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Politics DA

#### PC’s key to pass a revived BBB.

Andrew Duehren 1-21, Reporter for the Wall Street Journal, “Democrats Start to Sketch Out Revived Build Back Better Package,” Wall Street Journal, 01-21-2022, https://www.wsj.com/articles/democrats-start-to-sketch-out-revived-build-back-better-package-11642771824

Democrats began to revive their efforts to pass a major child-care, healthcare and climate package as lawmakers started to accept that they would have to further cater to Sen. Joe Manchin (D., W.Va.) in hopes of reaching a deal on a scaled-back plan.

After Mr. Manchin said last month that he was opposed to the party’s roughly $2 trillion plan, dooming its chances in the 50-50 Senate, the party largely pivoted away from the package for several weeks. Now, after the failure of a separate push on elections legislation, Democrats are again turning to the economic plan, which President Biden said on Wednesday the party may cut into separate pieces.

House Speaker Nancy Pelosi (D., Calif.) on Thursday said that Democrats wouldn’t seek to pass multiple pieces of legislation because of the procedural problems it could pose. But the party will likely have to further scale back its ambitions, she said.

“What the president calls ‘chunks’, I would hope would be a major bill going forward, it may be more limited, but it is still significant,” she said. She added that Democrats may have to change the name of the legislation, currently dubbed the Build Back Better Act.

Still, Democrats on Capitol Hill said Mr. Biden’s remarks more definitively showed that the White House would be willing to make major changes to the economic package in hopes of moving toward a deal. Mr. Biden, White House aides and Democrats on Capitol Hill have started to identify priorities for a revamped package: roughly $500 billion in incentives for reducing carbon emissions, which Mr. Manchin has said he supports, as well as measures aimed at lowering healthcare costs and expanded child care programs.

The healthcare provisions would likely include extending subsidies for insurance premiums and empowering the government to negotiate the price of some prescription drugs, according to lawmakers and aides. Democrats also see a universal prekindergarten program, along with subsidies for child-care costs, as part of a resurrected effort.

Such a package could leave out programs from the House-passed version of the plan, including funding for housing and expanding Medicare to cover hearing. Democrats have already abandoned a host of proposals, including creating a 12-week paid-leave program and offering free community college, as they tried to tailor the bill to centrist demands.

All of the early discussions among Democrats are premised on trying to win the support of Mr. Manchin, who on Thursday said the party would have to totally restart their monthslong effort on the bill.

“I’m hoping to talk to everybody and start with a clean sheet of paper,” Mr. Manchin said. “We’ll just be starting from scratch whenever we start.”

He also again raised concerns about inflation, which he has said could be exacerbated by a major spending package.

“The main thing we need to do is take care of the inflation, get your financial house in order, get a tax code that works, take care of the pharmaceuticals gouging people with high prices, we can fix that. We can do a lot of good things,” he said.

Democrats are using a process called reconciliation to pursue the package. Reconciliation allows lawmakers to approve tax-and-spending measures with a simple majority in the Senate and skirt the 60-vote threshold required of other bills. But the procedure also comes with a number of limitations, including on how often it can be used, which would largely preclude Democrats from trying to pass multiple bills through the process.

When he came out in opposition to the legislation in December, Mr. Manchin argued against Democrats’ plan to fund myriad programs for the short term in hopes of extending them later, saying that disguised the potential cost. Democrats are now working to choose a smaller core of initiatives to fund for the long term, while keeping the price tag in the range of $1.75 trillion. Mr. Manchin previously signaled he could support roughly that much spending.

“We need to get as much as we can across the finish line,” Sen. Elizabeth Warren (D., Mass.) said. “That’s hard because we have the skinniest possible majority and that means it takes every vote and so that means we have to do what it takes to get every vote.”

Democrats will face a particularly fraught choice on the expanded child tax credit, a central component of the House-passed plan and a subject of regular criticism by Mr. Manchin. The party had been hoping to continue offering a more generous child tax credit to a larger group of Americans in monthly cash installments.

That expansion expired at the end of 2021, and Democrats have started sketching out how they could revive a pared-back version that might draw Mr. Manchin’s support. In a blow to some Democrats on Capitol Hill, Mr. Biden said on Wednesday that Democrats may not be able to include any expansion of the child tax credit in the legislation.

Rep. Richard Neal (D., Mass.), the chairman of the Ways and Means Committee, said he would seek to alter the expansion in a way that was palatable to Mr. Manchin.

“I think that the child credit is very popular in the Democratic caucus,” he said. “We need to determine what Joe Manchin is in favor of.”

On the revenue side of the equation, Democrats expect their proposed tax increases to win the support of their caucus, though Mr. Manchin has expressed frustration that the party moved away from increases in the top rates for corporations and individual income. The party dropped those tax increases from the package to address the concerns of Sen. Kyrsten Sinema (D., Ariz.).

The party will also still have to grapple with demands to lift the $10,000 cap on the state and local tax deduction. Democrats from high-tax states like New York and New Jersey have made lifting the cap, which Republicans put into place in their 2017 tax law, a priority in the bill. Other Democrats have said lifting the cap primarily benefits high-income Americans.

A group of three House Democrats said again on Thursday that any deal would need to include measures addressing the state and local tax, known as SALT, deduction.

“We support the President’s agenda, and if there are any efforts that include a change in the tax code, then a SALT fix must be part of it. No SALT, no deal,” Reps. Tom Suozzi (D., N.Y.), Mikie Sherrill (D., N.J.) and Josh Gottheimer (D., N.J.) said.

#### 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 21, 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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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.

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

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

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

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

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

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

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

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

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

Conclusion

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

### 1NC

Hospitals DA

#### The plan sends a rippling signal of uncertainty that spills into the health sector

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

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

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

#### That collapses rural hospitals---they’re on the brink AND depend on mergers, but chilled by the threat of antitrust

Ken Kaufman 20, M.B.A. with a Concentration in Hospital Administration from the University of Chicago, Chair of Kaufman, Hall & Associates LLC, “Removing Antitrust Barriers to Solve the Rural Health Care Crisis”, Morning Consult, 1/2/2020, https://morningconsult.com/opinions/removing-antitrust-barriers-solve-rural-health-care-crisis/

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

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

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

Antitrust impediments to a system-based approach

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

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

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

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

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

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

#### Food shocks are immediate

David Alemian 16, Founder of Talent Retention Plans, President of the National Group Insurance Brokers, Degree in Business Administration from Dean College, “Rural Healthcare Is a Matter of National Security”, Medical Economics, 11/8/2016, https://www.medicaleconomics.com/view/rural-healthcare-is-a-matter-of-national-security

Rural health organizations are already struggling with enormous turnover rates and costs that run up into the millions of dollars each year. The additional financial burden of penalties from Medicare and Medicaid will put many rural health organizations at risk of going out of business. If too many rural health organizations go out of business, it then becomes a matter of national security and here’s why:

In most rural communities, the healthcare organization is the largest employer. When the largest employer goes out of business, the community collapses and people move away. What was once a thriving community then becomes a ghost town. Rural America produces the food that feeds the rest of the country.

What will happen when our amber waves of grain turn to desert wastelands because there is no one to work our great farmlands? As the source of food dries up, and store shelves empty, the price of food will go through the roof. As food prices go up, hyperinflation will become a reality, and our printed money will become worthless. Almost overnight, Americans will begin to go hungry because they won’t be able to afford to put food on the table.

#### Nuclear war

John Castellaw 17, National Security Lecturer at the University of Tennessee, Founder and CEO of Farmspace Systems LLC, Former President of the Crockett Policy Institute, Retired Lieutenant General in the United States Marine Corps, “Food Security Strategy Is Essential to Our National Security”, Agri-Pulse, 5/1/2017, https://www.agri-pulse.com/articles/9203-opinion-food-security-strategy-is-essential-to-our-national-security

The United States faces many threats to our National Security. These threats include continuing wars with extremist elements such as ISIS and potential wars with rogue state North Korea or regional nuclear power Iran. The heated economic and diplomatic competition with Russia and a surging China could spiral out of control. Concurrently, we face threats to our future security posed by growing civil strife, famine, and refugee and migration challenges which create incubators for extremist and anti-American government factions. Our response cannot be one dimensional but instead must be a nuanced and comprehensive National Security Strategy combining all elements of National Power including a Food Security Strategy.

An American Food Security Strategy is an imperative factor in reducing the multiple threats impacting our National wellbeing. Recent history has shown that reliable food supplies and stable prices produce more stable and secure countries. Conversely, food insecurity, particularly in poorer countries, can lead to instability, unrest, and violence.

Food insecurity drives mass migration around the world from the Middle East, to Africa, to Southeast Asia, destabilizing neighboring populations, generating conflicts, and threatening our own security by disrupting our economic, military, and diplomatic relationships. Food system shocks from extreme food-price volatility can be correlated with protests and riots. Food price related protests toppled governments in Haiti and Madagascar in 2007 and 2008. In 2010 and in 2011, food prices and grievances related to food policy were one of the major drivers of the Arab Spring uprisings. Repeatedly, history has taught us that a strong agricultural sector is an unquestionable requirement for inclusive and sustainable growth, broad-based development progress, and long-term stability.

The impact can be remarkable and far reaching. Rising income, in addition to reducing the opportunities for an upsurge in extremism, leads to changes in diet, producing demand for more diverse and nutritious foods provided, in many cases, from American farmers and ranchers. Emerging markets currently purchase 20 percent of U.S. agriculture exports and that figure is expected to grow as populations boom.

Moving early to ensure stability in strategically significant regions requires long term planning and a disciplined, thoughtful strategy. To combat current threats and work to prevent future ones, our national leadership must employ the entire spectrum of our power including diplomatic, economic, and cultural elements. The best means to prevent future chaos and the resulting instability is positive engagement addressing the causes of instability before it occurs.

This is not rocket science. We know where the instability is most likely to occur. The world population will grow by 2.5 billion people by 2050. Unfortunately, this massive population boom is projected to occur primarily in the most fragile and food insecure countries. This alarming math is not just about total numbers. Projections show that the greatest increase is in the age groups most vulnerable to extremism. There are currently 200 million people in Africa between the ages of 15 and 24, with that number expected to double in the next 30 years. Already, 60% of the unemployed in Africa are young people.

Too often these situations deteriorate into shooting wars requiring the deployment of our military forces. We should be continually mindful that the price we pay for committing military forces is measured in our most precious national resource, the blood of those who serve. For those who live in rural America, this has a disproportionate impact. Fully 40% of those who serve in our military come from the farms, ranches, and non-urban communities that make up only 16% of our population.

Actions taken now to increase agricultural sector jobs can provide economic opportunity and stability for those unemployed youths while helping to feed people. A recent report by the Chicago Council on Global Affairs identifies agriculture development as the core essential for providing greater food security, economic growth, and population well-being.

Our active support for food security, including agriculture development, has helped stabilize key regions over the past 60 years. A robust food security strategy, as a part of our overall security strategy, can mitigate the growth of terrorism, build important relationships, and support continued American economic and agricultural prosperity while materially contributing to our Nation’s and the world’s security.

### 1NC

T-Scope Exemptions

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

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

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

*‘we widened the scope of our investigation’*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Specific Long Term Plans to Strengthen Committee

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

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

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

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

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

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

#### The aff intensifies the application of antitrust to already covered activities---it does not curtail an exemption or immunity.

#### Vote neg:

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

### 1NC

States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should prohibit private sector business practices that violate an antitrust worker welfare standard.

### 1NC

Philippines DA

#### The Philippines watches US antitrust law---they’ll model the plan, abandoning consumer welfare, and destroying sustainable growth.

Arsenio M. Balisacan 20, Chairperson of the Philippine Competition Commission, Ph.D. in Economics from the University of Hawaii at Manoa, “Toward a Fairer Society: Inequality and Competition Policy in Developing Asia,” Munich Personal RePEc Archive, 01-29-2020, https://mpra.ub.uni-muenchen.de/100797/2/MPRA\_paper\_100797.pdf

The adoption of a comprehensive law on competition—the Philippine Competition Act (PCA) of 2015—signified the intent of the country’s political leadership to sustain the gains from recent liberalisation reforms and pave a more inclusive development path for the country. For the framers of the law, the PCA is a critical piece of legislation that fills the missing link in the enabling environment for a level playing field in the marketplace.

To be sure, prior to the PCA’s passage, the country’s legal system did have provisions that control practices and conduct deemed harmful to market competition. However, these provisions were fragmented, outdated, and spread across various disparate statutes over a century.21 Broadly, these statutes sought to prohibit certain anticompetitive practices in particular sectors or areas of the economy and were enforced by various government agencies. However, they could not consistently deal with the wide range of anticompetitive acts and practices across sectors and circumstances. Moreover, under the pre-PCA regime, bringing criminal and civil actions under court proceedings had been difficult. Hence, successful prosecutions of prohibited acts and practices were few and far between. A change in law was needed, to one that would establish an administrative body with the power to prohibit or regulate anticompetitive conduct, block or remedy anticompetitive mergers, and impose sanctions and penalties on antitrust infringements. In having such a body, administrative procedures were expected to be shorter and less costly than regular court proceedings, making it possible to stop or remedy anticompetitive conduct or merger sooner than a court case would, hence minimising harm to market competition.

The PCA provides a comprehensive enabling law for this administrative body. It established the Philippine Competition Commission (PCC), which is mandated to enforce the constitutional provisions against acts and practices that stifle competitive market conditions. The crafting of the law and, subsequently, its implementing rules and regulations, benefitted from the experience and lessons learned from mature jurisdictions, particularly the U.S. and the EU, as well as from the ASEAN model.22 Evidently, as noted by Abrenica and Bernabe [2017], the PCA meets the high OECD standards of an effective competition law.

Section 2 (“Declaration of Policy”) of the PCA restates the fundamental policy of the State, as enshrined in Article XII, Section 19 of the 1987 Constitution, to protect market competition, to wit:

“The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.”

The same section mentions the “constitutional goals for the national economy to attain a more equitable distribution of opportunities, income, and wealth” and provides for the prevention of “economic concentration which will control production, distribution, trade, or industry that will unduly stifle competition”, The section also sets the goals of competition policy: “[P]enalize all forms of anticompetitive agreements, abuse of dominant position, and anticompetitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing… domestic and international trade and economic development.”

Case law recognizes that the Philippines’ “free enterprise system” cannot pursue “a strict handsoff policy” or adopt a “let-the-devil-devour-the hindmost rule”,23 hence, the constitutional mandate of the State to intervene in the market if public interest so requires. The determination of when public interest demands such intervention is left to the State, through its legislative and the executive instrumentalities.24 The PCA is deemed part of the legal architecture, providing guidance to such determination, particularly in the context of protecting consumer welfare and advancing economic development.

5. Standard of competition policy—framing and public choice

The chief aim of competition policy is to create and maintain conditions for effective competition to maximize economic welfare. As a standard concept in economics, economic welfare is a measure that aggregates the welfare (or surplus) of different groups in society or industries in the economy. In a group or industry, total welfare (total surplus) is the sum of the surpluses of consumers (consumer surplus) and producers (producer surplus). In its basic form, total surplus abstracts from consideration of income distribution between consumers and producers, or between individuals within group or industry. That is, total welfare gives a summary measure of how efficient a given industry or the economy is, without regard to how equal or unequal the distribution of welfare is. This is not to say that such consideration is irrelevant or that achieving a fairer distribution of income is not a public policy objective. The assumption is simply that economic welfare (efficiency) and income distribution (equity) objectives can be dealt with separately using different policy tools.

Thus, given the welfare objective, competition authorities train their lens broadly on preventing competition infringements or significant departures from competitive market outcomes. However, ambiguity arises when in so doing they also consider goals of public policy other than the core economic goal of efficiency—that is, “public interest” considerations, such as social equity, environmental protection, employment preservation, and, more recently, privacy. One argument for this policy stance is that the other policy tools are inadequate to achieve the public-interest objective. It is presumed, for example, that taxation and expenditure policies alone would be insufficient to curtail the rapid rise of income and wealth inequality arising from globalisation and digital revolution (Stiglitz [2019]; Baker [2019]).

There may be also a political economy element to the policy stance. A specialized regulatory agency mandated to secure or protect a public-interest concern may be more vulnerable to “regulatory capture” than a competition agency. This is perhaps because the parties (firms) may find it worth their while to invest in a relationship with the regulator owing to their frequent interactions with it; whereas in the case of a competition agency, they would seldom transact with it, if at all, during the life of their project or business.

Across the world, competition authorities have different practices in exercising their mandate, given their respective legal systems, institutional legacies, and historical circumstances (Bradford et al. [2019]; OECD [2018]). In the U.S., for instance, the object of antitrust enforcement since the late 1970s has been confined to economic efficiency, particularly the preservation of competitive processes to protect consumer welfare. To the extent that non-economic considerations are relevant, the antitrust agencies tend to leave the matter to the relevant regulatory agencies specifically charged with or better suited to address these noncompetition concerns. In the EU, while merger decisions informed by public-interest considerations can be found in the history of antitrust among the member countries, those decisions are not common and are usually in the context of financial or other crises [OECD 2016].

In contrast, many developing countries, such as China, India, and South Africa, have framed their competition policy in ways that accommodate broad and specific public-interest considerations. The common argument is that such considerations carry more weight in competition policy owing to certain structural and institutional characteristics of their economies [Fox and Bakhoum 2019; Gal 2003; Goldberg 2019]. For instance, market size in small market economies limits economies of scale and scope. Local industries thus tend to exhibit high market concentration. But for the tradable sectors of the economy, an open trade policy may effectively limit the exercise of market power even in highly concentrated markets. Suppose industrial development is another public policy objective. Balancing of goals may then require allowing some degree of market concentration by limiting trade openness in support of the industrial development objective, while creating and maintaining the conditions for workable competition to promote social welfare (or, narrowly, consumer welfare).

This consideration of public interest in competition policy potentially complicates enforcement. For one, what constitutes public interest may be quite vague, conceptually and operationally. Lack of guidance based on objective, measurable criteria may make public interest a convenient argument for exemption from certain competition infringements.25 For another, even in cases where public interest is well-defined by statutes, the assignment of welfare weights to potential winners and losers of enforcement action may influence the relative ranking of options with respect to the competing goals. This complexity creates uncertainties in enforcement and raises the cost of compliance to competition policy. It can also make the competition agency vulnerable to influence-peddling by interest pressure groups, including political entities.

In practice, many competition authorities, including PCC, periodically set enforcement priorities to sharpen their goals, minimize arbitrariness in case selection, maximize the impact of enforcement actions, and achieve efficiency in the deployment of limited resources.26 In considering whether or not a potential anti-competitive practice is of public interest, PCC may examine whether such practice involves any of its priority sectors, whether it may result in widespread harm to consumers, and whether it has precedential value or will have a significant deterrent effect. In addition, it may consider the likelihood of a successful outcome of an enforcement action, and whether there are other reasonable grounds to conduct an enforcement action.27 Enforcement prioritization is particularly critical for a developing country in view of limited agency resources and the conflicting demands for investment in other critical areas of development, such as education, health, infrastructure, and rule of law.

Moreover, mobilising competition policy from a broader strategic framework would help focus the goal of enforcement action. As theory and evidence suggest, competition policy works best when the other policy tools of development are in place. In the Philippine case, PCC, through the National Economic and Development Authority, has taken the approach of mainstreaming competition policy in the government’s development agenda by clearly identifying the development or societal objective that the policy is best suited to address, the measurable development outcomes (targets) expected from its implementation, and the ways by which the competition policy complements the other policy tools of the government to achieve society’s development goals.28

Arguably, the prioritization filters, along with the policy mainstreaming strategy, effectively limit deviation from the total welfare or consumer welfare standard of competition policy. In other words, the enforcement of competition policy is framed in such a way that the tool is broadly consistent with the welfare objective, while recognising the comparative efficiency of other policy tools in addressing other societal goals such as equity.

