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#### BBB will pass, but it’s the ultimate test of Biden’s political capital.

Kevin Liptak 1-1, Reporter covering the White House for CNN, “Biden's 2022 challenges revolve around Covid, Russia and dealing with Congress,” CNN Politics, 01-01-2022, <https://www.cnn.com/2022/01/01/politics/joe-biden-2022-pandemic-russia-ukraine-congress-democrats/index.html>

President Joe Biden will return to the White House from an abbreviated winter break facing a set of hurdles that will test his political, diplomatic and management skills at a trying moment for his presidency.

The raging pandemic, a crisis with Russia and uncertainty surrounding his prized domestic priorities all await Biden in the new year. Determined to reset after a series of struggles -- and to recalibrate expectations that some of his allies believe were unrealistic -- the President is hopeful the coming weeks can provide much-needed momentum as another election cycle dawns.

Biden spent much of his time away from Washington over the past week on the phone discussing the days ahead with advisers and others in his extended orbit, plotting next steps in what could prove a pivotal month for his presidential ambitions. That includes preparation for a speech marking next week's one-year anniversary of the January 6 Capitol riot, a moment that underscores the stakes of his tenure and the strained political environment in which he governs.

His team is still regrouping after Sen. Joe Manchin, the moderate West Virginia Democrat, threw the future of his sweeping economic plan into doubt the Sunday before Christmas. In the days after his announcement, which surprised and angered Biden's aides, Manchin made particular note of his annoyance with White House staff, claiming they undermined the negotiation process and cryptically citing a perceived slight that drove him to his "wit's end."

Since then, tensions seem to have cooled, though Biden told reporters on Tuesday he hadn't spoken to Manchin this week. White House officials are hopeful talks can be revived on a more limited bill, or set of bills, in the new year.

"President Biden, who I have worked for for many years ... has a habit of pulling legislative rabbits out of hats. And has done so many times," said Jared Bernstein, the president's top economist, on CNN. "He is not by any means done fighting for Build Back Better. When I talk to him about that, he has some confidence about that."

Democrats in Congress, who have been left politically vulnerable by retirements and GOP redistricting plans, enter the midterm election cycle eager for Biden and Manchin to strike some kind of accord, even if the final package lacks the ambition of the sweeping social and climate bill the President initially proposed.

"I think it is important we pass whatever components we can through Congress and get them signed into law," said Rep. Raja Krishnamoorthi, a Democrat from Illinois, this week. "If we do that, we make our own luck and increase the chances of doing better in the midterms and delivering for the American people."

Viewed by the President and his team as a rebuilding year after the tumult of the Donald Trump era, 2021 was marked by a series of challenges that dramatically eroded Biden's political standing. His approval rating entered negative territory over the summer and has not rebounded since.

The sour national mood belies a strong economic record, including the creation of nearly 6 million jobs. New jobless claims fell this week to a 52-year low. Other indicators have shown near-record levels of growth as the economy rebounds from pandemic-era shutdowns.

Biden was also able to pass two major pieces of legislation -- a Covid relief package and a massive infrastructure bill -- and successfully rolled out a vaccination campaign to hundreds of millions of Americans, even if a stubbornly large percentage of the country still refuses the shot.

Biden and his advisers have been frustrated those achievements were obscured by other challenges, like a messy withdrawal from Afghanistan, slogging negotiations among Democrats over the domestic spending bill, supply chain issues, high inflation and the still-raging pandemic.

Unlike some of his predecessors, Biden opted against convening a year-end press conference to discuss the year's achievements or his priorities for 2022. He sat for one news interview, with ABC, and appeared on Jimmy Fallon's late-night show, but otherwise left public assessments of his first year to others.

"Here's the deal," Biden told Fallon, "we've been in less than a year, a lot has happened. Look, people are afraid, people are worried, and people are getting so much inaccurate information to them. I don't mean about me, but about their situation. And so they're, you know, they're being told that, you know, Armageddon is on the way."

Biden spent two nights at his Rehoboth Beach, Delaware, home after Christmas with members of his extended family and a new German Shepherd puppy, emerging once to walk the dog -- which he received as a birthday gift from his brother -- along the Atlantic. He departed the beach one day earlier than originally planned to return to his main house in Wilmington, which is situated more privately than his oceanfront property.

It was from there he spoke by telephone with Vladimir Putin on Thursday, hoping to defuse a crisis on the Ukrainian border. The conversation did not yield much clarity over whether the Russian president plans to invade Ukraine, as the West fears he might. Biden, who spent the preceding days conferring with his secretary of state and national security adviser by telephone, is hopeful diplomatic talks early next month in Europe can help ease the situation.

The Ukraine standoff is an opportunity for Biden to repair a foreign policy reputation damaged by a chaotic and deadly withdrawal from Afghanistan over the summer, which angered US allies and led to questions about the President's diplomatic acumen.

The administration's admitted failure to foresee how quickly the Taliban would retake control was one in a roster of items that seemed to catch Biden and his advisers off-guard this year. Other examples included persistent inflation that officials once described as "transitory," the emergence of the highly transmissible Omicron variant and a shortage of Covid-19 tests that Biden is now hurriedly working to remedy.

The White House is expected to soon unveil details surrounding the rollout of the 500 million free at-home tests Biden promised all Americans last week, though a series of questions about the logistics and capacity of the program remain unanswered. The vaccine mandates he sought to implement will also face the Supreme Court this week.

The resurgent coronavirus shadowed the President's festive season as national case counts rose to record levels this week and strained hospitals in certain areas of the country. Over the Christmas weekend, Biden took notice of long lines at testing centers that aired on television.

It was, for Biden, another pandemic-related disappointment in a year that fell short of nearly everyone's expectations. A July 4 ceremony marking "Independence from Covid-19" was followed nearly immediately by a surge of the Delta variant. Biden said during a CNN town hall last February that he hoped by the Christmas holidays -- then still 11 months away -- "we'll be in a very different circumstance, God willing, than we are today."

"A year from now, I think that there'll be significantly fewer people having to be socially distanced, having to wear a mask," he said then -- a goal that, at the time, seemed dully unambitious.

The Bidens had once hoped to escape somewhere warmer for the week between Christmas and New Year's Day, as they usually did before the pandemic. But those plans were abandoned in mid-December, and instead the President's family requested a Christmas Eve at the White House.

Before departing for Delaware, Biden spoke by video link to the nation's governors and assured them he was standing ready to provide support to states in need, even as he acknowledged shortcomings in his testing strategy.

"It's clearly not enough," he said after listing which steps he has taken to ramp up test capacity. "If I had -- we had known, we would have gone harder, quicker if we could have."

At the same time, the White House has begun a concerted shift away from focusing exclusively on case counts as a barometer for the pandemic, hoping to hone in on severity of cases as measured in hospitalizations. A CDC decision this week to halve the number of recommended isolation days post-infection -- driven in part by a desire to keep businesses running as employees become infected -- reflected a response increasingly attuned to living with a virus that shows no signs of disappearing completely.

"If you're in office, you're accountable and you're always going to be subject to criticism. When you manage a pandemic, you're not running a popularity contest. You're trying to manage the situation so you minimize the amount of pain as much as possible and allow people to lead their lives," said Andy Slavitt, who was Biden's top pandemic adviser earlier in the administration.

Still looming in the middle distance is Biden's first State of the Union, a moment advisers hope to use to define the first year of Biden's presidency on their own terms. Tentatively set for early February, the speech will also provide a chance to adjust expectations for the coming months. Work has already begun on the outline of the address.

It could be Biden's final address to a Congress controlled in both chambers by Democrats, a matter of urgency if he hopes to pass the major items on his priority list. That includes protections for voting rights, an issue Biden has said has no equal when it comes to preserving American democracy.

The coming weeks will prove critical for the push to safeguard access to the ballot, and Biden along with Vice President Kamala Harris -- tasked with leading on the issue from within the White House -- are planning a renewed drive to pass stalled pieces of legislation. That includes using the January 6 anniversary to call for greater democratic protections.

Civil rights groups have called on Biden to get something done by the Martin Luther King Jr. holiday mid-month. How that is accomplished, however, remains an open question.

#### The plan trades-off

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 12-23, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

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Offsets CP

#### By contracting the scope of its core antitrust laws, the United States federal government should substantially increase prohibitions on nearly all anticompetitive business practices by the private sector that are currently exempted by the filed rate doctrine and immunize corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions from antitrust enforcement.

#### The CP competes:

#### It’s a PIC of the plan’s specification that prohibitions are part of an ‘expansion’ of antitrust.

#### ‘Expanding’ means an overall increase

Craig H. Nakamura 14, Judge on the Hawaii Intermediate Court of Appeals, Hanabusa v. Dep't of Envtl. Servs. of Honolulu, 2014 Haw. App. LEXIS 277, \*25, 133 Haw. 452, 330 P.3d 390 (Haw. Ct. App. May 30, 2014), 5/30/2014, Lexis

Moreover, as the City argues, "[a]n expansion, by its very definition, is to increase in size or to enlarge or to spread out." The word "expansion" is defined as "the act or process of expanding," and the word "expand" means "to increase in extent, size, volume, scope, etc." Expansion Definition, DICTIONARY.COM, http://dictionary.reference.com/browse/expansion (last visited May 29, 2014); Expand Definition, DICTIONARY.COM, http://dictionary.reference.com/browse/expand (last visited May 29, 2014). Viewed in context, we conclude that the Final EIS, and the other materials published by the DES during the EIS review process, adequately disclosed that the proposed project to expand WGSL by an additional 92.5 acres encompassed landfill operations on the entire 200-acre Property.

#### Immunizing energy reductions from antitrust is key to corporate leadership on climate---extinction

Paul Balmer 20, J.D. from the University of California, Berkeley, School of Law, BA from Pomona College, Senior Articles Editor of Ecology Law Quarterly and Treasurer of the Election Law Society, Summer Associate at Tonkon Torp, “Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change”, Ecology Law Quarterly, 7/27/2020, https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/

Even though DOJ quietly dropped the investigation in February 2020,[79] the market results of the probe itself were almost immediate and significant. In October 2019, just weeks after the antitrust investigation began, other major automakers joined the Trump Administration as parties in litigation over California’s right to set its own vehicle emissions standards,[80] even though automakers had once stood united behind the Obama Administration’s higher fuel efficiency standards.[81] DOJ’s abandoned investigation had sent a clear message to automakers: do not collude on car standards that will raise prices for consumers, or you will be investigated. With the threat of antitrust enforcement off the table for now, the Trump Administration finalized its dramatically lower fuel efficiency rule in March 2020.[82]

Despite the naked political motive and the arguably weak legal argument for antitrust enforcement against the four automakers in this case, the specter of antitrust liability will not be limited to the auto industry. At a time when companies are making serious commitments to address climate change, even the most progressive companies are likely to think twice about making commitments with competitors on any industry standard that could lead to higher consumer prices. Companies could be discouraged from moving forward on climate, at a time when bold action is needed most.

IV. Conclusion: An Antitrust Framework for the Twenty-First Century Economy

The threatened antitrust enforcement against the four automakers highlights the disconnect between corporate law and climate reality. An antitrust framework that never permits price increases resulting from coordinated action ignores both the possibility of consumer benefits beyond price as well as the changing nature of corporations. As corporations wrestle with potential legal duties to take environmental outcomes into consideration in corporate decisions,[83] they need to be able to consider a broader definition of consumer welfare. Antitrust law’s focus on short-term prices has helped mask long-term consumer harms and broader negative effects on society.[84] At the same time, corporations have been unable to successfully justify agreements that raise prices in order to achieve some societal benefit. Those two blind spots in competition law keep our legal framework stuck in a bygone era, prompting the need for change in at least three ways.

First, and at a minimum, courts need to revisit a jurisprudence that prizes low prices and market “efficiencies” as procompetitive justifications, but rejects justifications of social benefits. Courts must at least allow coordinating firms to offer cognizable counterarguments when their conduct is considered under the rule of reason. This realignment should accompany judicial acknowledgment that “consumer welfare” encompasses more than current or readily predictable price in an isolated market, and instead can include the long-term effects on things like consumer choice, consumer privacy, and local economic vitality.[85]

Second, Congress should pass legislation immunizing corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions.[86] Congress has provided similar exemptions before, permitting specific industries like railroads, insurance companies, and agricultural cooperatives to coordinate on prices and terms of service where regulation was preferable to competition.[87] Allowing companies in the transportation sector—responsible for over 25 percent of U.S. emissions in 2018[88]—to coordinate on environmental efforts would be a common sense step in line with past practice.

Finally, and more broadly, the Securities and Exchange Commission could, on its own[89] or with congressional backing,[90] require companies to disclose progress on environmental efforts and benchmarks that could be set internally or externally.[91] Mandatory environmental reporting, alongside other key metrics on governance and financial issues, would have three important benefits. First, corporate performance could be measured by more than just quarterly earnings, incentivizing longer-term decision making and reflecting the broadening of corporate purpose to include societal and environmental benefits. Second, a government-required environmental disclosure—ideally translated into a comprehensible number or rank—would allow antitrust regulators and consumers alike to track corporate progress on green initiatives, ensuring that any increases in consumer price or exclusionary conduct is more than offset by tangible gains on addressing climate change and replacing the voluntary, often one-sided corporate environmental reports often derided as “greenwashing.”[92] Third, greater transparency and real environmental metrics that can be weighed alongside price and other standards could help ensure that corporations are not able to skirt competition laws to their profit, under the guise of fighting climate change. There is widespread discussion and progress on this type of mandatory reporting;[93] any new framework could easily be tailored to enforce antitrust rules for environmental coordination.

Updating antitrust and corporate law in these three ways would encourage much-needed corporate collaboration on climate change, reflect the changing nature of corporate activism, and acknowledge that consumer welfare can and must mean more than low prices. Saving the world may well depend on legalizing and incentivizing this kind of corporate collusion.

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T-Law

#### ‘Law’ requires legislative action

Dr. Mohammed Saif-Alden Wattad 8, Post-Doctoral Minerva Fellow at the Max-Planck Institute for Foreign and International Criminal Law Studies in Freiburg, “The Torturing Debate on Torture”, Northern Illinois University Law Review, 29 N. Ill. U. L. Rev. 1, Fall 2008, Lexis

6 See MOHAMMED SAIF-ALDEN WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 44 (2008) (explaining that the term "law" refers to the laws enacted by legislative bodies [i.e. statutes, constitutions, and treaties] and is to be distinguished from the term "Law," which refers to the higher concept of the "good and just law" binding on all human beings [i.e. the moral or religious law]; if the "law" contradicts the "Law," the latter must prevail).

#### The plan is non-legislative

#### Vote neg:

#### Ground---antitrust is fundamentally political, so the best DAs are about Congress like Biden agenda, DOJ or FTC de-funding, or industry horse-trading.

#### Limits---they open Pandora’s Box of agents, allowing a proliferation of executive agencies or Courts. That multiplies each aff by dozens, overstretching research.

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Capitalism K

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

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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.

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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).

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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.

