact. We would join with International Task Force in its study of the impact of exemptions in other countries.

In short, the Committee should standardize the analysis of exemption proposals and reach out on the international front to catalog the differences in exemptions in different areas of the world.

B. Description of Reflective Evaluation of Membership Levels, Diversity, and Growth

The Committee currently has nearly 300 members, a 20% increase in membership in the last two years. Our members include government antitrust officials, private practitioners, corporate counsel and academics, and some practitioners based outside the United States. This variety of members ensures diverse views on the scope, applicability and appropriateness of antitrust exemptions and immunities.

Although other committees are larger, our Committee tends to include lawyers who specialize in specific antitrust issues. As most members of the Committee are members of other Section committees, the Committee may not be the primary committee that draws members into the Section. We believe that tracking the key issues surrounding the scope of the antitrust laws draws members of broader committees to also join E&I, and thus must continue to be a high priority for the Section.

#### They’re premier in the field

Jonathan B. Baker 19, Research Professor of Law at the American University Washington College of Law, “Market Power in an Era of Antitrust,” The Antitrust Paradigm: Restoring a Competitive Economy, 2019, pp. 11–31

Antitrust norms, especially the objection to collusive conduct, are consistently endorsed and upheld by enforcers and courts, regardless of political affiliation.12 These norms have spread throughout the world, particularly since the 1990s, with the aid of a growing global antitrust community. Annual attendance at the spring meeting of the American Bar Association’s Section of Antitrust Law—the premier gathering in the field—now exceeds 3,000, a threefold increase over the low ebb in the late 1980s. Several new academic journals dedicated to antitrust law, economics, and policy were launched in the last decade.

#### The introduction to their handbook provides an intuitive and predictable synthesis of the topic---should markets be protected by dictating outcomes or by protecting the competitive process?

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Chapter 1: Introduction,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, pp. 1–12

The Supreme Court’s many emphatic generalizations over several decades suggest that antitrust applies very broadly. “[A]ntitrust,” the Court has said, “[is] a fundamental national economic policy.”1 It is no less than a “charter of freedom”2 and our very “Magna Carta of free enterprise.”3 When describing the scope of antitrust law in the abstract, therefore, courts commonly speak in very broad terms. Because “Congress intended to strike as broadly as it could” in enacting the antitrust laws,4 “[l]anguage more comprehensive” than those statutes contain “is difficult to conceive.”5 The breadth accorded the antitrust laws by the courts “reflects the felt indispensable role of antitrust policy in the maintenance of a free economy... .”6

One might then have thought that the scope of antitrust would be a simple affair. If the law applies so broadly, then cases raising serious issues of applicability would be rare. But in fact it is not simple at all. The scope of antitrust is governed by dozens of federal statutes and by a variety of elaborate caselaw doctrines. Numerous cases every year raise difficult scope issues, and many hundreds or thousands of reported opinions now address them, often in meticulous, complex detail. The scope of antitrust has morphed into a large, distinct, and complex body of law.

No prior work appears to have considered the entire law of the scope of antitrust as one body, in any comprehensive and integrated way. Integrated treatment poses certain benefits. A primary goal of this book is to aid practitioners, because several of the scope doctrines have become complex and uncertain, and their interrelationships can be especially challenging.

Integrated treatment might also be useful for public policy purposes, given that scope issues have generated frequent reform efforts and debate.7 While this Handbook-takes no position on normative matters, a problem in those debates has been their oftentimes great complexity. As one example, commentators have criticized results in which different doctrines are applied in different ways to similar facts,8 and the Supreme Court, too, has occasionally indicated that scope doctrines applicable to different circumstances should nevertheless be theoretically consistent.9 Addressing questions of that nature, however, has been difficult simply because doctrinal scope issues are ordinarily considered in isolation, a fact that in itself reflects the complexity and scale of the issues. In those rare cases in which conflicts among scope doctrines are considered, courts have felt unable or unauthorized to resolve them.10