PCC’s decisions on enforcement cases since the agency’s formation in 2016 show a deep respect for the core guiding principle of competition policy: to protect the competitive process and advance consumer welfare. For example, PCC’s decisions on 133 cases of mergers and acquisitions from June 2016 (when the PCA Implementing Rules and Regulations became effective) to December 2019 solely rested on the standard of competition policy. That is, PCC’s review of the transactions focused entirely on whether or not the merger would “substantially lessen competition” in the relevant market.29

Similarly, for its first abuse of dominance case, PCC employed no other considerations but the harm done to the competitive process and the welfare of consumers. This landmark case involved Urban Deca Homes (UDH), a property developer that imposed a sole internet service provider on its residents, preventing them from availing themselves of alternative and cheaper internet service.30 PCC’s Enforcement Office filed a complaint against UDH. Instead of contesting the complaint, the developer proposed to correct its anticompetitive conduct through a settlement. The Commission approved the settlement, ordering UDH to cease its admitted misconduct, pay a fine of ₱27 million, and comply with the terms of settlement, which included inviting other internet service providers to offer their services to its residents.

Note that, even as most economists prefer total welfare as the standard, many jurisdictions, including PCC, employ the simpler consumer welfare standard. The preference for the latter is broadly consistent with institutional and economic realities, including the political economy of policymaking. As history shows, antitrust (in the U.S.) and competition policy (in the EU and elsewhere) are partly an outcome of populism, emerging and then fortified during periods of political backlash spurred by widening wealth disparity and rising industrial concentration and market power. The political mantra during such periods is to give back to consumers what they have been robbed by the elite. As discussed in section 3, numerous anticompetitive practices in the Philippines have deep-seated roots in government policies and regulations, spawned by oligarchs whose control and dominance of the economy have been fortified by barriers to entry in many industries and in politics. These have harmed consumers, prevented the expansion of productive employment opportunities, and stifled inclusive economic development.

There is also a public-choice dimension to the consumer welfare standard. Policies and regulations affecting industrial organisation—structure, conduct, and performance—do not come from a vacuum. Interest groups exert influence on the formation of these policies and regulations. Consider the domestic market for industrial goods. Consumers are numerous, geographically disperse, and, especially in developing countries, have generally low levels of educational attainment and poor access to information. The cost of coalition formation may thus be high. Also, the incentive (benefit) to contribute to the group effort is likely low since each consumer’s share in the total consumer surplus resulting from the change in policy is small. As such, the amount of investment in political influence (time and money) that the consumers can mobilize is small even though they are a big group numerically. On the other hand, industrial producers are small in number and geographically concentrated (usually in urban or near-urban areas) owing to agglomeration economies and other considerations such as access to infrastructure and support services. Both cost and benefit considerations in coalition formation favor high investment in influencepeddling by this group. Thus, in the competition by interest groups for influence, the “equilibrium policy” that comes to play tends to favor the industrialists. This policy may take the form of barriers to entry against potential competitors or higher tariffs against competitive imports. The results are higher prices, poorer quality and less variety of goods and services, and less innovation.

The economically wasteful influence-peddling activities push the economy down from its potential, i.e., inside the production possibility frontier.31 The consequences are lower long-term growth, higher poverty, and higher income inequality than otherwise would be the case. Society becomes less fair: the numerically large losers are consumers and the numerically small gainers are producers. The producers (sellers) may also be consumers but they are net gainers to the extent that they are net sellers in the market, i.e., they produce more than what they consume.

Viewed from this perspective, the independent competition authority acts on behalf of consumers— as a countervailing force—to make markets work better by effectively removing barriers to competition and other business practices that substantially hinder, prevent, or lessen competition. Thus, by promoting consumer welfare, competition policy enhances economic efficiency, thereby moving the economy to its potential (toward the production possibility frontier), creating more productive employment opportunities, raising growth, and reducing poverty. Society becomes fairer. Empirical evidence from developing countries shows positive effects of competition policy on household welfare, economic growth, and other dimensions of development, including equity.32

Competition policy is most effective in reducing poverty and inequality by boosting enforcement in sectors or markets that are most relevant for the less well-off households. Food markets, for example, tend to be vulnerable to cartelistic behavior, partly due to the high degree of homogeneity for certain food products, and partly to the inelasticity of consumer demand for food, especially staples. Since food products account for a high proportion of the total consumption basket of less well-off households, protecting food markets from any form of anticompetitive practice is good for the poor and shared prosperity.

6. Concluding remarks

Competition policy and effective enforcement are not framed in a vacuum. They are situated in a particular space and time, including the country’s institutional legacies. In the case of the Philippines, competition policy has roots in the country’s struggle for social and economic reforms aimed at achieving inclusive development. It has emerged as a tool to address market inefficiencies and inequities perpetuated by the mutually reinforcing effects of policy action, market power, and political influence and power.

While this seems to suggest that competition policy is loaded with goals and considerations more than what is at its core, the operational framing of policy enforcement matters: it must be done in a way such that the tool is broadly consistent with the total welfare objective. For instance, mainstreaming competition policy in the country’s development agenda, along with deployment of robust prioritization filters in enforcement, helps sharpen the focus of antitrust enforcement, while cognisant of the interplay between competition policy and other development policy tools in addressing societal goals, including equity.

It is not uncommon in developing countries that low-income consumers, despite their large number and having much to gain from undoing anticompetitive practices, tend to lose—and the economic elites to win—in the competition for political influence over public policies governing markets. The competition agency, acting on behalf of consumers, has the power—in the Philippine case, under the Philippine Competition Act—to make markets work better so consumers reap the full benefit of vigorous competition. This countervailing force—prohibiting cartels, abuse of dominance, and anticompetitive mergers— enhances efficiency (total welfare). It is in this sense that the consumer welfare standard in competition policy promotes efficiency while also contributing to the goal of achieving a fairer society.

As a new regime emerging during an advanced period of globalisation and rapid technological change, antitrust enforcement in the Philippines has many challenges. For one, PCC, a young competition agency, has to quickly develop its enforcement capacity, in light of expectations for competition enforcement to contribute to sustaining rapid growth and achieving inclusive development. Identifying its role in markets characterized increasingly by big data, digital platforms, and artificial intelligence requires a nuanced understanding of the economic underpinnings of disruptive technologies and the Fourth Industrial Revolution. Apart from understanding fully the complexities introduced by big tech, PCC also needs to work closely with sector regulators, government agencies, and competition authorities around the world, particularly in more mature competition jurisdictions.

#### Philippine growth prevents Southeast Asian piracy that’ll target oil tankers

Drake Long 20, 2020 Young Professionals in Foreign Policy Asia-Pacific Fellow and MA in Conflict Resolution from Georgetown University in May 2020, “COVID-19 Could Spark a New Era of Piracy in Southeast Asia.”, Diplomat. June 2020, Issue 67, p C219-C223

Out of all the possible aftershocks from the COVID-19 pandemic, a surge in piracy may not be the most obvious. But Southeast Asia — and those countries so dependent on trade passing peacefully through the region — should anticipate it. Research shows that people turn to piracy when economic opportunities elsewhere are scarce. It is a potentially lucrative profession; states and companies frequently pay ransoms set by pirates without much fuss since insurance more than covers the cost of doing so. In addition, shipping companies cut down on crews and safety measures to save on costs at times of economic hardship, making them more vulnerable to piracy (and armed robbery at sea). Piracy was already trending upward in the first quarter of 2020, mostly in the traditional hotspots of the Malacca Strait, the Bay of Bengal, and the Sulu and Celebes Seas. The number of pirate attacks and armed robberies at sea in the first months of 2020 were three times the number at the same time last year. Now, with the impending economic disaster from COVID-19, ASEAN states and concerned stakeholders in the region must face the uncomfortable fact that increased crime in Southeast Asian seas is inevitable. Global trade is in a nosedive caused by the pandemic's chilling effects on the time-sensitive shipping industry and the "doubleshock" of no supply followed by no demand affecting China's manufacturing sector. Both of these external realities will hit the trade-dependent, China-entangled economies of Southeast Asia hard, and they are likely to be replicated domestically as these countries cycle through their own public health emergencies. The effects may even worsen given some countries' poor testing capacities. The World Bank forecast for ASEAN plus Timor-Leste is dismal. It projects negative 3.5 percent growth in Indonesia and negative 4.6 percent growth for Malaysia. The best-case projection for Thailand is a 3 percent contraction. Southeast Asia as a whole will tumble from near-constant growth over the last decade to zero economic growth. With China's own economy headed for stagnation, the state and its investors are unlikely to offer a lifeline out of the crisis. Even if public health capacity proves sufficient (which does not seem to be the case so far), the economic effects will precipitate unavoidable political strife and thinner budgets. Solid, growing economies have been the norm for so long that a sudden crash invokes the politically tumultuous 1998 Asian Financial Crisis. Now, other factors are compounding the likelihood of an outright surge in Southeast Asian piracy. Precipitous oil prices have created an unprecedented oversupply of crude, to the point that there is insufficient storage on land — leaving offshore storage in floating tankers as the only option for many companies. Consequently, China has dramatically ramped up its production of oil tankers, and it is projected that some 14 million barrels of oil will go into storage per day for this month. These tankers are filled to the brim with "black gold" and sitting in port with no destination. Other tankers are sailing to East and Southeast Asia to idle at ports with cheaper storage costs and laxer security. They present the juiciest possible targets for aspiring pirates. Most piracy is unaffiliated with any sort of armed group, and amounts to little more than petty theft or kidnapping for an expected ransom. Minor piracy and armed robbery of a ship at port is not an existential threat to any country and will likely dissipate with economic recovery. However, rebel groups or terrorist outfits turning to piracy as a main revenue stream is a truly dangerous possibility, and warrants preventative action. Rebel groups in Myanmar or the southern Philippines could use ransomed crew members or whole ships to fund their militancy, accruing resources and inspiring others. The Abu Sayyaf Group infamously engaged in piracy and attacks on diving resorts to recoup losses in foreign funding during the mid-2000s, and were only beaten back after a sustained campaign by the Philippine armed forces around 2016. Yet Abu Sayyaf and similarly aligned groups now exploit the seas between the Philippines, Malaysia, and Indonesia for armed robbery and the transportation of equipment and fighters on behalf of the transnational Islamic State. If other armed groups in the region adopt this tactic, the internal stability of certain Southeast Asian countries and their ability to come out of the COVID-19 crisis still intact will suffer. For a region at the center of the global economy, unfettered piracy and newly emboldened insurgencies could prolong the global recession even after the pandemic passes. Preventative measures can help address the growing threat of piracy in Southeast Asia. First, regional states' respective coast guards need to sit down and plan for a near-term surge in piracy. The Trilateral Cooperation Agreement between Indonesia, Malaysia, and the Philippines proved useful in cutting down piracy and kidnappings in the Sulu and Celebes Seas that connect all three countries. An increased pace in joint patrols in those most vulnerable areas — the Malacca Strait, the Sulu and Celebes Seas, and the Gulf of Thailand — would help mitigate some of the security issues associated with economic decline. The next ASEAN Regional Forum Intersessional Meeting on Maritime Security should assess how implementation of its 2018- 2020 work plan went in this respect. Outside countries like India could augment joint patrols in areas like the Bay of Bengal, where there is a distinct lack of capacity in maritime domain awareness and law enforcement. Second, the United States and other external states with a stake in Southeast Asian stability should help cushion the economic fall of maritime Southeast Asian countries where possible and aid in their recovery. The foreign secretary of the Philippines pleaded for as much at a recent ASEAN-U.S. meeting, asking for a respite from China's aggressive South China Sea pressure campaign amid the COVID-19 fallout. Prioritizing economic support to Brunei, Indonesia, Malaysia, and the Philippines (BIMP-EAGA states) would mitigate some of the worst knock-on effects, solve underlying issues driving piracy, and sew goodwill.

#### Nuclear war

Colin Crawford 11. J.D. Wake Forest University School of Law. “Green Warfare: An American Grand Strategy for the 21st Century.” Wake Forest Journal of Business and Intellectual Property Law. p. Lexis.

[\*248] In addition to the potential for economic growth, even the most ardent climate change skeptics will concede that the United States' dependence on fossil fuels has implications for national security and foreign policy. Security analysts have made the case for framing this debate in terms of "natural security," as the scarcity of natural resources will inevitably affect the United States' foreign policy calculus for years to come. n24 Despite the fact that the U.S. imports most of its oil from Canada and Latin America n25 - not the Middle East - many emerging markets are just beginning their love affair with the sticky, black hydrocarbon. n26 The corresponding increase in demand from emerging economies will continue to drive up energy prices, necessitating importation of oil from countries with less friendly dispositions toward the United States. n27 It is important to note how energy policy intersects with virtually all other aspects of governance. Not only will increased prices constrain U.S. fiscal policy and make it more expensive to project American power around the globe, they create pressures that will heavily influence American foreign policy in the coming decades, whether through resource wars or climate-induced humanitarian crises. n28 International trade and maritime policy in particular will be [\*249] greatly affected. Because "90 percent of global commerce and two thirds of all petroleum supplies travel by sea," and global energy demand will continue its inexorable rise, the Indian Ocean - already heavily used by "nuclearized" powers such as Pakistan, India, China, and Israel - will dramatically increase in strategic importance to the world's great powers. n29 The proximity of nuclear states in the Asia-Pacific region, along with increased pressures commensurate with rising energy demand, are already heightening military tensions among the major players in the region, including China and Russia in particular. n30 Geopolitical constraints will become increasingly difficult to manage as fuel prices continue to rise, and intervention will be needed to combat piracy and protect merchant shipping. n31 Make no mistake, the United States' continued dependence on fossil fuels poses significant problems for the national interest. The strategic implications are clear as U.S. foreign policy throughout entire regions is framed in the context of energy. n32

### 1NC

Regulation CP

#### The United States federal government should:

#### ---regulate private sector business practices that violate a worker welfare standard;

#### ---provide the Federal Trade Commission sufficient resources and agency flexibility to continue the prosecution of scam artists, deceptive advertisers, and privacy violators.

#### 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

## Inequality ADV

### Inequality---1NC

#### Antitrust in labor markets is a hammer in search of a nail.

Richard A. Epstein 21, Laurence A. Tisch Professor, Law, The New York University School of Law. Research Fellow, Law & Economics Center, Antonin Scalia Law School, George Mason University, "The Application of Antitrust Law to Labor Markets — Then and Now," NYU Journal of Law & Liberty, Vol. 15, No. 2, 11/09/2021, pg. 771-772. [italics in original]

There are a set of rich ironies in addressing the question of whether, and if so how, the antitrust laws should apply to employers. The first of these is historical. The early applications of the antitrust laws targeted the efforts of unions, especially through secondary boycotts, to use economic pressure in order to secure their economic objectives. But the legal response was not to condemn these as illegal activities. Instead, it took the position that unions could engage in a collective refusal to deal with an employer, even if they could not use various tactics that went beyond their refusal to deal, most notably the secondary boycott and the strategic withdrawal of services at critical times during the life of the contract. The New Deal response was not to attack that use of monopoly power but to solidify it by adding protections in the form of an exclusive right to represent workers that required employers to negotiate in faith with the union as their exclusive representative if selected by a majority of the workers.

The progressive economists who prize competition should join with classical liberals in seeking to remove the legal underpinnings of union monopoly power. Instead, they sidestep that conclusion and insist that the antitrust laws should turn their attention to employers and their actions that limit workers choices. There is much merit in the first part of that program that applies existing law to various covenants not to compete in labor markets. It is sound, but in its basic outline it is similar to the traditional position that it is relatively easy to apply antitrust laws to explicit contractual provision.

It is, however, a very different question as to whether the antitrust law can sensibly be applied to claims, especially in the context of mergers, that employers wield some monopsony power that should be countered by the government in the course of its review. There are in principle reasons to doubt that these pockets of power will escape the attention of new entrants who can bid up the wages of workers. But even if the forces of new entry are halting, there is little reason to think that this source of power applies to low level workers whose broad but limited skill sets allow them to shift jobs across different industrial categories. And for those jobs that do have some special licensing requirements, it is just not clear who benefits from the restriction: is it the workers, who are not at risk from new entry by unlicensed competitors, or is it firms that know these workers must sacrifice real income if they do not continue to use their licensed skills? But in the face of all this uncertainty, any firm that has high levels of monopsony in labor markets will likely have high levels of monopoly profits in product and service markets. The ability to deal with the product market is far easier, which means that there is no strong case for seeking to include in merger evaluations a detailed examination of the multiple labor markets in which many national and global firms operate.

So the message again is to keep it simple and go after the lowhanging fruit. And in so doing, we reject the explicit premise of Posner’s book *How Antitrust Failed Workers*. For the most part, antitrust law does not touch workers’ lives, which are heavily influenced by direct forms of regulation whose consequences are often too clear. It is just not the case that some novel expansion of the antitrust laws would help the position of workers. On the strength of the current evidence, we should not even attempt any major changes in antitrust practice. In the end therefore, the standard rule that ignores labor markets in antitrust is the best result in a second-best world.

#### Concentrated markets are inevitable and better for workers.

Allison Schrager 21, Senior Fellow at the Manhattan Institute, Ph.D. in Economics from Columbia University, “The Labor Market Doesn’t Need Antitrust Protection,” Bloomberg Opinion, 11-15-2021, https://www.bloomberg.com/opinion/articles/2021-11-15/jobs-market-doesn-t-need-antitrust-protection

A national labor shortage is an odd time to argue that some workers don’t have enough job options. But that’s what the U.S. Department of Justice is doing — specifically, they’re worried about the prospects of aspiring authors. Simon & Schuster and Penguin Random House (full disclosure: Penguin published my last book) are hoping to merge, but antitrust officials are suing to block the deal. The DOJ argues the merger would further concentrate the publishing industry and the result would be smaller advances for authors and less diverse books.

This is the latest twist in modern antitrust enforcement, which is no longer just concerned about consumers paying too much. The latest suit argues workers would have less power in a more concentrated market and that does them harm. It’s true there is more market consolidation, but it’s not clear this hurts workers (or authors). Modern antitrust often feels like a solution in search of a problem. This case is the latest example.

Increased market concentration is not limited to the publishing industry. More than 75% of U.S. industries contain fewer firms compared with the 1990s. Traditionally, when a few firms dominate an industry that means more concentrated market power and customers pay more. But concentration this time is different, consumers may pay less for many goods, including books, but there are reasons to worry that workers could be harmed. The DOJ and the Federal Trade Commission have started to take an active interest in labor market competition. And over the years quite a few economists have become concerned about increased monopsony power when there are fewer firms hiring people, which they argue holds down wages. Indeed, there is evidence suggesting that more concentrated industries have seen a bigger decline in labor’s share of income.

But before the government stops this merger (to preserve what they believe is a competitive industry that rewards diverse ideas), or pursues other deals like it, we need to understand why bigger firms are doing so well and if they actually are hurting workers. Big is not necessarily bad and the fact that labor’s share of income has fallen could just reflect a world where labor is less valuable.

The rise in market concentration didn’t arise from unchecked market power. A more likely explanation is that the world changed and the ideal market structure changed with it. A global technology-driven world created a winner-take-all economy. More global competition and the ability to reach customers all over the world offers big rewards to companies that can scale up quickly. This is in part because of network effects — your product is more valuable if lots of people use it. More users also means scale and access to data to improve your product. In this kind of market bigger firms will have some natural advantages because they will be more productive and dominate their markets. The big publishers are making a similar argument, claiming they need to merge to take advantage of the scale it would offer in order to take on Amazon.com, which is pinching publishers’ profits by lowering the price of books and getting into the publishing business itself.

Reducing industry concentration will not change global economic trends or turn the clock back on technology. And it’s not necessarily true that workers need to be protected. First of all, the winner take-all firms tend to pay better. If you’re lucky enough to work for one your wages will rise faster. One study estimates that one third of the growth of income inequality comes from the difference between people who work at superstar firms (at all skill levels) and everyone else. If big firms were using their power to under-pay workers, they’d pay less, not more. Perhaps breaking them up would make big firms less productive and that would lessen the disparities across firms. But that would harm the overall economy.

Second, even if there are fewer employers on the national level, a paper from an economist at the U.S. Census estimates there are more employers at the local level. How can that be? Before, if you lived in a smallish town maybe you could only work in the local hardware store. Now there is the hardware store, the Home Depot and Lowes. What looks like more concentration nationally can mean more competition at the local level. It’s bad for small local, businesses, but better for employees because they face more demand for their work and larger companies offer more stability in addition to higher pay.