### 1NC

T-Per Se

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

#### Limits---many standards, requiring distinct answers, make the topic unmanageable.

#### Ground---fringe standards dodge links and allow bidirectional permissiveness.

### 1NC

Regulation CP

#### The United States federal government should:

#### ---regulate anticompetitive business practices by the private sector that are currently exempted by the filed rate doctrine;

#### ---cease approval of anticompetitive rates or tariff terms;

#### ---financially induce relevant private regulatory agencies to cease approval of anticompetitive rates or tariff terms;

#### ---enact fiscal responsibility reforms.

#### The Supreme Court of the United States should rule that federal antitrust law does not preempt state health licensing, especially with regard to telemedicine.

#### Regulation solves without ‘antitrust’ or FTC involvement

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A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

### 1NC

UQ CP

#### The United States executive branch should cease relevant antitrust action as per 1AC Tankersly and Dillickrath.

## Energy ADV

### Energy---1NC

#### Eliminating the filed-rate doctrine is not sufficient to create competitive power markets.

Sandeep Vaheesan 13, Special Counsel at the American Antitrust Institute, J.D. from the Duke University School of Law, M.A. in Economics from Duke University, “Market Power in Power Markets: The Filed-Rate Doctrine and Competition in Electricity,” University of Michigan Journal of Law Reform, Vol. 46, 2013, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1010&context=mjlr

IV. WHY ELIMINATING THE FILED-RATE DOCTRINE IS NOT SUFFICIENT TO CREATE COMPETITIVE POWER MARKETS

Congress or the Supreme Court can promote competitive power markets and more affordable electricity by limiting application of the filed-rate doctrine to exclusionary conduct.221 The filed rate doctrine should not bar antitrust suits alleging collusive behavior in the industry. The distinction between collusive and exclusionary conduct offers guidance on how the filed rate doctrine should be applied in electricity markets. Courts have the ability to remedy collusive conduct through damage awards but are much less competent at addressing exclusionary conduct that involves transmission access.2 22 A sensible legal rule would recognize this distinction. On the one hand, purchasers of power should have all the usual antitrust remedies against generators accused of collusion. On the other hand, market participants that allege exclusionary conduct like discriminatory access to transmission should face the filed-rate bar or similar immunity and instead be directed to seek relief from the industry experts at FERC.

The KeySpan episode in New York City shows how private antitrust enforcement could promote competitive power markets. FERC failed to prevent or remedy a two-year period of anticompetitive behavior that likely cost ratepayers more than $100 million and did not pursue any enforcement action after it learned of the misconduct.223 Notably, in its public statements, the Department of Justice suggested that it pursued disgorgement-a rarely used remedy in public antitrust enforcement 224 -against KeySpan because the filed-rate doctrine barred private damages actions.225 Given the imperfect ability to detect collusion, even full disgorgement of gains from anticompetitive behavior inadequately deters such conduct.226 Private antitrust suits would allow direct purchasers of power to recover the overcharges they paid (and more after trebling) and strongly deter future anticompetitive behavior.

Although the present application of the filed-rate doctrine is problematic and allows some types of market misconduct to go unpunished, the actual benefits of a judicial or legislative repeal or limitation of the doctrine should not be overstated. The KeySpan episode shows how restricting the scope of the filed-rate doctrine can produce better market outcomes. The threat of private antitrust damages actions could have deterred what amounted to explicit collusion between rival generators. Express collusion between generators, however, is not the sole or even primary reason why restructuring the industry has not delivered the promised consumer benefits. Two important forms of anticompetitive market behavior-unilateral withholding and tacit collusion-are permissible and difficult to prosecute, respectively, under long-standing interpretations of the antitrust laws. In other words, the antitrust laws do not proscribe the entire universe of anticompetitive conduct that occurs in electricity markets.

A. The Exercise of Unilateral Market Power Is Not Proscribed by the Sherman Act

Today, Section 2 of the Sherman Act does not prohibit dominant firms from charging whatever price the market can bear.227 Companies with monopoly power do not violate the Sherman Act unless that power is maintained or extended through some exclusionary act. At times, Congress and the courts have considered using Section 2 to attack the mere existence of monopoly power. In 1976, Senator Philip Hart proposed expanding Section 2 to deconcentrate industries marked by durable monopoly power.228 This and similar proposals garnered significant attention but were never enacted. In his famed opinion in United States v. Aluminum Co. of America, Judge Learned Hand raised the possibility of "no-fault" monopolization.2 29 He rejected such a rule, though, stating that "[tlhe successful competitor, having been urged to compete, must not be turned upon when he wins."230 Since the mid-1960s, the Supreme Court has held that excluding rivals and possessing monopoly power are both necessary elements for establishing a monopolization claim.23

The charging of high prices is arguably an important part of the competitive dynamic. In theory, high prices in a market, while imposing short-term pain on consumers, should attract new entry and help reallocate scarce resources toward high-value uses and away from low-value ones in the long run.2 3 2 The Supreme Court has taken this idea to an extreme in recent years. In its controversial ruling in Verizon Communications v. Law Offices of Curtis V Trinko, LLP, the Supreme Court asserted in dicta that "[t] he opportunity to charge monopoly prices-at least for a short period-is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."2 33 Although this may be an empirically dubious position, the Court has thus treated the ability to charge high prices as an essential part of the market dynamic-the antithesis of the no-fault monopolization position. Even when viewing the hyperbolic dicta of Trinko with skepticism, high prices also play an important role in electricity markets. High prices signal to investors when, where, and what type of new generation needs to be constructed.23 4

Due to long-standing reading of the Sherman Act, generators that economically or physically withhold electricity from the market do not automatically violate Section 2. They can thus reduce their output to increase their own profits and effect large wealth transfers from consumers. While such conduct may run afoul of RTO rules and other state and federal laws, it does not violate Section 2 under its present judicial articulation.2 35 If, for example, power purchasers had sued TXU in the wake of its anticompetitive conduct in the summer of 2005 had overcome the filed-rate doctrine, they likely would have not obtained antitrust damages. By all appearances, TXU was only exercising its own market power, and did not engage in conduct that excluded rivals from competing against it on a level playing field.23 6 Likewise, based on the allegations in Utilimax,237 the plaintiff would not have been able to obtain damages even in the absence of the filed-rate doctrine. The plaintiff alleged that the defendant had exercised its monopoly power but had made no suggestion that this monopoly power was obtained through exclusionary or other improper conduct.2 38 Even the California crisis appears to be the result of generators unilaterally maximizing their individual profits rather than colluding.23 9 Assuming the filed-rate doctrine had not been applied, private antitrust suits likely still could not have remedied this extended period of market misconduct, which allowed producers to capture billions of dollars from consumers.

B. Tacit Collusion Is Often Beyond the Reach of the Sherman Act

Tacit collusion, also known as conscious parallelism, in oligopolistic industries has been one of the most intractable problems in antitrust law. It involves firms setting supracompetitive prices without any overt agreement or direct communication between them.24 In oligopolistic markets, the profits of firms are dependent on the expected behavior of their rivals. 24 ' Because of this strategic interaction, smaller players may, for example, recognize it is in their selfinterest to follow the prices of a market leader, all without ever directly communicating with each other.2 42 The result may be to mimic the price effects of a cartel without any overt communication-let alone agreement-between participating firms. 243

Noted antitrust scholars have debated what to do about tacit collusion in oligopolistic markets. Donald Turner, the head of the Antitrust Division at the Department of Justice in the Kennedy Administration and then-author of the leading antitrust treatise, thought that tacit collusion was a common problem in concentrated markets in the mid-twentieth century.24 He argued, however, that there is no satisfactory remedy for tacit collusion under Section 1-how could courts enjoin firms from ignoring the pricing decisions of their rivals?245 He said that courts should not impose Section 1 liability for tacit collusion "without more in the way of 'agreement' than is found in 'conscious parallelism."'2 46 Instead, he called on using Section 2 of the Sherman Act to reduce market concentration in oligopolistic markets as a means of addressing persistent tacit collusion. 247

Judge Richard Posner has presented a contrasting view, arguing that tacit collusion is not as prevalent as Turner claimed. According to Posner, tacit collusion is not an inevitable feature of oligopolistic markets; industry characteristics and practices often create strong incentives for undercutting the collusive price.248 As a consequence, Posner has said that tacit collusion is a product of "voluntary behavior" and should be addressed under Section 1.249 Thus, in his view, courts should look to market conduct and price effects in determining whether firms have colluded tacitly.2 50 Regarding appropriate remedies, Posner endorsed the use of private damages, civil and criminal penalties, and, in exceptional cases, divestitures but rejected judicial regulation of pricing behavior. 251

The courts have generally followed the Turner approach to tacit collusion. Although tacit collusion is not categorically legal under the antitrust laws, plaintiffs still face significant evidentiary hurdles in bringing a successful claim. The Supreme Court has long held that mere parallel behavior is legal under the antitrust laws.2 52 To establish an agreement under Section 1, the plaintiff must show the existence of "plus factors" in addition to the existence of parallel market conduct.2 53 The courts have not enumerated an exhaustive list of these factors, but some have been used repeatedly to establish liability in parallel conduct cases. An anticompetitive arrangement may be inferred if there is (1) proof that rivals did or could have communicated directly, (2) evidence of anticompetitive intent behind the parallel conduct, (3) behavior so complex as to be unlikely to occur without detailed communication among rivals, or (4) behavior that is unlikely to be rational in the absence of an agreement. 254 The 2007 Supreme Court decision Bell Atlantic Corp. v. Twombly raised the hurdles for plaintiffs trying to bring a successful tacit collusion claim.2 55 It held that a defendant's motion to dismiss in a conscious parallelism case must be granted unless a plaintiff can plausibly allege plus factors at the prediscovery stage in litigation.2 56

Given the present state of antitrust jurisprudence, tacit collusion in electricity markets may be persistent and yet incurable under the Sherman Act. The transparent pricing and repeated game nature of centralized wholesale power markets may simplify collusion among generators in RTO regions.2 57 The threat of quick detection and punishment make defection from such arrangements less profitable and consequently less likely than in other industries . 258 Tacit collusion in an industry conducive to it may make actual agreement on price or output unnecessary. 25 9 This is an important virtue from the perspective of suppliers. Even with the filed-rate doctrine, electricity market participants who engage in more overt forms of collusion face the risk of civil and criminal prosecution by the government.26 Generators may thus be able to engage in persistent parallel pricing above competitive levels without triggering any of the plus factors that could invite legal liability.

#### Natural gas prices are declining, but there are alt causes.

Talmon Joseph Smith 12-7, Economics Reporter at the New York Times, “Sinking natural gas prices are a sign of hope for household winter heating bills.”, New York Times, 12-07-2021, https://www.nytimes.com/2021/12/07/business/natural-gas-prices.html

After hitting their highest levels since 2014 mere months ago, natural gas prices have tumbled in recent weeks, falling more than 10 percent on Monday alone, a development that could bring much-needed relief to many Americans who had been bracing for high home heating bills this winter.

The latest drop came after the release of updated government weather forecasts projecting a warmer-than-expected winter. Prices for natural gas traded on the futures market are now back down to levels that prevailed last summer and are down about 41 percent from their peak in October.

After taking a sharp dive during the height of pandemic lockdowns as the economy slowed, energy and other commodity prices soared this year as the economic recovery accelerated and many goods and raw materials became snarled in tangled global supply chains.

Natural gas, used to heat almost half of U.S. households, almost doubled in price earlier this fall. Prices remain higher than they were during the depths of the pandemic, at about $3.75 per thousand cubic feet on the New York Mercantile Exchange. Those prices are up about 50 percent since January, but are far lower than in late October, when they exceeded $6 per thousand cubic feet.

Natural gas prices recently took a sharper turn down as the weather in much of the country was warmer than expected. Concerns about the supply of gas, which have been a much bigger problem in Europe, have also eased in the United States.

“We’ve still got January, February, March — but it’s certainly a good sign that its coming down,” said Mark Wolfe, the executive director of the National Energy Assistance Directors’ Association, a group of state officials that provide assistance to households in need. “If it’s a warmer winter, then our estimates about consumption will be down, and if consumption is down, that’ll reduce the price of the fuel. It’s a good sign.”

Even if the winter months are not as cold as on average, other factors, including limited supply and strong demand for gas from power plants and other users, could keep heating costs high, energy experts said.

Conversely, gas prices could drop further if the Omicron variant of the coronavirus proves more dangerous than expected, slowing the economy and sapping demand for goods and services.

Good news about energy prices has been uncommon for consumers lately. The broad gauges of inflation have been running at the highest rates in decades. The vagaries of the weather, and climate change, may now cut them at least a temporary break. Several states have experienced some of their warmest December days on record. The temperature in Central Park reached 61 degrees on Monday.

According to the National Oceanic and Atmospheric Administration’s Climate Prediction Center, above-average temperatures throughout the South and most of the East could predominate for most of this winter.

Jon Gottschalck, the chief of the operational prediction branch at NOAA’s Climate Prediction Center, said those milder conditions would be the result of the recent development of atmospheric conditions known as La Niña. But he warns that all forecasts are “probabilistic,” not certainties, and that “volatile” severe cold snaps should still be expected in the months ahead.

In its short-term energy outlook released Tuesday, the U.S. Energy Information Agency noted that “the evolving effects of consumer behavior on energy demand because of the pandemic present a wide range of potential outcomes for energy consumption.”

#### Doesn’t solve the grid.

David Roberts 19, Writer at Vox, “More natural gas isn’t a ‘middle ground’ — it’s a climate disaster,” Vox, 05-30-2019, https://www.vox.com/energy-and-environment/2019/5/30/18643819/climate-change-natural-gas-middle-ground

4) Gas isn’t needed for grid reliability

Renewable energy skeptics like to claim that natural gas power plants are required on the grid to balance out variable renewable energy, which comes and goes with the wind and sun.

OCI responds with three arguments.

First, most natural gas plants being built these days are combined cycle gas turbine (CCGT) plants, which produce the cheapest power. “In the United States alone, around 24 gigawatts (GW) of CCGT capacity was commissioned in 2017 and 2018, and more than 14 GW was under construction at the beginning of 2019,” writes OCI. “There is more than 425 GW of CCGT capacity in operation globally.”

But CCGT plants are not the plants that can ramp up and down quickly to balance renewables. They are big and relatively slow, meant to run at high utilization rates and provide bulk power. In other words, they compete with, rather than complement, renewables.

Second, the faster natural gas plants — gas reciprocating engines (GRE) and open cycle gas turbines (OCGT), or “peakers,” named for their function of spinning up during peaks of energy demand — are increasingly being beat out by batteries, which respond even quicker.

Wind and solar plants coupled with battery storage — which can compete directly with peakers — are getting cheaper. OCI cites a BNEF report showing that they “are already able to compete with new coal or gas plants on an LCOE basis in Germany, the United Kingdom, China, Australia, and the United States.”

For now, most utility-scale battery storage is in the four-hour range. Those battery installations are expected to get cheaper than natural gas peakers in the early 2020s. But they still have somewhat limited application.