A. Why Are There Limits on the Scope of Antitrust?

Scope issues are as old as antitrust itself.11 They have also always been controversial. On the one hand, limits on the scope of antitrust are said to be disfavored. Traditionally, the courts observed a strong presumption against judge-made limits, in all but a few special situations,12 and there has been something of a consensus among commentators that courts should fashion limits with caution.13 Explicit statutory limits are disfavored as well. The courts read them narrowly,14 the enforcement agencies have long opposed them,15 and they have been criticized by each of the many blue-ribbon antitrust review commissions established by the President and Congress over the past several decades.16 The ABA Section of Antitrust Law has maintained a consistent opposition to them for many years.17 Other nations have widely come to hold similar views, having repealed large numbers of antitrust exemptions in recent decades.18

On the other hand, scope limits of various kinds have always existed. Congress explicitly limited antitrust by statute as early as 1914,19 and did so many more times during the rise of organized labor20 and the price-and-entry regulatory regimes of the Progressive and New Deal eras.21 Judge-made limits were likewise recognized as early as 1922, again mainly as a consequence of the new regulatory regimes.22 As new waves of health and safety regulation emerged during the 1960s and 1970s,23 defendants sought antitrust clemency with some increasing success.24 Courts have also long sought to protect the political process from antitrust, even though businesses have frequently turned to that arena for advantage within the marketplace.25

Interestingly, most other nations with competition laws have similar histories of complex scope limits. The European Union (EU), for example, built a process for exemption into the very first treaty creating its competition law,26 and much of the work of its competition authority has involved administration of that process. The national laws of several EU member states likewise included various exclusions before creation of the EU,27 and exemptions exist in Australia, Canada, Japan, and South Korea.28

This long history, in which the generally broad applicability of the antitrust laws has been fraught with controversial disputes, can be seen as a struggle between the general and the specific. For the most part, substantive antitrust insists on generality and purports to oppose special treatment for the idiosyncrasies of particular markets.29 Antitrust presumes, in other words, that in respects important to antitrust, markets are mostly the same. Thus, in the absence of an exemption, the U.S, antitrust laws apply to all exchanges of goods or services for consideration, anywhere within the domestic reach of Congress’s interstate commerce power, and quite broadly to overseas conduct as well, where anticompetitive effects are felt in the United States.30 Yet, that broad application, especially during periods in which antitrust laws were applied more strictly and many kinds of conduct were held per se illegal, invites arguments that some contexts simply cannot be subject to one-size-fits-all policies.31 There have been times, as during the heyday of “destructive competition” reasoning during the first part of the 20th century, when industries like transportation, communications, and insurance were quite successful in arguing that special economic problems prevented them from performing well under the rules of competition that antitrust imposed elsewhere.32 Similar arguments have found some traction in more recent times, even as during this purportedly deregulatory age we generally claim to have disposed of the longstanding fear of destructive competition. For example, recent, explicit antitrust exemptions now protect standard setting organizations,33 the placement program for medical residents,34 and charitable gift annuities.35

Accordingly, despite the strong commitment to generality often stated, we do in fact see limits on scope. For the most part, the courts and Congress have followed one consistent instinct in moderating these struggles between the general and the specific. They typically will relax the preference for antitrust only where there is some other public, politically accountable oversight of a particular market. In effect, antitrust exemptions usually reflect the instinct that we should have either regulation or antitrust in any given context, which is to say that any context should be regulated either by direct government oversight or by competition kept healthy through antitrust.36 Thus, at least traditionally, Congress rarely displaced antitrust without setting up an administrative agency to take its place. Likewise, where courts fashioned scope limitations, they generally did so only where a regulatory agency oversaw rates or conduct (as with the filed rate doctrine) or where the challenged conduct was actually the conduct of a government entity itself (as with the state action doctrine).