Third, in some ways workers have more power than ever. This was true even before the current labor shortages. Technology makes it possible to search and sell your services to more employers, whether it’s gig and contract work or just job-posting web sites. The market for books is one example. Authors don’t need big publishers as much as they used to. Self-publishing has become more widely accepted, and more easily done with Amazon and Substack. Social media and podcasts have leveled the playing field when it comes to book promotion (though I am very grateful to my publisher, editor, and their PR team; I would be nothing without you).

There are reasons to be concerned about concentration. It may decrease competition in some cases, but it’s not necessarily bad for workers. And if that’s a key justification for blocking the Penguin Random House/Simon and Schuster merger there are better uses of government resources.

#### Inequality is shrinking---they use bad data.

Phil Gramm & John Early 21, former Chairman of the Senate Banking Committee, Visiting Scholar at the American Enterprise Institute; former Assistant Commissioner at the Bureau of Labor Statistics, “Incredible Shrinking Income Inequality,” 03-23-2021, https://www.wsj.com/articles/incredible-shrinking-income-inequality-11616517284

The refrain is all too familiar: Widening income inequality is a fatal flaw in capitalism and an “existential” threat to democracy. From 1967 to 2017, income inequality in the U.S. spiked 21.4%, and everyone from U.S. senators to the pope says it’s an urgent problem. Yet the data upon which claims about income inequality are based are profoundly flawed.

We have shown on these pages that Census Bureau income data fail to count two-thirds of all government transfer payments—including Medicare, Medicaid, food stamps and some 100 other government transfer payments—as income to the recipients. Furthermore, census data fail to count taxes paid as income lost to the taxpayer. When official government data are used to correct these deficiencies—when income is defined the way people actually define it—“income inequality” is reduced dramatically.

We can now show that if you count all government transfers (minus administrative costs) as income to the recipient household, reduce household income by taxes paid, and correct for two major discontinuities in the time-series data on income inequality that were caused solely by changes in Census Bureau data-collection methods, the claim that income inequality is growing on a secular basis collapses. Not only is income inequality in America not growing, it is lower today than it was 50 years ago.

While the disparity in earned income has become more pronounced in the past 50 years, the actual inflation-adjusted income received by the bottom quintile, counting the value of all transfer payments received net of taxes paid, has risen by 300%. The top quintile has seen its after-tax income rise by only 213%. As government transfer payments to low-income households exploded, their labor-force participation collapsed and the percentage of income in the bottom quintile coming from government payments rose above 90%.

In 2017, federal, state and local governments redistributed $2.8 trillion, or 22% of the nation’s earned household income. More than two-thirds of those transfer payments went to households in the bottom two income quintiles. Remarkably the Census Bureau chooses to count only $900 billion of that $2.8 trillion as income for the recipients. Excluded from the measurement of household income is some $1.9 trillion of government transfers. These include the earned-income tax credit, whose beneficiaries get a check from the Treasury; food stamps, which let beneficiaries buy food with government issued debit cards; and numerous other programs in which government pays for the benefits directly.

Americans pay $4.4 trillion a year in federal, state and local taxes. Households in the top two earned-income quintiles pay 82% of the tax bill, although they never see most of this money because it is deducted directly from their paychecks. When measuring income inequality, however, the Census Bureau doesn’t reduce household income by the amount paid in taxes. Had it done so and counted all transfer payments as income, inequality from 1967 to 2017 would have increased by only 2.3% instead of the reported 21.4%. That’s a difference of almost 90%—a rather large error.

Twice over the past 50 years, the Census Bureau has significantly changed how it collects and records income statistics. In 1993 and 2013 the Census Bureau changed its methods in an effort to collect better information from high-income households. These changes created two major discontinuities and distorted the time-series so that the change in measured income inequality in those years was as much as 15 times the average annual change found for the entire 50-year period. At the time, the Census Bureau explained in detail what it had done. It also explained the limitations the changes imposed on the use of its income-inequality measure to look at changes over extended periods. In subsequent use of the data by the Census Bureau and others, however, those warnings have been neglected.

The simple solution would have been to isolate the distortions caused solely by the changes in data-collection techniques and adjusted the previous years’ measures to reflect the effect of the changes. We made these adjustments and they are shown in the nearby figure. The blue line is the actual reported Census Bureau measurement of income inequality. The yellow line eliminates the effects of the 1993 and 2013 discontinuities caused solely by changes in measurement technique. The black line shows income inequality when the value of all transfer payments received is counted as income, income is reduced by taxes paid

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, and the two technical corrections are made.

Lo and behold—income inequality is lower than it was 50 years ago.

The raging debate over income inequality in America calls to mind the old Will Rogers adage: “It ain’t what you don’t know that gets you into trouble. It is what you do know that ain’t so.” We are debating the alleged injustice of a supposedly growing social problem when—for all the reasons outlined above—that problem isn’t growing, it’s shrinking. Those who want to transform the greatest economic system in the history of the world ought to get their facts straight first.

#### New standards get bogged down in courts.

Wright et al. 19, Joshua D. Wright, former Commissioner of the Federal Trade Commission, Ph.D. in Economics from the University of California, Los Angeles; Elyse Dorsey, Adjunct Professor at the Antonin Scalia Law School at George Mason University, Deputy Chair of the Antitrust & Consumer Protection Working Group at the Regulatory Transparency Project, J.D. from the Antonin Scalia Law School at George Mason University; Jonathan Klick, Professor of Law at the University of Pennsylvania Carey Law School, J.D. from the Antonin Scalia Law School at George Mason University; Jan M. Rybnicek, Adjunct Professor and Senior Fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University, J.D. from the Antonin Scalia Law School at George Mason University, “REQUIEM FOR A PARADOX: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” Arizona State Law Journal, Vol. 51, Spring 2019, accessed via Lexis

Replacing the well-established consumer welfare standard would necessarily require courts to trade off some amount of consumer welfare for some other set of values, thereby throwing open the door to uncertainty and to exploitative behavior. As has been discussed above, decades of debate and case law has worked to refine the precise contours of the consumer welfare standard and to bring consensus about the types of evidence that are indicative of harm to competition and consumers. 273 The consumer welfare standard employs a variety of economic tools to evaluate the effect transactions and business practices may have on consumers in the form of increased prices, reduced output, reduced innovation. By using current economic theory and empirical evidence as the starting point for creating liability rules and subsequently conducting an evidence-based inquiry into the welfare effects of a particular practice, the consumer welfare model offers a tractable method for weighing procompetitive and anticompetitive effects.

If consumer welfare were to be replaced by some other set of values, the result explicitly would be for courts and enforcers to elevate other factors above consumer welfare and to reach different conclusions about liability. Under a "public interest" or "citizen interest" approach, a transaction that would reduce prices to consumer, increase output, or spur innovation may be prohibited under the antitrust laws for failing to satisfy any number of other vague factors, including failing to leave some arbitrary number of competing firms in the market despite the clear presence of competition or create a more efficient albeit consolidated supply chain. Even more dramatically, a new standard also may result in a transaction that increases prices, reduces output, or stifles innovation to not necessarily run afoul of the antitrust laws if a court concludes that such consumer harm can be tolerated to satisfy other aspects of the multidimensional standard, such as income equality. In light of these very real concerns, a subjective, multiprong antitrust standard untethered from economics offers nothing beyond speculative benefits. Accordingly, it would be imprudent to abandon the consumer welfare standard.

[\*365] The same is true of proposals by some Hipster Antitrust advocates who seek not to implement a new public or citizen interest standard, but rather wish to see the Antitrust Agencies and courts return to the DOJ's 1968 Horizontal Merger Guidelines and a focus on market structure and concentration. These critics of the consumer welfare standard argue that modern antitrust has become far too complicated and, as a result, defendants all too frequently are capable of avoiding liability. To increase the probability of success under the antitrust law, they argue for a return to the days where an eight percent combined market share was sufficient grounds on which to block a transaction. Although this new structuralist approach has the benefit of clarity that the multi-dimensional public and citizen welfare tests lack, it is no better a replacement for the consumer welfare standard because it sacrifices accuracy for administrative simplicity. Although the economic foundation of the structuralist approach of the premodern era were robust, it has since been debunked and today no longer is treated credibly by industrial organization economics. Therefore, although replacing the consumer welfare standard with the 1968 structuralist approach may yield faster answers that are more frequently favorable to plaintiffs, the probability that those antitrust outcomes are in line with the actual competitive realities of whatever market is being examined is low.

#### Firms take advantage, worsening their impacts in the interim.

Wright et al. 19, Joshua D. Wright, former Commissioner of the Federal Trade Commission, Ph.D. in Economics from the University of California, Los Angeles; Elyse Dorsey, Adjunct Professor at the Antonin Scalia Law School at George Mason University, Deputy Chair of the Antitrust & Consumer Protection Working Group at the Regulatory Transparency Project, J.D. from the Antonin Scalia Law School at George Mason University; Jonathan Klick, Professor of Law at the University of Pennsylvania Carey Law School, J.D. from the Antonin Scalia Law School at George Mason University; Jan M. Rybnicek, Adjunct Professor and Senior Fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University, J.D. from the Antonin Scalia Law School at George Mason University, “REQUIEM FOR A PARADOX: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” Arizona State Law Journal, Vol. 51, Spring 2019, accessed via Lexis

Replacing the well-defined consumer welfare model with a vague, new standard that has no unifying objective based in objective economic evidence would dramatically increase the ability and likelihood of interested industry participants to engage in rent seeking when appearing before the federal antitrust authorities. 274 Today, the well-established definitions and boundaries of the consumer welfare standard allow courts to hold enforcers (and private parties) accountable and prevent misuse of the antitrust laws and political influence in antitrust enforcement decisions. Unlike sister agencies prone to capture, the FTC and DOJ are relatively well insulated from such influence by the need to apply objective economic principles to a clearly articulate consumer welfare standard.

A new "public interest" or "citizen interest" standard would take years to deploy and even longer before meaningful guidance could be issued similar to that which the consumer welfare standard offers today. In the meantime, [\*366] firms could use the new standard as leverage over the Antitrust Agencies--something that is not possible today because the consumer welfare standard offers a well-defined framework. By substituting in a vague new standard, Hipster Antitrust proponents ironically would grant large, powerful corporations with the ability to exert undue influence over the Antitrust Agencies' decision-making process. Moreover, once allowed to influence agency enforcement practices during the initial period when no framework exists, it will be difficult to establish guidelines that do not leave room for such manipulation to continue.

Calls to abandon the consumer welfare framework thus would exacerbate concerns about corporate influence by providing firms with a new ill-defined standard to manipulate. As a result, contrary to the purported objectives of consumer welfare critics, abandoning the consumer welfare model would revert the antitrust laws to a rent-seeking regime that increases--rather than reduces--corporate welfare.

#### Labor monopsony is a myth.

Robert D. Atkinson 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “The Myth of Local Labor Market Monopsony,” Information Technology & Innovation Foundation, 05-07-2021, https://itif.org/publications/2021/05/07/myth-local-labor-market-monopsony

Many economists and advocates, particularly progressives, have raised concerns in the past decade about the fact that wages have increased slower than productivity. Notwithstanding the fact that this divergence is overstated, it is true that raising wages is important.

The problem is that, rather than keep the focus on real solutions, such as raising taxes on wealthy individuals, increasing the minimum wage, promoting greater unionization, and spurring faster productivity growth, progressives proffer a dark narrative in which monopoly is the villain lurking in the background. If only we could break up big companies, they argue, all other economic problems would be easier to solve.

To prove that the U.S. economy is being crushed by rapacious monopolies they constantly repeat a host of claims: Price markups have increased, labor’s share of income has decreased, corporate profits are up, new firm start-ups are down, and the overall trend toward monopoly has grown. These are, by and large, false.

Yet, in their ongoing quest to find a monopolist under every bed, progressives have latched onto the notion of labor market monopsony. In other words, they claim that in too many local labor market, workers have only a few choices of firms to work for, and this enables firms to squeeze wages.

The most commonly cited scholarly work on the topic is from liberal economists Jose Azar, Ioana Marinescu, and Marshall I. Steinbaum. Indeed, their work has become the de facto view on the issue, with government officials, the media, and others citing it as scripture.

While Azar, Marinescu, and Steinbaum have published a number of articles on the topic, all of their work uses a similar methodology. They analyze local labor markets in the United States by comparing job openings and salaries using online job tools.

They looked at a combination of U.S. commuting zones and 200 six-digit occupational codes to assess the state of more than 117,000 specific labor markets in 2016. They found that 60 percent of markets were highly concentrated, while another 11 percent were moderately concentrated.

At first glance, it would appear they are on to something and that antitrust officials better get on the ball. But on closer inspection, while it helps advance the “monopoly crisis” narrative, it is actually much ado about nothing.

The reality is that most of the labor markets with high levels of employer concentration are rural and small-town areas with few employers overall. As they wrote, “Commuting zones around large cities have lower levels of labor market concentration than smaller cities or rural areas.” Ioana Marinescu explains, “This may contribute to explaining why wages are higher in urban areas.”

As any regional economist knows, wages are lower in rural Wisconsin than in Manhattan, not because there are more employers in Manhattan than in rural Wisconsin, but because it costs more to do business in Manhattan than it does in rural Wisconsin. For example, the cost of living in Dyersburg, TN (a community of about 18,000 people), is almost 25 percent lower than it is in Fort Lauderdale, FL, and home prices are 46 percent lower. So, you can be sure that workers in Dyersburg are paid lower wages than workers are paid in Fort Lauderdale.

A second problem with this line of work is that it assumes monopoly is the problem and antitrust enforcement is the solution. But imagine there is a “paper mill monopsony” in a small town in upstate Wisconsin. How exactly is antitrust supposed to solve that problem? Force the company to divide its mill in two, so each division can compete for the workers?

A third problem is that firms in smaller labor markets are generally smaller than firms in larger ones because of economies of scale. The markets are not as big. And as my colleague Michael Lind and I showed in Big Is Beautiful: Debunking the Myth of Small Business, on average, workers earn more in large establishments than they do in small ones.

A fourth problem is that these studies assume workers have only one skill and can only work in one occupation. This may be true for some professionals, like insurance adjustors, but it is less true for many other occupations. Someone who is looking for a job as a cashier can also look for a job as restaurant server. This is why one academic study of the issue concluded: “The prior literature has focused on industry and occupation concentration and likely overstates the degree of monopsony power, since worker skills are substitutable across different firms, occupations and industries.”

A related problem is that in at least one article that Azar, Marinescu, and Steinbaum have published, they looked at a small number of more specialized occupations, such as farm equipment repair, legal secretaries, mobile heavy equipment mechanics, industrial engineers, railcar repairers, tractor-trailer drivers, and insurance underwriters. This is likely why they found that in the average market there are only 2.3 recruiting employers at any time. Of course there are not likely to be very many firms in the same labor market employing railcar repairers. This is why the authors not surprisingly found high levels of concentration for railcar repairers. Clearly, the Justice Department needs to break up “Big Farm Equipment Repair.”

In fact, many workers can and do apply for jobs in more than one occupation. Moreover, as one study noted, “there is evidence of publication bias in parts of the literature, which results in negative estimates of supply elasticities receiving lower probability of being reported.” In other words, findings of monopsony are more likely to get published.

But, not deterred by these issues, the authors march on to their predetermined policy recommendations: more antitrust enforcement and breaking up existing companies. Besides the fact that labor monopsony is largely a non-existent problem and one that, to the extent it exists, stems from the inherent nature of small labor markets, breaking up companies would have little impact. The issue is not firms, but establishments. If two paper companies merge but retain their existing factories, and none of those factories are in the same labor market, then there is no increase in local labor market monopsony.

If progressives really want to fix the supposed problem of monopsony in small towns, they should breakup Big Small Towns! Force everyone to live in big cities. Then workers would be able to enjoy living in expensive apartment buildings or houses in the exurbs with 90-minute commutes. But, by God, they will at least not be subject to corporate monopsony!

#### Democratic peace is statistically disproven

Dr. Daina Chiba 21, Associate Professor of Political Science in the Department of Government and Public Administration at the University of Macau, Ph.D. in Political Science from Rice University, LL.M in Jurisprudence and International Relations from Hitotsubashi University, and Dr. Erik Gartzke, Professor of Political Science at the University of California, San Diego, PhD in Political Science from the University of Iowa, “Make Two Democracies and Call Me in the Morning: Endogenous Regime Type and the Democratic Peace”, 2/19/2021, https://dainachiba.github.io/research/make2dem/Make2Dem.pdf

The democratic peace—the observation that democracies are less likely to fight each other than are other pairings of states—is one of the most widely acknowledged empirical regularities in international relations. Prominent scholars have even characterized the relationship as an empirical law (Levy 1988; Gleditsch 1992). The discovery of a special peace in liberal dyads stimulated enormous scholarly debate and led to, or reinforced, a number of policy initiatives by various governments and international organizations. Although a broad consensus has emerged among researchers regarding the empirical correlation between joint democracy and peace, disagreement remains as to its logical foundations. Numerous theories have been proposed to account for how democracy produces peace, if only dyadically (e.g., Russett 1993; Rummel 1996; Doyle 1997; Schultz 2001).

At the same time, peace appears likely to foster or maintain democracy (Thompson 1996; James, Solberg, andWolfson 1999). A vast swath of research in political science and economics proposes explanations for the origins of liberal government involving variables such as economic development (Lipset 1959; Burkhart and Lewis-Beck 1994; Przeworski et al. 2000; Acemoglu and Robinson 2006; Epstein et al. 2006) and inequality (Boix 2003), political interests (Downs 1957; Bueno de Mesquita et al. 2003), power hierarchies (Moore 1966; Lake 2009), third party inducements (Pevehouse 2005) or impositions (Peceny 1995; Meernik 1996), geography (Gleditsch 2002b), and natural resource endowments (Ross 2001), to list just a few examples. Each of these putative causes of democracy is also associated with various explanations for international conflict. Indeed, some as yet poorly defined set of canonical factors may contribute both to democracy and to peace, making it look as if the two variables are directly related, even if possibly they are not.

We seek to contribute to this literature, not by proposing yet another theory to explain how democracy vanquishes war, but by estimating the causal effect of joint democracy on the probability of militarized disputes using a quasi-experimental research design. We begin by noting that some of the common causes of democracy and peace may be unobservable, generating an endogenous relationship between the two. Theories of democracy and explanations for peace are at a formative state; it is not possible to utilize detailed, validated and widely accepted models of each of these processes to assess their interaction. Indeed, to a remarkable degree democracy and peace each remain poorly understood and weakly accounted for empirically, despite their central roles in international politics. We address the risk of spurious correlation by applying an instrumental variables approach. Having taken into account possible endogeneity between democracy and peace, we find that joint democracy does not have an independent pacifying effect on interstate conflict. Instead, our findings show that democratic countries are more likely to attack other democracies than are non-democracies. Our results call into question the large body of theory that has been proposed to account for the apparent pacifism of democratic dyads.

#### Slow growth is a sign of productivity.

Dietrich Vollrath 20, Professor and Chair in the Department of Economics at the University of Houston, Ph.D. in Economics from Brown University, “Why A New Wave Of Economists Are Championing Slow Economic Growth,” WBUR, 02-12-2020, https://www.wbur.org/onpoint/2020/02/12/economists-slow-economic-growth

“I'm not proposing that we should target zero growth or slow growth, but I'm not really afraid of slow growth. I mean, I think that we have to conceive of, from the economic side, that growth occurs because fundamentally, we can either add more inputs into the economy, more labor, we could use more resources, we could build more capital; or we can get more productive at using those things. And productivity is the thing that has been driving the economy for decades and centuries, this is the fundamental source of all this growth. There's two ways to respond to that productivity. One, the way we've been pursuing for a very long time, is to use the existing inputs, have higher productivity and have higher growth, higher GDP. An equally valid response to higher productivity is to use fewer inputs, work fewer hours, use fewer resources, take a longer vacation. Those are all valid ways of taking advantage of productivity.

"So at risk of my own health, probably, in the economics community, perhaps, I will disagree with Larry Summers and say that, 'No, [stagnation] is not something that is to be feared at all. And it's not in the sense that the economy would become comatose.' It's us taking advantage of productivity growth to do something different than we've done in the past. Productivity growth is the thing that we don't want to get rid of. Because it allows us to make these choices, where we’ve reached the stage where we've decided to take the longer vacations, work less, use fewer resources, change our vision.”