However, OCI notes, “a study by Wood Mackenzie in 2018 found that six- and eight-hour battery storage systems, which are beginning to enter commercial operation today, can address 74 percent and 90 percent of peaking demand, respectively.” Once batteries get more sophisticated and cheaper, there won’t be much left for natural gas peakers to do. (For a longer look at how natural gas is getting displaced, see my article here.)

Third, OCI argues that the key to stable, reliable grids is not any individual technology but the design of power markets and power systems. Today, in dozens of sometimes subtle and technical ways, they are designed around large, centralized power plants and one-way power flows. To keep grids reliable during the energy transition, policymakers need to redesign markets to encourage diverse portfolios of energy technologies, from distributed generation to storage and demand response. (The report contains some policy suggestions.)

OCI doesn’t address the thorny question of whether getting to 100 percent clean electricity requires some form of dispatchable power (power that can be turned on and off), including nuclear and possibly natural gas or biomass with carbon capture and storage. (See here and here for more on that debate.) Regardless, it’s been fairly well demonstrated that we know how to get to 80 percent renewables — if there’s a modest role for gas in getting to 100, it certainly won’t look anything like the modern gas industry.

#### 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.

## Econ ADV

### Econ---1NC

#### 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/

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.

#### 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.

#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy---it’s impossible to distinguish specific industries because, unlike regulation, it’s enforced in generalist common law

Dr. William Rogerson 20, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology, and Dr. Howard Shelanski, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Top-line GDP growth will be 4%, underpinned by positive expectations about the future environment

Tim Smart 12-23, Contributing Editor for News at U.S. News & World Report, Responsible for All News Editorial Content, Including Best Countries, Best States and Healthiest Communities, “Will 2022 Be Naughty or Nice for the Economy…Or Both?”, U.S. News & World Report, 12/23/2021, https://www.usnews.com/news/the-report/articles/2021-12-23/will-2022-be-naughty-or-nice-for-the-economy-or-both

First, the good news:

* The labor market continues to improve, with the unemployment rate down to 4.2% from 14.8% in the earliest days of the pandemic in April of 2020.
* Consumer demand remains strong, with wallets and bank accounts flush with pandemic payouts, rising wages and a year of record housing prices and strong stock market performance.
* Industrial production increased 0.5% in November after a 1.7% gain in October, while motor vehicle assemblies rose to a 9.35 million annual rate, the highest since May and possibly a sign that supply chain issues are abating. Meanwhile, a recent survey of corporate financial officers by Deloitte found 97% expect their spending on labor to increase in 2022, with the CFOs also raising their planned capital spending, hiring and compensation higher than in the previous quarter.

The recently released Wilmington Trust’s 2022 Business Owners Success Survey found “business owner optimism and confidence in the U.S. economy and their own businesses are almost back to pre-pandemic levels with 77% saying they are very optimistic about their business prospects – approaching the 81% who answered the same just before the pandemic.”

“We are optimistic about the economy,” says Luke Tilley, chief economist at Wilmington Trust. “We are optimistic about demand.”

After slowing markedly in the third quarter, amid the surge of cases from the delta variant of the coronavirus, growth picked up in October and November and estimates are that fourth-quarter growth could be the strongest since the early 1980s.

“Supported by the expectation of continued healthy financial market conditions, increased production to restock lean inventories, further gains in the consumption of services as consumer and business travel picks up, and a resilient housing market, continued above-trend growth is likely in 2022,” Kevin Kliesen, a business economist and research officer at the Federal Reserve Bank of St. Louis, wrote on Monday. “At this point, the most probable outcome is 3% to 4% real GDP growth.”

## Federalism ADV

### Federalism---1NC

#### No internal link to global aging---US isn’t modelled, and structural barriers stop major economies dealing with it.

#### Telehealth doesn’t solve aging---if people are getting older, they just get treated more which increases economic consequences.

#### AND old people can’t figure out computers.

#### No aging crisis

Andrew Scott 18, Professor of Economics, London Business School, “The Myth of an "Ageing Society"”, World Economic Forum, 5/29/2018, https://www.weforum.org/agenda/2018/05/the-myth-of-the-aging-society

For the past two centuries, governments have approached demographic issues with the assumption that calendar years are an objective indicator of age. But with a rapid increase in lifespans over the past few decades, age is not what it used to be, and unless public policy reflects that fact, the dividends of longevity may be squandered.

Economic doomsayers have long warned that the aging populations of industrial and post-industrial countries represent a “demographic time bomb.” Societal aging is bad news for the economy, they say, because it means that fewer people work and contribute to economic growth, and more people collect pensions and demand health care.

The United Nations estimates that between now and 2050, the share of the population aged 60 and older will increase in every country. Though life expectancy tends to be highest in advanced economies, it is growing fastest in emerging markets. The number of people aged 60 and over in developing countries is currently twice that of the developed world. And the UN expects a three-to-one ratio by 2030, and a four-to-one ratio by 2050.

The number of people over 60 looks set to increase dramatically by 2050.

Image: United Nations: World Population Prospects

Within many countries, increased life expectancy and declining birth rates are pushing up the average age of the population. In Japan, the median age has risen from 26 in 1952 to 46 today. In China, it has risen from 24 to 37 over the same period, and is expected to reach 48 by 2050.

The argument that aging will weaken these countries’ economies stems from what economists call the old-age dependency ratio (OADR) – the proportion of the population over 64, relative to the working-age population (those aged 15 to 64). If one assumes that old people are unproductive consumers of government benefits, then a rising OADR implies slower economic growth and mounting pressure on public budgets.

But what if this assumption is mistaken? Governments are concerned about your age not because they want to know how many candles to buy for your birthday cake, but because it affects productivity and health-related spending. And if those are the factors that really matter, then the changing conditions of aging are far more relevant than the share of the population that has reached some arbitrary threshold of years on the planet.

Measuring aging gracefully

The concept of “aging” is not as straightforward as it seems. Obviously, aging has a chronological component, expressed in the straightforward question: “How old are you?” But it can also be viewed in terms that are biological (“You look good for your age”), subjective (“You are as old as you feel”), and sociological (“You shouldn’t be doing that at your age”). Policymakers’ sole focus on chronological age is a 200-year-old artifact from the era when governments first started keeping reliable birth records.

If the various dimensions of aging could be embodied in a single immutable concept, focusing on a benchmark such as chronological age would not be a problem. Yet the biological, subjective, and sociological components of aging are not immutable. On the contrary, their relationships with one another have shifted over time.

As Figure 1 shows, the average age of the US population has steadily increased since 1950, but the average mortality rate has trended down. In other words, the average US citizen has become chronologically older but biologically younger. She is further along in years from her date of birth, but also further away from her probable expiration date. And the same trends can be found in other advanced economies, including the United Kingdom, Sweden, France, and Germany.

Given the decline in average mortality, one cannot say unambiguously that these societies have aged. Average mortality rates are driven by two factors, only one of which could properly be called “aging.” As countries industrialize, they undergo a “demographic transition” from higher to lower birth rates. This shift implies that older cohorts of the population will increase in size, and that average overall mortality will rise, because mortality rates are higher for older people.

But over the past few decades, this aging effect has been offset by a “longevity effect”. Owing to medical advances and other factors (for example, lower rates of smoking), mortality rates at all ages have fallen. In actuarial terms, this means that people are younger for longer. Whereas the aging effect captures changes in the age distribution, the longevity effect addresses how we are aging. And in a country like the US, where the average age has increased while average mortality rates have fallen, it is clear that the longevity effect has more than offset the aging effect.

#### Telehealth causes doctor burnout

GlobalMed 1/20/17, healthcare provider, worldwide leader in telemedicine, "Telemedicine and Depression: A Possible Link", https://www.globalmed.com/telemedicine-depression-possible-link/

Medical school studies and post-graduate training used to be the most trying periods of time for those who wish to practice medicine because of the number of hours demanded. A study in the Annals of Internal Medicine found that nearly 50 percent of students experienced burnout among the more than 2,000 medical student respondents across seven schools. A heavy study load can be exhausting and isolate students. Thanks to an update of a three-year study evaluating burnout and work-life balance, we know that American physicians are worse off today than just three years ago. Burnout has increased among physicians in all specialties, even those involved in telemedicine, who must deal with work-related stress, feelings of detachment toward patients, and EHRs. During a panel discussion at an Arizona Telemedicine Program at Flagstaff Medical Center last week, Bart Demaerschalk, MD, MSc, FRCP(C), touched on the topic of isolation depression. It came up when moderator Ronald Weinstein, MD – the founding director of the ATP - asked panelists to discuss the recruitment of telemedicine physicians for their programs. Demaerschalk, who is Professor of Neurology and Medical Director, Telemedicine, for the Mayo Center for Connected Care, said that Mayo is devising and structuring its clinical programs, both real and virtual, in such a manner that the clinicians are engaged in telemedicine practice, but not to the exclusion of their face-to-face practice. “To be a superb telemedicine doctor, one must be a superb face-to-face doctor,” Demaerschalk said in a follow-up email. It has been known for some time that social isolation and loneliness are risk factors for the onset of major depression. Doctors who spend their professional work day seeing patients remotely via telemedicine are often closeted in a room by themselves, staring at several monitors for hours on end. The physical detachment from other people for an extended time can take its toll. Demaerschalk said Mayo has had experience with this problem while developing its telestroke programs in Arizona, Florida and Minnesota. The clinical practice initiatives that Mayo has designed “assist clinicians with achieving balance in their professional duties and to help prevent telemedicine practicing doctors from developing feelings of professional isolation and burnout.” Also present for the ATP event was Hargobind S. Khurana, MD, an intensivist - a specialist who takes care of patients in a hospital’s intensive care unit. As Senior Medical Director for Health Management at Banner Health, he oversees the largest tele-ICU program in the country, covering 550 beds in 28 hospitals. One doctor is on duty during the day, but at night five physicians and two nurse practitioners monitor the ICUs.

#### No spillover---federalism is compartmentalized---state authority to do telemedicine is distinct from energy.

#### Non-antitrust bases solve telemedicine---they can claim its interstate and use the commerce clause.

#### Telemedicine high---no aff card post-dates COVID. If there’s a future age wave, we wouldn’t stop it. We’d greenlight it!

#### Misdiagnosis is likely

Addady 16 Michal Addady is a reporter for Fortune Magazine, May 16, 2016 A New Study of Telemedicine Services Finds Bad Diagnoses, <http://fortune.com/2016/05/16/telemedicine-services/>

A study recently published in JAMA Dermatology looked into telemedicine companies, and the Wall Street Journal reports that researchers found many physicians failed to ask important questions, and subsequently misdiagnosed and mistreated certain conditions. The study covered 16 companies—nine of which were specific to dermatology while the remaining seven were general medicine websites—totaling in 62 visits. According to the American Telemedicine Association (ATA), there are 200 networks and 3,500 service sites in the U.S., and the group is expecting more than 1 million online consultations this year. Researchers created six scenarios, including detailed medical histories, and used stock photos to pose as patients. Of 62 visits, 48 patients were diagnosed and 31 were prescribed medication. Only 10 were warned about potential risks and side effects, 13 were asked about their primary care physician, and six were offered to have records of the consultation sent to their doctor, according to the study. Diagnoses tended to be correct when a condition was identifiable based on photos alone. Clinicians were less successful when it was a more complex condition that required additional information. “The services failed to ask simple, relevant questions of patients about their symptoms, leading them to repeatedly miss important diagnoses,” dermatologist and lead author Jack Resneck told the Journal. The study admitted it couldn’t say whether visits would have been more successful had patients seen a doctor in person, though Resneck said, “The usual give-and-take that occurs between a physician and a patient wasn’t happening.”

#### No nuke war---card just says global priority, not that it causes the things it is on par with.

#### Aging doesn’t cause conflict

Mark L. Haas 17, Department of Political Science, Duquesne University, July 2017, “Population Aging and International Conflict,” <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-589>

How is the near worldwide phenomenon of population aging likely to affect international relations (IR)? Most scholars who have examined this issue have linked the potential effects created by aging to established IR theories. Most analyses that have developed around the issue of aging, in other words, have not created new theoretical approaches to the study of international politics. They have instead argued that aging is likely to affect key variables associated with existing IR theories, which will then tend to generate particular outcomes based on these theories’ predictions. The IR theories that studies of populating aging have most frequently tied into include ones from realist, diversionary war, and constructivist research programs. Many of the arguments that link the effects of aging to these theories reach opposite conclusions, with some predicting a much higher probability of international conflict due to aging, others the reverse. There are, however, very few empirical analyses that test these competing hypotheses, largely because aging is such a new phenomenon.

#### Telemedicine severs the foundation of doctor and patient trust by replacing long term relationships with consults with strangers.

Dr. Glen Mccracken 15, President of eVisit and a practicing ER physician with over 20 years of experience., 2-10-2015, "How the Typical Telemedicine Model Gets it Wrong," No Publication, http://blog.evisit.com/how-to-do-telemedicine-the-right-way

Most telemedicine companies connect patients with doctors they've never met before. While this is one way to provide more accessible healthcare, it's not the best path to sustainable, high-quality care. What's wrong with this model? The care isn't being provided by the patient's own physician. Why is this important? It’s simple. Telemedicine isn't as effective without a foundation of trust.

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Imagine this scenario: A young woman thinks she may have an ear infection, coupled with a nasty cough and a very sore throat. After two weeks, she finally makes an appointment to see a doctor in the city she’s recently moved to. She hates going to see a doctor unnecessarily, but she hasn’t been able to beat this illness and she’s starting to miss work. She walks into the new clinic feeling achy and miserable, and the office staff hands her a clipboard of papers. She fills out the intake forms and follows a nurse to the exam room where she waits to see her new primary care provider. She closes her eyes, exhausted, hoping the Yelp reviews she read about this new doctor are accurate. And then the doctor walks in—she’s warm, engaging, smart, and asks the patient what brought her in today. Not wanting to appear too needy, our sick patient understates her problems: “I don’t feel well and I’m not sure what’s wrong." The doctor looks straight at her, “You seem like you don’t come to the doctor for just anything. What’s really going on, and how can I help?” Finally, the real symptoms are discussed. It is this type of trust and intuition that makes a good physician: a doctor who can read the non-verbal cues of a patient and know when there’s more to the story. This type of engaged care leads to patient loyalty and trust. While much of medicine is science-based and about accurate research and cold hard facts, a large component is also about people, trust, and relationships. It's the constant dance of any healthcare provider: bringing both the head and the heart to the treatment room. For this reason, I believe telemedicine is only truly effective for physicians who already have relationships with their patients. Context is everything. When your patient already trusts you, telemedicine is convenient, efficient, and an excellent resource. However, when you’ve never established rapport with a patient, telemedicine can be frustrating; it can be a hurdle to the relationship, rather than an asset. With your current patients, you already know how they respond to information and whether they tend to be nervous, excited, or reserved. You can better understand their description of their symptoms in emails because you know their personalities. It is hard to trust a doctor—let alone any person—who is a complete stranger, especially when you're talking through a computer screen. Thus, telemedicine programs that are simply connecting providers with patients without an opportunity for in-person interaction are at a severe disadvantage. I would even argue that they will not be sustainable long-term.