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities-: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

### AT: C/I + We Meet---‘FTC Determines Scope’---Wright 15

#### Section 5 already prohibits ‘unfair methods of competition’---the plan clarifies an example of what’s covered, but does not expand scope

FTC 21 – Federal Trade Commission, “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act,” 7/9/21, https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our view (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

#### ‘Unfair methods’ is the outer limits of ‘antitrust law’---whatever Section 5 covers, it’s already within those

Royce Zeisler 14, J.D. Candidate at Columbia Law School, B.S. and B.A. from the University of British Columbia, “Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement Note,” Columbia Business Law Review, Volume 2014, Number 1, 2014, pp. 266–312

To summarize, Figure 1 diagrams the statutory landscape. The inner circle represents the Sherman Act; this is the judicially determined common law component of section 5.107 The larger oval represents section 5's maximal scope of liability. This includes the Sherman Act and the unfair methods "penumbra." The FTC may regulate conduct in the penumbra space through interpretations gaining Chevron deference. Finally, there is an outer boundary of judicially determined impermissible meanings. This denotes possible interpretations that Congress did not empower the FTC to pass. As a practical matter, this limit would likely coincide with conduct that is per se legal under the Sherman Act. The next section examines this boundary in more detail.

Diagram

Description automatically generated

### AT: C/I---‘Core Antitrust Law’---OECD 08

#### ‘Antitrust laws’ include Sherman and Clayton, but exclude Section 5

Ronald M. Whyte 7, Judge, United States District Court, California Northern, Hynix Semiconductor Inc. v. Rambus Inc., 2008 U.S. Dist. LEXIS 53220, United States District Court for the Northern District of California, San Jose Division, January 2008, LexisNexis

Section 5(a) accords prima facie weight to a final judgment brought "under the antitrust laws." The Clayton Act specifically defines the phrase "antitrust laws." See 15 U.S.C. § 12(a). The definition includes the Sherman Act and the Clayton Act, but it does not list the Federal Trade Commission Act (15 U.S.C. §§ 41, et seq). This exclusion accords with the final sentence of section 5(a), which distinguishes "the antitrust laws" from "section 45." 2

The Federal Trade Commission brought its proceeding against Rambus pursuant to Section 45, which is also known as Section 5 of the FTC Act. See In re Rambus, Administrative Complaint, Docket No. 9302, at 1, 31-33 (FTC June 18, 2002). 3 The FTC's final order found that "Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act, and that Rambus unlawfully monopolized the markets for four technologies incorporated into the JEDEC standards in violation of Section 5 of the FTC Act." In re [\*12] Rambus, Opinion of the Commission, Docket No. 9302, at 3 (FTC August 2, 2006). HN4 Section 5 of the FTC Act incorporates various standards from the antitrust laws and also forbids practices the FTC deems against public policy for other reasons. FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). Although the FTC found that Rambus violated the Sherman Act, the FTC's order was in a proceeding under Section 5 of the FTC Act.

### AT: Overlimits

#### Here’s a comprehensive list---we’re inserting it.

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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### AT: Not Exclusive

#### It’s purposefully designed to be a comprehensive and complete list of all limits on the scope of antitrust

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, Handbook on the Scope of Antitrust, ePub

PREFACE

Throughout its life, federal antitrust law has been subject to literally dozens of limitations. Specific statutory exemptions have existed since 1914 and currently about 30 of them remain in force. Antitrust is likewise limited by several distinct, voluminous bodies of caselaw that set out judicially created exemptions, to shield politics, labor, and a broad range of industries subject to other regulation. Several of these doctrines have become complex and uncertain. The scope of antitrust, in other words, now comprises a substantial body of law in its own right. This new Handbook on the Scope of Antitrust offers a first-of-its-kind, user-friendly solution in the form of a one-stop, black-letter-focused book of practical guidance on *all* exemptions and immunities issues, treating them in an integrated fashion as components of one body of law.

As far as we are aware, no such book has ever existed. As for the statutory exemptions, no single book has ever covered them all. Even the Antitrust Section’s major Monograph on the topic1 is not well suited to most practitioners’ needs, and was not so intended. It covers only a sample of the exemptions that exist—while it mentions them all, it gives comprehensive treatment to only nine now in force—and its purpose was to assess empirical and theoretical evidence concerning their effects, not to aid practitioners. As to the caselaw doctrines, several books exist, some are practitioner-focused, and a few are recent (notably the Section’s Noerr Handbook and State Action Practice Manual). But none of them is comprehensive or integrated in any way, and there appear to be no recent practitioner works on important topics like implied repeal, the other regulated industries doctrines, or the labor exemption.