#### Modifying the CWS nukes the economy.

Will Hild 21, Executive Director of Consumers’ Research, J.D. from Georgetown University Law Center, B.A. in Political Science from the University of Florida, Licensed to Practice Law in the Commonwealth of Virginia, Former Deputy Director of the Regulatory Transparency Project, Former Director of External Affairs for the Culture of Freedom Initiative at the Philosophy Roundtable, “Congress’ Misguided ‘Big Tech’ Antitrust Efforts Are No Win For Consumers”, Washington Times, 3/16/2021, https://www.washingtontimes.com/news/2021/mar/16/misguided-big-tech-antitrust-efforts-are-no-win-fo/

Adopted decades ago in a series of U.S. Supreme Court decisions — many unanimous — the consumer welfare standard ended an era of confusion for business and abuse by regulators. Before adopting the consumer welfare standard, antitrust law included numerous competing justifications for enforcement actions against businesses. Often it was impossible for companies to determine with reasonable certainty whether a potential merger, acquisition or expansion was legal or not. This hampered capital investment, restricted consumer choice and hindered the streamlining of business operations even when it was to the consumer’s benefit.

Existing antitrust regulations based on the consumer welfare standard already provide the government the enforcement tools necessary to protect consumers from price collusion, unfair competitive practices and abuse. New antitrust legislation that creates additional justifications for intervention into the market would only politicize our economy, reduce legal clarity and discourage investment.

Mr. Lee is also correct that lawmakers must no longer ignore Big Tech’s ability and willingness to censor disfavored viewpoints to bolster preferred political expressions and outcomes. There certainly seems to be an industrywide effort to silence voices accused of “wrong think.” When the handful of companies that make up Big Tech collectively decided they didn’t like Parler, the social media network systemically removed from app stores, and even its webserver within 24 hours.

Unlike the infamous 19th and 20th century instances abuses by monopolists that gave rise to our nation’s foundational antitrust legislation, these synchronized assaults on consumer choice are not aimed at raising prices. Instead, they are meant to punish companies and silence consumers who dare disagree with the prevailing politics of Big Tech.

That falls straight into the domain of Section 230 of the Communications Decency Act (Section 230), not antitrust law.

Section 230 is the law that protects Twitter from civil action for blocking or banning content Twitter deems inappropriate, even if that content favors one political ideology over another. Mr. Lee writes, “The Silicon Valley fairytale of innovation and technological progress sold to Americans has turned into a corporatist nightmare of censorship and hypocrisy.” If that’s the case, Section 230, not antitrust law, is the culprit. Discarding the consumer welfare antitrust standard to attack censorship would be a mistake.

I share Sens. Klobuchar’s and Lee’s concerns about the market power of large technology firms. However, shifting the focus of antitrust law away from the consumer would open a Pandora’s box of regulatory uncertainty and turmoil onto the nation’s economy. Such a change is wholly unnecessary. If censorship is the concern, better to consider reform of Section 230 than toss the consumer welfare standard. Moving to a risk-based antitrust system will eventually lead to increased operating and litigation costs for the nation’s businesses, the vast majority of whom have nothing to do with censorship by Big Tech. In the end, that cost will ultimately be passed along to the consumer.

American consumers have been bullied enough by these would-be Silicon Valley tyrants. Congress must find another way to curb their abuses than sacrificing the consumer welfare standard.

#### 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.

#### Inequality doesn’t cause diversionary war

Gal Ariely 15, senior lecturer in the Department of Politics & Government, Ben-Gurion University of the Negev, PhD from the University of Haifa’s School of Political Sciences, “Does National Identification Always Lead to Chauvinism? A Cross-national Analysis of Contextual Explanations,” Globalizations, 2015, https://s3.amazonaws.com/academia.edu.documents/43980028/Ariely\_Globalizations\_2015.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1515397197&Signature=78lnbbHNRVjhLgOKyRPKm%2BK8M1o%3D&response-content-disposition=inline%3B%20filename%3DDoes\_National\_Identification\_Always\_Lead.pdf

With respect to internal explanations, the effects of income inequality and ethnic diversity are presented in Table 3. Models 3.1 and 3.2 indicate that neither directly affects chauvinism. H4 is therefore not supported. The results suggest, however, that both have a negative effect on the national-identification slopes. Contrary to our expectations, countries with higher levels of economic and ethnic division appear to exhibit a weaker relation between national identification and chauvinism. While these findings might seem to contradict H5, the pattern was caused by outliers. After excluding South Africa—the most unequal and ethnic diverse country in our sample—the effect of ethnic diversity is not even of borderline significance. After excluding Chile—the most unequal country in our sample—the interaction effects for economic inequality were also far from significant. The results, therefore, do not support H5.21¶ Conclusions¶ During the historic phone call between President Obama and Iranian President Sheikh Hasan Rouhani in September 2013, the latter stated that his country’s nuclear program ‘represents Iran’s national dignity’.22 This declaration reflects the common perception that Iran’s nuclear program mobilizes Iranians in support of resisting further national humiliation at the hands of foreigners (Moshirzadeh, 2007). This reflects the important role national feelings play in the contemporary international arena. Evidence from other examples—such as the Israeli-Palestine conflict—indicates that national identity serves as a key factor in conflict resolution. The prominence of national feelings is not limited to the Middle East, their effect on public attitudes towards international issues, and conflicts also being manifest in the West (Billig, 1995; Kinder & Kam, 2010).¶ It is thus hardly surprising that scholars seeking to develop a better understanding of conflicts adopt a social-psychology perspective, replacing the deterministic view that identification with one’s in-group necessarily leads to antagonism towards out-groups with an examination of the broader social context. In line with this approach, the present paper focuses on the way in which political and social contexts encourage chauvinistic views towards the international arena and how they affect the relation between national identification and chauvinism.¶ Integrating various social and psychological theories, we investigated two external contextual explanations (globalization and conflict) and an internal explanation (social division). Employing cross-national survey data, we examined the relation between national identification and chauvinism across 33 countries. The findings indicate that a positive relationship exists between national identification and chauvinism across most of the countries, although the level differs from country to country. Using a multilevel regression analysis, we tested to see whether globalization, conflict, and social division correlate with this variation. The results indicate that social and political contexts are related to chauvinism and the ways national identifi- cation and chauvinism are linked. Although a closer relation exists between national identification and chauvinism in more globalized countries, globalization failed to explain the variation in chauvinism itself. These findings support the notion that globalization highlights the importance of national identity (Calhoun, 2007; Castells, 2011). While those sections of globalized societies that are attached to their country also tend to resist international cooperation and endorse hostile views, the complexity of the phenomenon—as evinced by the divergent findings of previous studies (e.g. Jung, 2008; Norris & Inglehart, 2009)—calls for further research of this interpretation. The fact that the current study is cross-sectional must also be taken into account, the findings adducing the relation but not the causal relations between the variables. In contrast to experimental studies, the present design is similarly limited in its ability to offer a robust control for alternative explanations.¶ Another external factor found to be relevant—to a certain degree—was conflict. Countries that suffered large numbers of deaths in conflicts and mobilized resources and personnel exhibited higher levels of chauvinism. When other indices for conflict were used, however, these results were not replicated. A possible explanation for this finding lies in the inherent limitation in the way in which conflicts are measured across various countries. Measuring international conflicts is a challenging task (Anderton & Carter, 2011). While the ways of measuring conflict were chosen because they reflect different dimensions of conflict in order to be representative of a wide range of countries, the problem of comparability cannot be ignored. An alternative explanation may derive from the fact that only deaths from conflict and resources/personnel mobilization are sufficiently significant to contribute to chauvinism. The limitations of our measurements of conflict and research design mean that this idea must remain speculative, however. In addition, it is important to emphasize that the sample of countries is also limited as many countries are not involved in conflict and there is also limited variation in the types of conflicts.¶ Contrary to what the divisionary theory of national mobilization would lead us to expect, neither economic inequality nor ethnic diversity were related to chauvinism or affected the relation between national identification and chauvinism. This finding might also be explained by the limitation of the current research design. The number of countries included in the ISSP 2003 National Identity Module being relatively small and the sample only covering countries with available survey data, the results relate solely to this specific sample of countries. Across another set of countries, social division might play a far more significant role. Another explanation might be the meaning given to national identification and chauvinism across the countries. While evidence exists for the comparability of the scales across most of the countries, the divergent meaning probably attributed to them in Germany, the United States, and Israel might form an additional limitation.

## FTC Credibility ADV

### FTC Cred---1NC

#### The FTC won’t significantly expand the scope of antitrust because it’s politically cautious

Megan Browdie 21, Jacqueline Grise, and Howard Morse, Partners at Cooley, Washington, DC, “Biden/Harris Expected to Double Down on Antitrust Enforcement: No “Trump Card” in the Deck”, Concurrences: Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

38. Current leadership at the agencies appear to agree with the Republicans’ more cautious approach. For example, Chairman Joe Simons, while having touted himself as “responsible for overseeing the re-invigoration of the FTC’s non-merger enforcement program” during his tenure as director of the FTC Bureau of Competition under Bush, has pushed back on these “expanded” theories of antitrust harm. For example, he argued in January 2020 that “U.S. antitrust laws are sufficiently robust to handle competition problems as they arise. Over the years, antitrust laws have proven to be very flexible and resilient in enabling enforcers to challenge conduct that harms competition in a broad range of markets. These laws have proved themselves effective even as the economy evolved with technological progress.” [42]

39. Given this disagreement, and that the Democrats, at best, will have a very thin majority in the Senate, we anticipate some modest modifications to the antitrust laws but expect serious pushback to substantial overhauls of the system or laws.

#### The plan destroys FTC credibility

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Or its resilient

William E. Kovacic 16, Visiting Professor at King's College London and the Global Competition Professor of Law and Policy at George Washington University Law School, and Marianela Lopez-Galdos, Legal Consultant with the Inter-American Development Bank and the Director of the Global Competition Law Benchmarking Project at the Competition Law Center of the George Washington University Law School, “Explaining Variation in the Implementation of New Regimes”, Law and Contemporary Problems, 79 Law & Contemp. Prob. 85, Lexis

For the most part, an older, better-established, and more experienced agency is more likely to be in a stronger position to respond to such blows and recover. This is because: (a) a better-established and more experienced agency has had more time to build a career staff that provides continuity and stability over time and is able to carry out the work of the agency despite significant disruptions in leadership; 92 and (b) such an agency probably has accumulated reputational capital that it can "spend" in the time of a crisis to maintain its standing in the eyes of external audiences. 93 [FOOTNOTE] 93 See William E. Kovacic & Marc Winerman, The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness, 100 Iowa L. Rev. 2085, 2106-07 (2015) (discussing how competition agencies accumulate and spend political capital). [FOOTNOTE] A relatively newer agency, by contrast, may be more vulnerable to being swept aside or permanently diminished because it has not had the opportunity to build a staff of sufficient depth and experience or to build a reputation that can sustain it in difficult times.

No scamming impact---says a Twitter hacker can cause nuclear war which is empirically disproven.

FTC doesn’t solve scamming---bot networks are Russian, and their authorities will never comply with investigations.

Alt causes to emerging tech---Chinese refusal to engage, lack of consensus on effective regulation, and US military applications.

#### No emerging tech impact---humans check, and it isn’t deterministic.

Zachery Tyson Brown 21, Security Fellow at the Truman National Security Project, Board Member of the Military Writers Guild, “Don’t Fear the Future,” Foreign Policy, 03-26-2021, https://foreignpolicy.com/2021/03/26/future-technology-optimism-corporations-us/

For some, the future is unknown, foreign land that we cannot know until we arrive there—or rather, until it arrives here. But that’s not quite right, is it? Because while you can’t predict the future, you can catch glimpses of it right here in the present if you know where to look.

Optimists like to imagine a future in which today’s problems, difficult as they are, have been solved—and maybe we finally get our flying cars. Pessimists, on the other hand, maintain a darker view, one that’s extremes are replete with gray rhinos, black swans, and boiling frogs.

After a long, brutal year of endemic plague punctuated by widespread civil unrest, it’s easy for many U.S. citizens to understand and adopt the pessimist’s stance—that is, to see the future as a threat. Glued to our devices, we have grown accustomed to daily reports of the world’s unraveling. The information superhighways that were supposed to lead us into a glowing age of prosperity appear instead to have left us at dead ends or worse—in smoking pileups. After perhaps the most contentious—and worse, incompetent—presidency in U.S. history, the nation is as anxious, confused, and as dangerously divided as ever.

Many Americans have, quite reasonably, lost faith in the things we might have once taken for granted—things like the ability to one day own a home or the idea that U.S. democracy is the model the world should aspire to. Confidence in public institutions—not to mention faith in fellow citizens—remains historically low, a distrust driven by year after year after year of routine gridlock and Thelma and Louise-style crisis brinksmanship that has unfortunately had very real negative consequences for millions of people. Lately, it appears Americans have even started to lose faith in their military, which has, until recently, enjoyed practically unquestioned and widespread support across many segments of society.

But the travails of the past year were an outlier only in the scale of the damage inflicted, not in kind. Americans have for decades now endured a torrent of successive crises, each one a psychological blow that has sapped the nation’s collective will, not to mention its prestige. From terrorist attacks and ecological disasters to near-economic collapse and, most recently, a murderous putsch that reached the very seat of its government, these events have in aggregate left many U.S. citizens simply exhausted, engendering a passivity about their ability to effect change in the present and an even fatalistic attitude about their common future as a nation purportedly in sharp decline.

I was an intelligence officer in a past life. The public has, over the years, probably spent hundreds of thousands of dollars to teach me how to synthesize data, identify trends, and make forecasts. Which is to say, I know a little bit about how the future gets made, and I hope you will believe me when I say that the passivity described above is dangerous—not only because it feeds the very cycle of crises that in turn generate more detachment but also because the constant doom-mongering is remarkably ineffective at actually getting anyone to do anything.

You read that right. The future is made.

Let me explain. When we think of the future as something that just happens to us—when we reduce ourselves to mere observers as either beneficiaries or victims—we rob ourselves of the very agency that makes us human and essentially lets ourselves off the hook.

And yet, our hands are not completely free to create as we see fit. The future is significantly path-dependent; choices are constrained by decisions made before. The choices we make are also themselves influenced by larger driving forces that we think of as either reinforcing continuity or driving change. “Forces” might sound mysterious, but it’s just shorthand for the broad impersonal factors—whether social, economic, technological, or ecological—that encourage or discourage individual behavior.

But again, that’s no reason for U.S. citizens to think of themselves as merely flotsam buffeted by the torrents of fate. When we become aware of these forces, we also get better at seeing how to drive the changes we want.

The forces of change can be incredibly powerful. Change is, after all, the only constant. But the status quo has an inertia of its own. The forces of continuity are sufficient, usually, to prevent change from spreading too quickly. And even when they fail to do that, they’re often able to co-opt change, to mold change into its own image.

Think about it. Objects at rest tend to stay that way. The sunk costs of legacy investments drag heavily upon the decision-making of corporations and governments alike. People grow attached to the familiar. They are often skeptical or even fearful of change. As a result, existing systems tend to stay in place regardless of whatever new gadgets we adopt. Even on the rare occasions when those systems are uprooted, the patterns they’ve ingrained over time remain visible for decades if not centuries. There’s a reason, for example, why Google and Amazon build their data centers along the same trails blazed by those who once built the transcontinental railroad.

For an example of how we create the future through the continuous interplay of these forces, consider how 2020 played out. Advances in digital communication technologies have provided the ability to collaborate remotely from almost anywhere on Earth well before the pandemic struck. But this particular force of change was held in check by even more powerful forces of continuity that preferred to keep things the way they were. Before the onset of the coronavirus crisis in March 2020, both the private sector and the public had soured the notion of remote work.

It took an exogenous event like COVID-19 and its various knock-on economic effects to loosen continuity’s grip, forcing government agencies and corporate boards around the world to embrace the change they had only recently shunned. Telepresence and remote collaboration quickly became indispensable. They’ve proven so successful that some go as far as to project we might never return to the office, with major firms like Microsoft and Facebook having already announced their staffs will work remotely permanently. Salesforce went so far as to declare that the “9-to-5 workday is dead.”

But even in crisis, continuity retains a powerful grip. Recall, for instance, how many organizations this past spring tried to simply replicate their normal, in-person work practices remotely, with uniformly frustrating results. It took months for traditional office cultures to adapt to the distributed, asynchronous, and necessarily more informal nature of remote work. Some workplaces never adapted at all and have defaulted to the familiar in a rush to “get back to normal.” Although it is quite likely that we’ll see remote work become far more commonplace, I wouldn’t put money on the wholesale revolution that some have predicted.

The future, it turns out, has a strong status quo bias.

Too many would-be futurists fixate on a particular trend or technology and are frustrated when their maximalist projections turn out to be wrong. Others make the mistake of exaggerating the strength of the status quo, thinking that what exists now is more permanent than what it really is. To make more useful projections about the future, forecasters must account for the forces driving both change and continuity. The single biggest mistake in most predictions, as a raft of recent work has shown, is overconfidence in the extent of change. Even during a crisis, wide-scale change is gradual.

If predictions start by recognizing the power the status quo holds over the future, it forces people to see their world in terms of systems and to see themselves as actors within them. It is at once empowering and intimidating because while it gives them more agency to make deliberate choices, it also holds them more accountable—both to their future selves and to those who will come after them. They’re the ones, after all, who will be forced to live in the future we’re building.

When we recognize that the future is being created—right now—by us, it allows us to eschew the more conventional conception of seeing it as a linear path we’re walking down. Instead, it forces us to realize we’re actually building the path ourselves, step by step.

The question is, where do Americans want to go?

# 2NC

## Regulation CP

### Solvency---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

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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.

### Solvency---AT: Private Right

#### Public enforcement is sufficient

Alexander Italianer 13, Director-General for Competition, European Commission, “Fighting Cartels in Europe and the US: Different Systems, Common Goals,” 10/9/2013, <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.

#### They’re super slow

Daniel A. Crane 10, Frederick Paul Furth Sr. Professor of Law, Michigan Law, “Optimizing Private Antitrust Enforcement,” 63 Vand. L. Rev. 675

Given all of the above factors, it is implausible that the threat of future private litigation does much to deter anticompetitive behavior. The author's own experience in a private antitrust case is illustrative. By the time the case settled during an appeal, it had been nine years since the lawsuit was filed and fifteen years since the alleged misconduct began. Only a handful of personnel who were with the company during the relevant events were still employed by the firm at the time of settlement. Since the underlying conduct occurred, the company had witnessed multiple generations of senior management come and go. The company's capital structure had changed multiple times, too. First, it was part of a corporate conglomerate, then it was spun off as an independent, publicly traded company, then it was acquired by another conglomerate, and shortly afterwards it was taken private. The managers and shareholders who had reaped the gains from any unlawful conduct-assuming that there was any-had long since moved on.