#### Physician trust is key to solve climate change – generates popular support for immediate action

**Shankman 3/15** 2017 Sabrina Shankman is a producer and reporter for InsideClimate, Masters in Journalism from UC Berkeley's Graduate School of Journalism. Doctors' Group: Climate Change Threatens Public Health Across the Nation

Pediatrician Samantha Ahdoot may not use the words "climate change" when she's talking to her patients and their parents in Alexandria, Va., but she's talking about its impacts all the time.

Whether it's a 6-year-old boy who contracted Lyme disease in November—long after ticks should be gone for the year—or having to start kids on spring allergy medication in February instead of March, climate change is making its way into Ahdoot's exam room. And she's not alone.

As a physician, Ahdoot practices at the intersection **where public health and climate change meet**. She is part of a group of physicians who announced on Wednesday the formation of the Medical Society Consortium on Climate & Health, which aims to help the **public and policymakers understand how climate change is impacting health**. The group represents more than half of the physicians in the country and includes 11 of the nation's leading medical societies.

"When I discuss it, it's very straightforward," said Ahdoot. "The plants are blooming early because it's so warm, and that's why your child has allergies. Your child got Lyme disease in Chicago because it's 60 degrees and the ticks are out."

These are among the concrete health-related impacts of climate change—like an increase in stomach and intestinal illnesses following extreme weather events, or a 50 percent rise in emergency room visits for respiratory illness in areas impacted by the plumes of wildfires. A report released Wednesday by the consortium explores these and other impacts, highlighting the inescapable nature of climate change's threat to health and the important role physicians play in getting the word out.

"It's not just one part of the country, we're hearing from physicians all over the country," said Mona Sarfarty, the director of the consortium, who also directs the Program for Climate and Health in the Center for Climate Change Communication at George Mason University. "The people suffering the most harm are kids, pregnant women and people with any kind of chronic condition, especially any kind of heart or lung condition."

**People** inherently **trust physicians and the consortium is hoping to leverage that trust to educate people about climate change**. They believe they can play a role in helping people understand that 97 percent of the scientific community agrees on mankind's role in **climate change**, that certain groups of Americans are more vulnerable to its health impacts right now, **and that without immediate action, it's going to get worse**.

Climate health threats

The formation of the consortium and the release of the report representss the first time that the disparate physicians groups, representing family doctors, pediatricians, obstetricians, allergists, geriatricians and internists, have banded together to publicly discuss how climate change is making Americans sick, Sarfaty said.

"There are certain areas of the country that aren't experiencing this much," she said. "That explains in part why it's been easier in some places to ignore it. But physicians are seeing it everywhere. That's why we have a need to speak out."

# 2NC

## Regulation CP

### O/V---2NC

#### It tailors specific solutions to specific problems

D. Daniel Sokol 20, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “Antitrust's "Curse of Bigness" Problem, The Curse of Bigness: Antitrust in the New Gilded Age”, Michigan Law Review, Volume 118, Issue 6, 118 Mich. L. Rev. 1259, April 2020, Lexis

CONCLUSION

Antitrust works well because it is technocratic in that a singular (but flexible within its economics) goal is administrable institutionally. To introduce the world of political imperfections into a technical process that examines markets would create further distortions affecting consumers. 152Antitrust does well dealing with antitrust problems. To the extent that there are other related problems, the right answer is not to create an antitrust that lacks democratic accountability (because antitrust becomes regulation via the backdoor) and exceeds its mandate of the past forty years. Rather, the better solution is to identify the underlying problem and solve it with more effective tools. If the problem is one of redistribution, tax is a better choice than antitrust. 153 If the problem is one of privacy, strengthen privacy laws. 154 If the problem is one of financial institutions or sector regulators not doing what they need to do, correct structural problems with sector regulators. Antitrust has increasingly moved out of sector regulation 155 and toward advocacy. 156The advocacy budget of the antitrust agencies is tiny, and to the extent that the problem is the rules of the game for particular industry sectors, Wu falls short by not suggesting greater competition advocacy.

Wu's concern with big tech companies because they are big (p. 126) is as misplaced now as it was earlier in antitrust history. Antitrust has gone through various moments in which it had reevaluated whether it has the proper tools to combat anticompetitive behavior in technology-related markets. 157It does have such tools and can bring important cases in these markets. 158 [\*1281] It was just a decade ago that we were told that Walmart was taking over shopping, that eBay was the largest online marketplace, or that Facebook was the primary way in which users shared information. Today, Uber competes with Lyft, Amazon has eclipsed eBay, Facebook is a legacy service, and younger people use any other set of applications to share information--such as Pinterest, Twitter, or Snapchat. In a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics. To ask antitrust to go beyond its institutional capacity sets up antitrust to fail, because Wu's deeper concern is with how society is structured. That structure can be changed through elections to the presidency and Congress and through changes as to the makeup of the Supreme Court. Antitrust history shows that it is the Supreme Court that changes antitrust law and policy the most because of antitrust's common law-like nature. 159

#### Regulation is more effective than antitrust because it directly targets the desired conduct

Dr. Pedro Caro de Sousa 21, Advisor at the European University Institute Florence School of Regulation, Competition Expert with the OECD, DPhil from the University of Oxford, Former Visiting Scholar at the European University Institute and Associate Research Fellow at New York University’s School of Law, Qualified Lawyer in Portugal and Barrister of England and Wales, Lecturer of Law at the University of Reading, Former Graduate Teaching Assistant in Competition Law and a Visiting Tutor in Competition Law and European Law at the University of Oxford, Former Visiting Tutor in European Law at King's College, Former Visiting Lecturer at Universidade Catolica de Lisboa's LLM, Former Judicial Assistant in the Portuguese Constitutional Court, “Competition Enforcement and Regulatory Alternatives”, OECD, 6/7/2021, https://www.oecd.org/daf/competition/competition-enforcement-and-regulatory-alternatives-2021.pdf

Nonetheless, competition law cannot be preferred to regulation in all instances. First, as we saw above, regulation can pursue goals other than pure market efficiency, and can tackle challenges other than market power, such as health concerns and safety standards (OECD, 2011, p. 22[6]) (Competition and Markets Authority, 2020, p. 2[4]). Second, even within concerns about market power, regulation may be better placed than competition law to address the relevant problems. Competition law has limited effectiveness against structural market issues, including those that involve the mere existence of a monopoly or oligopoly, exploitative behaviour, or issues that require ongoing implementation or monitoring (Breyer, 1984[1]) (OECD, 2011, p. 23[6]). Proceeding directly via specifically enacted regulation may provide a more comprehensive and effective means by which to remedy ongoing market failures than episodic antitrust enforcement (Hellwig, 2009, p. 212[26]) (Dunne, 2015, p. 176[5])

#### It catalyzes competition---the result is antitrust by effect

Tim Wu 17, Isidor and Seville Sulzbacher Professor at Columbia Law School, JD from Harvard Law School, BSc from McGill University, Former Law Clerk for Justice Stephen Breyer of the U.S. Supreme Court and Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit, “Antitrust Via Rulemaking: Competition Catalysts”, Colorado Technology Law Journal, Volume 16, Issue 1, 16 Colo. Tech. L.J. 33, Lexis

Introduction

In its March 26, 2016 issue, The Economist magazine announced that "America needs a giant dose of competition." 1 Its study of industry concentration and profits suggested that, after decades of consolidation, competition had decreased across a broad range of the [\*34] American economy. 2 An April 2016 issue brief by the Council of Economic Advisors reached similar conclusions, stating that "competition appears to be declining" due to "increasing industry concentration, increasing rents accruing to a few firms, and lower levels of firm entry and labor market mobility." 3

The promotion of competition in the American economy is a task that has traditionally fallen to the enforcement agencies at the federal and state level, relying on the main antitrust statutes. 4 However, the challenge of declining competition has also prompted interest in the use of regulatory alternatives to antitrust to "catalyze" competition. 5 The strategy involves using industry-specific statutes, rulemakings, or other tools of the regulatory state to achieve the traditional competition goals associated with the antitrust laws. 6 Hence, "antitrust via rulemaking."

While conducting competition policy outside of the main antitrust laws is not entirely new, it came into some prominence through an April 15, 2016 Executive Order issued by the White House. 7 In that order, the President charged the executive agencies as follows:

Executive departments and agencies with authorities that could be used to enhance competition (agencies) shall, where consistent with other laws, use those authorities to promote competition, arm consumers and workers with the information they need to make informed choices, and eliminate regulations that restrict competition without corresponding benefits to the American public. 8

In the field of administrative law, there is a longstanding debate over the relative merits of rulemaking and adjudication. 9 Beginning in the 1960s there was a decisive shift among most agencies toward [\*35] rulemaking. 10 However, with exceptions (most of which are described here), the promotion of competition - the antitrust regime - remains rooted in an adjudication model, and might even be described as stuck there. More effective and widespread promotion of competition may require more widespread and effective use of pro-competitive rulemaking by a broader variety of agencies.

### Perm: Do the CP---2NC

#### Regs don’t create competition, they replicate its results---blurring the decision ruins precision

Spencer Weber Waller 98, Associate Dean for Academic Affairs and Professor at the Brooklyn Law School, JD from Northwestern University School of Law, Fellow at the Institute of Public Policy Studies, BA in Economics and Political Science from the University of Michigan, “Prosecution by Regulation: The Changing Nature of Antitrust Enforcement”, Oregon Law Review, 77 Or. L. Rev. 1383, Winter 1998, Lexis

The conventional wisdom is that the antitrust laws are the antithesis of pervasive regulation of the economy. Under this view, the antitrust laws seek to perfect market systems by imposing important constraints on anticompetitive behavior, but do not attempt to dictate the terms under which firms enter the market, price their product, or select their customers. Thus, while the antitrust laws may affect a firm's behavior and penalize violations of the rules, they are supposed to operate quite differently from traditional regulation, where all aspects of competition are under the control of an administrative agency and the firms surrender substantial freedom in return for a regulated fair rate of return.

The numerous champions of this point of view come from a wide cross-section of backgrounds and ideological stripes. As then Professor Stephen Breyer noted in Regulation and its Reform:

In principle the antitrust laws differ from classical regulation both in their aims and in their methods. The antitrust laws seek to create or maintain the conditions of a competitive marketplace rather than replicate the results of competition or [\*1384] correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions prohibiting certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do … Only rarely do the antitrust enforcement agencies create the de tailed web of affirmative legal obligations that characterizes classical regulation.

Economists and public policy scholars are even more inclined to draw a sharp distinction between the goals of antitrust and those of traditional regulation. So too, officials of the Antitrust Division and the Federal Trade Commission (FTC) routinely de scribe their mission as "law enforcement" and deny that they are acting as regulators. For all the changes wrought by the Chicago [\*1385] school of antitrust, the law and economic scholars also cling to a model of antitrust that is distinct from regulation.

#### The difference is fundamental

James B. Speta 6, Elizabeth Froehling Horner Professor of Law Senior Associate Dean for International Initiatives at the Northwestern University School of Law, JD and AB at the University of Michigan, Consultant at Eimer Stahl Klevorn & Solberg, LLP, “The Antitrust Enterprise: Principle and Execution: Resale Requirements and the Intersection of Antitrust and Regulated Industries”, Iowa Journal of Corporate Law, 31 Iowa J. Corp. L. 307, Winter 2006, Lexis

I. Introduction

In his forthcoming book, The Antitrust Enterprise, Professor Hovenkamp makes clear that antitrust is simply one of a menu of market-regulating choices available and pursues the interactions among antitrust, intellectual property, and sector-specific regulation. "The antitrust laws are only one among many legal regulators of competition and innovation. Intellectual property laws and market-specific regulations for markets such as telecommunications or electric power also pursue the same ends." 1 This fundamental point, which was too often lost during the height of regulated industries law, is particularly salient as many of the traditional utility markets - including especially telecommunications and electricity - move through a transition to more competitive market structures. The Antitrust Enterprise traces the great transformations of antitrust industries law, 2 and pays particular attention to the challenges for antitrust of changing market structures, increasingly rapid innovation, and improved economic tools.

### AT: Private Right to Action Key---2NC

#### Private plantiffs turn aff solvency

Nuechterlein, JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and Muris, George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, ‘21

(Jon and Timothy J., “Private Antitrust Remedies: An Argument Against Further Stacking the Deck,” March, <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>)

Advocates of expanding private antitrust remedies begin with the premise that “private enforcement deters anticompetitive conduct” and conclude, in the words of the Report, that legal “obstacles” to recovery by “private antitrust plaintiffs” should be eliminated to maximize deterrence.24 But even if the premise is true,25 the conclusion would not follow. The Report appears to assume that the more deterrence the law provides, the better, and that any “obstacles” to private recovery should thus be removed.26 But that position ignores the consequences of overdeterrence, including the prospect that firms will respond to the threat of draconian penalties in ways that reduce the threat of liability but that ultimately harm consumers.

Overdeterrence is a particular concern in antitrust doctrine because the line separating lawful from unlawful conduct can be blurred and much of the conduct falling on the lawful side of the line is socially beneficial. As economists William Baumol and Alan Blinder explain: One problem that haunts most antitrust litigation is that vigorous competition may look very similar to acts that undermine competition …. The resulting danger is that courts will prohibit, or the antitrust authorities will prosecute, acts that appear to be anticompetitive but that really are the opposite. The difficulty occurs because effective competition by a firm is always tough on its rivals.27

For example, excessive antitrust remedies for predatory pricing may not only deter firms from engaging in conduct that would ultimately be deemed unlawful, but also induce them to keep prices well above their costs and, in effect, hold a price umbrella over smaller, potentially litigious rivals. Such a regime would result in less competition and higher prices for consumers—the very outcomes the antitrust laws are designed to prevent.

Proposals to slap another layer of deterrence on top of existing private remedies are particularly perverse because, as discussed above, the current U.S. regime is already overdeterrent, in that it subjects firms to unusually severe liability risks even for overt conduct subject to the rule of reason. If anything, Congress should consider aligning private antitrust remedies with remedies for analogous common law torts by, for example, limiting treble damages and one-way fee-shifting to cases involving hard-core violations that may elude detection, such as price-fixing cartels. In all events, Congress should not make a bad situation worse by ratcheting up the level of overdeterrence.

#### Public enforcement with SINGLE damages is enough

Italianer, Director-General for Competition, European Commission, ‘13

(Alexander, “Fighting cartels in Europe and the US: different systems, common goals,” October 9, <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>)

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### That achieves optimal deterrence because agencies can sue, without creating huge liability, the only function of private suits is to compensate

Juška, PhD candidate, Leiden Law School, Leiden University, Leiden, ‘18

(Žygimantas, “The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pages63–93)

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.

#### Business will self-regulate out of fear of prosecution AND to conserve reputational capital, so enforcement is not required

Dr. Adi Ayal 15, Professor at Bar Ilan University, PhD in Economics from the University of California, Berkeley, and PhD in Law from Bar Ilan University, with Highest Distinction, “Anti-Anti Regulation: The Supplanting of Industry Regulators with Competition Agencies and How Antitrust Suffers as a Result”, in Competition Law as Regulation, Ed. Drexl and Di Porto, p. 28-30

The broad definition of regulation encompasses the idea that the state controls private actions through a myriad of means, some direct and some indirect. This formulation may be useful to avoid biases inherent in examining only specific types of rules, while other norms influence the same behaviour. In order to overcome such biases, some prefer to use terms such as ‘regulatory regime’ or ‘regulatory space’ to denote the environment which influences both the formation and enforcement of such legal norms.3

For the purposes of this chapter, I focus on specific regulatory regimes, i.e. those dealing with industries subject to direct agency review, and contrast them with a general regime enforced by competition agencies based on antitrust law. Industry-specific regulation is associated with the rise of the ‘administrative state’, increasing governmental intervention in the economy and reducing judicial oversight by focusing on expert institutions using ‘command and control’ methods.4 While current consensus might be that such regulation was excessive and is in the process of reduction, it should be noted that such cycles of increasing and then decreasing state intervention have been occurring periodically, usually with economic booms increasing trust in markets (and inducing calls for less regulation), and with downturns and depressions pushing in the opposite direction.5 Deregulation is often associated with an increased role for competition agencies, many citing antitrust as a substitute for industry-specific regulation, a claim that will be assessed in more detail below.6

Most studies of regulatory agencies focus on three main types of activities such agencies employ: information gathering, standard setting and behaviour modification.7 Information gathering is necessary for an understanding of the industry and problems plaguing it; standard setting is the formation of legal norms and guidelines which firms and individuals subject to the regulatory agency must follow; and behaviour modification refers to enforcement measures aimed at those failing to follow said rules.

Despite the current focus on regulatory enforcement, it is important to note that much of the effect of regulation stems from self-regulation. This is due to businesses’ eagerness to avoid later prosecution, or the importance of public perception and the reputational capital associated with the appearance (or reality) of ‘good citizenship’. Thus, literature abounds on hybrid forms of regulation, such as requiring firms to form internal codes of conduct or enforcement mechanisms.8 In these situations, the public agency monitors only the exterior contours of internal regulation, such as the existence of such a code or the appointment of an internal compliance officer. Such measures create a legally binding contract (e.g., if encoded in a firm’s bylaws) or the public perception of such (e.g., if declared as company policy). Internal compliance measures can thus be self-enforcing and a regulatory agency requiring them, but not enforcing them, can still make a large difference in eventual behaviour.

### AT: Expertise---2NC

#### Antitrust agencies will share expertise with regulators, ensuring proper design

Dr. Chris Pike 19, MS and PhD in Economics from the University of East Anglia, Competition Expert at the OECD, Leader of Working Party 2 of the OECD Competition Committee, Associate at the Centre for Competition Policy, BA in Economics from the University of East Anglia, “Independent Sector Regulators – Note by the United States”, OECD Working Party No. 2 on Competition and Regulation, 12/2/2019, p. 8-9

4. Competition Advocacy

23. Where sectoral regulators have a lead or shared role in promoting or preserving competition in a sector, the Antitrust Agencies regularly share their expertise with the relevant regulator through competition advocacy. The Antitrust Agencies generally seek to promote reliance on competition rather than on government regulation, unless there is compelling evidence that regulation is necessary to achieve an important social objective. They also seek to ensure that when regulation is necessary, it is properly designed to accomplish its objectives as efficiently as possible, for example, through market-based solutions and structural, rather than behavioral, remedies. The Antitrust Agencies also seek to inform regulators of the costs associated with restrictive regulation. The FTC and DOJ have sought to inform sectoral regulators about the impact of regulation on efficiency and consumer welfare and potential benefits of deregulation in various sectors of the economy, including electricity, natural gas, telecommunications, broadcasting, cable television, and electricity generation and distribution. They communicate their views to other agencies through informal consultations, or more formally, through letters or regulatory filings.

24. In one recent example, the Antitrust Agencies submitted public comments to the U.S. Federal Energy Regulatory Commission (“FERC”) regarding how the FERC assesses market power in the agency’s review of mergers and electricity sales rates under the Federal Power Act. The Antitrust Agencies encouraged the FERC to look beyond market share and concentration statistics in this analysis, which should ultimately be aimed at understanding the competitive effects of proposed transactions. Due to features specific to electricity markets, even firms with relatively small market shares may be able to exercise market power, and so other evidence should be considered in determining whether, for example, a proposed combination of assets would enhance the ability and incentive of a firm to raise prices.25

25. The Antitrust Agencies also opine on specific transactions, or aspects of them. For example, in April 2016 the DOJ formally opposed the structure the Canadian Pacific Railway proposed for its merger with Norfolk Southern Corp. The Canadian Pacific Railway had proposed to create an “independent voting trust” that would hold the shares of Canadian Pacific for the pendency of the Surface Transportation Board’s (“STB”) substantive analysis of the merger.26 The DOJ argued that this ownership arrangement would undermine the independence of the two companies and effectively combine the two companies before a regulatory review could be completed. In the face of the opposition to the voting trust arrangement by the DOJ and by other parties that submitted their views at the STB, the companies abandoned the deal before the STB had the opportunity to rule either on the voting trust or on the merger itself.

#### Regulators have more resources than antitrust agencies

Lina Khan 17, Fellow at the Open Markets Program at New America, JD from Yale Law School, BA from Williams College, and Sandeep Vaheesan, Legal Director at the Open Markets Institute, B.A. from the University of Maryland and J.D. and M.A. from Duke University, Regulations Counsel at the Consumer Financial Protection Bureau, “Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents”, Harvard Law & Policy Review Online, 11 Harv. L. & Pol'y Rev. Online 235, Lexis

384 See John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULL. 979, 1002 (2012) (observing that "the antitrust agencies do not have the resources of sector regulators to monitor and oversee compliance").

#### Antitrust is developed by adjudication---that creates an ineffective, unpredictable, and unenforceable patchwork

Rohit Chopra 20, Commissioner of the Federal Trade Commission, and Lina M. Khan, Academic Fellow at Columbia Law School, Counsel to the Subcommittee on Antitrust, Commercial, and Administrative Law, US House Committee on the Judiciary and Former Legal Fellow at the Federal Trade Commission, “The Case for "Unfair Methods of Competition" Rulemaking”, University of Chicago Law Review, 87 U. Chi. L. Rev. 357, March 2020, Lexis

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

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

One reason that antitrust adjudication suffers from these shortcomings is that courts analyze most forms of conduct under the "rule of reason" standard. The "rule of reason" involves a broad and open-ended inquiry into the overall competitive effects of particular conduct and asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws. Balancing short-term losses against future predicted gains calls for "speculative, possibly labyrinthine, and unnecessary" analysis and appears to exceed the abilities of even the most capable institutional actors. 1 Generalist judges struggle to identify anticompetitive behavior 2 and to apply complex economic criteria in consistent ways. 3 Indeed, judges themselves have criticized antitrust standards for being highly difficult to administer. 4 And if a standard isn't administrable, it won't yield predictable results. The dearth of clear standards and rules in antitrust means that market actors face uncertainty and cannot internalize legal norms [\*360] into their business decisions. 5Moreover, ambiguity deprives market participants and the public of notice about what the law is, thereby undermining due process--a fundamental principle in our legal system. 6

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

#### Antitrust courts lack expertise to make correct decisions. That allows continued market distortion.

Herbert Hovenkamp 18, James G. Dinan University Professor at Penn Law and Wharton School of Business at the University of Pennsylvania, “The Rule of Reason”, Florida Law Review, 70 Fla. L. Rev. 81, January 2018, Lexis

II. BURDENS OF PROOF, QUALITY OF EVIDENCE, AND THE "QUICK LOOK"

A. Cost Savings from the Per Se Rule?

Antitrust policy should strive to reduce the social costs of anticompetitive behavior, which has two distinct components. One is the net social costs of anticompetitive price increasing or output reducing conduct and the private measures taken to defend against it, offset by any economic benefits. Second are administrative costs, including error costs, of operating the enforcement system.

One must assume that a full-blown rule of reason inquiry is much costlier than analysis under the per se rule. Applying the rule of reason typically requires expert testimony identifying a relevant market or alternative mechanisms for estimating market power, as well as some evidence that purports to measure actual anticompetitive effects. 103 By contrast, the per se rule requires only proof that a particular type of conduct has occurred. Thus, the rule of reason is justifiable only to the extent that it provides superior outcomes.

Administrative costs include not only the costs of litigation, whether terminated by settlement, dispositive motion, or trial, including appeals, but also the cost of detecting violations, of determining whether to sue, as well as of antitrust compliance with whatever the rule happens to be. Error costs are particularly relevant to compliance costs. For example, an unduly harsh tying rule may influence firms to avoid socially beneficial tying. By contrast, an overly lenient predatory-pricing rule may yield excessive anticompetitive predation. 104

[\*99] Excessive complexity can increase error costs just as much as excessive simplicity. Antitrust cases in the United States are decided by generalist judges, many of whom lack economics training. Further, facts are often determined by juries, who frequently lack any relevant training whatsoever. In such cases increased complexity can produce poorer rather than better outcomes. 105 As a result, a per se rule that is easily administered but right only 80 percent of the time may actually be preferable to an open-ended rule of reason query with an arbitrary and indeterminate error rate.

#### Ideologically conservative judges will gut the plan in court

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.

## UQ CP

### Amendment---2NC

#### The United States federal government should cease relevant antitrust activity as per 2AC Swartz.

## Energy ADV

### Resilient---2NC

#### The grid’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.

#### It won’t cascade---impossible

Chris Marciano 16, Utilities Worker and Researcher, “Could Terrorists Shut Down The United State's Entire Power Grid?”, https://www.quora.com/Could-terrorists-shut-down-the-United-States-entire-power-grid

Unlikely. First off, there are three separate grids in the US: the Eastern Interconnect, the Western Interconnect, and Texas (called ERCOT). Yes, Texas is its own entity. Don't act surprised. You can take an electron and run it from Louisiana to Maine, but you can't go to Houston or San Francisco. Several changes were made due to the Northeast Blackout of 2003. The grid operates on a principle of redundancy to avoid cascading failures. When a power line fails, the electrons near-instantaneously go to other lines. If the addition of those electrons cause these lines to overload and fail, the failures will continue like a domino effect. The operators of the grid, using fancy software, manage the grid so that no single failure leads to a cascading failure. If one failure does occur, they will make necessary changes to prevent another single failure from causing a cascading failure; that could include a starting reserve generation in particular areas (even if that generating resource is more costly) or by turning off the power of select areas.

## Econ ADV

### U---2NC

#### This prices in all headwinds

Ernest “Doc” Werlin 12-27, Spent 35 Years in Fixed Income as a Trader and Corporate Bond Salesman, including Time as a Partner at MorganStanley in Charge of Corporate Bond Trading, “Doc’s Prescription: U.S. Economic Outlook for 2022”, Herald-Tribune, 12/27/2021, https://www.heraldtribune.com/story/business/2021/12/27/economists-expect-u-s-enjoy-solid-economic-growth-2022/9022524002/

There is a growing consensus that the United States will enjoy solid economic growth in 2022 despite concerns about inflation, supply chain disruptions, COVID-19 and Federal Reserve tightening. The Conference Board, a research group comprising more than 1,000 public and private corporations, forecasts that the U.S. economy will grow by 3.5% in 2022.

The main challenges to the United States and the global economy in the next decade come from a continued trend toward deglobalization and faster-than-expected inflation. The transition toward decarbonization of economies in response to climate change will create challenges and opportunities for global growth.

Despite the acceleration of new COVID-19 cases in December, largely associated with the delta and omicron variants, America enjoyed strong growth in Q4 2021.

COVID-19 remains a threat but its economic impact is fading. There remains uncertainty regarding the transmissibility, severity, and effectiveness of existing vaccines against omicron. World Health Organization officials, in recognition of the dangers inherent with COVID-19, are advocating more coordinated and decisive efforts to vaccinate the world’s population to prevent the emergence of new, more dangerous variants.

The Food and Drug Administration recently granted emergency authorization to Pfizer’s COVID treatment pill for patients 12 years and up with mild to moderate COVID symptoms who are most likely to end up hospitalized. The agency said it should be prescribed as soon as possible after diagnosis and within five days of symptom onset.

The United States is experiencing robust but an uneven rebound from the pandemic. Demand growth is outstripping supply growth because of unprecedented fiscal and monetary stimulus.

A consensus of economists forecast a decline in the unemployment rate from the current 4.2%. The Bureau of Labor Statistics wrote, “As the nation’s demographic shift continues, with the baby-boom generation moving into retirement, the labor force participation rate will continue to decline, moderating growth.”

The U.S. Census Bureau released a report that the U.S. population grew at a slower rate in 2021 than in any other year since the founding of our nation. This year was the first time since 1937 that the U.S. population grew by fewer than one million people.

In response to COVID-19, households have redirected their spending away from activities that are “locked-down” (food and entertainment) and toward durable goods. Governments have eased COVID restrictions because of vaccines and the ability to more precisely target and curtail certain types of activities.

On Wednesday, in a fresh sign of his growing concerns about inflation, Federal Reserve Chairman Jerome Powell said the Federal Reserve can't be sure that price increases will slow in the second half of next year. To stem inflation, we can expect the Fed to stop bond purchases and raise interest rates three times in 2022.

## Federalism ADV

### No Aging Crisis---2NC

#### No aging crisis---threshold is arbitrary, mortality is declining, average citizen is biologically younger than ever, and medical advances solve---that's Scott.

#### Advanced anti-aging R&D is inevitable and solves

Dr. Andrew Scott 18, Professor of Economics, London Business School, “The Myth of an "Ageing Society"”, World Economic Forum, 5/29/2018, https://www.weforum.org/agenda/2018/05/the-myth-of-the-aging-society

To manage current demographic trends, governments will need to design policies aimed at both aging and longevity. All countries still need programs to support those who are aging in a traditional sense; but there is also a growing need for more flexible policies to help older workers reap the benefits of longer, more productive lives. Increasing the official retirement age – one of the most common policy responses to the “aging society” problem – does not advance these other goals. And for those not benefiting from longer, healthier lives, it amounts to a cruel, retrograde intervention.

To capitalize on the boon offered by longevity, governments need to develop policies to help older, still-productive citizens find full-time employment or more flexible work arrangements. Unlike aging, longevity opens the door for policies that go well beyond end-of-life issues. Significantly longer lives, the twentieth-century historian Peter Laslett observed, invite us to draw up “a fresh map of life” itself.

Just as developments in the twentieth century gave shape to new, discrete life stages in the teenage and retirement years, twenty-first-century lifespans are creating the space for even more life stages to emerge. To maximize the advantages of longevity, we will need to rethink both education and traditional career paths, while ensuring that today’s younger generations live as long and as healthily as possible.

The future ain't what it used to be

As ongoing anti-aging research and development gains momentum, longevity will become an increasingly central feature of policy debates. Most discussions about the future currently revolve around Moore’s Law and the rise of robots; but a genuine breakthrough in anti-aging research could have equally profound effects on individual lives and the organization of society. “By the end of the century,” notes Harvard Medical School geneticist David Sinclair, “people could live to 150 because there’s going to be a combination of research that will lead to pills we could start taking at the age of 30 to boost the body’s defenses against diseases and age.”