#### Businesses settle than continue as usual

Eric McCarthy 7, GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, “Litigation Culture Versus Enforcement Culture A Comparison of US and EU Plaintiff Recovery Actions in Antitrust Cases,” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### Private suits have a ‘toxic cocktail’ of legal effects that only sow uncertainty and chaos

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Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

### Solvency---AT: Regulatory Capture---2NC

#### No capture

-- the track record of unsuccessful business opposition to regulation proves influence isn’t ironclad

-- most arguments are theory or anecdotes, refuted by rigorous empirics

-- examples of deregulation could be driven by public interest theory, rather than capture

-- regulators aren’t driven by personal gain – they’re committed to agency missions or promotion of the public good

-- even actions that appear to be the effect of capture may be misattributed

Dr. Christopher Carrigan 16, Assistant Professor of Public Policy and Public Administration at George Washington University, PhD in Public Policy from Harvard University, MBA from the University of Chicago, BA in Economics from Davidson College, and Dr. Cary Coglianese, Edward B. Shils Professor of Law and Professor of Political Science, and Director of the Penn Program on Regulation at the University of Pennsylvania, PhD in Political Science from the University of Michigan, JD from the University of Michigan Law School, MPP from the University of Michigan, AB in Philosophy and Political Science from The College of Idaho, “Capturing Regulatory Reality: Stigler’s *The Theory of Economic Regulation*”, Penn Law: Legal Scholarship Repository, 7/4/2016, p. 6-8

First, Stigler’s article can be read to exaggerate the power of business over regulation. Some of his language definitely left this impression. He stated, for example, that his “central thesis” was “that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit” (Stigler 1971, 3). Such a strong claim about business dominance “as a rule” begs to be challenged – and easily so. After all, any suggestion that business holds an ironclad grip over regulatory policy is contradicted by persistent and often unsuccessful business opposition to the imposition of costly regulatory burdens (Kamieniecki 2006). However, notwithstanding Stigler’s sometimes forceful language, it would be somewhat unfair to attribute to Stigler the bold claim that regulatory capture occurs “as a rule.” He never put forth evidence in The Theory that could show regulatory capture occurred with any regularity. Instead, he offered theoretical arguments and very limited empirical evidence from a few regulatory domains (Posner 1974). He also acknowledged elsewhere in his article the “defensive power of various other industries” that could complicate any business’s efforts to capture a regulatory agency (Stigler 1971, 8). He specifically stated that his theory “does not mean that every large industry can get what it wants or all that it wants” (Stigler 1971, 11). For these reasons, it should be clear that Stigler did not believe all regulation is acquired by industry. That said, he did seem to think that a lot of regulation came into existence solely to serve industry’s interests. As a result, reality seemed to hit Stigler’s Theory hard within just a few years after its publication. The sweeping deregulation of airlines, telecommunications, trucking, and natural gas that occurred in the United States in the late 1970s and early 1980s proved hard to square with Stigler’s emphasis on regulation as a barrier to entry (Levine 1981; Quirk 1981; Derthick & Quirk 1985), although subsequent extensions of his analysis have been directed toward understanding deregulation (Peltzman 1989). Also complicating Stigler’s account were the consumer, civil rights, and environmental movements – and the extensive new forms of regulation that accompanied them but which were opposed by industry. Of course, this is not to say that these new regulatory arenas cannot be helpfully analyzed by referencing political economy theory (e.g., Keohane, Revesz & Stavins 1998), only that Stigler himself did not envision these possibilities any more than he considered the prospect of widespread deregulation.

Second, Stigler made little effort to distinguish between legislators and bureaucrats in his work. Legislators and the bureaucrats in regulatory agencies face different institutional environments with different political incentives – with bureaucrats being affected by what legislators do. Without any deep consideration of differing political institutions, Stigler’s analysis could not fully explain how business-friendly regulatory regimes emerge (or do not emerge) from the political system (Shepsle 1982; Weingast & Moran 1983). This critique does not invalidate Stigler’s political economy approach; it only qualifies the generalizability of some of Stigler’s claims. As already noted, many scholars since Stigler have given specific attention to both the differences between legislators and bureaucrats as well as their interactions (Weingast & Moran 1983; Laffont & Tirole 1991). One of the most productive streams of political economy research on regulation in recent decades has centered on the study of regulatory institutions and their design (Carrigan & Coglianese 2011).

Third, Stigler’s empirical evidence was, as he himself acknowledged, very limited. He analyzed only two types of regulation – trucking and licensing – and found more than mixed support in only one of these. More importantly, and something Stigler did not acknowledge, his evidence could not rule out plausible explanations consistent with a public interest theory of regulation (Carpenter 2013). Although a positive correlation between truck weight limits and the length of railroad freight hauls might be some indication of regulatory capture by railroads, it may also be the case that states with higher weight limits simply have lower population densities. If so, longer railroad freight hauls would be needed to bring goods to a more dispersed population. Having fewer people would also decrease the risks of allowing heavy trucks on the roads, suggesting a reasonable competing explanation for the higher weight limits (Carpenter 2013). Similarly, if occupational licensing counteracts information asymmetries to improve the quality of services offered, it would be consistent with the public interest if these requirements arose where they would have the greatest benefits. In addition to urban areas, the benefits would be greatest where both the demand for and supply of the service was greatest. Rather than demonstrating capture, an alternative explanation for Stigler’s negative correlations between licensing and both urbanization and occupational size was that they simply arose where regulation was most needed. In a similar vein, Stigler also gave short shrift to the possibility that regulation could at times be both supportive of industry interests and simultaneously advance the public interest, at least relative to a status quo of no regulation. He assumed rather than established that private interests and the public interest were in conflict.

Finally, although one of the virtues of a political economy approach like Stigler’s lies in its relative simplicity, for some scholars that also makes for one of its possible vices. A political economy model treats regulatory officials as subject to only a narrow range of self-interested motivations, an assumption that certainly makes generating predictions more tractable but could be said to undermine verisimilitude, if nothing else. It is sometimes suggested that government officials are motivated by more than their private gain (DiIulio 1994; Golden 2000); they may be called to public service by an underlying belief in the mission of an agency or a desire to pursue policies for the greater good (Kelman 1987; Wilson 1989). Public-interested regulators might even display outward behavior that sometimes looks like capture (Carpenter 2004; Coglianese, Zeckhauser & Parson 2004). For example, if an agency observes through repeated interactions with certain firms that these businesses faithfully adhere to existing rules, it might sensibly choose to hold those firms to lower levels of regulatory scrutiny relative to newcomers to the industry. Focusing more attention on those with which they have less experience could be a sensible way for public-interested regulators to deploy scarce resources, but an unsophisticated political economic analysis might well associate such behavior with industry influence (Carpenter & Moss 2013). Thus, as with all theories, the circumstances to which Stigler’s insights apply ultimately depend on where his assumptions fit, an obvious qualification never reflected in his strongly-worded assertions.

#### The best evidence disproves it

Dr. David B. Spence 19, Baker Botts Chair in Law at the University of Texas at Austin School of Law and McCombs School of Business, Ph.D in Political Science from Duke University, J.D. from the University of North Carolina, “Regulation and the New Politics of (Energy) Market Entry”, Notre Dame Law Review, 95 Notre Dame L. Rev. 327, November 2019, Lexis

If one subscribes to theories of capture and business dominance of the regulatory process, NGOs' emphasis on mobilizing around risk makes sense as a way to overcome resource disadvantages (relative to firms) in the contest to shape decisions. Capture suggests that because of businesses' resource advantages in the policy process, regulators are systematically biased toward [\*376] project sponsors, 229an idea that seems particularly attractive in the Trump era given the evident corruption and proindustry orientation of some regulators in the Trump administration. 230

[FOOTNOTE] 230 Scott Pruitt's reign at the Environmental Protection Agency (EPA) combined unprecedented levels of corruption and apparent probusiness bias. See Oliver Milman & Dominic Rushe, New EPA Head Scott Pruitt's Emails Reveal Close Ties with Fossil Fuel Interests, Guardian (Feb. 22, 2017), https://www.theguardian.com/environment/2017/feb/22/scott-pruitt-emails-oklahoma-fossil-fuels-koch-brothers. This is to suggest that there is an important conceptual distinction to be made between probusiness decisions driven by corruption and those driven by an ideological preference. For a discussion of why this matters, and of the literature on capture, seeinfra notes 231-35. [END FOOTNOTE]

It is also an idea that has long enjoyed the support of (mostly right-leaning) public choice scholars, 231and (mostly left-leaning) revisionist historians. 232 But despite its popularity, the capture hypothesis has not fared particularly well under academic scrutiny. The canonical pieces in the capture literature consist mostly of "theory-plus-anecdote" accounts. 233

[FOOTNOTE] 233 Christopher Carrigan and Cary Coglianese's review of one of capture theory's seminal works concluded recently that it "exaggerates the power of business over regulators,... suggesting ... nearly an iron law of business control that clearly does not exist." Christopher Carrigan & Cary Coglianese, Capturing Regulatory Reality: Stigler'sThe Theory of Economic Regulation, at abstract (Univ. of Pa. Law Sch., Faculty Scholarship, Paper No. 1650, 2016) [https://scholarship.law.upenn.edu/faculty scholarship/1650/](https://scholarship.law.upenn.edu/faculty%20scholarship/1650/). [END FOOTNOTE]

In a recent book-length review of the capture literature, entitled "Failures of Capture Scholarship," 234political scientist Daniel Carpenter observes that scholars have had considerable difficulty "demonstrating the existence and degree of capture" despite the fact that their "evidentiary standards ... are rather low." 235All of this suggests that defaulting to capture explanations for pro-development siting decisions may be unwarranted.

#### It’s links equally to antitrust

Thibault Schrepel 20, Assistant Professor at Utrecht University School of Law, Associate Researcher at University of Paris 1 Pantheon-Sorbonne and Invited Professor at Sciences Po Paris, “Antitrust Without Romance”, New York University Journal of Law & Liberty, 13 NYU J.L. & Liberty 326, Lexis

In Section A.1, I demonstrate that antitrust authorities are particularly prone to co-option because of their place in the political process. As a result, personal interests find their way into official actions and push authorities to deviate from the purpose of promoting competition. 23I draw a map of these interests in Section A.2.

1. Antitrust Authorities in the Political Process

Public choice was the first theory to analyze the political process using principles of economics. 24Public choice academics have focused much of their attention on legislators, because the process of elections incentivizes letting personal goals play a role in how they behave while in power. 25 The theory explains that legislators respond to three different personal interests: (1) their desire for re-election; (2) their personal political and economic beliefs; and (3) the short-run influence of special-interest groups. 26In short, firms seek to [\*335] maximize profits, consumers seek to maximize utility, and policymakers seek to maximize political support. 27

However, legislators are not the only government actors that pursue personal interests. The personnel of regulatory agencies have a similar agenda and attempt to achieve their goals through their own institutions. This in turn may result in government failures. 28 This use of public power for private means is particularly relevant for antitrust authorities, both in the United States and Europe, insofar as they are closely linked to legislators through the appointment of commissioners, and legislative budgetary control. 29 This creates strong political responsiveness within antitrust authorities. 30

[\*336] In the United States, the Federal Trade Commission and the Antitrust Division of the Department of Justice submit their budget to Congress as part of the President's proposed budget. As for Europe, the Directorate General for Budget (DG Budget) prepares an annual budget, which is submitted the European Parliament and Council. Once the budget is adopted, DG Budget is responsible for distributing it between the different departments, including the Directorate General for Competition (DG Comp). Over the past ten years, the FTC's budget has increased steadily, 31while the DOJ Antitrust Division's budget has remained constant. However, DG Comp's administrative budget has increased by more than 33% in just four years. 32

How are these budget requests justified? The three antitrust authorities link their "budget justification" with their "Annual [\*337] Performance," or "Performance Report." 33Unsurprisingly, these reports focus primarily on each authority's level of enforcement. 34

One can draw two lessons from this. First, the budgets of antitrust authorities in both the United States and Europe are closely linked to the legislatures which have the last word on approving them. 35Therefore, public choice theory applies both to the legislator and the regulatory authorities, given their close relationship. Albert Cummins, one of the chief sponsors of the Federal Trade Commission Act, noted in 1914 that "the Commission is always subordinate to Congress (...) Congress can always destroy the Commission," 36making it clear that regulatory agencies exist subject [\*338] to Congress' political will. This subordination persists to this day. 37Second, budget requests are justified on the basis of antitrust authorities' "performance" 38which is a measure of the repressiveness of their enforcement activities. 39It is easier to measure the negative impact of certain events or practices (an anticompetitive practice, for instance) than to take into consideration positive trends such as an increase in the competitiveness of economies and the spread of innovation. 40Despite the difficulties, antitrust authorities' evaluation should consider any regulatory action's positive impact [\*339] on economic growth. The way in which their performance is currently evaluated creates an incentive for these authorities to focus on fining companies instead of finding other ways to ensure the competitiveness of markets.

2. The Expression of Personal Interests Within Antitrust Authorities

It is a staple of public choice theory that "groups do not make choices; only individuals do." 41For that reason, one cannot analyze the diverse interests of antitrust authorities, only their objectives. Moreover, as their personnel pursues these objectives, we must analyze to what extent their interests may conflict with the authority's goals.

The Personal Interest of Antitrust Authorities' Employees . 42Agency personnel may pursue a variety of personal interests. First, they may seek to promote their own beliefs. 43The impact of this behavior is [\*340] hard to measure. 44Let us simply note that the spectrum spans from "fairness" to laissez-faire. 45Commentators on either side of the spectrum have the impression that the good side is their end and the bad side is other end. This feeling is unfortunately accentuated by the romanticizing of antitrust law.

Second, the personnel of agencies may behave in ways that benefit solely their careers, whether within the government or in the private sector. 46 While these individuals are not subject to direct elections, internal appointments and external promotions lead to very similar strategies; on this basis, James Wilson has distinguished three types of employees within regulatory authorities: careerists, politicians and, professionals. 47Careerists aim to advance their [\*341] career within the agency, politicians pursue election outside the agency, and professionals seek the approval of other professionals outside their agency. 48

In the United States, for example, several former FTC Commissioners now work for technology companies that are under investigation or surveillance by these authorities. 49 In Europe, one may notice the tendency of antitrust agency personnel to get appointed to the European Commission or to courts of appeal. 50 The European Commission's personnel may also hope to move in the opposite direction and find a management position in national [\*342] antitrust authorities. 51 Key positions in the national authorities can also serve as a springboard for other elections or appointments, particularly given the high-profile nature of antitrust enforcement. 52The increase in the level of individual fines imposed in recent years by the European Commission has led sustained media coverage, 53which incentivizes the actualization of personal interests, and eventually government failures. 54

Antitrust agency personnel can achieve their own personal goals by acting to please a potential future employer through an improvement in the "performance" of the agency. Such a strategy would be less problematic if performance was measured through a non-litigation based metric as the personnel's interests could then be aligned with the promotion of competition. 55But under the current regime, litigation is key in evaluating antitrust authorities' performances, 56and as a result, antitrust authorities' employees [\*343] implement policies that do not benefit the public, but which instead bring out "good performances." 57Agency personnel currying favor with their superiors are thus incentivized to increase the levels of sanctions and litigation. 58

Private and Pseudo-State Interests. Antitrust authorities can be captured by various outside groups that lead antitrust employees to please them so as to maximize their own future interest. 59Public choice theorists have pointed out that special interest groups may capture regulatory authorities. 60This issue cannot be overlooked and [\*344] a precise risk map should be drawn in this area as antitrust authorities' employees may please these groups for personal benefit, to the detriment of consumers. 61The importance of this issue is growing as the scope of antitrust authorities is expanding, which increases the risk of regulatory capture by interest groups. 62

### Condo---2NC

### 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.

## Inequality ADV

### Antitrust Fails---Circumvention---2NC

#### Businesses shift to end-around antitrust

Kate Tromble 21 & Gregory Nantz, TROMBLE is vice president for Federal Policy at Results for America; NANTZ is a consultant for Results for America, “Federal Evidence-Based Competition Policy,” Inequality and the Labor Market, edited by Sharon Block and Benjamin H. Harris, Brookings Institution Press, 2021, pp. 193–208 JSTOR, https://www.jstor.org/stable/10.7864/j.ctv13vdhvm.17

4. Employer Concentration

A fourth issue contributing to lack of competition in labor markets is increased employer concentration. By one estimate, employer concentration reduces workers’ share of overall economic output by one-sixth to onethird (Naidu, Posner, and Weyl 2018). Increased employer concentration also reduces the number of firms competing within a given market, which reduces the risk to employers of engaging in collusion—even if the collusion is not explicit (Padin 2018). Although federal antitrust reforms could help to reduce employer market concentration, the mechanisms by which employers assert monopsony power are diffuse, requiring action along multiple fronts to successfully increase workers’ bargaining power relative to their employers (Bivens, Mishel, and Schmitt 2018).

U.S. labor laws have been in place for decades, but anticompetitive forces continue to impact workers. Those forces have changed over the years, warranting a systematic review of the cause and effect of statutory and regulatory changes on labor market activity. The federal govern ment has not, however, conducted such a systematic evaluation. Rather, the role of evaluator has been largely outsourced to academic economists and lawyers. Minimum wages, for example, have been the subject of decades of research, with a weak consensus only recently emerging. We need faster and more-robust systems and resources for understanding the impact of our federal labor laws on workers, employers, and markets. The federal government, through the DOL’s Chief Evaluation Office (CEO; the CEO is housed within the Office of the Assistant Secretary for Policy), could provide this kind of cohesive labor market research and evaluation activity.

#### Their authors lost this debate 30 years ago to the Econ DA and case defense.

Christopher S. Yoo 20, John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, “Hipster Antitrust: New Bottles, Same Old W(h)ine?”, University of Pennsylvania Law School Institute for Law and Economics, 04-06-2020, https://ssrn.com/abstract=3567928

The contours of this debate are well documented in the antitrust literature, outlined quite nicely in Michael Jacobs’s 1995 historical survey. During the 1970s and 1980s, antitrust populists waged an unsuccessful war against the growing dominance of the economic approach to antitrust and attempted to preserve the Warren Court jurisprudence that regarded large firm size and industry concentration as inherently problematic without any need to analyze the impact of particular business practices on consumers. They faced a vigorous academic critique showing that large size may well be the product of economies of scale inherent in a particular industry or from being a more efficient competitor. As the consumer welfare standard became entrenched in judicial decisions, the academic literature, and agency practice and guidance documents, populist criticism “took on a frantic tone” and eventually “grudgingly acknowledged the success” of the consumer welfare approach. By the end of the 1980s, the debate between the populist and the economic approaches “ha[d] lost its drama,” and “[t]he victory of a purely economic analysis . . . could hardly seem more complete.”2

Gone were the days when big was regarded as inherently bad and when small firms were protected for their own sake. Instead, firm size was relevant only to the extent that it benefitted or harmed consumers. Herbert Hovenkamp has noted that the problem with applying standards other than consumer welfare is that the goals:

are unmeasurable and fundamentally inconsistent, although. . .their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.3

It thus comes as no surprise that during this period, the Supreme Court embraced consumer welfare as the appropriate standard under the Sherman Act.4 The emergence of a consensus that economic analysis should dictate the contours of antitrust did not, of course, mean the end of all controversy. As anyone who has worked with economists knows, agreement that consumer welfare is the goal of antitrust still leaves a great deal of room for differences of opinion. During the 1990s and 2000s, these disputes took place between the largely price-theoretic approach of the Chicago School and the more game-theoretic approach of the post-Chicago School. More recently, antitrust has taken a more empirical turn. It would be a mistake, however, to regard these disputes as a rehash of the old fight between the economic and populist approaches. Instead, these arguments took place within a shared commitment to consumer welfare as the proper antitrust standard. In the words of Carl Shapiro, Berkeley business professor and former Deputy Assistant Attorney General for Economics of the U.S. Department of Justice’s Antitrust Division, “If ‘Post-Chicago Economics’ stands for the notion that . . . antitrust should move away from promoting efficiency and consumer welfare, count me out.”5

#### They fall prey to the nirvana fallacy.

Christopher S. Yoo 20, John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, “Hipster Antitrust: New Bottles, Same Old W(h)ine?”, University of Pennsylvania Law School Institute for Law and Economics, 04-06-2020, https://ssrn.com/abstract=3567928

In short, to experienced observers of antitrust, the current uproar about hipster antitrust has the familiar ring of a debate that both sides thought had been long settled. The new bottles do not hide the fact that the wine is the same, and the same vinegary flavor that led to its rejection a generation ago remains. Although complaining about large companies has always had a certain appeal in some quarters and may have new appeal in others, mere slogans and epithets do not represent an adequate substitute for reasoned analysis. This is particularly true in the digital economy, which has yielded specular economic growth and value and in which the need for large investments in R&D and other features of the market may necessitate the existence of large firms if consumers are to enjoy these benefits. Moreover, the classic nirvana fallacy reminds us how easy it is to point out the flaws of one approach while foregoing any close examination of the proffered alternative, which no doubt suffers from flaws of its own that may be even greater. The absence of a coherent alternative to the consumer welfare standard thus limits the seriousness with which complaints about it are taken. All of these considerations are framed by the backdrop that vague standards open the door to political manipulation and abuse and that enforcement authorities around the world typically watch U.S. antitrust law closely and often take cues from how it develops. They underscore the importance of avoiding the seduction of basing legal changes on mere demagoguery and insisting that any reforms be based on a solid analytical foundation.

#### Overwhelming consensus goes neg.

Christopher S. Yoo 20, John H. Chestnut Professor of Law, Communication and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, “Hipster Antitrust: New Bottles, Same Old W(h)ine?”, University of Pennsylvania Law School Institute for Law and Economics, 04-06-2020, https://ssrn.com/abstract=3567928

The continuing support for the consumer welfare standard was evident at the December 13, 2017, hearings held by the Antitrust Subcommittee of the Senate Judiciary Committee on “The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?” While one of the speakers advocated abandoning the consumer welfare standard, the other three disagreed, including those who generally favor more vigorous enforcement of the antitrust laws.