Advances in anti-aging technology could prove particularly useful for countries suffering from the aging effect, so governments would do well to support R&D in this area. Unlike the US and Western European countries, which can probably help their Baby Boomers adjust to longer, more productive lives through smart reforms, developing countries with rapidly aging populations will need to make significant investments in longevity to offset the effects of aging. Japan, Singapore, and South Korea have already made large investments in automation and robotics to make up for lost productivity in their aging workforces, and it is only a matter of time before they become heavily involved in longevity research, too.

### Telehealth Fails---2NC

#### Broadband challenges prevent implementation

Cynthia LeRouge 11/28/13, Department of Health Management & Policy, College for Public Health and Social Justice, Saint Louis University, Salus Center"Crossing the Telemedicine Chasm: Have the U.S. Barriers to Widespread Adoption of Telemedicine Been Significantly Reduced?", Int. J. Environ. Res. Public Health 2013, 10(12), 6472-6484, www.mdpi.com/1660-4601/10/12/6472/htm

2.1. Technology 2.1.1. Barriers The lack of broadband infrastructure has proven challenging for the advancement of many forms of telemedicine, specifically high demand video and store-and-forward services, which require expansive health networks [16]. The broadband penetration rate in the U.S. (26.4 connections per 100 inhabitants) makes it 15th in the ranking of countries by the Organization for Economic Cooperation and Development (OECD) [17], down from its ranking of 6th in 2002. Fifteen percent of American adults (over 18 years old) do not use the Internet as of May 2013, which may make the application of widespread home telemedicine difficult to implement [18].

# 1NR

## Pharma DA

### Impact---1NR

#### It’s the most probable existential threat

Thomas Such 21, Writer for the Glasgow Guardian, “How to Wipe Out Humanity”, The Glasgow Guardian, 2/9/2021, https://glasgowguardian.co.uk/2021/02/09/how-to-wipe-out-humanity/

Not only is a virus the key to an unpredictable disease which may one day wipe out humanity, but the origins of said virus are key. My “research” concluded that the most efficient way of killing humanity is to have the disease spread in a semi-developed country such as China; it is far easier for viruses and other diseases to spread in less developed countries - but in order to successfully achieve global transmission, a host country must have the substantial international infrastructure to spread a pandemic worldwide. Using this strategy in my “research”, I was able to play a game of Plague Inc. wherein the spread and threat of Covid-19 seemed minimal by using China as a perfect starting point to wipe out humanity. The key, as it turns out, is the spreading of the virus - something that Covid-19 has proved can be done very easily in our modern globalised society. The journey from China to Italy spreading the plague across Europe took almost 40 years back in the middle ages: in 2020, it took a mere 40 days for widespread outbreaks to begin in Italy spreading across much of Europe.

My research into the historical spread of pandemics and my attempts to create my destroyer of humanity illustrates a significant disparity between what happens in the real world and the measures one may find in a simulator. Political realities and measures many may consider “draconian” or simply unrealistic heavily impact how a pandemic may spread and the eventual impact it will have on humanity. Using Plague Inc., I was able to effectively kill off humanity in around a year using a fast transmission of virus, which also became gradually more lethal. This is essential to ensure the near-universal transmission of the virus, and to penetrate measures such as increased border security and isolated regions once the knowledge of the pandemic spreads. Whilst it is unlikely that humanity will be wiped out any time soon, it became clear to me that instead of nuclear war, alien invasion or the looming threat of global warming; the real threat to humanity and the eventual destruction of our species may come from something as simple as bacteria. While we like to revel in our scientific advancements of the modern era and the ascension of humans as Earth’s alpha species, it becomes clear that, when we adapt, our environment and the threats it poses adapt with us. Plague Inc. showed a clear pathway to killing off humanity - though, luckily, the Covid-19 threat in the program was combated due to immense political pressure, restrictions and record-making vaccine paces. The real threat, however, remains clear: if humanity becomes increasingly lax with preventive and managerial measures, it is obvious what the future may hold for us.

#### It sparks global instability that goes nuclear

Tatsujiro Suzuki 21, Director and Professor at the Research Center for Nuclear Weapons Abolition, Nagasaki University, Former Vice Chairman of Japan Atomic Energy Commission, et al., “Pandemic Futures and Nuclear Weapon Risks: The Nagasaki 75th Anniversary Pandemic-Nuclear Nexus Scenarios Final Report”, Journal for Peace and Nuclear Disarmament, Volume 4, Issue Supplement 1, Taylor & Francis

The Challenge: Multiple Existential Threats

The relationship between pandemics and war is as long as human history. Past pandemics have set the scene for wars by weakening societies, undermining resilience, and exacerbating civil and inter-state conflict. Other disease outbreaks have erupted during wars, in part due to the appalling public health and battlefield conditions resulting from war, in turn sowing the seeds for new conflicts. In the post-Cold War era, pandemics have spread with unprecedented speed due to increased mobility created by globalization, especially between urbanized areas. Although there are positive signs that scientific advances and rapid innovation can help us manage pandemics, it is likely that deadly infectious viruses will be a challenge for years to come.

The COVID-19 is the most demonic pandemic threat in modern history. It has erupted at a juncture of other existential global threats, most importantly, accelerating climate change and resurgent nuclear threat-making. The most important issue, therefore, is how the coronavirus (and future pandemics) will increase or decrease the risks associated with these twin threats, climate change effects, and the next use of nuclear weapons in war.5

Today, the nine nuclear weapons arsenals not only can annihilate hundreds of cities, but also cause nuclear winter and mass starvation of a billion or more people, if not the entire human species. Concurrently, climate change is enveloping the planet with more frequent and intense storms, accelerating sea level rise, and advancing rapid ecological change, expressed in unprecedented forest fires across the world. Already stretched to a breaking point in many countries, the current pandemic may overcome resilience to the point of near or actual collapse of social, economic, and political order.

In this extraordinary moment, it is timely to reflect on the existence and possible uses of weapons of mass destruction under pandemic conditions – most importantly, nuclear weapons, but also chemical and biological weapons. Moments of extreme crisis and vulnerability can prompt aggressive and counterintuitive actions that in turn may destabilize already precariously balanced threat systems, underpinned by conventional and nuclear weapons, as well as the threat of weaponized chemical and biological technologies. Consequently, the risk of the use of weapons of mass destruction (WMD), especially nuclear weapons, increases at such times, possibly sharply.

The COVID-19 pandemic is clearly driving massive, rapid, and unpredictable changes that will redefine every aspect of the human condition, including WMD – just as the world wars of the first half of the 20th century led to a revolution in international affairs and entirely new ways of organizing societies, economies, and international relations, in part based on nuclear weapons and their threatened use. In a world reshaped by pandemics, nuclear weapons – as well as correlated non-nuclear WMD, nuclear alliances, “deterrence” doctrines, operational and declaratory policies, nuclear extended deterrence, organizational practices, and the existential risks posed by retaining these capabilities – are all up for redefinition.

A pandemic has potential to destabilize a nuclear-prone conflict by incapacitating the supreme nuclear commander or commanders who have to issue nuclear strike orders, creating uncertainty as to who is in charge, how to handle nuclear mistakes (such as errors, accidents, technological failures, and entanglement with conventional operations gone awry), and opening a brief opportunity for a first strike at a time when the COVID-infected state may not be able to retaliate efficiently – or at all – due to leadership confusion. In some nuclear-laden conflicts, a state might use a pandemic as a cover for political or military provocations in the belief that the adversary is distracted and partly disabled by the pandemic, increasing the risk of war in a nuclear-prone conflict. At the same time, a pandemic may lead nuclear armed states to increase the isolation and sanctions against a nuclear adversary, making it even harder to stop the spread of the disease, in turn creating a pandemic reservoir and transmission risk back to the nuclear armed state or its allies.

In principle, the common threat of the pandemic might induce nuclear-armed states to reduce the tension in a nuclear-prone conflict and thereby the risk of nuclear war. It may cause nuclear adversaries or their umbrella states to seek to resolve conflicts in a cooperative and collaborative manner by creating habits of communication, engagement, and mutual learning that come into play in the nuclear-military sphere. For example, militaries may cooperate to control pandemic transmission, including by working together against criminal-terrorist non-state actors that are trafficking people or by joining forces to ensure that a new pathogen is not developed as a bioweapon.

To date, however, the COVID-19 pandemic has increased the isolation of some nuclear-armed states and provided a textbook case of the failure of states to cooperate to overcome the pandemic. Borders have slammed shut, trade shut down, and budgets blown out, creating enormous pressure to focus on immediate domestic priorities. Foreign policies have become markedly more nationalistic. Dependence on nuclear weapons may increase as states seek to buttress a global re-spatialization6 of all dimensions of human interaction at all levels to manage pandemics. The effect of nuclear threats on leaders may make it less likely – or even impossible – to achieve the kind of concert at a global level needed to respond to and administer an effective vaccine, making it harder and even impossible to revert to pre-pandemic international relations. The result is that some states may proliferate their own nuclear weapons, further reinforcing the spiral of conflicts contained by nuclear threat, with cascading effects on the risk of nuclear war.

#### Externally---there’s a bioweapons impact: pharma contains it AND it causes extinction---nuke war doesn’t

Clifford Singer 1, Director of the Program in Arms Control, Disarmament, and International Security at the University of Illinois at Urbana-Champaign, “Will Mankind Survive the Millennium?”, The Bulletin of the Program in Arms Control, Disarmament, and International Security, Spring 2001, Volume 13, Number 1, http://www.acdis.uiuc.edu/research/S&Ps/2001-Sp/S&P\_XIII/Singer.htm

In recent years the fear of the apocalypse (or religious hope for it) has been in part a child of the Cold War, but its seeds in Western culture go back to the Black Death and earlier. Recent polls suggest that the majority in the United States that believe man would survive into the future for substantially less than a millennium was about 10 percent higher in the Cold War than afterward. However fear of annihilation of the human species through nuclear warfare was confused with the admittedly terrifying, but much different matter of destruction of a dominant civilization. The destruction of a third or more of much of the globe’s population through the disruption from the direct consequences of nuclear blast and fire damage was certainly possible. There was, and still is, what is now known to be a rather small chance that dust raised by an all-out nuclear war would cause a so-called nuclear winter, substantially reducing agricultural yields especially in temperate regions for a year or more. As noted above mankind as a whole has weathered a number of mind-boggling disasters in the past fifty thousand years even if older cultures or civilizations have sometimes eventually given way to new ones in the process. Moreover the fear that radioactive fallout would make the globe uninhabitable, publicized by widely seen works such as “On the Beach,” was a metaphor for the horror of nuclear war rather than reality. The epidemiological lethal results of well over a hundred atmospheric nuclear tests are barely statistically detectable except in immediate fallout plumes. The increase in radiation exposure far from the combatants in even a full scale nuclear exchange at the height of the Cold War would have been modest compared to the variations in natural background radiation doses that have readily been adapted to by a number of human populations. Nor is there any reason to believe that global warming or other insults to our physical environment resulting from currently used technologies will challenge the survival of mankind as a whole beyond what it has already handily survived through the past fifty thousand years.

There are, however, two technologies currently under development that may pose a more serious threat to human survival. The first and most immediate is biological warfare combined with genetic engineering. Smallpox is the most fearsome of natural biological warfare agents in existence. By the end of the next decade, global immunity to smallpox will likely be at a low unprecedented since the emergence of this disease in the distant past, while the opportunity for it to spread rapidly across the globe will be at an all time high. In the absence of other complications such as nuclear war near the peak of an epidemic, developed countries may respond with quarantine and vaccination to limit the damage. Otherwise mortality there may match the rate of 30 percent or more expected in unprepared developing countries. With respect to genetic engineering using currently available knowledge and technology, the simple expedient of spreading an ample mixture of coat protein variants could render a vaccination response largely ineffective, but this would otherwise not be expected to substantially increase overall mortality rates. With development of new biological technology, however, there is a possibility that a variety of infectious agents may be engineered for combinations of greater than natural virulence and mortality, rather than just to overwhelm currently available antibiotics or vaccines. There is no a priori known upper limit to the power of this type of technology base, and thus the survival of a globally connected human family may be in question when and if this is [[1]](#footnote-1)achieved.

### AT: Thumpers

#### Pharma mergers are powering ahead because of confidence in the overall regulatory environment

Anirban Sen 12-20, and Pamela Barbaglia, Kane Wu, Economic Reporters at Reuters, “Global M&A Activity Smashes All-Time Records to Top $5 Trillion in 2021”, Reuters, 12/20/2021, https://www.reuters.com/markets/europe/global-ma-activity-smashes-all-time-records-top-5-trillion-2021-2021-12-20/

Global merger and acquisition (M&A) activity shattered all-time records in 2021, comfortably erasing the high-water mark that was set nearly 15 years ago, as an abundance of capital and sky-high valuations fuelled frenetic levels of dealmaking.

The value of M&A globally topped $5 trillion for the first time ever, with volumes rising 63% to $5.63 trillion by Dec. 16, according to Dealogic data, easily surpassing the pre-financial-crisis record of $4.42 trillion in 2007.

"Corporate balance sheets are incredibly healthy, sitting on $2 trillion of cash in the U.S. alone -- and access to capital remains widely-available at historically low costs," said Chris Roop who co-heads North America M&A at JPMorgan (JPM.N).

Technology and healthcare, which typically account for the biggest share of the M&A market, led the way again in 2021, driven partly by pent-up demand from last year when the pace of M&A activity fell to a three-year-low due to the global financial fallout from the COVID-19 pandemic.

Companies rushed to raise funds from stock or bond offerings, large corporates took advantage of booming equity markets to use their own stock as acquisition currency, while financial sponsors swooped on publicly listed companies.

Moreover, robust corporate earnings and an overall bright economic outlook gave chief executives the confidence to pursue large, transformative deals, despite potential headwinds such as inflationary pressures.

Report ad

"Strong equity markets are a key driver of M&A. When stock prices are high, that usually corresponds with a positive economic outlook and high CEO confidence," said Tom Miles, co-head of Americas M&A at Morgan Stanley (MS.N).

Overall deal volumes in the United States nearly doubled to $2.61 trillion in 2021, according to Dealogic. Dealmaking in Europe jumped 47% to $1.26 trillion, while Asia Pacific rose 37% to $1.27 trillion.

"While China cross-border activity has been modest, corporates from other Asian countries have stepped up to buy global assets. We expect to see this trend continue, especially for deals in Europe and the United States," said Raghav Maliah, Goldman Sachs' (GS.N) global vice chairman of investment banking.

#### Profitability and innovation are strong, but tentative---there’s latent regulatory risk

Ana Nicholls 12-15, Industry Director at the Economic Intelligence Unit, MA from the University of Cambridge, “Pharmaceuticals in 2022”, PharmaTimes Magazine, https://www.pharmatimes.com/magazine/2021/december\_2021/pharmaceuticals\_in\_2022

The pharma industry has been pivotal during the pandemic and this focus looks set to continue into 2022

The coronavirus pandemic has not only boosted many pharmaceutical companies’ revenues, it has also bolstered their reputations.

The value of pharma innovation is undoubted, after COVID-19 vaccines were developed at record speed. Pharma manufacturing and supply chains have so far delivered 7.5bn vaccine doses, and also kept supplies of most other medicines on track. And despite outcry from emerging markets over the uneven distribution of vaccines, the patent system seems to have survived intact. The industry is entering 2022 in good shape, less vilified, more central to government policy, and with less budget pressure than in recent years. Even so, there will be challenges ahead.

Market growth will not be one of them. Overall, we expect pharmaceutical sales in the 60 biggest markets worldwide to increase by 4.6% in US-dollar terms to about US$1.5trn. That is about half the growth rate seen in 2021, but still faster than that seen in most of the previous decade. Little wonder that many pharma companies, having upgraded their 2021 earnings forecasts, are issuing bullish (if tentative) forecasts for 2022. COVID will continue to be a major driver for several companies. Pfizer expects earnings from its Comirnaty vaccine to be around U$29bn in 2022, only slightly down from the expected earnings of US$36bn. Add in revenues from its new COVID treatment, and prospects are good. Even AstraZeneca will finally start charging commercial rates for its COVID vaccine in 2022.

Vaccine supply problems should also ease in 2022. Unicef, which is monitoring COVID vaccine supply deals as part of its COVAX programme, reckons that global production capacity will jump from 8.5bn doses this year to over 40bn doses next. Some of that extra capacity will come from India, where the export ban for vaccines has finally been lifted despite the lingering caseload. India already has deals in place to produce 2.8bn doses. More groundbreaking, though, will be expansion of vaccine production in Africa.

From late 2022 the Pasteur institute of Dakar in Senegal will start producing 25m doses of coronavirus vaccines a month, with international backing. Vaccine capacity will also rise in Egypt, South Africa and Morocco as existing plants expand.

Other medicines will see some supply-chain problems – albeit not as extreme as in other markets. The disruption suffered in 2020 - when many countries were scrambling for medtech supplies - has died down, but the pharmaceuticals industry is still suffering from the rapid rise in shipping and delivery costs, particularly in Asian shipping routes. Coronavirus cases and power cuts are also causing occasional production stoppages in China, affecting supplies of active pharmaceutical ingredients as well as inputs such as magnesium (used to make aluminium foil packaging). The effect is likely to last into 2022, and will push the EU and US, among others, to move ahead with the reshoring initiatives they started last year, when supply-chain disruption underlined their reliance on China.

New regulations will also hold risks. The EU, for example, plans a full overhaul of its regulatory framework for pharmaceuticals, encompassing everything from incentivising innovation to securing supplies and ensuring equal access. A 12-week consultation process began in September 2021, with the aim of delivering the final revisions of the regulation by the end of 2022. The pharmaceutical industry is likely to be most concerned about the European Commission’s efforts to boost market competition, with the aim of promoting generics and bringing down prices. A promise to overhaul the R&D incentives on offer, such as extended marketing exclusivity, will also ring alarm bells, although the results are unlikely to involve drastic cutbacks. As always, the Commission will need to tread carefully between innovation and affordability.

Other countries are also pursuing new regulations. In 2022 Japan will implement the final stage of its rules requiring barcodes on pharma packaging – the kind of small-sounding reform that can be surprisingly difficult to implement. Taiwan is also introducing rules to improve traceability, though these will not come into effect until January 2023. In China, meanwhile, drugmakers are still feeling their way forward as the National Health Commission tries to centralise and streamline drug procurement processes, including instructions designed to ensure “more rational drug use”. Given that the Chinese government is also moving to extend insurance coverage under its public health schemes, we expect much stricter scrutiny of how money is spent. Digital health apps, such as Tencent’s WeDoctor, will feel the brunt of this as China looks to integrate telehealth into its systems, but pharmaceutical procurement will not be spared. More positively, however, China is progressively improving the environment for innovation, with firmer patenting rules, the emergence of bioclusters, and faster approval processes. Chinese biotech companies are growing rapidly, aided by both public and private funding.

Tax changes will prompt strategic reviews. Although the outlook for innovation is generally good, companies will need to be planning ahead for tax changes. Most immediately, in the US more elements of the 2017 tax reforms will come into effect, changing the extent to which companies can offset their R&D expenses. Some of the changes will promote innovation, by extending new credits, but others will be detrimental, particularly when it comes to orphan drugs. Less immediately, the pharmaceutical industry will need to prepare for the possible implementation of a global minimum tax for multinationals, following the recent deal by 136 countries. The aim of the legislation, due to come into effect in 2023 if approved by national legislatures, is to stamp out the kind of tax avoidance that several pharma companies have tried, most obviously by moving their tax base to low-tax Ireland.

None of this will prevent more innovation. Not only is global R&D spending in good shape, but the pandemic has accelerated several pathways to innovation. One is the access to and use of digital data to drive research. Pharma companies may not want to repeat the cooperative data sharing that helped them to develop COVID vaccines, but the data analytics tools are still there and being used. The sudden move from site-based clinical trials to virtual trials during lockdowns, though painful at the time, has opened up new ways of getting such trials done quickly. The same has happened for diagnostics, with the rapid roll-out of home testing kits. Liquid biopsies, an innovation that predated the pandemic, are now helping clinicians to catch up with missed non-COVID investigations. And mRNA and lipid nanoparticles, the innovation behind some of the vaccines, may have new uses for other treatments. The pandemic was an ill wind for the world, but it has blown the pharma industry some good.

#### Current antirust is stalled in the courts---only the plan’s success signals a sea change in the law

Tara L. Reinhart 10-6, Partner for Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP, J.D. from the Catholic University of America Columbus School of Law, B.A. from the University of North Carolina, et al., “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb”, JD Supra – Newstex Blogs, 10/6/2021, Lexis

Practical Limitations on Implementation of Chair Khan's Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as 'robust,' and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan's memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan's vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2[2]

Moreover, Chair Khan's plan to revise the merger guidelines and her desire to target 'facially illegal deals' will also face constraints based on current law. First, the antitrust guidelines typically incorporate existing legal standards, making radical change difficult to achieve. The 1982 Guidelines, which impactfully affected merger enforcement with the implementation of the hypothetical monopolist test, provide the last dramatic revision. Whether courts will accept major revisions at this stage will be an open question. Second, agency merger review is shaped by the existing review process enacted by the Hart-Scott-Rodino Act, regardless of whether the FTC believes a deal is facially illegal. Unlike regulators in other jurisdictions, the FTC must file a lawsuit and prevail in court if the agency wants to block a pending transaction.

Relatedly, Ms. Khan's ability to implement her ambitious agenda will be subject to the fact that changing these legal frameworks will depend on either Congressional action, which is far from certain, or litigation victories, which require the commitment of significant resources at a time when the FTC claims to already be stretching its capacity. Despite her recognition of the demands already imposed on FTC staff and plan for 'intentional' resource allocation, Chair Khan envisions the FTC undertaking increased vigilance and a more assertive agenda. If the existing resource constraints grow in response to Chair Khan's enhanced enforcement ambitions, the FTC could face difficulty balancing its investigatory agenda with the ability to litigate those cases, particularly considering the complex nature of antitrust matters, which often take years to resolve and require millions of dollars for experts and other related costs as well as a large team of attorneys and staff to manage. In addition, though Chair Khan referenced her hope for increased cross-bureau coordination in cases, it is unclear that such coordination would be efficient or create the capacity needed to fulfill the new agenda, especially when attorneys from other government divisions have already been recruited to help reduce burdens on matters of antitrust enforcement.

Finally, Chair Khan's desire to expand the agency's regional footprint and supplement the staff with various nonlawyer roles may further strain the budgetary resources needed to keep pace with the new agenda and present their own management challenges. Whether funding from Congress is imminent, whether it would be used to onboard lawyers or the other potential staff Ms. Khan desires, and how quickly hiring could reach the scale necessary to support the FTC's newly announced enforcement priorities are not yet clear.

Conclusion

Given the challenges to implementing the generalized policy goals set by Chair Khan, we do not expect an immediate fundamental sea change in antitrust enforcement. The practical obstacles described above mean that Chair Khan's FTC will be unable to contest every instance of what the agency might perceive to be unlawful conduct or unfair competition. We expect that the FTC will need to continue to be selective in the cases that it brings, which may mean that in the near-term, it will focus available resources on sectors of the economy perceived as involving 'the most significant actors,' such as large technology firms that Chair Khan has frequently referenced, particularly to the extent they engage in transactions that implicate the novel considerations under the proposed 'holistic' approach to identifying antitrust harms.3[3] We still expect to see some matters receive extensive investigations and proceed to litigation, and the outcomes of these matters will likely partially signal the success of the new agenda.

#### The possibility of reform generates uniqueness---businesses are rushing to merge because they think antitrust is coming soon---it’ll screech to a halt once a rule breaks through to actual implementation

David French 21, and Sierra Jackson, Reuters, “Analysis: Dealmakers See M&A Rush, Then Chills, in Biden's Antitrust Crackdown”, Reuters, 7/21/2021, https://www.reuters.com/business/dealmakers-see-ma-rush-then-chills-bidens-antitrust-crackdown-2021-07-12/

Dealmakers expect a new wave of transformative U.S. mergers and acquisitions (M&A), as companies rush to complete deals before President Joe Biden's antitrust push takes shape, to be followed by a slowdown when regulators start cracking down.

Biden signed a sweeping executive order on Friday to bolster competition within the U.S. economy. This included a call for regulatory agencies to increase scrutiny of corporate tie-ups which have left major sectors such as technology and healthcare dominated by few players. read more

The order came amid an unprecedented M&A frenzy, as companies borrow cheaply and spend mountains of cash they have accumulated on transformative deals to reposition themselves for the post-pandemic world. Almost $700 billion worth of U.S. deals were announced in the second quarter, the highest on record.

The dealmaking bonanza is set to continue, as companies seek to take advantage of the time window during which regulators frame precise rules to implement Biden's order, advisers to the companies said. The M&A slowdown will come only when regulators implement the rule changes, possibly in two years or more, they added.

### AT: No Link

#### Action in other sectors spills into pharma AND they’ll definitely think it’s possible, stunting consolidation

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

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

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

#### Abrupt shifts in any area ripple into pharma---it’s all interlinked because antitrust is underwritten by generalist common law

Dr. William Rogerson 20, Charles E. and Emma H. Morrison Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology, and Dr. Howard Shelanski, Ph.D. in Economics from University of California, Berkeley, Professor of Law at Georgetown University and Partner at Davis Polk & Wardwell LLP, JD from the UC Berkeley School of Law, BA from Haverford College, Former Clerk for Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit and Justice Antonin Scalia of the United States Supreme Court, Former Administrator of the White House Office of Information and Regulatory Affairs and Director of the Bureau of Economics at the Federal Trade Commission, Former Chief Economist of the Federal Communications Commission and Senior Economist for the President’s Council of Economic Advisers at the White House, “Antitrust Enforcement, Regulation, and Digital Platforms”, University of Pennsylvania Law Review, 168 U. Pa. L. Rev. 1911, June 2020, Lexis

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

#### That causes companies to preemptively pull the plug on mergers---the possibility of enforcement injects huge uncertainty in unrelated sectors

Clyde Crews 19, Vice President for Policy and Senior Fellow at the Competitive Enterprise Institute, and Ryan Young, Senior Fellow at the Competitive Enterprise Institute and M.A. in Economics from George Mason University, “The Case against Antitrust Law”, Competitive Enterprise Institute, 4/16/2019, <https://cei.org/studies/the-case-against-antitrust-law/>

Uncertainty. Antitrust regulation creates an enormous amount of economic uncertainty. Nobody knows how it will be used at a given time. If antitrust statutes are interpreted literally, potentially any firm, no matter how small, can be charged with an antitrust violation—or for dominating its relevant market, however defined. If a business sells goods at a lower price than its competitors, it can be charged with predatory pricing. If it sells goods at the same price as its competitors, it can be charged with collusion. And if it sells goods at a higher price than its competitors, it can be charged with abusing market power.

A century of case law has evolved some guidelines, but judicial precedents can be overturned any time a new case is brought. There are few bright-line legislative or judicial standards for antitrust enforcement. It is mostly guided by a mix of inconsistently enforced judicial precedents, regulators’ personal discretion, and political factors unrelated to market competition. Even the mere threat of antitrust enforcement can have a preemptive chilling effect on innovation, business strategies, and potential efficiency-enhancing arrangements.

Rent-seeking. Neo-Brandeisians rightly want to reduce rent-seeking, but they routinely propose policies that will backfire because of a common misunderstanding of how governments work in practice. Government employees do not operate with only the public interest in mind. They are human beings, with the same incentives and flaws as other human beings. They want to increase their budgets and power and enjoy the publicity that accompanies big cases. It also makes regulators especially vulnerable to what is known as a Baptist-and-boot-legger dynamic. In Clemson University economist Bruce Yandle’s classic example, a moralizing Baptist and a profit-seeking bootlegger will both favor a law requiring liquor stores to close on Sundays, though for different reasons. A true-believing “Baptist” in Congress or at the Justice Department or the FTC would be inclined to listen seriously to the entreaties of corporate “bootleggers” who can come up with virtuous-sounding reasons for why regulators should give their businesses special favorable treatment.36

Oracle, one of Microsoft’s rivals, ran its own independent Microsoft investigation during that company’s antitrust case, for what it alleged were Baptist-style reasons. “All we did is try to take information that was hidden and bring it to light,” said Oracle CEO Larry Ellison. “I don’t think that was arrogance. I think it was a public service.”37 Former Sen. Orrin Hatch (R-UT), who counted Oracle among his constituents, was one of the loudest anti-Microsoft voices in Congress. Around that time, he also received $17,500 donations from executives at Netscape, AOL, and Sun Microsystems. Perhaps heeding Hatch’s admonition that, “If you want to get involved in business, you should get involved in politics,” Microsoft expanded its presence in Washington from a small outpost at a Bethesda, Maryland, sales office to a large downtown Washington office with a full-time staff plus multiple outside lobbyists.38 Microsoft quickly went from a virtual non-entity in Washington to the 10th-largest corporate soft money campaign donor by the 1997-1998 election cycle. Sen. Hatch’s campaign was among the beneficiaries.39

The lines between Baptist and boot- legger can be blurry, and some actors play both parts. But such ethical dynamics are an integral part of antitrust regulation in practice.

Government usually stifles competition. If antitrust regulation is to be retained, it should not be a first-resort policy. If a company has an overwhelming competitive advantage, it is important to first ask what is causing it. If the advantage is due to superior performance, then consumers are not being harmed.

In most cases, dominance does not last long, as evidenced by how quickly any list of America’s largest companies changes from year to year. If a company does remain dominant for a long period of time, one of two possibilities must be true. The first option is that it continues to be consumers’ preferred option. The second is that it is engaging in rent-seeking behavior. In the first case, there is no need for an antitrust intervention. In the second case, the solution is not antitrust regulation, but to take away the government’s power to tilt the scales in rent-seekers’ favor.