Diana Moss of the American Antitrust Institute, one of the leading organizations arguing in favor of ramping up antitrust enforcement, stated that her organization “has always held the view that the antitrust laws are fundamentally durable and the consumer welfare standard is fully capable of meeting the challenges of the modern economy.” She cautioned that “remaking the antitrust laws or replacing the existing consumer welfare standard would throw the enforcement agencies, private plaintiffs, and the courts into disarray.” She then traced enforcement actions taken under the consumer welfare standard, concluding that “[t]hey support the notion that the standard capable of taking on the challenges we face moving forward” and that “[t]he consumer welfare standard is able to tackle the manifestation and exercise of market power in these settings.” In short, any problems with antitrust lay in the vigor with which it has been enforced, not in the consumer welfare standard itself.6

Shapiro similarly endorsed the consumer welfare standard and rejected concluding that a firm harms consumers simply because it has obtained a dominant position. He further stated:

During the 40 years that I have been studying and practicing antitrust, there has been a broad consensus among antitrust scholars and practitioners in favor of the “consumer welfare” standard. No evidence whatsoever has been put forward calling this consensus into question. Indeed, I know of no serious antitrust experts who favor abandoning the “consumer welfare” standard, and no workable alternative has been proposed.7

### Econ D---2NC

#### Empirics prove austerity pressures overwhelm.

Christopher **Clary 15**, Ph.D. in Political Science from MIT, Postdoctoral Fellow, Watson Institute for International Studies, Brown University, “Economic Stress and International Cooperation: Evidence from International Rivalries,” April 22, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2597712

Do economic downturns generate pressure for diversionary conflict? Or might downturns encourage austerity and economizing behavior in foreign policy? This paper provides new evidence that economic stress is associated with conciliatory policies between strategic rivals. For states that view each other as military threats, the biggest step possible toward bilateral cooperation is to terminate the rivalry by taking political steps to manage the competition. Drawing on data from 109 distinct rival dyads since 1950, 67 of which terminated, the evidence suggests rivalries were approximately twice as likely to terminate during economic downturns than they were during periods of economic normalcy. This is true controlling for all of the main alternative explanations for peaceful relations between foes (democratic status, nuclear weapons possession, capability imbalance, common enemies, and international systemic changes), as well as many other possible confounding variables. This research questions existing theories claiming that economic downturns are associated with diversionary war, and instead argues that in certain circumstances peace may result from economic troubles. Defining and Measuring Rivalry and Rivalry Termination I define a rivalry as the perception by national elites of two states that the other state possesses conflicting interests and presents a military threat of sufficient severity that future military conflict is likely. Rivalry termination is the transition from a state of rivalry to one where conflicts of interest are not viewed as being so severe as to provoke interstate conflict and/or where a mutual recognition of the imbalance in military capabilities makes conflict-causing bargaining failures unlikely. In other words, rivalries terminate when the elites assess that the risks of military conflict between rivals has been reduced dramatically. This definition draws on a growing quantitative literature most closely associated with the research programs of William Thompson, J. Joseph Hewitt, and James P. Klein, Gary Goertz, and Paul F. Diehl.1 My definition conforms to that of William Thompson. In work with Karen Rasler, they define rivalries as situations in which “[b]oth actors view each other as a significant political-military threat and, therefore, an enemy.”2 In other work, Thompson writing with Michael Colaresi, explains further: The presumption is that decisionmakers explicitly identify who they think are their foreign enemies. They orient their military preparations and foreign policies toward meeting their threats. They assure their constituents that they will not let their adversaries take advantage. Usually, these activities are done in public. Hence, we should be able to follow the explicit cues in decisionmaker utterances and writings, as well as in the descriptive political histories written about the foreign policies of specific countries.3 Drawing from available records and histories, Thompson and David Dreyer have generated a universe of strategic rivalries from 1494 to 2010 that serves as the basis for this project’s empirical analysis.4 This project measures rivalry termination as occurring on the last year that Thompson and Dreyer record the existence of a rivalry.5 Why Might Economic Crisis Cause Rivalry Termination? Economic crises lead to conciliatory behavior through five primary channels. (1) Economic crises lead to austerity pressures, which in turn incent leaders to search for ways to cut defense expenditures. (2) Economic crises also encourage strategic reassessment, so that leaders can argue to their peers and their publics that defense spending can be arrested without endangering the state. This can lead to threat deflation, where elites attempt to downplay the seriousness of the threat posed by a former rival. (3) If a state faces multiple threats, economic crises provoke elites to consider threat prioritization, a process that is postponed during periods of economic normalcy. (4) Economic crises increase the political and economic benefit from international economic cooperation. Leaders seek foreign aid, enhanced trade, and increased investment from abroad during periods of economic trouble. This search is made easier if tensions are reduced with historic rivals. (5) Finally, during crises, elites are more prone to select leaders who are perceived as capable of resolving economic difficulties, permitting the emergence of leaders who hold heterodox foreign policy views. Collectively, these mechanisms make it much more likely that a leader will prefer conciliatory policies compared to during periods of economic normalcy. This section reviews this causal logic in greater detail, while also providing historical examples that these mechanisms recur in practice.

## FTC Cred ADV

### Cred Resilient---2NC

#### Its consumer protection status is rock solid AND delinked from antitrust

David A. Hyman 14, H. Ross & Helen Workman Chair in Law and Professor of Medicine, University of Illinois, and former special Counsel at the Federal Trade Commission, & William E. Kovacic, Visiting Professor at King's College London and the Global Competition Professor of Law and Policy at George Washington University Law School, “Competition Agencies with Complex Policy Portfolios: Divide or Conquer?”, Illinois Program in Law, Behavior and Social Science Paper No. LE12-14, 11/3/2014, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2110351

The FTC has strived to establish general recognition that it is the principal federal agency for safeguarding consumer interests. This is common element of branding by agencies with a dual competition and consumer protection mandate. The United Kingdom’s Office of Fair Trading (OFT), which has largely the same remit as the FTC, states its purpose as “making markets work well for consumers.”103 This short and statement of purpose is one of many ways that similarly situated agencies identify themselves with the promotion of consumer well-being.

In this aim, the Commission appears to have been generally successful. Its public reputation and its stature within Congress largely derive from its consumer protection work, especially highly visible initiatives such as the Do Not Call program.104 There is only modest awareness of the Commission’s role as a competition policy institution, and perhaps still weaker understanding of how the agency’s combination of functions informs its choice and execution of programs. Thus, the agency is largely associated with consumer protection issues. The breadth of the agency’s mandate can create unwanted expectations that the agency is the appropriate solution for all difficult economic problems that affect consumers.

#### Congress will do oversight or hearings---not open backlash

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There are a variety of ways to ensure that the agency is accountable for its decisions without interfering in its decision to investigate, to prosecute, to punish, or to exercise other powers. A legislature can hold periodic hearings at which legislators can press the agency's leadership to explain its action in completed matters and to discuss general trends in policy. The agency itself can issue statements explaining specific decisions to prosecute or not to prosecute. It can maintain and disclose data sets about its activities to permit informed external debate about its allocation of resources. An agency can also implement a program of ex post assessment by which the consequences of individual initiatives are measured. 58 All of these techniques make the agency accountable for its policy choices without permitting the political branches of government to determine how power will be exercised in specific matters.

### No Emerging Tech Impact---2NC

#### No emerging tech impact

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

# 1NR

## Hospitals DA

### Impact---2NC

#### It causes nuke war in Asia and the Middle East---each independently causes extinction

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Weapons of Mass Destruction

Detonating just 50–100 out of the global arsenal of nearly 15,000 nuclear weapons would suffice to end civilisation in a nuclear winter, causing worldwide famine and economic collapse affecting even distant nations, as we saw in the previous chapter in the section dealing with South Asia. Eight nations now have the power to terminate civilisation should they desire to do so – and two have the power to extinguish the human species. According to the nuclear monitoring group Ploughshares, this arsenal is distributed as follows:

– Russia, 6600 warheads (2500 classified as ‘retired’)

– America, 6450 warheads (2550 classified as ‘retired’)

– France, 300 warheads

– China, 270 warheads

– UK, 215 warheads

– Pakistan, 130 warheads

– India, 120 warheads

– Israel, 80 warheads

– North Korea, 15–20 warheads.11

Although actual numbers of warheads have continued to fall from its peak of 70,000 weapons in the mid 1980s, scientists argue the danger of nuclear conflict in fact increased in the first two decades of the twenty-first century. This was due to the modernisation of existing stockpiles, the adoption of dangerous new technologies such as robot delivery systems, hypersonic missiles, artificial intelligence and electronic warfare, and the continuing leakage of nuclear materials and knowhow to nonnuclear nations and potential terrorist organisations.

In early 2018 the hands of the ‘Doomsday Clock’, maintained by the Bulletin of the Atomic Scientists, were re-set at two minutes to midnight, the highest risk to humanity that it has ever shown since the clock was introduced in 1953. This was due not only to the state of the world’s nuclear arsenal, but also to irresponsible language by world leaders, the growing use of social media to destabilise rival regimes, and to the rising threat of uncontrolled climate change (see below).12

In an historic moment on 17 July 2017, 122 nations voted in the UN for the first time ever in favour of a treaty banning all nuclear weapons. This called for comprehensive prohibition of “a full range of nuclear-weapon-related activities, such as undertaking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.”13 However, 71 other countries – including all the nuclear states – either opposed the ban, abstained or declined to vote. The Treaty vote was nonetheless interpreted by some as a promising first step towards abolishing the nuclear nightmare that hangs over the entire human species.

In contrast, 192 countries had signed up to the Chemical Weapons Convention to ban the use of chemical weapons, and 180 to the Biological Weapons Convention. As of 2018, 96 per cent of previous world stocks of chemical weapons had been destroyed – but their continued use in the Syrian conflict and in alleged assassination attempts by Russia indicated the world remains at risk.14

As things stand, the only entities that can afford to own nuclear weapons are nations – and if humanity is to be wiped out, it will most likely be as a result of an atomic conflict between nations. It follows from this that, if the world is to be made safe from such a fate it will need to get rid of nations as a structure of human self-organisation and replace them with wiser, less aggressive forms of self-governance. After all, the nation state really only began in the early nineteenth century and is by no means a permanent feature of self-governance, any more than monarchies, feudal systems or priest states. Although many people still tend to assume it is. Between them, nations have butchered more than 200 million people in the past 150 years and it is increasingly clear the world would be a far safer, more peaceable place without either nations or nationalism. The question is what to replace them with.

Although there may at first glance appear to be no close linkage between weapons of mass destruction and food, in the twenty-first century with world resources of food, land and water under growing stress, nothing can be ruled out. Indeed, chemical weapons have frequently been deployed in the Syrian civil war, which had drought, agricultural failure and hunger among its early drivers. And nuclear conflict remains a distinct possibility in South Asia and the Middle East, especially, as these regions are already stressed in terms of food, land and water, and their nuclear firepower or access to nuclear materials is multiplying.

It remains an open question whether panicking regimes in Russia, the USA or even France would be ruthless enough to deploy atomic weapons in an attempt to quell invasion by tens of millions of desperate refugees, fleeing famine and climate chaos in their own homelands – but the possibility ought not to be ignored.

That nuclear war is at least a possible outcome of food and climate crises was first flagged in the report The Age of Consequences by Kurt Campbell and the US-based Centre for Strategic and International Studies, which stated ‘it is clear that even nuclear war cannot be excluded as a political consequence of global warming’. 15 Food insecurity is therefore a driver in the preconditions for the use of nuclear weapons, whether limited or unlimited.

A global famine is a likely outcome of limited use of nuclear weapons by any country or countries – and would be unavoidable in the event of an unlimited nuclear war between America and Russia, making it unwinnable for either. And that, as the mute hands of the ‘Doomsday Clock’ so eloquently admonish, is also the most likely scenario for the premature termination of the human species.

Such a grim scenario can be alleviated by two measures: the voluntary banning by the whole of humanity of nuclear weapons, their technology, materials and stocks – and by a global effort to secure food against future insecurity by diverting the funds now wasted on nuclear armaments into building the sustainable food and water systems of the future (see Chapters 8 and 9).

#### Shortages cause pandemics---extinction

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Pandemic Disease

Disease pandemics have been a well-known existential risk to humanity since the plague of Athens in 430 BC – itself linked to a war. However, a point that escapes many people nowadays is that, as humans have become so numerous – indeed the predominant lifeform on the planet – we have also become the major food source for many microbes. We are now the ‘living compost heap’ on which they must dine and in which they must reproduce, if they are themselves to survive.

As our own population grows, pandemics are thus likely to increase, as more and more viruses and bacteria are forced to take refuge in humans following the depletion or total extinction of their natural hosts, the wild animals we are exterminating. This process is greatly assisted by our creation of megacities, tourism and air travel, schools and child-minding centres, air-conditioned offices, night clubs, sex with strangers, pet and pest animals, insects which prosper from climate change or human modification of the environment (like mosquitoes), ignorance, poor public hygiene, lack of clean water, and deficient food processing and handling.

So, while humanity is confronted with an ever-expanding array of parasites, we are simultaneously doing everything in our power to distribute them worldwide in record time – and to seed new pandemics. The World Health Organisation has identified 19 major infectious diseases with potential to become pandemic: chikungunya, cholera, Crimean-Congo haemorrhagic fever, Ebola, Hendra, influenza, Lassa fever, Marburg virus, meningitis, MERS-CoV, monkeypox, Nipah, plague, Rift Valley fever, SARS, smallpox, tularaemia, yellow fever and Zika virus disease.28 While none of these is likely to fulfil the Hollywood horror movie image of wiping out the human species – for the simple reason that viruses are usually smart enough to weaken to a sublethal state once comfortably ensconced in their new host – the apocalyptic horseman representing Pestilence and Death will nevertheless continue to play a synergetic role with his companions warfare, famine, climate change, global poisoning, ecological collapse, urbanisation and other existential threats.

Food insecurity affects the progression of pandemic diseases, often in ways that are not entirely obvious. First, new pandemics of infectious disease tend to originate in developing regions where nutritional levels are poor or agricultural practices favour the evolution of novel pathogens such as, for example, the new flu strains seen every year – which arise mainly from places where people, pigs and poultry live side-by-side and shuffle viruses between them – and also novel diseases like SARS and MERS. Second, because totally unknown diseases tend to arise first in places where rainforests are being cut down for farming and viruses hitherto confined to wild animals and birds make an enforced transition into humans. Examples of novel human diseases escaping from the rainforest and tropical savannah in recent times include HIV/AIDS, Hendra, Nipah, Ebola, Marburg, Lassa and Hanta, Lujo, Junin, Machupo, Rift Valley, Congo and Zika.29 And thirdly, because the loss of vital micronutrients from heavily farmed soils and from food itself predisposes many populations to various deficiency diseases – for example, a lack of selenium in the diet has been linked with increased risk from both HIV/AIDS and bowel cancer.30 A key synergy is the way hunger and malnourishment exacerbate the spread of disease, classic examples being the 1918 Global Flu Pandemic which spread rapidly among war-starved populations, or the more recent cholera outbreak in war-torn Yemen. In a fresh twist, Dr Melinda Beck of North Carolina University has demonstrated that obesity – itself a form of malnutrition – may cause increased deaths from influenza by both aiding the virus and suppressing the patient’s immune response.31

At the same time, food is largely responsible for the fastest growing pandemic of all – the so-called ‘lifestyle’, chronic or noncommunicable diseases, such as cancer, heart disease, diabetes, obesity, kidney and liver failure and some mental conditions, all of which are diet-related. These are responsible for 71 per cent of deaths worldwide, killing around 42 million people a year.32

Food and dietary quality are therefore inseparable from worldwide efforts to prevent or contain new disease pandemics. Vaccines, public health and biosecurity alone are not enough. In an overpopulated world, people must be sufficiently well-fed to avoid becoming fertile soil for the germination of fresh plagues. Diseases must be prevented – not just ‘cured’, and the key to prevention lies in a healthy diet.33

### AT: No Link

#### Hospitals are the next target AND carefully watch the overall regulatory environment when deciding to merge---there’s just enough confidence to sustain acquisitions because antitrust is other areas is restrained

Douglas Litvack 21, JD, Attorney at Davis Wright Tremaine LLP, “Antitrust State of Play for Healthcare Providers Under a New Administration - Part I: Mergers and Acquisitions”, JD Supra, 8/11/2021, https://www.jdsupra.com/legalnews/antitrust-state-of-play-for-healthcare-3757565/

Antitrust scrutiny of large technology companies may be in the headlines, but what some have dubbed "Big Med" is being eyed by the Biden Administration and federal agencies for heightened antitrust enforcement. Hospitals, physician groups, and health plans already accustomed to an active antitrust enforcement climate may need to prepare for even choppier regulatory waters ahead as a new President and new leadership at the Federal Trade Commission (FTC) and Department of Justice (DOJ) turn their focus on healthcare provider markets.

In the first of a series of articles, we look at the latest developments in competition policy and enforcement in provider markets, before turning to their impact on dealmaking during a time of rapid change and consolidation in the healthcare industry.

Pro-Enforcement Era for Healthcare Antitrust

President Biden's appointment of Lina Khan, a progressive reformer and supporter of aggressive enforcement of the antitrust laws, as the swing vote and Chair of the FTC was the first major harbinger of the changes to come. At that point, the federal antitrust agencies had already stopped granting "early termination" of merger reviews.1 Without the discretionary practice, non-problematic deals have had to wait the full 30 days of an initial review period following their filing with the government, resulting in some delay.

But the first sign that the new FTC, under Chair Khan, would have its eyes on healthcare providers in particular came at an open meeting of the Commissioners held last month. At that meeting, a 3-2 majority voted to single out healthcare—including hospitals and other providers—among several other industries as "enforcement priorities" that would be subject to resolutions authorizing sweeping compulsory process probes.2 The resolutions were described as removing "red tape bureaucracy" during a "massive merger boom," with both proposed and consummated transactions as potential targets.

Next came the Biden Administration's Executive Order on Promoting Competition in the American Economy, which singled out healthcare markets impacted by "hospital consolidation" for heightened antitrust scrutiny.3 The Executive Order identifies lowering prices and improving quality and access to care, in particular in rural communities, as requiring more vigorous enforcement of federal antitrust laws. It directs the FTC and DOJ to "review and revise their merger guidelines," which influence how agency staff conduct merger investigations. Judges also rely on the guidelines to help them assess the legality of mergers.

Finally, at the most recent open meeting of the FTC, a majority of Commissioners voted to rescind a 1995 Policy Statement that had limited the use of "prior approval" requirements in merger consent decrees. These decrees are settlements that the agency sometimes reaches with merging parties as conditions for not opposing their deal in court.4 Prior approval provisions require giving the FTC advance notice (before closing the transaction) of certain future deals and can even require the parties when presenting future deals to prove to the agency that they are not anti-competitive. The latter in effect flips the burden of proof, which normally lies with the government to challenge a deal, to the merging parties.

Active Enforcement Against Healthcare Provider Mergers

None of the recent actions of the Biden Administration or FTC are significantly out of step with the recent trend of vigorous merger enforcement against healthcare providers.

The healthcare industry has grown accustomed in the last decade to close scrutiny and frequent challenges to hospital and physician practice deals. A 2019 report from the FTC detailed at least nine hospital mergers and six physician group acquisitions that the agency challenged going back to 2008.5 Since then, it has challenged at least three more hospital deals, in addition to launching a merger retrospective study earlier this year to analyze the market effects of physician group and hospital consolidation.6

But even with this recent history of active enforcement, there does seem to be some acceleration in the trendline. Following last summer's blockbuster "Big Tech" hearings, Congress held another round of less-publicized, though still significant, hearings that focused on healthcare markets. At two separate hearings in the Senate and House of Representatives, lawmakers elicited testimony seeking to show that hospital and physician practice acquisitions are driving up healthcare costs, failing to improve quality of care, and lowering employee wages.7 Participants called for more aggressive enforcement of merger laws.