Think long term. Robert Bork, though famous for his antitrust skepticism, still favors some antitrust regulation. He merely favors a more restrained usage than the Brandeis school. As he writes in The Antitrust Paradox, “Antitrust is valuable because in some cases it can achieve results more rapidly than can market forces. We need not suffer losses while waiting for the market to erode cartels and monopolistic mergers.”40

Bork’s statement is problematic for several reasons. How do regulators and judges know which cases are causing consumer harm and which are not? How do they decide which cases to pursue? Cases also often take years to resolve. Assuming regulators identify a valid case, how would they, and the judges who hear the case, know if market activity could address the problem by the time the case is decided? Do the benefits of regulatory action exceed the court and enforcement costs? Are the affected companies in a position to capture the regulators?

More to the point, does the short-term benefit come at a greater long-term cost? An enforcement action now could have a deterrent effect on future mergers, contracts, and innovations, including in unrelated industries. The consumer harm from these could well exceed the short-term benefits of a short-term improvement on market outcomes—assuming that regulators are consistently capable of such a feat.

#### The FTC will jump on the plan as an opportunity for cross-industry enforcement

Dr. Babette E.L. Boliek 11, Ph.D. in Economics from the University of California, Davis, J.D. from the Columbia University School of Law, Professor of Law at Pepperdine University, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011 Lexis

The analysis of the relevant jurisdiction is broken into two rival camps: (1) regulatory jurisdiction and (2) antitrust jurisdiction. The first camp, regulatory jurisdiction, the more complex of the two, is further divided into two subparts of particular concern (a) legacy-based regulation and (b) "satellite jurisdiction." The first subpart of regulatory jurisdiction, legacy-based regulation, refers to the FCC's congressionally designated core industry. The concern with legacy-based regulation is that the FCC will engage in *procedural opportunism*: that is, the agency may exploit the service classification process to extend its own regulatory authority.

The second subpart of regulatory jurisdiction analyzed is "satellite jurisdiction." 30 This is a new and unique grouping of various theories of regulatory jurisdiction. This novel grouping brings keen focus to those exertions of FCC authority that are the most legally and politically troubling--areas where the FCC may engage in substantive opportunism. These areas include certain uses of the FCC's Title I service classification, its spectrum licensing authority, and the FCC's authority to approve mergers in the telecommunications arena. 31

In contrast to regulatory jurisdiction, however, antitrust jurisdiction is not tethered to categorical classifications but, when triggered, is plenary over all private commercial actors. 32 The jurisdictional question for antitrust authorities is not in what legacy-based category Internet access properly exists, but whether an Internet access provider, in a properly defined market, is acting or is likely to act counter to competitive norms. Antitrust jurisdiction is largely conduct-based and not limited [\*1636] to technical distinctions between industries 33 but, rather, assessed against anticompetitive conduct within relevant markets.

#### That’ll specifically target pharma---they’re next in line

Eric Cortellessa 21, Investigative Editor of the Washington Monthly, Graduate of Northwestern University’s Medill School of Journalism, “The Conservatives Out to Stop the New Bipartisan Antitrust Movement”, Washington Monthly, July / August 2021, https://washingtonmonthly.com/magazine/july-august-2021/the-conservatives-out-to-stop-the-new-bipartisan-antitrust-movement/

That’s when the Alliance on Antitrust sprang into action, putting out a series of statements in conservative media warning Republicans against the idea. One of the Alliance’s members, Josh Withrow, then of FreedomWorks, for example, told The Washington Times that expanding the scope of antitrust enforcement to take on Big Tech would open a “Pandora’s box that could have dire consequences throughout our economy.” The group also sent a letter to the House antitrust subcommittee making a similar point, arguing that the “economic consequences of many of the recent proposals,” such as creating more stringent merger prohibitions, would “make the American economy and consumers substantially worse off across a wide array of industries.”

As it happens, this professed concern—that cracking down on tech monopolies would punish other industries—aligns with the interests that fund the Alliance and its member organizations. Most of these groups receive financial support from Big Tech—including the Committee for Justice, which gets donations from Google, according to the tech company’s political engagement disclosures—but also from monopolistic corporations in other sectors such as oil and gas, Big Ag, telecom, banking, and pharmaceuticals. These corporations will themselves soon face antitrust enforcement—and potentially major reductions in profits—if something isn’t done now to stop Congress from creating new and stricter laws against companies amassing too much market power.

#### 1. Ripple effects---they’re large and unforeseeable.

Maureen K. Ohlhausen 18, Commissioner at the U.S. Federal Trade Commission, “The Defense of Competition and Consumers in a Changing World: Reflections on a Decade of Competition Enforcement in China”, Remarks before the 7th China Competition Policy Forum, Competition Law Center, University of International Business and Economics, Federal Trade Commission, 7/31/2018, <https://www.ftc.gov/system/files/documents/public_statements/1396664/ohlhausen-_china_speech_7-31-18.pdf>

As you know, weather prediction is famously difficult, often because of a phenomenon called the butterfly effect. The butterfly effect explains that even small changes in one system can have large, unforeseeable changes other systems, such that the flap of a butterfly’s wing creates a tornado a thousand of miles away. And that phenomenon is not limited to weather. As a competition enforcer, I have at times seen the blue skies of consensus suddenly swept by the cold winds of doubt and the clouds of dissension, and I have observed the political weather vane spin and spin again.

#### 2. Courts---even slight changes unleash them

Ryan Tracy 21 and Brent Kendall, Tech and Legal Reporters, in WSJ’s Washington Bureau, "Antitrust Law: What Is It and Why Does Congress Want to Change It?”, Wall Street Journal, 3/12/2021, <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>

What would the changes mean?

Even if Congress acts on only a couple of middle-of-the-road proposals, it could mark the biggest substantive changes in decades, as courts have been reading current antitrust laws more narrowly. Very large companies could have trouble getting deals approved. Tech giants could have to divest themselves of certain business lines.

If lawmakers, for example, make slight changes to reinforce broad government authority to successfully challenge mergers that threaten consumers, “that would signal to the courts that merger enforcement is important and that doubts should not always be resolved in favor of defendants,” said Wayne State University law professor Stephen Calkins.

### AT: Public R&D

#### Pharma mergers are critical to R&D productivity and innovation

Michael S. Ringel 17, Boston-Based Senior Partner of The Boston Consulting Group and Global Leader of its Research and Product Development Topic, and Michael K. Choy is New Jersey-Based Partner at The Boston Consulting Group, “A New Wave of Pharma Mergers Could Put Innovative Drugs in the Pipeline”, 7/24/2017, https://www.statnews.com/2017/07/24/mergers-pharma-drug-development/

A new wave of pharmaceutical industry mergers may be on the horizon, driven in part by the $1.3 trillion in overseas cash that U.S. corporations currently hold. If policymakers provide a tax holiday on repatriation of these funds, some experts say that U.S. pharmaceutical companies would be flush with cash and could likely spend a meaningful portion of this windfall on mergers.

While big mergers could have many impacts — on employment at home and abroad, competition, and drug prices, to name a few — one of the most important would be the effect on research and development productivity and innovation.

Analysts have tackled this topic before. Their work has been of mixed quality and, perhaps not surprisingly, has yielded mixed results. Pundits at the Institute for Competition Economics in Dusseldorf, Germany, for example, claimed last year in a Harvard Business Review article that previous drug company mergers had “substantially” reduced R&D and innovation, not only at the merging firms but at the merging firms’ competitors as well.

Another team, this one from Duke University, the University of Toronto, and Baruch College/CUNY, reached a different conclusion with its data-driven approach. The team’s review of hundreds of mergers and acquisitions from 1985 to 2009, published in Loyola University Chicago Law Journal, indicated that the correlation between merger and acquisition activity and FDA approvals of new drugs is “moderately positive,” both at an industry level and individual firm level.

Who’s right? Are those in need of new lifesaving drugs harmed by consolidation in the pharmaceutical industry, or are they helped?

We believe that one of the main problems with much of the previous research in this area has been an over-reliance on anecdotal reporting rather than employing systematic data analysis. Even when such analysis has been done, researchers have sometimes focused on research and development spending or patent activity as benchmarks of success, as if these metrics are indicators of — or even synonymous with — actual product innovation.

But they aren’t necessarily the same. Spending is just an input, measured in dollars or some other currency. The same is true with patents. There is a long distance between the laboratory where new compounds are discovered and the corner drugstore where medicines are purchased.

We sought to address this uncertainty by focusing on research and development productivity: the amount of innovation created as measured by the value of new FDA-approved compounds reaching the pharmacy, relative to input. After all, what matters to patients is the creation of quality medicines, not how much a company spends on research and development or the number of patent applications it files.

To determine whether mega-mergers benefit patients, we looked at what happened to research and development productivity in all of the major mergers going back to 2001, including the last big wave in 2009 that brought together Merck & Co. and Schering-Plough, Pfizer and Wyeth, and Roche and Genentech.

As expected, the results varied from year to year and company to company. But our report in Drug Discovery Today showed that mergers generally appeared to drive productivity up — and did so significantly.

Why might this be so? While mergers undoubtedly bring disruption to research and development, they also can be catalysts for addressing the fatal flaw of most research and development enterprises: the high cost of failure.

More than 90 percent of pharmaceutical industry spending on research and development goes into projects that never reach the market. Any intervention that helps reduce this waste can be a real boon to productivity.

There are really only two ways to fix the industry’s cost-of-failure problem: 1) start with better science, so you have fewer failures; and 2) employ better decision-making about when to stop projects so you can reallocate that capital to more-promising opportunities.

Mergers can help with both of these dimensions. They bring the best combined science of the merged organizations to bear on the difficult questions of which pathways, modalities, and molecules to pursue. Mergers also trigger reviews that drive the leadership of the new company to take a fresh look at research and development. These reviews can offer the leadership an opportunity to soberly and objectively reassess its scientific hypotheses in each disease area and reevaluate the combined research and development portfolio, eliminating those projects least likely to produce advances in treatment.

This spring cleaning can have a cathartic effect. The combination of the two factors — fresh science and a fresh look at the portfolio — can create a renewed research and development enterprise better able to bring new medicines to patients.

Our analysis doesn’t suggest that all mergers are good. Even from the perspective of research and development productivity, some mergers in our study appeared to have depressed the flow of new medicines to patients by slowing down or stopping promising projects. And there are considerations beyond the scope of our analysis, such as jobs or drug prices, that may be equally valid inputs to views about mergers and acquisitions.

Overall, however, the evidence indicates that large mergers increase, not decrease, the productivity of pharmaceutical research and development — good news for those in need of new therapies.

### AT: Innovation Low

#### R&D and innovation are strong because regulatory pressure is limited

Naomi Ikeda 21, Manager of Innovation Incentives at Ayming, “Pharma R&D: 2021 and Beyond”, Pharma Times, 2/4/2021, https://www.pharmatimes.com/web\_exclusives/Pharma\_R\_and\_D\_2021\_and\_beyond\_1362768]

2020 was an even bigger year than expected with the pharma sector thrown into the limelight as a potential saviour to the pandemic. Funding was channelled into pharma in record amounts, supercharging R&D activity. Public confidence is high in the industry; our recent research report based on a survey of businesses across the globe, the International Innovation Barometer (IIB), has shown that those within the pharma sector remain positive about their ability to drive forward R&D spend. In this research, conducted in May last year, 59% of respondents in the pharma sector expected their R&D budgets to either somewhat or significantly increase over the next three years.

One thing is certain; pharma has entered into 2021 with a greater presence and with more funding than before. For a long time, the sector has struggled with its image; some seeing it as a giant industry that puts profits before people. The success of COVID-19 treatments is changing this narrative and provides the pharmaceutical sector with wider investor interest and public support to use as a foundation for greater innovation for the future.

The cutting edge of pharma knows no bounds, but there are several key trends likely to define the sector in the near future.

Collaboration will be even more important

The last five years have seen increasing demands for firms to pool resources. To improve or develop products in the modern world is increasingly technical and demanding, leading to more complex developmental activities as well. At the same time, economic and regulatory pressures are squeezing margins. Developing a new drug or treatment from scratch has historically been an incredibly expensive and long process, often taking years – if not decades – before a company sees the fruits of its labour. Collaboration not only allows the burden of costs to be spread across multiple companies, but the pooling of expertise and knowledge leading to faster breakthroughs.

### AT: Disease Defense

#### Disease has all the required biological conditions AND creates existential knock-on effects

Dennis Pamlin 15, Executive Project Manager, Global Risks, Global Challenges Foundation, & Stuart Armstrong, James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. “12 Risks That Threaten Human Civilisation: The Case For a New Risk Category”. Global Challenges Foundation, February 2015, <https://www.researchgate.net/publication/291086909_12_Risks_that_threaten_human_civilisation_The_case_for_a_new_risk_category>

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

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

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

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

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

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

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

#### Cognitive biases systematically underrate disease risks

Hin-Yan Liu 21, Kristian Lauta, and Matthijs Maas, Faculty of Law, University of Copenhagen, “Apocalypse Now?: Initial Lessons from the Covid-19 Pandemic for the Governance of Existential and Global Catastrophic Risks”, Journal of International Humanitarian Legal Studies, Volume 11, Issue 2, 12/9/2020, DOI:10.1163/18781527-01102004

Our cognitive biases also tend towards direct-causal near-term events, thereby marginalising tangential, second-order, or cumulative effects that may instead constitute an existential risk. From this view, pandemics are considered as diseases that directly kill human beings, rather than those which might trigger the demise of humanity in more circuitous fashion (for example, by a disease that targets and devastates staple crops in “pandemic” proportions).39 Thus, while existential risk research leans towards the spectacular one-hit knock-out events, such as asteroid strikes and all-out nuclear war, such direct existential risks can only be but a subset when it comes to threats for humanity as a whole. To counteract this type of bias, we would need to develop appropriate models and approaches to monitoring existential risks that focus on existential outcomes (as opposed to existential hazards) that flow from other events or emerge through the interaction lower level activity that might, taken together, constitute an existential risk.

Finally, our cognitive biases struggle to cope with historically recurring, but statistically rare events.40 In this vein, Wiener argues that public assessments of risks may neglect extremely rare catastrophic risks, due to factors such as psychological unavailability, mass numbing, and under-deterrence; critically, he argues that in such contexts, foresight and anticipation are critical, and that the inability to learn from experience (‘adaptive learning’) offers an even stronger case for precaution than mere uncertainty as such.41 This is directly pertinent to pandemics, given the ample historical record of plagues that repeatedly killed off significant proportions of the human population. Given accessible records of past catastrophe, our collective susceptibility to such known hazards is especially incongruous from an existential risks perspective: it is one thing to be caught out by a wholly novel threat, and quite another to be toppled by something that we knew about all along. Thus, the failure to have a global asteroid defence programme in place is congruent with our failure to prepare for Covid-19: these are both statistically rare events at any given time, despite a clear record of such events taking place in the past with cataclysmic effect.

1. [↑](#footnote-ref-1)