What an Executive Branch on Antitrust High Alert Means for Healthcare Provider Dealmaking

With so much interest from the Oval Office, federal enforcers, and Congress, healthcare providers—hospitals, physician groups, and integrated health systems—should anticipate heightened scrutiny of mergers and acquisitions.

At this time, with broader antitrust reforms still in draft bill form, nothing has changed about which types of deals will need to be reported to federal authorities. But companies should expect more frequent review of "non-reportable" transactions, which are deals falling under the thresholds that require pre-merger notification to the federal government.8 Formal integrations in healthcare can often be non-reportable. Non-reported deals have always been subject to investigations by federal authorities, but the recent directives of the Biden Administration and policy shifts at the FTC suggest that the agency will be more proactive in scoping out such deals for review.

The FTC's recent posturing also suggests that parties should expect additional scrutiny of consummated deals. That could include, for example, non-reportable transactions that have closed. But it also may involve fresh looks at mergers previously reported to the government that did not result in any action being taken. It is important to keep in mind that the FTC and DOJ never "approve" a merger. Although their decision not to take action against a merger upon reviewing it is a very strong indicator that they never will, they reserve the right to challenge it as unlawful in the future.

The typical forward-looking merger review seeks to predict the future competitive effects of a merger that has not yet occurred. By contrast, a retrospective investigation of a consummated deal looks back at everything that has happened post-merger to determine if it has, in fact, harmed competition. For example, post-closing pricing changes can be attributed to the merger, as can quality improvements or cost efficiencies. Therefore, in a climate of more active enforcement against consummated deals, merging companies should be more mindful of what their post-closing integration activities could mean for a future investigation of the deal.

The recent directives from the Biden Administration and policy shifts at the FTC also indicate that merging parties should be prepared to tackle a wider spectrum of theories of competitive harm when interfacing with the agency. For example, agency staff reviewing a hospital merger might need to more fully vet its potential impact on workers in labor markets, such as nurses or physicians, arising from the consolidation of employers in the market. Enforcers will also likely look more closely than they have in the past at vertical theories of harm involving "exclusionary conduct." This might include concerns, for example, about whether a health system buying a rival hospital faces increased incentives to cause its integrated insurance plan to lock out a rival provider from its network. Another concern might be that a hospital buying a group of physicians causes rival hospitals to lose access to specialists.

All of this would, of course, come on top of the extensive analysis already being done in these cases to determine whether the elimination of horizontal competition between merging providers might harm insurers and their members by creating fewer market alternatives. Therefore, more consideration of novel theories of competitive harm will only add to the burden and complexity that companies already face in assessing the risk that the government might challenge the deal and what remedies it might require as a condition for permitting the deal to close.

A wider competitive effects analysis will also likely lead to longer and more detailed government review of deals. Under the FTC's new policy, early termination is now essentially out of the question. At the same time, the agency appears poised to more frequently go beyond the 30-day window for its initial review that the merger statute provides for. Traditionally, at the 30-day mark, it has relied on asking parties to "pull-and-refile" their merger filing to restart the clock. But with a recent announcement, it appears the FTC may instead send a "pre-consummation warning letter" to the merging parties telling them that a review is ongoing and that they consummate the deal at their own risk.9 This could leave merging parties in a state of indefinite limbo if they are not willing to take the risk of closing on a deal that could later be challenged.

As for deals where the agency's concerns persist beyond the initial review period, parties should expect to receive an expansive "Second Request" for more information to trigger a detailed probe. Agency staff is likely to face pressure to ensure they capture all potentially relevant evidence, including anything needed to support the broader set of possible legal theories. Expansive Second Requests could also be used by overburdened agency staff as a tool to buy themselves more time to investigate.10 Merging parties will need to account for these potential delays and hurdles in the regulatory clearance process in their deal negotiations, in particular in how they allocate the risks associated with a prolonged review and potential challenge from the government.

Finally, the agency's recent policy shifts also mean that parties might now expect to see the FTC request a "prior approval" requirement as a condition (among others in the consent decree) for allowing a challengeable transaction to go through. This would mean having to give advance notice to the government of future transactions in related markets, including ones that would otherwise be non-reportable under the merger laws.

The main effect of a prior approval requirement, especially if it also contains a provision that flips the government's burden onto the merging parties in future filings, is that hospitals or health systems in an expansion mode cannot look at antitrust risk in isolation. In looking at whether to do a deal today, they will need to consider the regulatory risk posed to future deals (some of which may have more significant strategic importance) that could be subjected to a prior approval requirement.

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

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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

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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.

### AT: Antitrust Now

#### Hospital mergers are ramping AND on the cusp of expanding to rural markets BUT on the brink due to COVID

Susan Kelly 22, Contributor at Healthcare Drive, Freelance Journalist at MedTech, Former Correspondent from Thompson Reuters, BS in Journalism from Northwestern University, “Hospitals Turned to M&A to Shore Up Core Operations Last Year”, Healthcare Dive, 1/11/2021, Lexis

Hospitals in 2021 inked M&A deals aimed at stabilizing their pandemic-shaken core operations, according to a new analysis Monday from Kaufman Hall. It was a year marked by a significant drop in transactions across the sector overall, but a higher percentage of larger-sized deals.

•Just 49 health system mergers were announced in 2021, down from 79 in 2020 and the lowest number in a decade, according to the report. Yet the number of "mega mergers" in which the seller's annual revenue exceeds $1 billion almost doubled, reaching 16.3% in 2021, compared to 8.9% the year before. More than 12% of the smaller partners in those deals had a credit rating of A- or higher.

•Hospitals are also entering a new phase in healthcare dealmaking focused on partnerships that will look to tackle broader societal problems and address the needs of underserved populations, the industry consultants said.

Dive Insight:

Transactions involving groups of facilities in concentrated markets were one of 2021's most notable trends, the report found. Prominent examples included Tenet Healthcare's $1.1 billion sale of five hospitals and associated physician practices in south Florida to Steward Health Care and HCA's sale of four Georgia hospitals to Piedmont Healthcare for $950 million.

Steward doubled its Florida footprint through its deal with Tenet. HCA, meanwhile, said the hospitals it sold to Piedmont were not able to fully benefit from the chain's presence in their areas, Kaufman Hall said.

Pandemic disruptions and financial pressures have made non-core assets and markets less attractive to acquirers, the report said. Meanwhile, asset divestitures allow multi-regional systems to free up resources and re-balance portfolios focused elsewhere.

The consultants noted fewer independent, unaffiliated community hospitals seeking partnerships. In 2021's transactions, the average size of the smaller partner by annual revenue jumped to $619 million, from $388 million in 2020. Since 2011, average smaller partner size has increased at a compound annual growth rate of about 8%, they said.

The pandemic has drawn fresh attention to issues of health equity and underserved populations, and addressing those issues is becoming a stated goal of partnerships. In the Chicago area, for example, the merger of Edward-Elmhurst Health and NorthShore University HealthSystem includes creation of a community investment fund to which each partner will commit $100 million to support organizations working to advance health equity and local economic growth.

The report highlighted the efforts of several academic medical centers making a push to expand their intellectual capital resources in the past year. Among them, East Carolina University's Brody School of Medicine and Vidant Health joined forces to create ECU Health, with the goal of becoming a model for rural healthcare.

#### Current antitrust is all pronouncement and no law---it’ll all get jammed up in court AND businesses know that, so it hasn’t effected mergers---the plan is a unique break

John Ingrassia 22, Senior Counsel at Proskauer Rose LLP, JD from Hofstra University School of Law, BA from Pace University, “How to Navigate the Coming Antitrust Policy Tests”, JD Supra, 1/5/2022, https://www.jdsupra.com/legalnews/how-to-navigate-the-coming-antitrust-7543303/

2021 will be remembered in antitrust law. Not since the 1970s has there been so much chatter over the fundamental purposes of antitrust policy, or such potential for actual sea change.

Half a century ago, Robert Bork and the Chicago School argued that antitrust law had lost its way and should focus on consumer welfare. Bork's view was that antitrust enforcement was getting in the way of legitimate competition, and the U.S. Supreme Court was quick to embrace the consumer welfare standard.

Now, Federal Trade Commission Chair Lina Khan and the new Brandeisians argue that antitrust law has again lost its way and must shed the constraints of the consumer welfare standard.

Khan's view is that consolidation has gone unchecked in the American economy, resulting in structural harms to competition that the consumer welfare standard is unable to address.

She believes the agency has historically defined markets too narrowly to effectively police broader economic impacts of sustained consolidation, and favored gerrymandered remedies over outright challenges.

Khan has imposed sweeping changes aimed at chilling merger activity and shaping the future of merger enforcement. Against dissents from Republican Commissioners Christine Wilson and Noah Phillips, and charge of going rogue from the U.S. Chamber of Commerce, the FTC stripped away long-standing exemptions and interpretations that streamlined merger review.

The action came in response to an unprecedented merger wave — 3,845 acquisitions filed with the agencies in the first 11 months of 2021, substantially more than most full years.

The changes are having an impact, making investigations more intrusive, lengthy and less predictable. Still, policy precedes practice, and while the FTC has been heavy on policy, it has yet to test those policies in the courts.

The tests may come in the next year. Meanwhile, we can also expect the FTC and the U.S. Department of Justice under Assistant Attorney General Jonathan Kanter's leadership, to not only continue the trajectory of policy changes but also begin the task of entrenching them in agency practice.

Here, we review the year in FTC policy moves, what they mean and how to navigate the newly laid minefields.

Warning Letters After the Close of HSR Waiting Periods

In an unprecedented move, the FTC recently began issuing letters to parties in transactions

the agency may intend to investigate after expiration of the Hart-Scott-Rodino Act waiting period. According to the agency in an Aug. 3, 2021, blog, this is the result of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."

Wilson, however, said on Twitter on Aug. 12, 2021, that she was "gravely concerned that the carefully crafted HSR framework is suffering a death by a thousand cuts," following her Aug. 9 statement that said "For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings."

The FTC's jurisdiction to review transactions is independent of the HSR reporting requirements, with the power to investigate any transaction before or after closing, whether subject to reporting or not, and whether the HSR waiting period has expired or not.

There are examples of the agencies reviewing nonreportable transactions, and even investigating reportable transactions after expiration of the HSR waiting period, though they are rare.

The warning letters do not assert new authority not already existing under law, but notifying parties that an investigation may remain open post-HSR clearance implicates finality and certainty of investigations, but not every transaction gets a warning letter. Those with no issues go through unscathed. Those with clear issues are investigated.

The deals that might pose some issues, but not enough to draw an investigation, might trigger the newly minted warning letter. To show the letters have teeth, the FTC will sooner or later have to challenge a deal post-HSR waiting period, putting it to the test before courts, where it is likely to face hurdles to the extent the deal did not warrant a full investigation in the first instance.

Still, the practice is ushering a change in how provisions are drafted in deal documents. A buyer asserting that it is not required to close over the — arguably — still-pending investigation may face an uphill battle depending on how the closing conditions are drafted, for they typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations or issuance of warning letters.

So careful buyers seek closing requirements that no investigations are threatened and that no warning letters have been issued. Recent examples include the 3D Systems Corp.'s agreement to acquire Oqton Inc. and Universal Corp.'s agreement to buy Shank's Extracts Inc.

The parties' agreements provided that if a warning letter is issued, the investigation would be treated as closed 30 days after receipt of such letter. Buyers may want to consider similar provisions until more emerges on how the FTC will proceed with warning letter transactions.

More Intensive Merger Investigations

The FTC announced plans on Aug. 3, 2021, to make the second request process both "more streamlined and more rigorous." The changes include the following:

Merger investigations will address additional potentially impacted competition, such as labor markets, cross-market effects, and the impact on incentives of investment firms.

Modifications to second requests will be more limited.

The agency will require parties to provide more information relating to their use of e- discovery in responding to the investigation.

Additional information will be required with respect to privilege claims.

The FTC said these changes are in recognition that "an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."

Possibly in response to such steeped up investigative techniques and resistance to find common ground with merger parties, Sportsman's Warehouse Holdings Inc. and Great Outdoors Group LLC abandoned their proposed merger at the end of 2021, citing indications that the FTC would be unlikely to approve the outdoor sporting goods transaction.

The changes, though, do little to streamline the second request process. They make it more complex, burdensome and time-consuming.

Perhaps most notable is the use of the process to delve into labor markets. Republicans Wilson and Phillips argued that FTC leadership may have themselves to blame for the merger review crunch, saying in a Nov. 8, 2021 statement:

If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes.

More Onerous Consent Decree Provisions

Where merger parties settle a challenge rather than litigate, the consent decree process sets out the parties' obligations. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions.

The FTC rescinded this long-standing policy, noting that it:

Returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged.

The agency will also require divestiture buyers to agree to prior approval for any future sale of the assets they acquire. Khan explained the move was to avoid "drain[ing] the already strapped resources of the Commission" on "repeat offenders."

The FTC included the new provision in its Oct. 25, 2021, consent decree settling a proposed transaction by DaVita Inc., a dialysis service provider. DaVita is now required to receive prior approval from the FTC of 10 years before any new acquisitions, a dialysis clinic business in Utah being in question.

This is a significant change and will chill not only settlements with the FTC, but also M&A transactions at the outset where such provisions are commercially untenable. Wilson and Phillips noted in dissent that "a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers."

The FTC clearly aims to chill M&A activity, and merger agreements that provide more optionality to abandon deals will become more common, though parties intent on pushing their deal through may see a consent decree with 10-year approval provisions as less palatable than litigating, and force the FTC to cave or go to court.

Withdrawal of the Vertical Merger Guidelines

In another party-line vote, the FTC withdrew the vertical merger guidelines, which were issued just last year. Democratic commissioners criticized the guidelines as based on "unsound economic theories that are unsupported by the law or market realities," and reflecting a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."

Vertical transactions are between firms at different levels in the supply chain. Historically, antitrust enforcement of exceptional vertical mergers were rare and difficult given the previously presumed efficiencies. Vertical mergers can eliminate double marginalization, in which firms at each level mark up prices above marginal cost. Elimination of one markup results in lower prices and can be pro-competitive.

Khan, however, argues the guidelines' "reliance on [elimination of double marginalization] is theoretically and factually misplaced." Going forward, "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."

This too drew a strong rebuke from the Republican commissioners, who said "The FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them."

The commission's challenges to chipmaker Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd. alleged the transaction would combine one of the largest chip producers with a firm that has essential design technology — critical inputs.

In a Dec. 2, 2021, statement, the FTC said the acquisition "would distort Arm's incentives in chip markets and allow the combined firm to unfairly undermine Nvidia's rivals."

The FTC's lawsuit should "send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations," FTC Bureau of Competition Director Holly Vedova said in the statement.

Given that vertical mergers will be closely scrutinized as a matter of course, parties need to consider concerns the FTC may identify and prepare strong counters — other than elimination of double marginalization.

For example, parties could argue that the transaction expands access to products and expands consumer choice. Parties willing to go the distance with a vertical merger should also remain mindful that the guidelines have never been cited or relied on by a court, and it is the established jurisprudence on vertical transactions that will carry the day.

Rescinding the Consumer Welfare Standard

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as coterminous with promoting consumer welfare under the Sherman and Clayton Acts.

In a July 19, 2021, statement, the FTC called the rescinded policy was "bind[ing] the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act."

Still, the consumer welfare standard has been entrenched in antitrust jurisprudence for decades, and the FTC cannot change that. The immediate impact is thus more likely to be seen in administrative actions in the FTC's own court.

In a dissenting statement, Republican commissioners countered that FTC leadership does not propose a replacement standard and "that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions," adding that, "unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles."

Labor Market Scrutiny

Government investigations and private litigation relating to no-poach and wage-fixing agreements are ballooning, and criminal indictments are now a reality.

Encouraged by President Joe Biden's executive order on competition, the FTC and the DOJ have doubled down on investigating labor markets. Merger investigations now routinely include requests for employee compensation data, inquiries regarding noncompete and nonsolicit agreements, and are more likely to delve into both the merger's effects on labor, and the parties' prior labor practices.

The DOJ's challenge to Penguin Random House LLC's proposed acquisition of Simon & Schuster Inc. focuses on harm to the labor market — for authors.

In his first public comments, the DOJ's Kanter said:

We will fight for American workers including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these not only to continue but to increase.

Khan echoed the sentiment, saying:

Competition and conduct can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers who are especially vulnerable and subject to the whims of a boss we can't equally or practically escape.

Antitrust compliance policies now must extend to addressing practices with respect to employee recruiting and compensation. Antitrust compliance training must extend beyond the sales team, and include HR. Businesses are reviewing and revising their compliance policies, and beginning new antitrust training programs to ensure that they are not subjected to claims of depressed wages and barriers to worker mobility.

Looking Ahead to the Year to Come

The year 2021 has been like no other for antitrust enforcement. While the FTC's various policy pronouncements are clearly intended to chill merger activity, it does not appear to have had the intended outcome.

HSR filings continue at off-the-charts levels. Amid this strong showing of M&A activity, the advice is to keep moving transactions forward, stay ahead of the new tacks the agencies might take, and account for newly injected risk and uncertainty.

Looking ahead, expect another energetic year. So far, the FTC's policy changes have not seemed to slow the pace of merger activity, but the frenzy cannot last forever. Nonetheless, merging parties are now going into the merger review process with eyes open, knowing it is likely to be more intense and uncertain. Parties to vertical transactions will no longer ride easy on double marginalization theories, and parties will be handing over their HR and payroll files.

At the same time, the heavy resistance to these changes will continue, if not strengthen, and will play out not just in courts and the halls of Congress, but will also spill into the political mainstream.

#### Nothing will pass the conservative courts---only the plan’s success signals a sea change in the law

Tara L. Reinhart 21, 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: Antitrust Now---AT: FTC

#### CW challenges will be moderated AND restrained.

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

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

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

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

### AT: Link Nonsense

#### 1AC evidence says the plan cans hospital mergers.

---[UK in yellow]

Kate Bahn 21. Washington Center for Equitable Growth Testimony before the Joint Economic Committee, "Kate Bahn testimony before the Joint Economic Committee on monopsony, workers, and corporate power". Equitable Growth. 7-14-2021. https://equitablegrowth.org/kate-bahn-testimony-before-the-joint-economic-committee-on-monopsony-workers-and-corporate-power/

Thank you Chair Beyer, Ranking Member Lee, and members of the Joint Economic Committee for inviting me to testify today. My name is Kate Bahn and I am the Director of Labor Market Policy and the interim Chief Economist at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable and broad-based growth. Core to this mission is understanding the ways in which inequality has distorted, subverted and obstructed economic growth in recent decades.

Mounting evidence, which I will review today, demonstrates how the rising concentration of corporate power has increased economic inequality and made the U.S. economy less efficient. Reversing the trends that have led to a “second gilded age” is critical to encouraging a resilient economic recovery following the pandemic-induced economic crisis of 2020 and encouraging a healthy, competitive economy for the future.

Introduction

The United States boasts one of the wealthiest economies in the world, but decades of increasing income inequality, job polarization, and stagnant wages for most Americans has plagued our labor market and demonstrated that a rising tide does not lift all boats. Furthermore, economic evidence demonstrates how inequality results in an inefficient allocation of talent and resources while increasing corporate concentration that enriches the few while holding back the entire economy from its potential. Understanding the causes and consequences of the concentration of corporate power will guide policymaking in order to ensure that the economic recovery in the next phase of the pandemic will be broadly shared and ensure a more resilient economy.

“Monopsony” is a key economic concept to understand in this discussion. Monopsony is the labor market equivalent of the better-known phenomenon of “monopoly,” but instead of having only one producer of a good or service, there is effectively only one buyer of a good or service, such as only one employer hiring people’s labor in a company town. Like in monopoly, this phenomenon is not limited to when a firm is strictly the only buyer of labor. Today I will explain the circumstances and effects of employers having significant monopsony power over the market and over workers.

When employers have outsized power in employment relationships, they are able to set wages for their workers, rather than wages being determined by competitive market forces. Given this monopsony power, employers undercut workers. This means paying them less than the value they contribute to production. One recent survey of all the economic research on monopsony finds that, on average across studies, employers have the power to keep wages over one-third less than they would be in a perfectly competitive market. Put another way, in a theoretical competitive market, if an employer cut wages then all workers would quit. But in reality, these estimates are the equivalent of a firm cutting wages by 5 percent yet only losing 10 percent to 20 percent of their workers, thus growing their profits without significantly impacting their business.

It is not only important for workers to earn a fair share so they can support themselves and their families, but also critical to ensure that our economy rebuilds to be stronger and more resilient. Prior to the current public health crisis and resulting recession, earnings inequality had been growing since at least the 1980s while the labor share of national income has been declining in same period. This is cause for concern as recent evidence suggests that the labor share of income has a positive impact on GDP growth in the long-run.

The unprecedented economic shock caused by the coronavirus pandemic revealed how economic inequality leads to a fragile economy, where those with the least are hit the hardest, amplifying recessions since lower-income workers typically spend more of their income in the economy. But the crisis also demonstrated how economic policy targeted toward workers and families can provide a foundation for growth. This is because workers are the economy, and pushing back against the concentration corporate power by providing resources to workers is the foundation for strong, stable and broadly shared growth.

The Causes of Monopsony

The concept of monopsony was initially developed by the early 20th century economist Joan Robinson, who examined how lack of competition led to unfair and inefficient economic outcomes. The prototypical example of monopsony is a company town, where there is one very dominant employer and workers have no choice but to accept low wages since they have no outside options. This is the most extreme case, but it is important to note that firms have monopsony power in any circumstance where workers aren’t moving between jobs seamlessly in search of the highest wages they can get.

Firms can use monopsony power to lower workers’ wages any time workers:

* Have few potential employers
* Face job mobility constraints
* Can only gather imperfect information about employers and jobs
* Have divergent preferences for job attributes
* Lack the ability to bargain over those offers

I will go through each of these factors in turn and demonstrate how labor markets are unique compared to other markets in dealing with competitive forces.

While concentrated labor markets are not the norm, they are pervasive across the United States, especially within certain sectors or locations. When markets are very concentrated, employers can give workers smaller yearly raises or make working conditions worse, knowing that their workers have nowhere to go to find a better job with better pay. (See Figure 1.)

A study published in the journal Labour Economics by economists Jose Azar, Ioana Marinescu, and Marshall Steinbaum finds that 60 percent of U.S. local labor markets are highly concentrated as defined by U.S. antitrust authorities’ 2010 horizontal merger guidelines. This accounts for 20 percent of employment in the United States. Research by economists Gregor Schubert, Anna Stansbury, and Bledi Tsaka goes further by estimating workers’ outside options, or the likelihood a worker is able to change into a different occupation or industry. This study finds that even with a more expansive definition of job opportunities more than 10 percent of the U.S. workforce is in local labor markets where pay is being suppressed by employer concentration by at least 2 percent, and a significant proportion of these workers facing few outside options are facing pay suppression of 5 percent or more. As study co-author Anna Stansbury noted, “for a typical full-time workers making $50,000 a year, a 2 percent pay reduction is equivalent to losing $1,000 per year and a 5 percent pay reduction is equivalent to losing $2,500 per year.”

Certain sectors are now very concentrated, such as the healthcare industry. In a paper by the economists Elena Prager and Matt Schmitt, they find that hospital mergers led to negative wage growth among skilled workers such as nurses or pharmacy workers. Consolidation and outsized employer power, alongside other phenomenon such as the fissuring of the workplace, may have broader impacts on the structure of the U.S. labor market when it affects the overall structure of the labor market, including the hollowing out of middle class jobs that have historically been a pathway for upward mobility.

#### More 1AC evidence.

---[UK in yellow]

Eric Posner 21. Professor at the University of Chicago Law School. “You Deserve a Bigger Paycheck. Here’s How You Might Get It.” https://www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html

The spectacle of the antitrust challenge to Big Tech has been riveting. But a far more consequential transformation in antitrust law has largely escaped notice — the movement to use antitrust law to address wage suppression and inequality caused by the power of employers in labor markets.

Economic theory says that when a pool of workers has only one potential employer, or a small number of potential employers, those workers will be paid below-market wages. Without the credible threat to quit and work for a competitor, workers lack leverage that could allow them to secure a raise and better conditions. This situation is sometimes called monopsony, and it is similar to monopoly in the market for goods. When buyers have no choice among sellers, a monopolist can charge high prices; when workers have little choice among employers, the employer can “charge” low wages.

Monopolies result in sluggish economic growth as well as high prices because in order to raise prices, monopolists make fewer goods or provide less in services. Companies that use their market power to suppress wages do something similar: They hire fewer workers, and this leads to unemployment and low growth as well. And because employers push down wages by reducing employment, they supply fewer goods, causing higher prices to consumers even though labor costs are reduced. A business might have monopoly power (over goods it sells), monopsony power (over workers), both or neither. If a small town has one newspaper, the newspaper has both a monopoly over local news and a monopsony over journalists. If the town has a single automobile manufacturing plant, that business will have a monopsony over the relevant skilled workers but not a monopoly over cars, which are sold into a national market where there are competitors.

Economists have understood these things since Adam Smith, who famously called wage-fixing by employers “the natural state of things, which nobody ever hears of.” But economists did not take this risk very seriously until recently, instead usually assuming that employers compete vigorously for workers. As a result, though the logic for using antitrust law to address market power is the same for monopsony as it is for monopoly, the legal community did not embrace the possibility that antitrust law should be brought to bear against employers, except in unusual cases.

But in recent years, thanks to the remarkable work of a diverse group of mostly young economists, this conventional wisdom was shattered. Exploiting vast data sets of employment and wages that had become available, they discovered that concentrated labor markets — that is, with one or few employers — are ubiquitous. In one paper, José Azar, Ioana Marinescu, Marshall Steinbaum and Bledi Taska found that more than 60 percent of labor markets exceeded levels of concentration that are regarded as presumptive antitrust problems by the Department of Justice. Numerous papers have made similar findings.

In highly concentrated labor markets, wages fall — as economic theory would predict. For example, Elena Prager and Matt Schmitt examined hospital mergers and found that when hospitals expand through mergers and gain significant market power, the wage growth of employees declines. Notably, this decline affected skilled health care professionals like nurses — but not administrators and unskilled staff members like cafeteria workers, who could easily find jobs outside hospitals.

The work on labor market concentration has been supplemented by growing evidence that employers collude with one another and engage in other anticompetitive practices. Evan Starr and his co-authors have found that agreements not to compete — where employers block workers from moving to competitors — are extremely common (as many as nearly 40 percent of workers have been subject to one) and are associated with lower wages. Alan B. Krueger and Orley Ashenfelter found that nearly 60 percent of major brand-name franchises — companies like McDonald’s and Jiffy Lube — subjected franchise employees to no-poaching agreements, which prevented them, even within the same franchise system, from quitting one employer to join another.

As a result, many workers, especially in rural areas and small towns — areas subject to high unemployment and economic stagnation — are squeezed by employers and underpaid. For example, when farm equipment manufacturers merge, they close dealerships, and so a mechanic who used to be able to get a good job as several dealers competed for his work must accept a less-appealing job from the single place in the area or drop out of the labor market.

Antitrust law applies to “restraint of trade,” and courts agree that when employers enter cartels to suppress wages, they violate the law. Yet until a few years ago, there were hardly any antitrust cases against employers. The major exception was a 2010 case against Big Tech after Google, Apple and other companies agreed not to solicit one another’s software engineers. This was potentially criminal behavior, but the Justice Department slapped them on the wrist. (A subsequent lawsuit secured more than $400 million in damages for the workers.)

But it was the academic research, not the tech case, that finally woke the antitrust community from its torpor. In the past year, the Justice Department has brought several criminal indictments against employers for antitrust violations (the first ever). The Federal Trade Commission is pondering a rule to restrict noncompetes. State attorneys general brought cases against franchises and other employers that used no-poaching agreements and noncompetes. Congress is holding hearings next week on antitrust and the American worker. Private litigators have joined in as discoveries of abusive wage practices have piled up. For example, “Big Chicken” companies face lawsuits not only for fixing the prices of chicken but also for fixing the wages of their workers.

If the academic research on labor markets is correct, then millions of Americans are paid thousands or even tens of thousands of dollars less than they should be paid. Labor monopsony affects people at all income levels, but it is a particular problem for lower-income workers and people living in stagnant rural and semirural parts of the country. In his recent executive order on antitrust, President Biden became the first president to commit government resources to ensure that the antitrust laws are used to help workers. Let’s hope he follows through.

### AT: Consolidation Bad

#### Mergers are key to economies of scale and capital access to upgrade facilities AND keep costs low

Ken Summers 12-13, Fellow in State Policy at the Centennial Institute, Master’s Degree in Nonprofit Management from Regis University, BA Degree in Business Education from the University of Northern Colorado, Former Chair of the Health and Environment Committee in the Colorado House of Representatives, “FTC Crackdowns on Mergers Could Harm Rural Healthcare”, RealClearMarkets, 12/13/2021, https://www.realclearmarkets.com/articles/2021/12/13/ftc\_crackdowns\_on\_mergers\_could\_harm\_rural\_healthcare\_807469.html

The shift in policy comes amidst a broader skepticism the FTC is beginning to adopt around mergers. The new policy would in effect give the commission veto power over a company’s future transactions once it attempts an allegedly anticompetitive merger or acquisition. And while no one would fault the FTC for wanting to put a stop to mergers that would raise prices or harm consumers, the fact is recent consolidations in the hospital industry has shown that neither have occurred in this space. In fact, it is quite the opposite. Preventing some of these mergers from occurring could not only limit patient access to healthcare, but it could also cause healthcare prices to continue to rise.

Rural hospitals serve about 60 million Americans, or about one-fifth of the entire U.S. population. Even before the disruptive effects of COVID, these facilities were struggling to keep their doors open with 21% of rural hospitals at risk of closing. Since the start of the pandemic, that trend has only accelerated and in 2020 alone, 21 rural hospitals closed their doorsand more than three dozen entered bankruptcy. The result is underserved communities and hospital “deserts” where patients would be required to travel long distances in order to reach care, sometimes in excess of 35 miles.

In Colorado, where I previously chaired the House Committee on Health and the Environment, I have seen firsthand the struggles these facilities are facing in order to keep their doors open. Every single rural hospital considered high-financial-risk in the Centennial State in 2019 was also deemed essential. The dual stressors of COVID-related staffing shortages and financial shortfalls due to cancelled elective surgeries have found these facilities “stretched to the max” as COVID once again accelerates in Colorado. Clearly, immediate action is needed to help shore up these critical hospitals.

One of the best ways to do this is for the FTC to remove the regulatory hurdles to hospital consolidation. Doing so will allow these rural hospitals to better serve their patients and reduce the costs of providing care. Sometimes it is the only means of preserving this critical access.

Unfortunately, outdated data has been used to justify continued resistance to hospital mergers. Some of the commentaries asserting hospital mergers raise prices are based on information from as far back as the 1990s, when the economics of the healthcare industry were significantly different.

More recent data has found that hospital mergers can enhance patient outcomes while reducing costs. A study from Charles River Associates, for example, has found that “hospital acquisitions are associated with statistically significant decreases in both cost and revenue.” On at least three occasions this same conclusion has been reached. Research from the JAMA network meanwhile finds that mergers cut mortality rates at rural hospitals, challenging the argument that rural hospital consolidation “is likely to result in greater market power and higher prices but poorer quality.”

The reasons are simple. The economies of scale these smaller facilities can tap into by merging with larger hospital systems can reduce costs. By eliminating administrative redundancies operating costs are reduced or shifted towards patient care. The vast capital that larger hospital systems can provide meanwhile, provide rural hospitals an opportunity to invest in upgrading facilities. This improves patient outcomes, and also helps these facilities realize yet more efficiencies which result in additional cost savings.

Hospitals must adapt so they can continue serving their patients and for many of these rural facilities, mergers are the next logical step in that progression. The FTC and other interested parties need to stop relying on outdated and inaccurate information to justify their intransigence on necessary mergers in the healthcare space. It’s high time that regulators in Washington get out of the way and allow rural hospitals to continue their important work of saving lives and preserving communities.

#### Studies prove it averts closure

Victoria Bailey 21, Certified Natural Health Professional and Enzyme Specialist, “Rural Hospital Mergers Associated with Improved Patient Outcomes”, 9/22/2021, <https://www.aha.org/news/headline/2021-09-21-study-rural-hospital-mergers-linked-better-patient-outcomes>, September 22nd, 2021

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

### AT: Alt Causes

#### There’s a trend of consolidation to shore up financial assets and expand to underserved areas---it’ll continue in ‘22

John Commins 22, Senior News Editor at Health Leaders Media, “Health System M&A Fewer -- But Bigger -- In 2021”, Health Leaders Media, 1/11/2022, https://www.healthleadersmedia.com/strategy/health-system-ma-fewer-bigger-2021

The analysis also noted that:

* Smaller M&A partners with a credit rating of A- or better comprised more than 10% of transactions, which is consistent with 2020 transactions.
* Since 2011, average smaller partner size by annual revenue has increased at a compound annual growth rate (CAGR) of approximately 8%.
* Not-for-profit health systems' roles as both buyer and seller grew as a percentage of total transactions in 2021, representing 87% of announced transactions, compared with 81% in 2020.
* Rural or urban/rural sellers grew to 31% of announced transactions from 24% in 2020. The number of financially distressed sellers remained flat at 16% of announced transactions from 2020 to 2021.

Other notable trends identified in the analysis include hospitals’ greater focus on core markets and assets, strengthening intellectual capital resources, and addressing societal issues and underserved populations.

KH says these trends are expected to continue into 2022.

#### Rural economies are solid, including farms

Sara Schafer 1-20, Top Producer Editor & Farm Journal Content Manager at Farm Journal, BA in Journalism from the University of Missouri-Columbia, “Rural Bankers Rank the Greatest Threats for 2022”, Ag Web, 1/20/2022, https://www.agweb.com/news/business/taxes-and-finance/rural-bankers-rank-greatest-threats-2022

For 14 straight months, the rural economy has posted healthy and consistent growth. That’s according to the January Rural Mainstreet Index (RMI) from Creighton University.

For January 2021, the RMI sits at 61.1. That is down from December’s 66.7. The index ranges between 0 and 100 with a reading of 50 representing growth neutral and is generated by a monthly survey of bank CEOs in rural areas of a 10-state region dependent on agriculture and/or energy.

“Solid grain prices, the Federal Reserve’s record-low short-term interest rates, and growing agricultural exports have underpinned the Rural Mainstreet Economy,” says Ernie Goss, who chairs Creighton’s Heider College of Business and leads the RMI.

#### Ag’s growing, despite challenges

Donald Stotts 10-26, Agricultural Communications Services at Oklahoma State University, “Reasons for Optimism as US Agriculture Heads Into 2022”, Oklahoma State University Extension, 10/26/2021, https://extension.okstate.edu/articles/2021/cobank-optimism-fox.html

Agricultural producers are certain to face challenges as they plan for 2022, but there are reasons to be optimistic about the U.S. farm and ranch situation as a whole, said Rob Fox, director of Cobank’s Knowledge Exchange Division.

Fox discussed his outlook at Oklahoma State University Extension’s 2021 Rural Economic Outlook Conference in October, where he addressed the longer-term effects of the COVID-19 pandemic, the shrinking labor force, drought impacts on cattle supplies, packer concentration, poultry profitability, views on policy he has seen in evidence coming out of Washington D.C. and more.

"Commodity prices across the board are doing pretty well, particularly the grains and especially cotton,” Fox said. “Cattle prices could be a bit better, but they’re not terrible. The most obvious challenges are some key risks on the crop inputs side.”

Among the challenges listed by Fox:

There are going to be shortages of chemicals and fertilizer because of plant shutdowns and logistical issues.

Fertilizer prices are going to be higher the remainder of this year and into 2022.

Supply chain issues will continue to plague producers for the foreseeable future.

“Tractor repair parts, blades for equipment, forage choppers, pesticides and herbicides; you name it, there are going to be delays and shortages,” Fox said. “As a former dairy farmer, I can attest a producer can be in big trouble if a piece of equipment goes out. To combat this, keep more spare parts on hand, if possible, and stick to a well-designed maintenance schedule.”

Trent Milacek, OSU Extension area agricultural economics specialist, agreed with Fox and recommends Oklahoma producers take all possible steps to ensure they have a plan in place for several months or more to lessen the negative effects of potential challenges.

“Get your fertilizer supplies purchased, even if you have to keep them in a shed,” Milacek said. “Take advantage of current good crop prices; forward contract, look at futures prices, lock in what you can. There isn’t a lot an individual producer can do about the specifics of ongoing trade negotiations, but producers need to pay attention and manage as best they can any fallout and related effects.”

Ongoing trade negotiations between the United States and China could be particularly important. The current Phase One deal expires at the end of this year. Most analysts agree American agriculture has fared well overall. Unfortunately, other segments of the U.S. economy have not.

### AT: Antitrust Now---AT: Legislation

#### Nothing will get past GOP opposition

Dave Perera 21, Master’s Degree from the Columbia University School of International and Public Affairs, Technology Reporter at mLex, Veteran Cybersecurity Reporter for Politico and Former Editor for FierceMarkets Publications, “US Antitrust Legislation Faces Uphill Battle Despite Unified Democratic Government”, mLex, 3/12/2021, https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/us-antitrust-legislation-faces-uphill-battle-despite-unified-democratic-government

Renewed interest among US lawmakers in antitrust legislation is unlikely to produce radical policy shifts, notwithstanding the Democratic Party’s unified control of the federal government.

Democrats promised a “big, bold agenda” after they captured the Senate by a hairsbreadth in January. Democratic lawmakers may very well stick to those ambitions and announce audacious legislative proposals. But the fate of those bills is at the mercy of a political dynamic ensuring that the more liberal the policy prescriptions, the less likely they are to become law.

The most likely outcome over the next two years is more funding for enforcers at the Department of Justice and Federal Trade Commission, whether directly through appropriated funds, steeper merger notification filing fees, or both.

It’s also possible Congress could incrementally tinker along the edges of antitrust. It might lower the threshold for challenging mergers, or mandate data portability requirements for social media companies.

Those expecting — or fearing — more ambitious outcomes likely won’t see them enacted. So until America’s November 2022 election, scratch from the list of high probabilities reforms such as requiring dominant firms to separate lines of business, or shifting the burden of proof onto an acquiring company.

Put another way, unless a bill can attract significant Republican support, not even two years of unified Democratic government can guarantee reforms.

### Turns FTC

#### It turns FTC cred---blowing up hospitals wrecks Khan

Alexandra Levine 21, Master’s Degree from the Columbia University Graduate School of Journalism and Bachelor of Arts in English from the University of Pennsylvania, Alumna of the Fellowships at Auschwitz for the Study of Professional Ethics, a Program in Germany and Poland that Explores the Ethics of Reporting on Politics, War and Genocide, “How Biden's tech trustbuster could change health care”, Politico, 8/25/2021, https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333

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

### Turns Inequality

#### It massively turns inequality---hospital closures shred growth

Lauren Weber 17, and Andy Miller, 9-22-2017, "A Hospital Crisis Is Killing Rural Communities. This State Is 'Ground Zero.'," HuffPost, https://www.huffingtonpost.com/entry/rural-hospitals-closure-georgia\_us\_59c02bf4e4b087fdf5075e38//Genevieve

If you want to watch a rural community die, kill its hospital. After the Lower Oconee Community Hospital shut down in June 2014, other mainstays of the community followed. The bank and the pharmacy in the small town of Glenwood shuttered. Then the only grocery store in all of Wheeler County closed in the middle of August this year. On Glenwood’s main street, building after building is now for sale, closing, falling apart or infested with weeds growing through the foundation’s cracks. Opportunity has been dying in Wheeler County for the last 20 years. Agriculture was once the primary employer, but the Wheeler Correctional Facility, a privately run prison, is now the biggest source of jobs. With 39 percent of the central Georgia county’s population living in poverty, there aren’t enough patients with good insurance to keep a hospital from losing money. The hospital’s closure eliminated the county’s biggest health care provider and dispatched yet another major employer. Glenwood’s mayor of 34 years, G.M. Joiner, doubts that the town will ever recover. “It’s been devastating,” the 72-year-old mayor said, leaning on one of the counters in Glenwood’s one-room city hall. “I tell folks that move here, ‘This is a beautiful place to live, but you better have brought money, because you can’t make any here.’” Rural hospitals are in danger across the country, their closures both a symptom of economic trouble in small-town America and a catalyst for further decline.